

Authorised Nominating Authorities

Conditions of Authorisation

*Building and Construction Industry
Security of Payment Act 2002 (Vic)*

2009



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Building and Construction Industry Security of Payment Act 2002

The Building and Construction Industry Security of Payment Act 2002 (the Act) provides a fast, cheap and non-legalistic way to resolve payment disputes through adjudication.

Adjudicators are nominated by Authorised Nominating Authorities (ANAs). ANAs are authorised to perform this service by the Building Commission (the Commission), under section 42 of the Act. The Commission may also withdraw any authorisation it has given.

Before authorising an ANA under section 42, the Commission must have regard to guidelines issued by the Minister under section 44 (Ministerial Guidelines).

In addition, section 43 of the Act permits the Commission to impose conditions of authorisation, and to vary or revoke any existing conditions, in accordance with Ministerial Guidelines.

An ANA can appeal to the Building Appeals Board under section 144A of the Building Act 1993 against the imposition or variation of a condition.

1. General Obligations

Compliance with these Conditions

- 1.1. All Authorised Nominating Authorities (ANAs) must comply with these Conditions of Authorisation. A breach of any condition may affect the authorisation of the ANA concerned.

Compliance with the Act and Regulations

- 1.2. All ANAs must comply with the requirements of the Building and Construction Industry Security of Payment Act 2002 (the Act) and the Regulations. A breach of any requirement may affect the authorisation of the ANA concerned.

Capacity to perform functions

- 1.3. The ANA must have procedures and policies in place that enable it to perform its functions as an ANA as required by the Act, the Ministerial Guidelines and these Conditions of Authorisation.
- 1.4. The ANA is required to establish and maintain quality assurance systems that enable it to continuously monitor and improve its performance as an ANA.

Responsibility to perform functions

- 1.5. While an ANA may adopt any structure and method of operation, including outsourcing, it remains directly and fully responsible for the performance of its functions. It must not delegate or abrogate any function, power, authority or duty conferred on it by the Act.¹

¹ The functions of an ANA are described at s 43A of the Act.

2. Professional Conduct

Probity

- 2.1 The ANA and its directors and officers must be fit and proper to perform the functions of an ANA under the Act.²

Procedural Fairness³

- 2.2 The ANA must perform its functions as an ANA in accordance with the requirements of procedural fairness.
- 2.3 The ANA must not hinder or interfere with the independent exercise of an adjudicator's responsibilities under the Act.

Conflict of interest

- 2.4 The ANA must have processes and procedures in place to identify and resolve conflicts of interest in performing its functions as an ANA⁴.
- 2.5 The ANA must have processes and procedures in place to identify and resolve conflicts of interest for any adjudicator it considers for nomination or appointment.⁵
- 2.6 The ANA must not nominate or appoint an adjudicator where it is aware, or reasonably should be aware, that a conflict may or does exist between the interests of the adjudicator and the interests of the claimant or the respondent.⁶

² The factors to consider in determining whether a person is 'fit and proper' depend on the nature of the activities in which the person is engaged but generally can be expected to include the person's character (indicating likely future conduct) or reputation (indicating public perception as to likely future conduct). As a guide, the Commission considers that any of the following factors could raise doubt as to whether an individual is a fit and proper person. However, none of the items is necessarily conclusive, and the list is not exhaustive.

- Criticism, disqualification or removal by a professional or regulatory body or court.
- Evidence that the person has been obstructive, misleading or untruthful in dealing with regulatory bodies or a court.
- Refusal to comply with regulatory or professional requirements.
- Adverse findings about the person in relevant criminal or civil proceedings.
- Failure to manage personal debts satisfactorily.
- Failure to deal with conflicts of interest appropriately.
- Evidence that the person has been, or is, considered of bad repute.

³ The requirements of procedural fairness, or natural justice, include a duty to provide a fair hearing and a duty to be unbiased. Providing a fair hearing means that each party has a reasonable opportunity to prepare for and present its case within the limitations of the Act and knows what the case against it is. The duty to be unbiased means that the ANA must be impartial and act independently, avoiding both actual and apparent bias.

