

INDUSTRY GUIDE TO SECURITY OF PAYMENT LAWS



INTRODUCTION

This guide provides general security of payment information for people that work in the building and construction industry, including how to:

- meet the requirements of the legislation
- understand the payment protection rights and dispute resolution options available
- understand the consequences for failing to meet the legislative obligations.

This guide does not include information on:

- project bank accounts
- project trust account and retention trust account requirements
- domestic building contracts and disputes.

Who should use this guide

Anyone who carries out construction work or supplies related goods and services for construction work on a jobsite in Queensland.

This includes:

- QBCC licensees that are working as:
 - » Head contractors
 - » Subcontractors
 - » Trade contractors
 - » Owner builders
- Suppliers
- Other building and construction industry consultants such as architects and engineers
- Principals in the contractual chain such as:
 - » Developers
 - » Commercial building owners

NOTE: this guide does not include information for homeowners.

Further resources available to you

Trust accounts are an additional measure to support security of payment within the building and construction industry. There are specific guides available for trust accounts including:

- *Trustee Guide: Project Trust Accounts*
- *Trustee Guide: Retention Trust Accounts*
- *Trustee Guide: Transition from PBA to PTA*
- *Beneficiary Guide: Trust Accounts*

Information for both homeowners and contractors on the requirements of domestic building work is outlined in the Domestic Building Contracts Guide.

Governing legislation and why it exists

The Building Industry Fairness (Security of Payment) Act 2017

The *Building Industry Fairness (Security of Payment) Act 2017 (BIF Act)* was introduced to help to ensure a fairer building and construction industry where people are paid in full, on time, every time.

Queensland Building and Construction Commission Act 1991 – Part 4A

Part 4A of the *Queensland Building and Construction Commission Act 1991 (QBCC Act)* provides regulation of building contracts other than domestic building contracts. It sets out the requirements for building contracts (other than domestic building contracts) and the obligations of building contractors. Non-compliance with Part 4A of the QBCC Act may result in significant penalties.

The security of payment legislation is designed to promote cash flow down the contracting chain. It does so by providing a number of protections for contractors and mechanisms for the recovery of progress payments or unpaid debts.

Common terms

Contracting party vs contracted party:

The **contracting party** is the party to the contract requiring work to be carried out.

The **contracted party** is the party to the contract that is carrying out the work.

Construction work vs building work:

Construction work (includes but is not limited to) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, roadworks, power lines, telecommunication. (See section 65 of the BIF Act).

Building work broadly means the erection or construction of a building - a fixed structure typically with walls and a roof. It includes both domestic building work and commercial building work but there are also specific exclusions for what is not considered to be building work.

(See Schedule 2 of the QBCC Act and Schedule 1 of the QBCC Regulation).

Domestic building work

Domestic building work includes (but is not limited to)

- the erection or construction of a detached dwelling
- the renovation, alteration, extension, improvement or repair of a home
- removal or resiting work for a detached dwelling
- the installation of a kit home at a building site.

Related goods and services

Related goods are goods used for construction work and includes plant, materials (hired or otherwise) and components that form part of any building or structure. (Section 66 of the BIF Act).

Related services are services arising from or for use in construction work. This includes labour to carry out construction work, architectural, design and surveying services, and soil testing. (Section 66 of the BIF Act).

Resident owner

A **resident owner** is an individual that intends to reside in the building on completion (or within 6 months of completion) of building work under a domestic building contract. A **resident owner** however, does not include an owner builder or a building contractor.

Claimant

The **claimant** is a person who is (or claims to be) entitled to a progress payment under a construction contract. The **claimant** may give a payment claim to the person (respondent) who may be liable to make payment under the construction contract.

Respondent

The **respondent** is the person who may be liable to make payment under the construction contract.

Higher Party

A **higher party**, for an adjudicated amount, means:

- (a) if the claimant for the amount is a subcontractor—the person from whom an amount is or becomes payable to the respondent under an arrangement with the respondent for related work or services; or
- (b) if the claimant for the amount is a head contractor—the person who is the financier for the related work or services.

Progress payment

A progress payment is the payment that a person is entitled to for completing construction work or related goods and services for the construction work.

Business Day

Any day that:

- is not a Saturday or Sunday
- is not a public holiday or
- does not fall between 22 December and 10 January.

CONTRACTS

The contractual chain

Principal – the principal is the person who is the contracting party for the building contract. They are typically the owner or developer of the land.

Head contractor – the contracted party for a contract that is NOT also a subcontract of another contract.

Subcontractor – is a person that enters into a contract with a building contractor to carry out construction/building work under the relevant contract.

Suppliers – a subcontractor is a supplier, if under their subcontract they are only required to supply goods and service without carrying out building work. A subcontractor is NOT a supplier if they are required to hold a licence to lawfully supply goods and services under the:

- the *Building Act 1975*
- the *Electrical Safety Act 2002*
- the *Plumbing and Drainage Act 2018*; or
- the QBCC Act.

Related goods and services providers – are parties that provide materials or services that either form part of, or assist with the carrying out of, construction work. Providers may include architects, engineers, surveyors, interior designers, landscapers, soil testers, machinery operators and professional cleaners.

Benefits of a written contract

It is not uncommon in the building and construction industry for agreements for work to be made verbally and with a handshake, this is where a dispute can arise. A verbal contract makes it difficult to prove what was agreed to and the entitlement required to be paid.

The QBCC recommends using a written contract for the following building work:

- head contracts
- subcontracts
- sub-subcontracts
- subcontracts for domestic building work and
- all contracts for commercial building work between developers, builders and subcontractors.

A written contract can clearly define what parties have agreed to (including scope of work, payment terms and pricing), provide details of the obligations parties have agreed to and provide protection for all parties if they do not deliver on their obligations.

This also applies to contracts for building work between a contractor and an owner builder permit holder. Different requirements apply to contracts that are made directly with homeowners for domestic building work. Refer to the **Domestic Building Contracts Guide** for further information.

Basic requirements of a contract

There are various requirements for a written contract depending on the value of the work being completed.

<p>\$3,300 OR LESS</p>	<p>Generally, work priced at less than \$3,300 is not classed as building work under the QBCC Act and therefore does not require a written contract. However, commercial or subcontracted work of any value involving plumbing, drainage, gasfitting, design drafting, completed building inspections, site classification, fire protection, electrical work and pest control must be recorded in a written contract.</p> <p>Contracts for \$3,300 or less are not regulated by domestic building legislation, therefore a written contract is not a mandatory requirement. However, the QBCC recommends that even contracts priced at \$3,300 or less (including labour, materials and GST) should still be recorded in a brief written document to avoid uncertainty and minimise the risk of disputes. The QBCC Small Building Projects Contract is recommended for this purpose and is available to download from the QBCC website.</p>
<p>ALL CONTRACTS</p>	<p>Must be:</p> <ul style="list-style-type: none"> • in writing • dated, and • signed by, or on behalf of, the contractor and the owner
<p>CONTRACT VALUE \$3,301 - \$19,999</p> <p>(referred to as a Level 1 contract)</p>	<p>Must include:</p> <ul style="list-style-type: none"> • names of the contracting parties (including the name and licence number of the building contractor) • a description of the contracted work • the contract price (or method for calculating it, including the contractors reasonable estimate of the price) • the date for practical completion (or how the date is to be determined) • a copy of any plans or specifications required for the contracted work • a conspicuous notice advising the owner of their cooling off period rights and • clearly identify the site where the building work is to take place.
<p>CONTRACT VALUE \$20,000 OR MORE</p> <p>(referred to as a Level 2 contract)</p>	<p>Must also include:</p> <ul style="list-style-type: none"> • a copy of the QBCC Consumer Building Guide must be given to the owner before the owner signs the contract • the start date or how it is to be determined must be stated • relevant statutory/implied warranties must be stated in the contract • the first page of the contract schedule must contain the contract price (if a fixed amount, without allowances) and a price change warning must be stated • if the contract price is not fixed, the contract schedule must state the method for calculating the price including any allowances • the contractor must, within 10 business days of work commencing on site, give the owner a Commencement Notice stating the date work commenced on site and the date for practical completion.

Before signing a contract

Spending a little time preparing and reading over a contract, could save thousands of dollars and a lot of heartache later on:

- read the fine print carefully don't be afraid to seek legal advice before signing
- make sure that all variations are confirmed in writing as soon as possible before work begins on them. Verbal agreements and variations made should be confirmed in writing as soon as possible.
- avoid verbal contracts. Keep copies of emails, quotes and specifications, even notes about the discussions that have been had.

Contract templates

To ensure compliance with the legislation, the QBCC has contracts available that cover most situations. The QBCCs contract templates are available at qbcc.qld.gov.au/contracts-payments/contracts.

Contracts developed by an industry association can also be used but check to ensure they comply with current legislation.

If you want to use your own written agreement, it's essential you get legal advice first. You risk prosecution, fines, or financial loss if you go ahead without making sure the contract complies with the Queensland legislation.

PROGRESS PAYMENTS

Requesting payment (payment claim)

A payment claim (the claim made for a 'progress payment' for work) is a written request for payment. Payment claims are given to an individual or a company that owes you money for the construction work or the related goods and services you have delivered under a construction contract.

