

Nominating Authorities Conditions of Authorisation

*Building and Construction Industry
Security of Payment Act 2009 (Tas)*

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INFO SHEET IS068

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Building and Construction Industry Security of Payment Act 2009

The *Building and Construction Industry Security of Payment Act 2009* (the Act) provides a fast, comparatively inexpensive and non-legalistic way to resolve payment disputes through adjudication.

Adjudicators are nominated by Nominating Authorities (NAs). NAs are authorised to perform this service by the Security of Payments Official, under section 31 of the Act. The Security of Payments Official may also withdraw any authorisation that has been given.

Before authorising an NA under section 31, the Security of Payments Official will have regard to guidelines issued by the Minister (Ministerial Guidelines).

In addition, section 31(4) of the Act permits the Security of Payments Official to impose conditions of authorisation, and to vary or revoke any existing conditions.

An NA can appeal to the Magistrates Court (Administrative Appeals Division) under section 31(7) against the imposition or variation of a condition.

This document details the conditions that must be agreed to preliminarily and are required to be adhered to during the currency of an NA's appointment. A failure to meet the standards may cause an application to be rejected or an authorisation to be withdrawn.

I. General Obligations

Compliance with these Conditions

- I.1. All NAs must comply with these Conditions of Authorisation. A breach of any condition may affect the authorisation of the NA concerned.

Compliance with the Act and Regulations

- I.2. All NAs must comply with the requirements of the *Building and Construction Industry Security of Payment Act 2009* (the Act) and the Regulations. A breach of any requirement may affect the authorisation of the NA concerned.

Capacity to perform functions

- I.3. The NA must have procedures and policies in place that enable it to perform its functions as an NA as required by the Act, the Ministerial Guidelines and these Conditions of Authorisation.
- I.4. The NA is required to establish and maintain quality assurance systems that enable it to continuously monitor and improve its performance as an NA.

Responsibility to perform functions

- I.5. While an NA may adopt any structure and method of operation 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.

2. Professional Conduct

Probity

- 2.1 The NA and its directors and officers must be fit and proper to perform the functions of an NA under the Act.
- 2.2 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 Security of Payments Official 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.

Procedural Fairness¹

- 2.3 The NA must perform its functions as an NA in accordance with the requirements of procedural fairness².
- 2.4 The NA must not hinder or interfere with the independent exercise of an adjudicator's responsibilities under the Act.

Conflict of interest

- 2.5 The NA must have processes and procedures in place to identify and resolve conflicts of interest in performing its functions as an NA³.
- 2.6 The NA must have processes and procedures in place to identify and resolve conflicts of interest for any adjudicator it considers for nomination or appointment⁴.
- 2.7 The NA 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.

¹ 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 NA must be impartial and act independently avoiding both actual and apparent bias.

² For an explanation of what is meant by Procedural Fairness see point 5 of the attached Adjudicator Standards of Conduct.

³ Conflict of interest issues arise where any interests or circumstances of the NA are likely to compromise, or be perceived as compromising, the ability of the NA to carry out its duties impartially. The risk is particularly high when nominating an adjudicator to determine an adjudication application

⁴ Section 35 of the Act disqualifies a party from adjudicating an application if he or she has a material personal interest in a relevant building or construction contract, dispute, or party to the contract, to which the application relates. 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. Having acted as an Adjudicator in other matters involving one or more of the parties to a current application does not of itself establish a conflict that would preclude appointment.

3. Confidentiality, Privacy and Fees

Confidential information

- 3.1 The NA must keep all confidential information secure⁵. The NA 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. Subject to sections 33 and 34, the NA 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.⁶

Personal information

- 3.2 The NA must ensure that the personal information it collects, uses, holds and discloses in performing its functions as an NA is protected to the standards set out in the *National Privacy Principles in the Privacy Act 1988 (Cth)*.⁷

Limits on use and disclosure

- 3.3 The NA, 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.⁸

Fees

- 3.4 The NA must monitor the performance of adjudicators to ensure that the fees charged for services are reasonable, having regard to the nature and complexity of any matter, the time required and the expertise of the adjudicator.
- 3.5 The NA must monitor the performance of adjudicators to ensure that adjudicators fully disclose their scale of fees and other likely charges to the parties and to the NA before commencing the adjudication, and provide itemised invoices at the end of the process.

4. Public Access

Information and advice

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

Service of documents

- 4.2 The NA 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 (email etc).⁹

⁵ Security should be afforded both in securing the information during the Adjudication process and in any subsequent destruction of the material. It is accepted that secure means to a reasonable commercial standard.

⁶ '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.

⁷ '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 Security of Payments Official of their choice to be covered. An NA 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.

⁸ The NA is required by sections 33 and 34 of the Act and by these Conditions of Authorisation to provide information to the Security of Payments Official.