⁴ Conflict of interest issues arise where any interests or circumstances of the ANA are likely to compromise, or be perceived as compromising, the ability of the ANA to carry out its duties impartially. The risk is particularly high when nominating an adjudicator to determine an adjudication application

⁵ Section 19(2) of the Act prohibits a party to the relevant construction contract, or an employee of a party to that contract, from being nominated as an adjudicator. Other circumstances may also give rise to a conflict of interest, such as an association with either party or involvement in preparing the adjudication application or response.

⁶ Section 28G(3) of the Act prohibits a person who was involved directly or indirectly with an adjudication determination from being appointed by the relevant ANA to review that determination.

3. Confidentiality and Privacy

Confidential information

- 3.1 The ANA must keep all confidential information secure. The ANA is responsible for, and must take all reasonable measures to ensure, the security of confidential information for so long as that confidential information is within its control. In so doing, the ANA must ensure that the confidential information is protected at all times from access, use or misuse, damage or destruction, by any person not authorised to receive it.⁷

Personal information

- 3.2 The ANA must ensure that the personal information it collects, uses, holds and discloses in performing its functions as an ANA is protected to the standards set out in the National Privacy Principles in the Privacy Act 1988 (Cth).⁸

Limits on use and disclosure

- 3.3 The ANA, its staff and all other persons involved in the adjudication process must not use or disclose any matters or documents related to the adjudication except to the extent necessary for the performance of their functions under the Act and Regulations and these Conditions of Authorisation.⁹

4. Public Access

Information and advice

- 4.1 The public must be able to seek and obtain accurate information and timely advice from the ANA about the security of payment scheme and the adjudication process.

Service of documents

- 4.2 The ANA must maintain at all times an address in Australia where adjudication applications, adjudication responses and other documents may be expeditiously served by post, fax or other delivery.¹⁰

5. Management of the Adjudication Process

General responsibility for the adjudication process

- 5.1 The ANA is required to establish and maintain practices and procedures that deliver an adjudication process that is:
- in accordance with the Act, the Regulations, the Ministerial Guidelines and these Conditions of Authorisation

⁷ 'Confidential information' means any information or data, including personal information, whether or not in material form, which is confidential to a party, including confidential information acquired, collected or developed for the purpose of the adjudication or obtained during the adjudication, except that which is already in the public domain otherwise than as a result of breach of these Conditions of Authorisation.

⁸ 'Personal information' refers to information that directly or indirectly defines an individual and is defined at s 6 of the Privacy Act. Organisations with an annual turnover of less than \$3 million are generally exempt from the Privacy Act but can opt-in to the federal privacy regime by notifying the Federal Privacy Commissioner of their choice to be covered. An ANA that is otherwise exempt from the Privacy Act is not required to opt-in but is required to protect personal information to the same standard as those organisations that are covered by the federal privacy regime.

⁹ The ANA is required by s 43B of the Act and by these Conditions of Authorisation to provide information to the Commission.

¹⁰ Section 50 of the Act sets out the methods by which notices and documents may be served for the purposes of the Act.

- fair and impartial
- expeditious
- provided within a reasonable and appropriate cost framework and
- transparent.

Management of Documents and Notices

- 5.2 The ANA must manage documents and notices in a timely manner.¹¹
- 5.3 The ANA must develop and maintain a procedure for recording the time and date of receipt and service of any document relevant to a process under the Act.
- 5.4 The ANA must produce adjudication certificates promptly on request.

Nomination of Adjudicators

- 5.5 The ANA must develop and maintain a procedure for the selection and nomination of adjudicators that:
- is expeditious
 - is carried out fairly and without favouritism or self interest
 - identifies adjudicators who are suitably qualified and whose skills are appropriate to the particular adjudication application, and
 - ensures that any conflict of interest is addressed before nomination.

Quality of adjudication

- 5.6 The ANA must establish and maintain a quality assurance system that supports consistent and reliable adjudicator selection, training and monitoring. The system should ensure that all nominated adjudicators:
- are monitored for compliance with the Act, the Regulations and the Adjudicator Standards of Conduct at Appendix 1 of these Conditions of Authorisation.
 - meet the Adjudicator Core Competencies at Appendix 2 of these Conditions of Authorisation, and
 - continually update their skills and knowledge relevant to the practice of adjudication under the Act.

¹¹ The Act sets out timelines within which documents and notices must be delivered at all stages of the adjudication process.