Payment claim requirements

A payment claim can include a claim for:

1. work carried up to the reference date and
2. outstanding payments from a previous payment claim

A payment claim must be in writing and:

- identify the work or goods and services to which the claim relates, and
- state the amount owed, and
- request payment of the amount owed.

Additionally, if you are a head contractor issuing a payment claim to the principal or developer, you must also include a **supporting statement**. (See Supporting Statement section below).

Note: If the contract requires other documents to be included with the claim such as statutory declaration (stat dec), worksheets etc, it is important to include these to meet the contract requirements.

It is important that your payment claim meets these requirements, even if you are using your usual tax invoice. Correctly issuing a payment claim under the BIF Act gives you access to the adjudication process if you ever need to address an overdue or disputed payment, including partial payment or failure to pay.

When you issue a payment claim, the person owing you the payment (the respondent) must give you a payment schedule or pay the claimed amount (in full) within the required response period (penalties may apply for not providing a payment schedule). If you are still owed money from a previous payment claim, you may include that amount in your next payment claim if the payment is under the same contract.

An example payment claim template is available to download from the QBCC website at qbcc.qld.gov.au/sites/default/files/Payment_Claim.pdf.

When to give a payment claim

Follow the contract for when to make a claim for payment. If the contract specifies a reference date or day from which you can make a payment claim, then you should follow these terms. If you do not have a contract or the contract does not state when a payment claim can be made default reference dates are outlined in the BIF Act.

You can only make one payment claim for each reference date. You are entitled to give a payment claim for completed work or goods and services, on or after each reference date under the contract.

Reference dates

A reference date is the date detailed in the contract as the date from which a progress claim may be made for work carried out, or related goods and services supplied.

If there is no written contract OR the contract is silent on the matter, the BIF Act sets out default reference dates which can be used. The default reference date varies depending on the circumstances.

No reference date provided in the contract - the default reference date is the last day of each calendar month.

Progress payments or one-off payment claims - must be given within six months of the date that the work was completed or good and services were supplied.

Final payment claims - must be issued within the required timeframes. Whichever is the longer timeframe between the below two options, must apply.

- within 28 days following the end of the last defects liability period
- within six months of completing all construction work or supplying related goods and services under the contract.

Termination reference date - if your contract is terminated and the contract includes a final reference date after termination, you must use this as your reference date.

If your contract is terminated and does not include a final reference date or your contract has a clause that stops you from making a final payment claim after termination, the final reference date is the date of termination.

If you give a payment claim prior to a reference date it may be considered an invalid payment claim for the purposes of adjudication.

Amount that can be claimed

Calculate the payment about using the payment terms and requirements set out in the contract. If the contract does not state the requirements, the amount must be calculated based on the value of the construction work carried out or goods and services supplied in accordance with the contract.

Valuation of work and goods and services carried out under a construction contract

Construction work carried out under a construction contract should be valued in accordance with the contract. If the contract does not state the requirements, when calculating the amount, have regard to:

- (i) the contract price for the work; and
- (ii) any other rates or prices stated in the contract; and
- (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and
- (iv) if any of the work is defective, the estimated cost of rectifying the defect.

Related goods and services supplied under a construction contract are to be valued in accordance with the contract.

If the contract is silent on the matter, when calculating the amount, have regard to:

- (i) the contract price for the goods and services; and
- (ii) any other rates or prices stated in the contract; and
- (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract, is to be adjusted by a specific amount; and
- (iv) if any of the goods are defective, the estimated cost of rectifying the defect.

Due date for payment

Before issuing a payment claim it is important to understand what date your progress payment becomes payable (the due date).

The due date for payment is either the day or timeframe specified under your contract or, if no date has been specified it is 10 business days after a payment claim is made.

Pay when paid provisions

Pay when paid provisions in a construction contract have no effect in relation to any payment for construction work carried out or related goods and services supplied under the contract.

Maximum timeframes for payment

The QBCC Act sets out maximum timeframes for progress payments, any payment provisions outside these timeframes are void. The timeframes are:

- **Construction management trade contract or subcontract** - The maximum timeframe for a progress payment to a contracted party from a contracting party is no later than 25 business days after the submission of a payment claim.
- **Commercial building contract** - The maximum timeframe for a progress payment by a contracting party to a contracted party is no later than 15 days after submission of a payment claim.

Other void contract provisions

Access to building sites – at the consumers request the building contractor must allow the consumer reasonable access to the building site. Any contractual provision stating otherwise is void.

Entitlement to interest for late progress payments

If a progress amount has not been paid to the contracted party by the contracting party and the due date for the amount has passed, the contracting party is required to pay interest at the penalty rate, for each day the amount is unpaid.

The penalty rate is:

- (a) the rate made up of the sum of the following:
 - (i) 10% a year
 - (ii) the rate comprising the annual rate, as published from time to time by the Reserve Bank of Australia, for 90 day bills; or
- (b) if the building contract provides for a higher rate of interest than the rate worked out noted above, the higher rate.

Directions from contracting party must be given in writing

Unless stated in the contract, a direction may initially be given to the contracted party by the contracting party (or another authorised person) other than in writing. If the direction is not initially given in writing, the contracted party:

- may ask for the direction to be given in writing and
- is not required to comply with the direction until it is given in writing.

It is an offence to not provide a direction in writing within three business days after it was given other than in writing.

SUPPORTING STATEMENTS

A supporting statement is a written document that tells the contracting party whether all subcontractors of a head contractor have been paid in full, and whether there are any outstanding amounts owed to subcontractors.

When to provide a supporting statement

A supporting statement must be provided with every payment claim given in relation to a construction contract. However, **only the head contractor** who is contracted directly by the developer or owner needs to give a supporting statement and **only if they have engaged subcontractors** under the construction contract. Subcontractors and persons further down the contracting chain do not need to give a supporting statement.

Failure to include a supporting statement with a payment claim DOES NOT make the payment claim or invoice invalid.

NOTE: Supporting statements are not required for residential contracts with a homeowner.

What to include in a supporting statement

If all subcontractors have been paid in full, you will need to make a declaration that this has been done. Example wording for the declaration is included below.

If any subcontractors have not been paid in full, the supporting statement must state:

- the name of the subcontractor who has not been paid
- the date the subcontractor carried out the work
- details of the subcontractor’s unpaid payment claim (e.g. the invoice or payment claim number)
- the amount still unpaid
- the reasons the amount was not paid in full
- An example supporting statement template is available to download from the QBCC website at qbcc.qld.gov.au/protecting-your-payment-rights/supporting-statement.

When is a supporting statement not required?

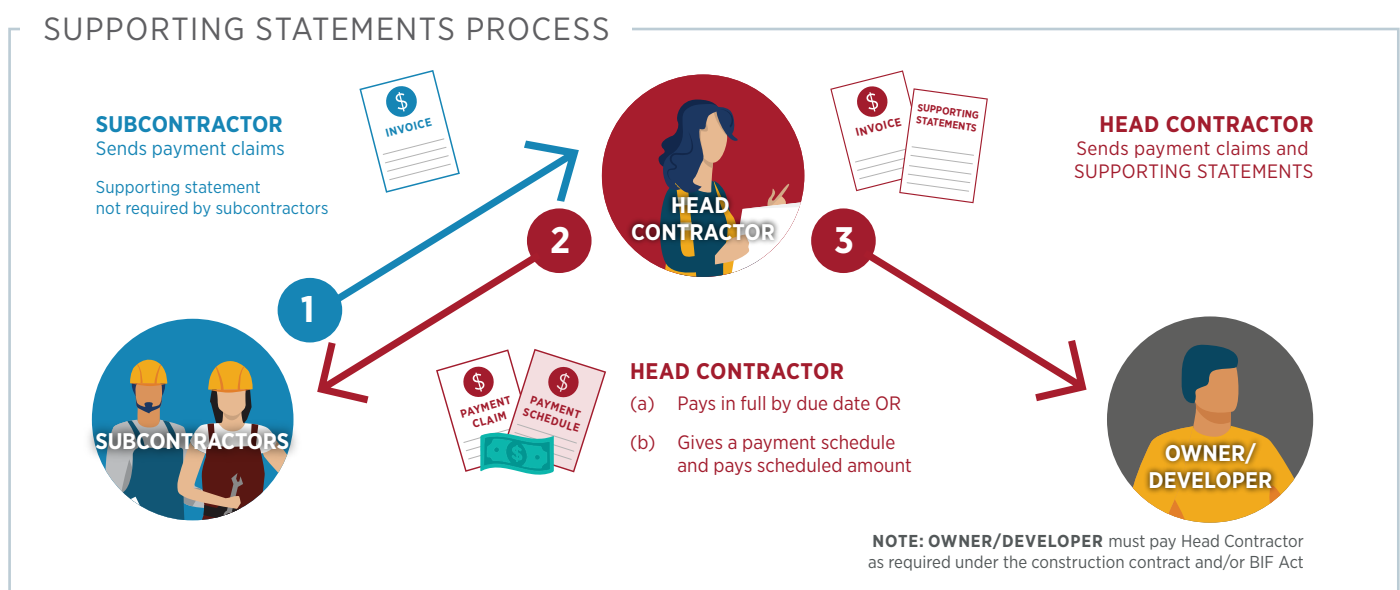
Supporting statements are not required with payment claims that are:

- for a contract with a residential owner
- given by a subcontractor
- given by a contractor who has NOT entered into any subcontracts under the construction contract the payment claim relates to.