⁹ Section 40 of the Act sets out the methods by which notices and documents may be served for the purposes of the Act.

5. Management of the Adjudication Process

General responsibility for the adjudication process

- 5.1 Essentially the minimum functions of an NA are advising applicants on the process for applying for adjudication, accepting adjudication applications, nominating adjudicators and issuing adjudication certificates. The NA 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
 - fair and impartial
 - expeditious
 - provided within a reasonable and appropriate cost framework and
 - transparent.

Management of Documents and Notices

- 5.2 The NA must manage documents and notices as stipulated under the Act.
- 5.3 The NA 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 NA must produce adjudication certificates within three business days of application, subject to receipt of any reasonable fees levied by the NA for producing a certificate.

Nomination of Adjudicators

- 5.5 The NA must develop and maintain a procedure for the selection and nomination of adjudicators that:
- is expeditious to enable the nomination of an appropriate adjudicator within four business days of an application being made
 - 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
 - as far as reasonably practical, ensures that any conflict of interest is addressed before nomination
 - expeditiously addresses any conflict of interest that is identified after nomination.

Quality of adjudication

- 5.6 The NA must establish and maintain a 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.

6. Record Keeping and Reporting

Records

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

Notification of subsequent court proceedings

- 6.2 The NA is required by section 34 to notify the Security of Payments Official as soon as practicable of any court action of which it becomes aware relating to or affecting an adjudication application made to that NA.

Supply of adjudicator decisions

- 6.3 The NA is required by section 38 to supply the Security of Payments Official (within 14 days) with any determination released by an adjudicator appointed by that NA as a printable PDF file. The PDF should display file reference details of the Adjudicator but should NOT contain personal details of the Claimant or Respondent. With the copy of the determination should be a report advising:
- 6.3.1 Fees charged
- 6.3.2 Any irregularities in the process (ie later completion of the Determination, or the like.)

Annual Reports¹⁰

- 6.4 The NA must submit an annual report in the approved form to the Security of Payments Official that includes the following information relating to the reporting period:
- Details of staff, indicating FTE (full time equivalent), available to carry out the NA's obligations, particularly under clauses 4, 5 and 6 of the Conditions of Authorisation.
 - Details of training activities provided to staff.
 - Details of adjudicators nominated by the NA (including qualifications of each adjudicator and the number of times each was nominated).
 - Details of training activities offered to adjudicators, and taken up by adjudicators.
 - Details of any complaints received about the NA 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 NA'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 NA, to adjudicators and to parties to adjudication.
 - All fee or financial arrangements between the NA and parties to adjudication.
 - All fee or financial arrangements between the NA and nominated adjudicators.
 - All fees received, from adjudicators and parties to adjudication.
 - Details of fees charged and received by nominated adjudicators.
- 6.5 The reporting period for Annual reports is the 12 month period from 1 January to 31 December. Annual reports must be signed by the Director, Company Secretary or equivalent office holder of the NA and submitted by 31 January each year.

Quarterly Reports

- 6.6 The NA must submit a quarterly report (within 1 month of the end of the quarter) in the approved form to the Security of Payments Official. The Quarterly Report will provide statistical information.
- 6.7 The Quarterly Reports are for the periods ending:
- Quarter 1 30 April
 - Quarter 2 31 July
 - Quarter 3 31 October
 - Quarter 4 31 January

¹⁰ The NA is required by s 33(1) of the Act to provide such information to the Security of Payments Official as the Security of Payments Official may request.

- 6.8 The NA must report to the Security of Payments Official any changes in details supplied in the NA Application for Authorisation as a Nominating Authority within 7 days of the changes occurring.
- 6.9 An NA is to provide at least 40 business days notice to the Security of Payments Official that it intends to no longer provide NA services to the public.

Legal Process

- 6.10 The NA must notify the Security of Payments Official if the NA becomes aware that an application has been made to a court in relation to a building or construction contract in relation to which an adjudication application has been made to the authority.

7. Complaints

Availability of complaints procedures

- 7.1 The NA must establish, and make available to any person involved in the adjudication process, a complaints procedure that provides:
 - for investigation of complaints against an adjudicator nominated by the NA.
 - an independent investigation if a complaint concerns the NA
 - a timely resolution, and
 - appropriate remedies and sanctions where the complaint is proved.
- 7.2 The NA's complaint procedures must be able to address complaints relating to:
 - any process of the NA in relation to or arising out of the Act
 - any conduct by any officer or personnel of the NA
 - any conduct by an adjudicator nominated by the NA, or
 - any other relevant matter concerning the NA.
- 7.3 The NA must make any person involved in the adjudication process aware of its complaints procedures.
- 7.4 The NA must notify any instance of non-compliance and unsatisfactory performance including details on remedial action to ensure such issues do not arise again such notification is to be submitted with the next scheduled quarterly report.