6. Record Keeping and Reporting

Records

- 6.1 The ANA must maintain all records relating to the administration and conduct of adjudication matters that are necessary to enable reporting to the Commission as required.

Notification of subsequent court proceedings

- 6.2 The ANA must notify the Commission as soon as practicable of any court action of which it becomes aware relating to or affecting an adjudication application made to that ANA.

Annual Reports¹²

- 6.3 The ANA must submit an annual report in the approved form to the Commission that includes the following information relating to the reporting period:
- Details of staff, indicating FTE (full time equivalent), available to carry out the ANA's obligations, particularly under clauses 4, 5 and 6 of the CA.
 - Details of training activities provided to staff.
 - Details of adjudicators nominated by the ANA (including qualifications of each adjudicator and the frequency of nomination).
 - Details of training activities offered to adjudicators, and taken up by adjudicators.
 - Details of any complaints received about the ANA or the conduct of any adjudicator arising from the Act along with any investigations, relevant decisions and the outcome of such complaints.
 - Details of the ANA's fees charged and received, for services provided in connection with adjudication applications for the reporting period, to include:
 - The fee structures by which they charge for their work as an ANA, to adjudicators and to parties to adjudication.
 - All fee or financial arrangements between the ANA and parties to adjudication.
 - All fee or financial arrangements between the ANA and nominated adjudicators.
 - All fees received, from adjudicators and parties to adjudication.
 - Details of fees charged and received by nominated adjudicators.
- 6.4 The reporting period for Annual reports is the 12 month period from 1 May to 30 April. Annual reports must be signed by the Director, Company Secretary or equivalent office holder of the ANA and submitted by 31 May each year.

Quarterly Reports

- 6.5 The ANA must submit a quarterly report in the approved form to the Commission. The Quarterly Report will provide statistical information.
- 6.6 The submission dates for Quarterly Reports are
- Quarter 1 28 February
 - Quarter 2 31 May
 - Quarter 3 31 August
 - Quarter 4 30 November
- 6.7 The ANA must report to the Commission any changes in details supplied in the ANA Application for Authorisation as a Nominating Authority within 7 days of the changes occurring.
- 6.8 An ANA that ceases to provide the services of an ANA to the public must inform the Commission as soon as practicable.

¹² The ANA is required by s 43B(1) of the Act to provide such non-identifying information to the Commission as the Commission may reasonably request. Section s 43B(2) specifies that the information that the Commission may reasonably request may include information regarding the nomination of adjudicators and appointment of review adjudicators, the assessment of the eligibility of persons to be adjudicators and the fees charged by the ANA and adjudicators.

7. Complaints

Availability of complaints procedures

- 7.1 The ANA must establish, and make available to any person involved in the adjudication process, a complaints procedure that provides:
 - an independent investigation, particularly if a complaint concerns the ANA
 - a timely resolution, and
 - appropriate remedies and sanctions where the complaint is proved.
- 7.2 The ANA's complaint procedures must be able to address complaints relating to:
 - any process of the ANA in relation to or arising out of the Act
 - any conduct by any officer or personnel of the ANA
 - any conduct by an adjudicator nominated by the ANA, or
 - any other relevant matter concerning the ANA.
- 7.3 The ANA must make any person involved in the adjudication process aware of its complaints procedures.

Appendix 1

Adjudicator Standards of Conduct

The conduct of adjudicators in performing functions under the *Building and Construction Industry Security of Payments Act 2002* should at all times meet the standards set out in this document.

The ANA Conditions of Authorisation require ANAs to monitor the adjudication process and report to the Building Commission about any complaints they receive about the adjudicators they nominate.

1. General Obligations

- 1.1. Adjudicators must comply with the requirements of the Act, the Regulations and these Standards of Conduct.
- 1.2. Adjudicators must conduct themselves in a professional and competent manner when exercising their powers under the Act.

2. Probity

- 2.1. Adjudicators must at all times be fit and proper people for the role of determining applications and review applications under the Act.¹³
- 2.2. Adjudicators must exercise their responsibilities independently and take into account only relevant matters.¹⁴

3. Competence

- 3.1. Adjudicators must meet and maintain the Adjudicator Core Competencies as laid out in Appendix 2 to the ANA Conditions of Authorisation.
- 3.2. Adjudicators must accept nominations only if they consider they are competent in view of the nature and complexity of the matter.