EXAMPLE DECLARATION WORDING

In accordance with section 75(7) of the *Building Industry Fairness (Security of Payment) Act 2017* I, [full name], being the head contractor (the Contractor), a director of the head contractor or a person authorised by the head contractor on whose behalf this supporting statement is made, declare that all subcontractors have been paid all amounts owed to them at the date of giving this payment claim.

DIAGRAM 1: SUPPORTING STATEMENTS



What is an 'owed' amount

Amounts owed to subcontractors include amount resulting from:

- payment claims
- adjudication
- court or tribunal orders
- other dispute resolution processes.

When does an amount become 'owed'

For the purpose of completing a supporting statement, an amount is considered owed to a subcontractor only once the due date for payment has occurred.

When an amount is 'owed'

If the due date for the amount required to be paid to a subcontractor is before the date the supporting statement is given, it is an owed amount.

If all subcontractors have been paid amounts owed to them by the due date your supporting statement simply needs to declare that to be the case. You do not need to provide details of the owed amounts you have fully and correctly paid.

See below for what you need to do in relation to 'unpaid' or overdue amounts.

When an amount is not yet 'owed'

If the due date for the amount required to be paid to a subcontractor is the same day, or a date after, the day the supporting statement is given, the amount is not yet an 'owed' amount.

These amounts become 'owed' on the due date for payment, and are not the subject of the declaration made in the supporting statement (they will be covered in any later supporting statements).

Consequences for failing to provide a supporting statement

Failure to provide a supporting statement with a payment claim as required may attract a penalty of up to 100 penalty units.

In addition, head contractors who provide false or misleading information in a supporting statement may attract a penalty of up to 100 penalty units.

RESPONDING TO A PAYMENT CLAIM

You should never ignore a payment claim. If someone claims you owe them money (the claimant) and gives you a payment claim, you must respond by either:

- Paying the amount in full by the due date
- Giving a payment schedule within the response period and
- Paying the proposed amount in the payment schedule by the due date.

The claimant may take action against you if you do not make payment or issue a payment schedule. They may choose to pursue the debt via legal proceedings, subcontractors' charges or adjudication, they may also take action to suspend work on site.

You may choose to ignore the payment claim, however failing to respond is an offence and you may face disciplinary action. If the other party chooses to go to adjudication for the payment dispute you will not have an opportunity during the adjudication process to provide your response for non-payment. Failing to respond is an offence if you don't make full payment of the claimed amount on or before the due date.

Payment schedules

A payment schedule is given to the claimant by the contracting party if a payment claim is received and the contracting party does not agree with the amount claimed and intends to pay a different or lesser amount.

This can be because the contracting party:

- believes the payment claim is invalid or
- is making a partial payment or
- are disputing the claim.

If the contracting party does not intend to pay the full claimed amount by the due date, they must give the claimant a payment schedule within 15 business days after they are given the payment claim or invoice – or earlier if the contract states another timeframe.

Failing to pay in full by the due date, failing to give a payment schedule or failing to pay the payment schedule amount are all offences and the QBCC may take disciplinary action.

Information to include on a payment schedule

A payment schedule is a written document which must:

- identify the payment claim to which it is responding
- state the amount – if any – the contracting party intends to pay
- state ALL reasons for paying the lesser amount or for withholding payment if a lesser amount than the amount claimed is proposed to be paid.

It is really important to list all the reasons for withholding payment. If the claimant disputes the payment schedule or amount paid – and the contracting party has not responded – you may lose your right to respond in some cases.

By not providing a payment schedule you forfeit your rights to dispute the amount claimed during the adjudication process.

Under the BIF Act you cannot provide a response to an adjudicator if you do NOT provide a payment schedule.

You also become liable to pay the amount in full and the other party may recover the money as a debt in court, apply for adjudication or start action to suspend work.

An example payment schedule template is available to download from the QBCC website at qbcc.qld.gov.au/sites/default/files/Payment_Schedule.pdf.

PAYMENT DISPUTES

What is a payment dispute - information for claimants

A payment dispute may occur when you give a payment claim but:

- no payment schedule received in response or
- you do not receive payment by the due date or
- a payment schedule is received outlining an amount to be paid BUT payment is not made AND the due date for payment has passed or
- you receive a payment schedule with a lower dollar amount than shown in the payment claim.

What is a payment dispute - information for respondents

A payment dispute occurs against you when you receive a payment claim but:

- you do not give a payment schedule in response or
- you do not make payment by the due date or
- you give a payment schedule outlining an amount to be paid BUT do not make payment AND the due date for payment has passed or
- you give a payment schedule with a lower dollar amount than shown in the payment claim.

Options for resolving a payment dispute

There are various options available to assist in resolving a payment dispute, these include:

- QBCC monies owed complaint
- QCAT
- The Courts
- Subcontractors' Charges
- Suspending work
- Adjudication and
- If an adjudicated amount has not been paid by the due date:
 - » Payment Withholding Request
 - » Charge Over Property.

You should seek legal advice prior to commencing any actions through the above.

MONIES OWED COMPLAINT

A monies owed complaint is a complaint process used to notify the QBCC when a licensee has not paid money they are liable to pay.

When to use a monies owed complaint

A monies owed complaint can be used:

- if the debt is between a QBCC contractor licensee and a contracted party or supplier of goods and services
- if an adjudicator, court or tribunal has made an order to pay the debt and the due date for payment has passed

A monies owed complaint can also be used once any payment disputes regarding the debt are finalised.

Lodging the monies owed complaint will NOT settle a payment dispute. It WILL notify the QBCC of possible payment offences or potential financial concerns with the licensee.

It is a minimum financial requirement that QBCC contractor licensees must pay a debt on or before the day the debt becomes due and payable. If the licensee fails to meet their requirements, QBCC may take action against the licensee which may prompt the licensee to pay the debt.

When you cannot use the monies owed complaint process

The monies owed complaint process cannot be used if:

- the payment dispute is involved in legal proceedings (Court or QCAT) or is in the process of adjudication
- the matter is currently subject to an adjudication application
- an adjudicator, court or tribunal decided the debt is not payable
- the licensee has commenced legal proceedings and has paid the disputed amount into the court as security until a decision is made.

How do I lodge a monies owed complaint?

To lodge a monies owed complaint, you will need to include evidence of the debt including the invoice, contract or similar agreement. The evidence must include:

- name of the QBCC contractor licensee
- amount of the debt
- due date of the debt
- reason for the debt (e.g. supply of paint)
- any correspondence with the licensee about the debt.

Once you have collated the evidence, complete and lodge the **Monies Owed Complaint Form** with the supporting evidence through myQBCC or download a PDF Monies Owed Complaint Form (qbcc.qld.gov.au/sites/default/files/Monies%20Owed%20Complaint%20Form.pdf).

Advantages

- free to lodge a monies owed complaint
- no time limitations on when the complaint may be lodged with the QBCC
- investigation by QBCC with possible action against licensee, including licence suspension or cancellation
- can be used at the same time (or after) suspending work, lodging subcontractors' charges or commencing legal proceedings (QCAT or court) – but can only be used after an adjudication decision has been made.

Disadvantages

- can only be used against a QBCC licensee
- The QBCC can't make a decision on who is in the right or in the wrong or settle the dispute
- The QBCC can't make the other party pay, however action taken by the QBCC such as applying demerit points or suspending or cancelling the person's licence can encourage prompt payment of the debt.

QCAT

QCAT is the Queensland Civil and Administrative Tribunal. It is an independent and accessible pathway to payment dispute resolution up to the value of \$25,000. QCAT is potentially a less costly option than court proceedings.

NOTE: if your payment dispute is over \$25,000 and you wish to pursue legal action, you must take your dispute to court.

When to use QCAT

You can choose to legally pursue an outstanding payment through QCAT or a court (Magistrates, District or Supreme). For QCAT to hear the payment dispute, it must be about:

1. the erection or construction of a building or renovation, alteration, extension, improvement or repair of a building
2. the provision of electrical work, water supply, sewerage or drainage or other like services for a building
3. demolition, removal or location of a building, any site work including

4. the construction of a swimming pool, retaining structures, driveways or landscaping but only if associated with the erection, construction or renovation of a house or building
5. preparation of plans and specifications, or bills of quantity related to the building work, the inspection of a completed building or work prescribed under a regulation.

How does the QCAT process work?

Prior to commencing any legal proceedings through QCAT, you must first participate in a dispute resolution process with the QBCC. Once the dispute resolution process is complete, you will receive a letter from the QBCC advising of the outcome. If you are not satisfied with the outcome, you can pursue your matter through QCAT.

If you do not participate in the dispute resolution process with the QBCC prior to applying to QCAT, your application may be dismissed. A copy of the dispute resolution outcome letter must accompany your QCAT application.

Once you have completed the QBCC dispute resolution process and you wish to pursue the process through QCAT, you must:

1. complete and provide the respondent with a **S99 Warning Notice – Notice of Intention to Start Legal Proceedings** (qbcc.qld.gov.au/sites/default/files/BIF_s99_Notice_of_Intention.pdf) form, no later than 20 business days after the due date for the payment
2. wait five business days after giving the respondent the warning notice before taking further action
3. be guided by the legal system as to the next steps to take.