4. Conflict of Interest

- 4.1. Adjudicators must not accept an adjudication application or undertake an adjudication review if doing so would create any actual or likely conflict of interest, or any perception of conflict of interest or bias on their part.
- 4.2. An adjudicator who identifies an actual or likely conflict of interest after the adjudication has commenced must notify the nominating ANA as soon as practicable and follow that ANA's procedures for resolving the conflict.¹⁵

¹³ The factors to consider in determining whether a person is 'fit and proper' depend on the nature of the activities in which the person is engaged but generally can be expected to include the person's character (indicating likely future conduct) or reputation (indicating public perception as to likely future conduct). As a guide, the Building Commission considers that any of the following factors could raise doubt as to whether an individual is a fit and proper person. However, none of the items is necessarily conclusive, and the list is not exhaustive.

- Criticism, disqualification or removal by a professional or regulatory body or court.
- Evidence that the person has been obstructive, misleading or untruthful in dealing with regulatory bodies or a court.
- Refusal to comply with regulatory or professional requirements.
- Adverse findings about the person in relevant criminal or civil proceedings.
- Failure to manage personal debts satisfactorily.
- Failure to deal with conflicts of interest appropriately.
- Evidence that the person has been, or is, considered of bad repute.

¹⁴ The matters an adjudicator must consider in determining an adjudication application are set out at s 23 of the Act.

¹⁵ ANAs are required to have processes and procedures to identify and resolve conflicts of interest for any adjudicators they consider for nomination or appointment – Conditions of Authorisation 2.5.

5. Procedural Fairness

- 5.1. Adjudicators must exercise their powers under the Act in accordance with the rules of natural justice and procedural fairness.
- 5.2. Adjudicators must exercise their powers under the Act impartially and avoid any actual or perceived bias.
- 5.3. Adjudicators must ensure that each party has a reasonable opportunity to be heard and full knowledge of the evidence and information on which the adjudicator will make the decision.

6. Confidentiality and Privacy

- 6.1. Adjudicators must protect confidential information at all times from access, use, misuse, damage or destruction by any person not authorised to receive it.¹⁶
- 6.2. Adjudicators must protect the personal information they collect, use, hold and disclose in performing functions under the Act in accordance with the privacy policy of the nominating ANA or otherwise to the standards set out in the National Privacy Principles in the Privacy Act 1988 (Cth).¹⁷
- 6.3. A determination must only include information that is necessary to explain the basis of any decision.

7. Fees

- 7.1. Adjudicators must charge fees which are reasonable, having regard to the nature and complexity of the matter, the time required and the expertise of the adjudicator.
- 7.2. Adjudicators must fully disclose their scale of fees and other likely charges to the parties and the nominating ANA before commencing the adjudication, and provide itemised invoices at the end of the process.

8. Complaints

- 8.1. An adjudicator must refer any complaint about the service provided by the adjudicator to the nominating ANA.
- 8.2. Adjudicators who wish to make a complaint regarding unsatisfactory or unprofessional conduct by an ANA or any officer or personnel of the ANA must raise the matter with the ANA in the first instance, except in the circumstances described in 8.3.18
- 8.3. If it might cause the adjudicator personal or professional prejudice or detriment to make a complaint to the ANA, the adjudicator may make a complaint referred to in 8.2 to the Building Commission.

¹⁶ 'Confidential information' means any information or data, including personal information, whether or not in material form, which is confidential to a party, including confidential information acquired, collected or developed for the purpose of the adjudication or obtained during the adjudication, except that which is already in the public domain otherwise than as a result of a failure to meet these Standards of Conduct.

¹⁷ 'Personal information' refers to information that directly or indirectly defines an individual and is defined at s 6 of the *Privacy Act* 1988 (Cth).

¹⁸ ANAs must have procedures in place to address complaints made by any person about themselves, their officers or personnel, or any adjudicator they nominate – Condition of Authorisation 7.2

Appendix 2

Adjudicator Core Competencies

ANAs must ensure that the adjudicators they nominate for the purposes of the *Building and Construction Industry Security of Payments Act 2002* have the qualifications, knowledge and skills set out in this document.