Advantages

- QCAT can make a decision on the dispute
- can be used at the same time as a QBCC monies owed complaint and suspending work
- requires prior written notice of the intent to start legal proceedings to be given by the claimant to the respondent no later than 20 business days after the due date for the payment*.

Disadvantages

- associated fees
- has strict time requirements and limitations
- can only hear commercial building disputes of up to \$50,000 (unless both parties agree that QCAT can hear a dispute for a greater amount)
- the claimant must wait five business days after giving the respondent written notice of intention to start legal proceedings, before taking further action*.

* Applies to payment disputes for construction work or supply of related goods and services under the *Building Industry Fairness (Security of Payment) Act 2017*.

COURT PROCEEDINGS

You can choose to legally pursue an outstanding payment through the courts (Magistrate, District or Supreme). The amount in dispute determines which court will hear the matter.

- Magistrates Court – up to \$150,000
- District Court – over \$150,000 up to \$750,000
- Supreme Court – over \$750,000.

Choosing to pursue a matter through the courts can be an expensive option. Alternate dispute resolution options may be available. You are encouraged to seek legal advice prior to commencing any action through the court system.

What is the process to proceed through the courts?

If you decide to take your payment dispute to the courts, there are certain processes you need to follow. You need to:

- complete and provide the respondent with a S99 Warning Notice – Notice of Intention to Start Legal Proceedings form, no later than 30 business days after the due date for the payment
- wait five business days after giving the respondent the warning notice before taking further action
- be guided by the legal system as to the next steps to take.

Advantages

- delivers a decision on the dispute
- can be used at the same time as a QBCC money owed complaint and suspending work.

Disadvantages

- potentially costly legal advice and fees.
- time requirements and limitations apply.

SUBCONTRACTORS' CHARGE

Subcontractors' charge provides a way for subcontractors to secure payment of amounts owed to them under a contract by someone who is higher in the contractual chain. It also potentially catches security held under such a contract.

Lodging a subcontractors' charge for outstanding payments, will 'leap frog' the contractor who owes you money and be applied to someone further up the contractual chain. In doing so, money owed to the contractor, can be frozen while the dispute is being decided and redirected to you after the dispute is decided by QCAT or the courts. Diagram 2: Charges Comparison shows traditional and leap frog charges.

NOTE: A subcontractors' charge will only apply if there is still money owing from the higher contractor to the contractor that owes you money, if they have been paid all remaining amounts owed under the contract, subcontractors charges cannot be used.

Who can use subcontractors' charges?

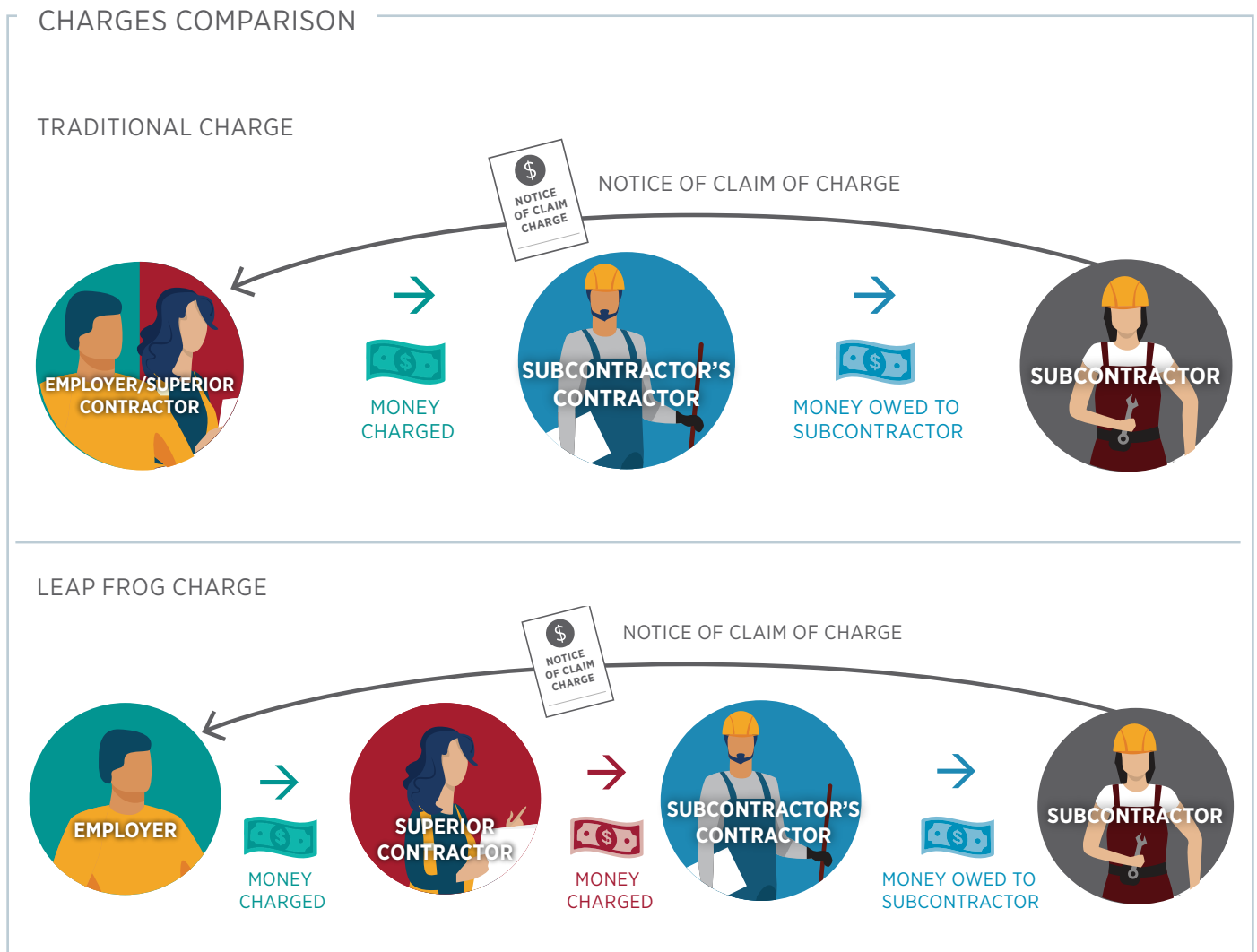
Any subcontractor who has been engaged to carry out 'work' by a contractor can use a subcontractor's charge. Under the BIF Act, 'work' covers almost all types of construction work including:

- unskilled labour
- the placement, fixation or erection of materials, plant or equipment onsite; and
- manufacture or fabrication of project specific components (including if that manufacture or fabrication occurs offsite).

However, it does not include work which is:

- delivering materials, plant or equipment to a site
- supplying materials, plant or equipment under a hire agreement
- if the work is done by an employee under a service contract (as opposed to a contractor); or
- testing of materials or the taking of measurements or quantities.

DIAGRAM 2: CHARGES COMPARISON



Using a subcontractors' charge to help secure money owed to you

The following information provides an indication of the process involved in securing money owed to you by way of a subcontractors' charge. It is provided for general information only and is not a substitute for legal advice.

It is necessary to strictly comply with the requirements of the BIF Act for it to be effective and it is therefore recommended that you seek the assistance of a suitably experienced lawyer before proceeding.

* For ease of use the following information will refer to the employer/principal/superior contractor as employer.

Determining if the subcontractors' charge applies to your situation

To lodge a charge, ensure:

- you are a contractor for a contract who is required to carry out work under the contract
- your contract is for 'work' as defined under the BIF Act such as labour carried out in connection with construction, demolition, alteration, repair of a building, plant or machinery used for these types of work
- your claim for payment is in accordance with your subcontract
- your claim is for payment for work done under your subcontract; and
- that you will be able to prove your entitlement to your claim.

Note: If the employer* has already made payment to the contractor who owes you the money then subcontractors' charges cannot be used, as this process is to freeze the money for you higher up the contractual chain.

How to apply for a subcontractors' charge

If subcontractors' charges apply to your situation, you can give a charge to secure money payable to you by the contractor. This is done by giving a **Notice of Claim** form (qbcc.qld.gov.au/sites/default/files/S122_Notice_Of_Claim.pdf) to the employer* to redirect money otherwise payable to the contractor, to you. This charge can then be enforced in court.

You can claim a charge on money payable to the contractor who owes you the money, or you can "leap frog" up the contractual chain and claim a charge on money payable to the employer*.

Information required when completing a subcontractors' charge

If subcontractors' charges apply to your situation, you will need to ensure the claim:

- specifies the amount of the claim
- details of the work delivered or the goods and services supplied
- is certified by a qualified person (such as a registered Architect, Professional Engineer, Surveyor or licensed Building Supervisor)
- is supported by a statutory declaration from you.

Obtaining higher party information

To complete the **Notice of Claim** form, you will need some information about the contract under which you have been engaged to perform this work. If you don't have this information, you can ask the contractor for this in writing and they must respond to your request within ten business days. Failure to provide the information in the relevant timeframe is an offence.

Make sure you properly give your **Notice of Claim** form to the employer* and to the contractor who owes you the money (or in the case of a 'leap frog' charge higher up the contractual chain, to the contractor to whom the money is payable).

Lodging a subcontractors' charge

When all required components of the **Notice of Claim** form have been completed, a copy of the form must be provided to:

- the contractor owing the money and
- the relevant person higher in the contract chain who pays the contractor (the employer*)

The **Notice of Claim** form can be given at any stage during a subcontract but no later than:

- For money owed under a contract or subcontract – within 3 months after completion of the works; and
- For retention monies – within 3 months of the expiration of the maintenance period.

What happens after the Notice of Claim has been lodged?

Within 10 days, the contractor must send a **Response to a notice of claim** form (qbcc.qld.gov.au/sites/default/files/S128_Response_Notice_Of_Claim.pdf) to you as well as the person higher in the contract chain who pays them.

In the form, the contractor must declare if they accept (in full) or dispute the claim (in part of in full).

It is an offence if the contractor fails to respond within the specified timeframe and can be reported to the QBCC to investigate by lodging a **Notice of Offence form** (qbcc.qld.gov.au/sites/default/files/Notification%20of%20Offence.pdf).

If the contractor accepts liability

If the contractor accepts liability for your claim, the person higher up the chain will pay you either the full claimed amount, or the amount stated in the contractor's response which they have accepted liability for paying.

SUBCONTRACTORS' CHARGE CONTINUED

If the contractor does not accept liability

If the contractor does not accept liability for the full claimed amount, **you must enforce the charge by commencing court proceedings**. Court proceedings must be commenced:

- within one month from when the notice of claim was first given or
- if the claim is for the retention amount only, court proceedings must be commenced within four months after the due date for payment of the retention amount.

Withdrawing subcontractors' charges

Subcontractors' charges can be wholly or partly withdrawn at any time by completing a **Withdrawing a notice of claim** (qbcc.qld.gov.au/sites/default/files/S125_Withdrawing_Notice_Of_Claim.pdf) and submitting it to each party who were given a copy of the **Notice of Claim** form.

Subcontractors' charge and adjudication

Subcontractors charges and adjudication **cannot** both be used; you need to pick one or the other. To claim a subcontractors' charge over the money payable, a notice of claim form to start the process must be issued. It is advised to seek legal advice prior to doing this.

Advantages

- freezes money owed by a higher person in the contractual chain
- can be used at the same time as a QBCC money owed complaint, suspending work and court proceedings.

Disadvantages

- is only effective if the higher person has money not yet paid to the contractor
- strict time requirements and limitations
- cannot be used in conjunction with adjudication – it's one or the other
- is only temporary until a court decision is made on the dispute
- needs legal advice
- costs of legal advice.

SUSPENDING WORK

Suspending work is a process that allows subcontractors, who are owed money, to take action in order to encourage payment from the person owing them money.

Suspending work will stop the amount of money owing to you increasing, it will give you time to decide on the best resolution option for your situation, and it may encourage payment.

There are two reasons for suspending work. You can suspend work when:

1. the respondent does not pay a payment claim in full by the due date
2. the respondent does not pay an adjudicated or court ordered amount

What is the process to suspend work?

The process to suspend work is:

1. give the higher contractor written notice of the intention to suspend work. The written notice must state that it is made under the *Building Industry Fairness (Security of Payment) Act 2017*

2. work can be suspended if at least two business days have passed since you gave written notice
3. once payment has been received, the right to suspend work ends.

What happens while work is suspended?

If you are the person who is owed money, you are not liable for any loss or damage suffered by the respondent during the time you have suspended work or stopped supplying related goods and services.

Additionally, if you incur a loss or expense because the respondent removes any part of the work or supply from the contract, the respondent is liable to pay you the amount of the loss or expense.

Advantages

- free, unless legal advice is sought
- may influence a quicker payment result without the need to escalate through other channels
- can be used at the same time as a QBCC monies owed complaint, adjudication, QCAT, court proceedings and subcontractors' charges
- stops further payment debt accruing.

Disadvantages

- two business days' notice is required
- does not provide a decision on the dispute
- fees may apply if legal advice is sought
- may inflame the situation
- other options to resolve the dispute are needed.

ADJUDICATION

Adjudication is a dispute resolution process intended to help resolve disagreements about a payment claim for a progress payment. It is a quick, cost effective alternative to court.

When parties are in dispute about an amount owed for construction work or provision of goods and services in relation to construction work the claimant can lodge an adjudication application to the Registrar. Once lodged, the Registrar will assign the application to an independent, appropriately qualified party (an adjudicator) to make a decision about the disputed payment claim. The adjudicator's decision is enforceable in court.

Who can use adjudication?

Anyone who has carried out construction work or supplied related goods and services under a construction contract in Queensland can use the adjudication process to try to resolve a payment dispute.

When the adjudication process cannot be used

Under a construction contract, the adjudication process cannot be used in the following instances:

- when the contract forms part of a loan agreement, contract of guarantee or a contract of insurance
- when the contract is for domestic building work and the contract is with the resident owner of that property
- when the work payable under the contract is not calculated by reference to the value of work completed
- when you are an employee and the construction work is for your own purposes
- when the work or goods and services is supplied for a job outside of Queensland
- when you have already given a subcontractors' charges Notice of Claim for the same work or related goods and services under the contract.

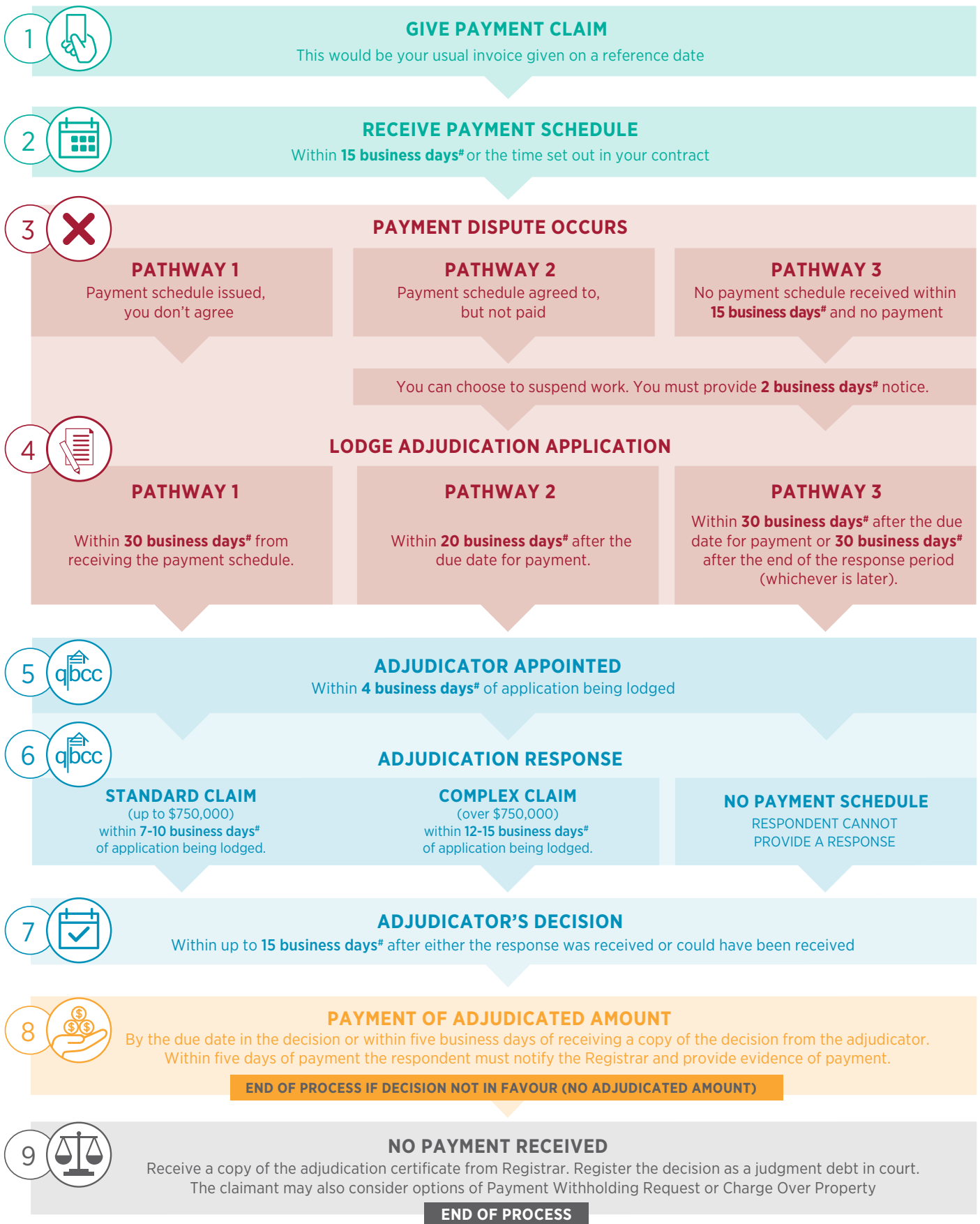
When to apply for adjudication

You may apply for adjudication for a payment claim for construction work completed or goods and services supplied under the contract if:

PATHWAY 1	you received a payment schedule but you do not agree with it
PATHWAY 2	you received a payment schedule but do not receive the full amount stated in the payment schedule and the payment due date has passed
PATHWAY 3	you do not receive a payment schedule or full payment by the due date

These pathways are outlined in Diagram 3.