Recognised qualifications

1. At least one of the following –
 - 1.1 A degree from a university or other tertiary institution in Australia, or an equivalent qualification from outside Australia, in one of the following disciplines:
 - Architecture
 - Building
 - Engineering
 - Construction
 - Quantity surveying
 - Building surveying
 - Law
 - Project management, or
 - 1.2 Eligibility for registration as a builder under the *Building Act 1993* in the class of commercial builder (unlimited) or domestic builder (unlimited), or
 - 1.3 10 or more years' experience in the administration, management and supervision of construction contracts or in dispute resolution relating to construction contracts.

Relevant experience

2. At least five years' experience in the administration, management and supervision of construction contracts or in dispute resolution relating to construction contracts.

Adjudication training

3. Successful completion of an adjudication qualification that attests to the adjudicator possessing the essential skills and knowledge set out below.
 - 3.1 **Overview of the *Building and Construction Industry Security of Payment Act 2002***
 - The object of the Act
 - The purpose of the Act
 - The structure of the Act
 - Meaning of terms
 - Comparison with equivalent legislation in other Australian jurisdictions.
 - 3.2 **Scope and purpose of adjudication under the Act**
 - The interim nature of adjudication
 - Comparison with other forms of alternative dispute resolution
 - Payment claims
 - Claimable variations
 - Excluded amounts
 - Relationship between the Act and contractual provisions
 - The two tiers of adjudication: initial adjudication and adjudication review
 - Consequences of acting outside jurisdiction
 - 3.3 **Regulatory framework**
 - Role and functions of the Building Commission
 - Role and functions of Authorised Nominating Authorities (ANAs)
 - Relationship between Building Commission and ANAs
 - Relationship between ANAs and adjudicators
 - Ministerial Guidelines

- Conditions of Authorisation

3.4 Role and functions of adjudicators under the Act

- Responsibilities and duties under the Act and Regulations
- Monitoring by the nominating ANA and the Building Commission

3.5 Appointment of adjudicators

- Eligibility requirements and restrictions specified in the Act
- Factors the ANA must consider in nominating an adjudicator or selecting a review adjudicator, including conflict of interest and the type and complexity of the particular dispute
- Factors the adjudicator must consider in accepting a nomination, including conflict of interest, availability and competence
- Statutory deadlines and the claimant's right to withdraw application if not met

3.6 Adjudication process

- Challenges to jurisdiction
- Withdrawal of application; settlement by the parties
- Previous adjudication applications
- Concurrent adjudication applications
- Time constraints and extensions of time
- Fees – right to withhold decision until paid
- Invoicing
- Correcting mistakes in determinations
- Reporting requirements

3.7 Standards of conduct

- Probity
- Avoiding conflict of interest, both perceived and actual
- Ensuring procedural fairness and meeting the requirements of natural justice
- Ensuring confidentiality and privacy
- Consequences of failure to meet Adjudicator's Standards of Conduct
- Applying the standards – including, as a minima, how to approach the following issues:
 - Relationship with ANA and other adjudicators
 - Prior or current connections with parties to the contract, perceived or actual
 - Previous or current involvement in the matter (eg advising parties, preparing claims or responses)
 - Contact with parties and their representatives
 - Communications and submissions by parties and their representatives
 - Calling, and conduct of, conferences and inspections
 - Keeping records of all communications
 - Using and disclosing confidential information
 - Conducting the adjudication expeditiously and impartially

3.8 Conduct of the adjudication

- Identifying issues
- What the adjudicator must take into account
- What the adjudicator must not take into account
- Seeking further written submissions
- Use of information arising from conferences and inspections
- Valuing the construction work carried out
- Valuation in any previous adjudication
- Managing intimidatory tactics (excessive documents, additional submissions, unsolicited contact by parties or representatives)
- Apportionment of adjudicator fees

3.9 Preparing the determination

- Making a finding on each issue
- Providing written reasons for each finding
- Contents of a determination
- Writing for ease of understanding

3.10 Adjudication Review

- Reviewable determinations
- Respondent's and claimant's rights to review
- Grounds for review
- Selection of review adjudicator
- Procedure for review
- Timing of review adjudication process

3.11 Adjudication Certificates

- Purpose of adjudication certificates
- Process for requesting an adjudication certificate
- Role of the ANA
- The contents of an adjudication certificate

3.12 Complaint handling

- Responding to complaints in a timely fashion
- Role of the ANA
- Reporting requirements