DIAGRAM 3: ADJUDICATION PROCESS



NOTE: PROCESS WILL END AT ANY POINT IF WHOLE CLAIMED AMOUNT IS PAID. Claimant may withdraw application at any stage in the process.
REFERENCE DATE: Date claimant (you) can invoice for payment under the contract; or on/from the last day of the month when work was last done.
#BUSINESS DAYS DO NOT INCLUDE • Date notice was served • National and regional public holidays • Weekends • 22 December to 10 January

ADJUDICATION APPLICATION GUIDE

Adjudicators find that a number of applications are outside of their jurisdiction. This means the adjudicator cannot make a decision on that application. It is crucial that you are careful in completing your application and submission. There are three separate parts to an adjudication application.

1. YOUR ADJUDICATION APPLICATION	Complete your adjudication application form taking care to complete each section in detail. When completing the application form: <ul style="list-style-type: none">• Use BLACK pen only and Print clearly in BLOCK LETTERS• DO NOT use correction fluid — any amendments should be crossed out and initialled• All items marked with an * asterisk must be completed before submitting• Take particular care to correctly identify the business details of the respondent and the contract in dispute• Please complete all details of the application where applicable.
2. SUPPORTING DOCUMENTATION	Your supporting documentation may only include: <ul style="list-style-type: none">• The payment claim to which the application relates• The supporting statement that accompanies the payment claim (if applicable)• The contract to which the payment claim relates• A payment schedule given in response to the payment claim• If a party to the application gave the other party a document in support of the payment claim or the payment schedule at the time the claim or schedule was given to the other party• Contract related documents e.g. written agreement to variations, extension of time, program of work• An expert report about a matter to which the payment claim relates• A statutory declaration about a matter which the payment claim relates
3. YOUR SUPPORTING SUBMISSION	<p>For claims \$25,000 and under your submission:</p> <ul style="list-style-type: none">• must be no more than 10 pages; and• if typed must be size 10 font or bigger with a margin of 2.54cm <p>There is no restriction for claims over \$25,000.</p> <p>Although it is not required, it is important to include with your adjudication application your submission to prove your entitlement to claim.</p> <p>The submission will assist the adjudicator to understand the detail of the project and the reasons why you have arrived at your position and they will consider this when making their decision.</p> <p>If there are no submissions, it may be hard for them to make a decision in your favour.</p> <p>Make sure that your submission states facts rather than thoughts and feelings about the situation. You may find it helpful to step back from the situation and write the submission as if it was about someone else.</p>

When drafting your adjudication application submission you may want to include information such as:

- A **summary background of the project** including the site details, site address, type of construction (e.g. bridge repair, shop renovation, building demolition), description of the work you are doing (e.g. supplying plaster sheeting for walls, scaffolding erection, architectural plans).
- **Information about the contract.** For example if the other party refuses to put details in writing, who supplied the contract, was legal advice sort on the contract prior to signing etc.
- **Outline any events** leading up to the Payment Claim in relation to the application such as verbal disagreements, lack of communication etc.

- **Explain how you have arrived at the valuation** of the works, goods or services and provide evidence to support your valuation such as contract and variation agreements, previous payments, pictures, emails, receipts for materials, reports etc.
- **Evidence why there is an entitlement to payment**, for example the contract terms, the work done, goods and services supplied etc. If you disagree with the reasons outlined in the payment schedule, outline the reason why you disagree.
- **Explain what supporting documentation you have supplied** along with your application, for claims of not more than \$25,000 your submission may only be accompanied by these documents:
 - » payment claim the application relates to,
 - » construction contract,
 - » other supporting documents that relate to the contract such as variations or a program of work, payment schedule,
 - » other supporting documents given at the time of the payment claim or payment schedule between the parties,
 - » if you disagree with a statement made by the other side, identify the statement and explain clearly why you disagree.

If you are uncertain about your skills in preparing the submission seek expert advice from a lawyer or other trained person experienced in the field of payment disputes under the legislation.

How to apply for adjudication/application requirements

An adjudication application:

- must be lodged using the approved
 - » Adjudication Application online form available at my.qbcc.qld.gov.au/s/login/?ec=302&startURL=%2Fs%2Fbif-app or
 - » Adjudication Application PDF form available at qbcc.qld.gov.au/sites/default/files/S79_Adjudication_Application.pdf
- must be lodged within specific timeframes; and
- must identify the payment claim and the payment schedule (if received) to which it relates; and
- must be accompanied by the prescribed application fee; and should include relevant submissions.

A copy of the adjudication application, submissions and related documents must be given by the claimant to the respondent. This should be done as soon as possible after the application is lodged with the Registrar.

Independent legal advice is recommended if the claimant intends to fulfil this requirement by way of a link to a cloud-based file storage service.

Timeframes for lodging

There are specific timeframes that must be met for lodging an adjudication application. These timeframes differ dependent on which pathway has been followed.

PATHWAY 1	Where a payment schedule was issued but you do not agree Within 30 business days after receiving the payment schedule.
PATHWAY 2	Payment schedule agreed to, but not paid Within 20 business days after the due date for payment claim.
PATHWAY 3	No payment schedule received within 15 days and no payment Within 30 business days after the due date for payment or the last day for responding with a payment schedule (whichever is later).

An application must be lodged with the Registrar no later than 5pm on a business day.

An application lodged after 5pm Queensland time will be taken to be lodged on the next business day in accordance with the *Building Industry Fairness (Security of Payment) Regulation 2018*.

If lodging in person at a Regional Service Centre, please allow enough time for the application to be received by the Registrar. All applications should be lodged at a Regional Service Centre no later than 4:30pm to be received by the Registrar on the same business day.

All applications lodged via post should also allow enough time. Please refer to the Australia Post Delivery Times for estimated timeframes. You should allow the maximum timeframe to avoid any invalid applications.

Adjudication application lodgement fees

Please refer to the QBCC website for a table of adjudication application fees (qbcc.qld.gov.au/adjudication/how-when-apply). Adjudicators fees and expenses may also be payable.

Adjudicator appointment

Once the adjudication application has been received, the Registrar will refer the application to a registered adjudicator who will decide the application based on the submissions and documents received.

The Registrar is required to refer an application to an adjudicator within 4 business days of receiving the application in accordance with the Adjudicator Referral Policy.

The adjudicator will provide a 'written notice of acceptance' to the claimant and the respondent. For claims over \$25,000 the notice of acceptance will state the fee the adjudicator intends to charge and is to be agreed on by the parties.

For respondents - adjudication response

If you have adhered to the appropriate timeframe and provided a payment schedule in response to a payment claim, you may give the adjudicator a response to the adjudication application.

Your response:

- must be in writing
- must identify the adjudication application to which it relates
- may include relevant submissions
- must not include any new reasons for withholding payment (i.e. reasons that were not included in the original payment schedule).

For claims \$25,000 and under your submission:

- **must be no more than 10 pages and**
- **if typed must be size 10 font or bigger with a margin of 2.54cm**

There is no restriction for claims over \$25,000.

If you failed to give the claimant a payment schedule as required, you are not permitted to submit an adjudication response, if you do, it will not be considered as part of the application.

Timeframes for the adjudication response

For standard claims (up to \$750,000), the response must be submitted:

- within 10 business days of receiving a copy of the adjudication application, or
- within 7 business days of receiving notice that the adjudicator accepts the application.

For complex claims (more than \$750,000), the response must be submitted:

- within 15 business days of receiving a copy of the adjudication application, or
- within 12 business days of receiving notice that the adjudicator accepts the application.

For complex claims only, respondents may also apply to the adjudicator for a time extension of up to 15 business days if they need more time to respond.

IMPORTANT: the respondent must give the claimant a copy of the adjudication response within 2 business days of submitting it to the adjudicator.

Adjudication decision process

When the adjudicator receives an application, the next step is for the adjudicator to decide whether they have jurisdiction to make a decision about the application and whether the application is frivolous or vexatious. They may request further information about a particular issue relating to the adjudication. It is important to comply with any requests for further submissions, within the time that the adjudicator specifies. If you do not meet the requests, the adjudicator may not consider your further submissions.

In making their decision, an adjudicator must decide:

- the amount owed by the respondent, if any (also known as the 'adjudicated amount')
- the date the amount, if any, is payable
- the rate of interest payable for the amount, if any.

The adjudicator is required to make a decision within specified timeframes as set out below.

An adjudicator's decision must be given in writing. It must include the reasons for their decision, unless both parties have requested that the reasons are omitted.

Timeframes for making a decision

The timeframes for an adjudicator to make a decision are:

- For standard claims (up to \$750,000), the decision must be made within 10 business days of the **response date**.
- For complex claims (greater than \$750,000), the decision must be made within 15 business days of the **response date**.

The **response date** is the day the adjudicator received the adjudication response from the respondent or the last day that the adjudication response could have been given. Note that if the respondent did not provide a payment schedule and is unable to provide an adjudication response, the response date is the last day that a response otherwise could have been given if they had provided a payment schedule.

An adjudicator may request an extension of time to decide the application.

Adjudicators fees

The adjudicator can decide how to divide the fee between the claimant and the respondent. To decide how much of the fee each party must pay, the adjudicator will consider:

- how successful the claimant or respondent have been in their submissions
- if the claimant or respondent applied or participated in the adjudication for improper (as per BIF Act) reason
- the adjudicator must consider the conduct of both parties in the lead up to and during the adjudication process, when deciding how to divide the fee between the claimant and respondent. Conduct could include whether the claimant or respondent has acted unreasonably or whether the respondent attempted to provide new reasons for withholding payment during adjudication.
- if the respondent included further non-payment reasoning that was not included in the payment schedule
- if the application was withdrawn
- what services the adjudicator provided in the adjudication process.

The maximum fees that the adjudicator can charge for deciding the application depend on the claimed amount and other factors such as the amount and complexity of the submissions.

Please refer to the QBCC website for the table of fees qbcc.qld.gov.au/once-adjudication-begins/adjudicator-fees

Release of adjudicators decision

The adjudicator will give a copy of the decision to both parties after payment of their fees. Both parties are equally responsible for paying the adjudicator fees and expenses unless the adjudicator decides otherwise.

Once a decision has been released, the registry will publish the decision on the decisions webpage decision search page. If an adjudicated amount is payable, the registry will provide the claimant with an adjudication certificate for the decision.

Payment of the adjudicated amount

If an adjudicator decides that a respondent is required to pay an adjudicated amount, they must pay the amount to the claimant including their share of the fees within five business days of receiving a copy of the adjudicator's decision or by the later date that the adjudicator has decided.

Failure to pay an adjudicated amount on or before the due date is an offence. It may result in prosecution or disciplinary action.

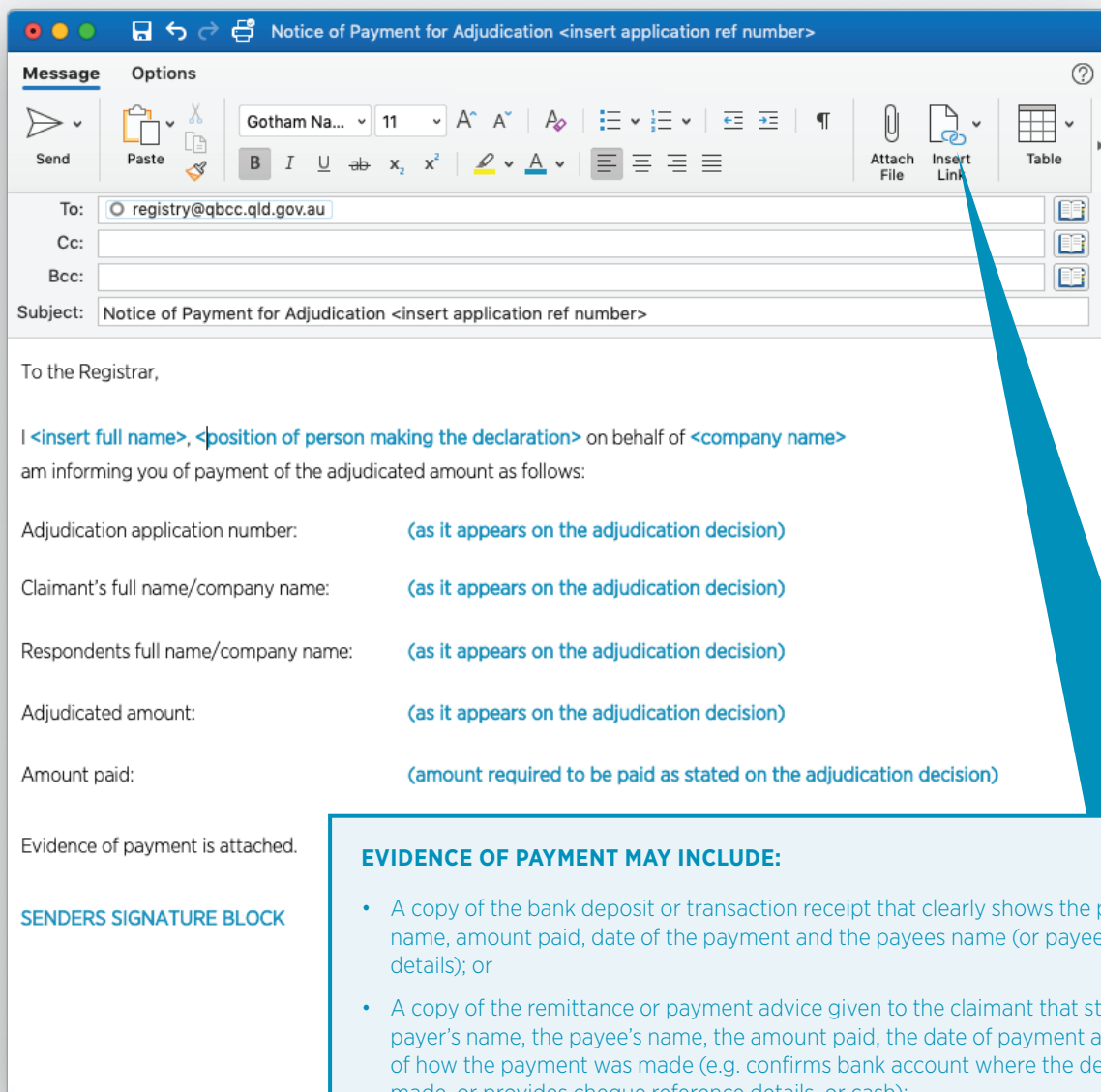
If the adjudicated amount is paid, the respondent must notify the Registrar and provide evidence of payment to the Registrar within five business days after making the payment.

Notification is required via email to adjudication.registry@qbcc.qld.gov.au.

A Notification of payment of an adjudicated amount template is available on the QBCC website at qbcc.qld.gov.au/once-adjudication-begins/adjudication-decision.

Failure to notify the registrar within 5 business days after making payment is an offence.

DIAGRAM 4 TEMPLATE NOTICE FOR NOTIFICATION OF PAYMENT FOR ADJUDICATION



Options if the adjudicated amount is not paid

If the adjudicated amount is not paid in full by the due date, the claimant may:

- give the respondent a written notice of intention to suspend work; and
- lodge the adjudication certificate as a judgement debt in court.
- There may be additional options available to help the claimant safeguard the amount that is owed to them including:
 - » giving a payment withholding request to the higher party in the contractual chain (see page 24); and
 - » registering a charge over property (see page 26).

Adjudication certificate

The Registrar will provide the claimant with an adjudication certificate within 5 business days of the registry receiving the adjudicator's decision.

If the respondent has failed to pay the adjudicated amount, you can apply to the courts to have the decision recognised as a judgment debt, the debt is not enforceable in the courts until the expiry of day 5 after the decision was given to the respondent or the due date if later than the 5 business days.

You will need to lodge the adjudication certificate with the appropriate court to start this process. You must include an affidavit that states whole or part of the adjudicated amount has not been paid at the time of filing the certificate. Queensland Courts have a template affidavit that you can use as a guide courts.qld.gov.au/about/forms.

Once you have lodged the adjudication certificate as a judgement debt in court, you can also register a 'charge over property' over a relevant property with the Titles Registry.

A relevant property is the property where work was completed or goods and services supplied for construction work on that property.

Withdrawing from adjudication

There are two ways an adjudication application can be withdrawn. Each requires action to be taken by the claimant.

1. **The claimant decides to withdraw** – the claimant can withdraw the application by giving the adjudicator and the respondent a written notice of discontinuation. The claimant must also inform the Adjudication Registrar, as soon as practicable, that the application has been withdrawn because of discontinuation.
2. **The respondent pays the payment claim in full** – if this happens before the adjudicator decides the application, the claimant must inform the Adjudication Registrar, the adjudicator and the respondent, as soon as practicable, that the adjudication application has been withdrawn because of payment. Despite the withdrawal of an adjudication application an adjudicator is still entitled to be paid fees for considering the application.

Advantages

- rapid decision on dispute (timeframes for adjudicator making decision apply)
- the adjudicator's decision is enforceable in court if not paid
- non-payment of the decision is an offence enforced by QBCC
- generally cheaper and faster than going to court (fees are capped for smaller claimed amounts under \$25,000)
- can be used at the same time as suspending work.

Disadvantages

- fees apply and vary depending on the amount being claimed
- strict time requirements for making application and limitations apply
- can still end up in court if the adjudicator's decision is not paid.

PAYMENT WITHHOLDING REQUEST

If an adjudicated amount (as determined through the adjudication process) owing to you has not been paid in full by the due date, you may be able to use a payment withholding request to help secure payment. A payment withholding request is given to the higher party and requires the higher party withhold an amount from money they are liable to pay the respondent for related work or services. The higher party is the party in the contractual chain directly above the respondent. For head contractors, the higher party may be a financier.

When can a payment withholding request be used?

A payment withholding request can only be used when:

- you are the 'claimant' (money is owing to you) and you've taken the payment dispute through the adjudication process
- an adjudicator has decided in your favour and specified the amount owed to you (the 'adjudicated amount') by the other party (the 'respondent')
- the respondent does not pay you the adjudicated amount by the due date – which is within 5 business days of receiving a copy of the adjudicator's decision or by a date decided by the adjudicator.

Identifying a higher party is in the contractual chain

If you do not know the name and business address of the higher party, you can request it from the respondent using **s97F Template – Payment Withholding Request – Information about Higher Party** (qbcc.qld.gov.au/sites/default/files/s97F_Template_PWR_Info_Higher_Party.pdf).

The respondent must provide the information within five business days. Failure of the respondent to provide the information is an offence and may incur a penalty.

How to use a payment withholding request

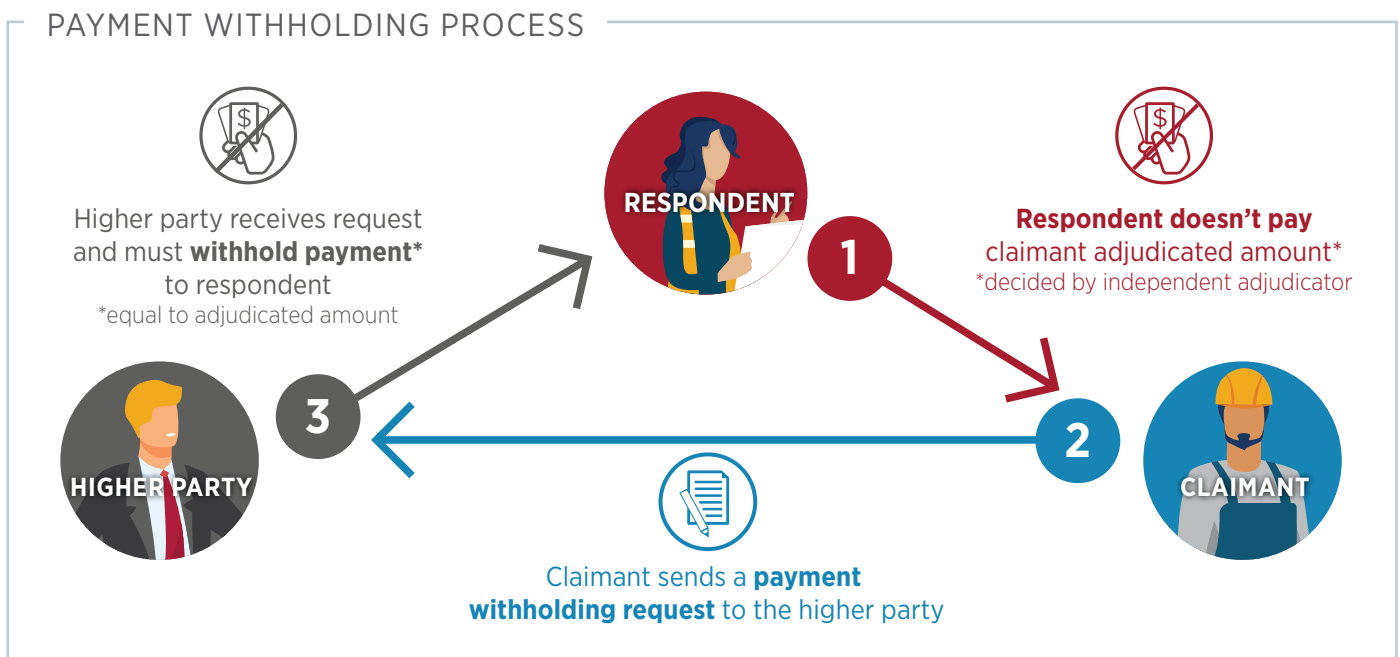
Follow these steps to send a payment withholding request:

- obtain all necessary information about the higher party
- complete **s97B(2) - Payment Withholding Request** (qbcc.qld.gov.au/sites/default/files/s97B2_Payment_Withholding_Request.pdf) and send to the higher party
- you must also give a copy of the request to the respondent at the same time – failing to do so is an offence and may attract a penalty.

If, after giving a payment withholding request, the respondent pays the adjudicated amount you must notify the higher party of the amount that you've been paid within 5 business days. Failing to do so is an offence and may attract a penalty.

You can notify the higher party by completing and sending this form **s97C(5) Template - Payment Withholding Request – Notice of Payment or Expiry** (qbcc.qld.gov.au/sites/default/files/s97C5_Template_Notice_Of_Payment_or_Expiry.pdf).

DIAGRAM 5



When a higher party receives a payment withholding request

On receipt of the payment withholding request, the higher party must withhold the lesser of the following amounts from the respondent's payment:

- the unpaid adjudicated amount or
- the amount the higher party is liable to pay the respondent for the construction work or supply of related goods and services.

There are serious consequences for a higher party who fails to withhold payment to the respondent as required.

If you receive payment of the adjudicated amount in full, you must notify the higher party within five business days. It is an offence to fail to inform the higher party of the respondent's payment within the specified timeframe.

Advantages

- the financier or higher party needs to withhold an amount, up to the same amount as owed under the adjudication decision, from money that would be payable to the respondent
- safeguards the adjudicated amount until it is paid by the respondent
- acts as an incentive for the respondent to pay the adjudicated amount owed
- no cost to the higher party for complying with a payment withholding request – they are protected from any recovery action by the respondent for the withheld amount (but might be liable for the amount and subject to penalty if they ignore the payment withholding request).

Matters to note

- payment withholding requests cannot be used if the higher party is a resident owner
- payment withholding requests can only be used if an adjudication decision has been awarded in your favour
- legal action may still be required to enforce payment of the adjudicated amount (it safeguards money only).

CHARGE OVER PROPERTY

If an adjudicated amount has not been paid in full by the due date, claimants who are head contractors may take action to register a charge over a relevant property.

A charge over property registers the claimant's interest in the property for the adjudicated amount, safeguarding the money whilst they pursue recovery action for the outstanding amount. It acts like a caveat or chattel against the property, preventing the registered owner from selling or dealing with the property.

The claimant may then seek a court order to enforce that the property is sold, resulting in payment of the outstanding adjudicated amount.

When can a charge over property be requested?

A charge over property can only be requested if:

- the claimant is owed an adjudicated amount that has not been paid
- the claimant is a head contractor
- the respondent (or a related entity) is the registered owner of the relevant property. (Note: they must own the property where the construction work related to the adjudicated amount was carried out or where related goods and services were supplied)
- the claimant has filed the adjudication certificate in the relevant court as a judgment debt.

How do you request a charge over property?

You can request a charge over property by lodging the following documents with the registrar of titles:

- a request to record the charge over the lot/property – using a Form 14 (general request) available from Titles Queensland.
- the adjudication certificate (or certified copy).
- a statutory declaration stating the details of the relevant property (lot on plan description), that the adjudicated amount has not been paid, and (if relevant) that the registered owner is a related entity for the respondent.

You can view full details on how to request, extend or release a charge over property in Part 14, paragraphs [14-2905] and [14-2906] of the Land Title Practice Manual available on the Titles Queensland website.

Note: A fee applies to request a charge over property. Contact Titles Queensland for more information.

Advantages

- a charge over property is a form of security interest that provides security to you for payment of the adjudicated amount
- prevents the registered owner from selling or dealing with the property
- creates a right for you to apply to court to sell the property so you can be paid what is owed to you from the proceeds of the sale.

Disadvantages

- you may still be required to take action to recover the outstanding amount
- a fee applies to request a charge over property be registered – contact the Lands Title Registry for more information
- the charge expires after a two-year period – you will need to apply to court to have the charge extended if you are still not paid
- if you fail to release a charge over property (when it has expired or you have been paid) you may incur a fine.

RETENTIONS, OTHER SECURITIES AND THE DEFECTS LIABILITY PERIOD

Statutory defects liability period

If the contract does not state when a defects liability period ends, or it is unclear in the contract, under the QBCC Act defects liability period is:

- 12 months from the date of practical completion, or
- the date stated in the contract, or
- the last day when the building work was completed as required by the contract.

Notice of defects liability period ending

If any retentions or other securities are held after practical completions, the head contractor is required to notify their contractors about the end of the defects liability period. The notice must be given within 10 business days before the end of the defects liability period. The notice must be given using the **S76 NC Notice of End of Defects Liability Period** (qbcc.qld.gov.au/sites/default/files/S67NC_Notice_End_Defect_Period.pdf).

If the defects liability period is linked to the defects liability period for another contract – the notice may be given within five business days after the contracting party is themselves given the defects liability notice under the other contract. Not providing the notice of the end of the defects liability period is an offence and could attract a maximum of 100 penalty units.

Getting paid at the end of the defects liability period

In most cases, a building contract will require a final payment claim to be submitted for the payment of retention amounts.

A final payment claim must be submitted within:

- the date specified in the contract, or
- 28 calendar days after the end of the last defects liability period, or
- six months after the completion of all construction work under the contract.

The defects liability notice will signal to a contractor that it is time to give their final payment claim.

Releasing retention amount or security

Unless they have a reasonable excuse, the party holding the retention amounts or other security must release them according to the building contract.

Failure to release retention or other security may incur a maximum penalty of 200 penalty units or one year's imprisonment.

Use of security or retentions withheld to recover amounts owed from the contracted party (set offs)

The contracting party for a building contract may use a security or retention amount, to obtain an amount owed under the contract. Prior to using the security or retention amount:

- the contracting party must give notice in writing to the contracted party advising of the proposed use and amount owed
- the notice must be given within 28 days after the contracting party becomes aware of the contracting party's right to obtain the amount owed.

For more information

Visit qbcc.qld.gov.au or call us on 139 333.