Appendix I

Adjudicator Standards of Conduct

The conduct of adjudicators in performing functions under the *Building and Construction Industry Security of Payments Act 2009* should always meet the standards set out in this document.

The NA Conditions of Authorisation require NAs to monitor the adjudication process and report to the Building Security of Payments Official 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. 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 Security of Payments Official 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.
- 2.2. Adjudicators must exercise their responsibilities independently and take into account only relevant matters.¹¹

3. Competence

- 3.1. Adjudicators must meet and maintain the Adjudicator Core Competencies as laid out in Appendix 2 to the NA 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 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 NA as soon as practicable and follow that NA's procedures for resolving the conflict.¹²

¹¹ The matters an adjudicator must consider in determining an adjudication application are set out at s 25 of the Act.

¹² NAs are required to have processes and procedures to identify and resolve conflicts of interest for any adjudicators they consider for nomination or appointment.

5. Procedural Fairness

- 5.1. Adjudicators must exercise their powers under the Act in accordance with the rules of natural justice and procedural fairness.

NATURAL JUSTICE AND PROCEDURAL FAIRNESS

The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. Three common law rules are referred to in relation to natural justice or procedural fairness.

The Hearing Rule

This rule requires that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker.

To ensure that these rights are respected, the deciding authority must give both the opportunity to prepare and present evidence and to respond to arguments presented by the opposite side.

Part 4 of the Act provides for such an exchange of information within prescribed timelines. However, parties may be restrained from providing information if they do not meet the tight timelines established under the Act.

The Bias Rule

This second rule states that no one ought to be judge in his or her case. This is the requirement that the deciding authority must be unbiased when conducting the hearing or making the decision.

Additionally, adjudicators must act without bias in all procedures connected with the making of a decision.

A decision-maker must be impartial and must make a decision based on a balanced and considered assessment of the information and evidence before him or her without favouring one party over another.

Even where no actual bias exists, investigators and decision makers should be careful to avoid the appearance of bias. Adjudicators should ensure that there is no conflict of interest which would make it inappropriate for them to conduct the investigation.

Part 6 of the Act provides strict remedies for situations where conflict of interest is identified.

The Evidence Rule

An adjudicator's decision must be based upon logical proof or evidence material.

Adjudicators should not base their decision on mere speculation or suspicion. Rather, an adjudicator should be able to clearly point to the evidence on which the determination is based.

Evidence (arguments, allegations, documents, photos, etc) presented by one party must be disclosed to the other party, who may then subject it to scrutiny.

This important exchange of information is addressed at Part 4 of the Act.

- 5.2. Adjudicators must exercise their powers under the Act impartially and avoid any actual or perceived bias.
- 5.3. Within the framework of the Act, adjudicators must ensure that each party has a reasonable opportunity to provide 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.¹³ Adjudicators should also ensure the post determination storage and destruction is generally suitable to a commercial standard.
- 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 NA or otherwise to the standards set out in the *National Privacy Principles* in the *Privacy Act 1988* (Cth).¹⁴
- 6.3. A determination must only include information that is necessary to explain the basis of any decision. Section 25 requires that a determination must be in writing and must include the reasons for the determination, unless the claimant and respondent have both requested the adjudicator not to include the reasons in the determination.

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 NA 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 NA.
- 8.2. Adjudicators who wish to make a complaint regarding unsatisfactory or unprofessional conduct by an NA or any officer or personnel of the NA must raise the matter with the NA in the first instance, except in the circumstances described in 8.3.
- 8.3. If it might cause the adjudicator personal or professional prejudice or detriment to make a complaint to the NA, the adjudicator may make a complaint referred to in 8.2 to the Security of Payments Official.

¹³ '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.

¹⁴ 'Personal information' refers to information that directly or indirectly defines an individual and is defined at s 6 of the *Privacy Act 1988* (Cth).

Appendix 2

Adjudicator Core Competencies

NAs must ensure that the adjudicators they nominate for the purposes of the *Building and Construction Industry Security of Payments Act 2009* have the qualifications, experience and training set out in this document.

1. Recognised qualifications

1. At least one of the following –
 - 1.1. A diploma or degree that satisfies the requirements of the Australian Qualifications Framework (AQF) Level 6 or higher in either:
 - Architecture
 - Building
 - Engineering
 - Construction
 - Quantity surveying
 - Building surveying
 - Law
 - Project management
 - 1.2. 10 or more years experience in Contract Administration, Contract Management, Contract Supervision or dispute resolution relating to building or construction contracts (or similar industry contracts), or
 - 1.3. Eligibility for accreditation as a builder under the *Building Act 2000* (TAS) in the class of builder (open).

2. Relevant experience

2. At least five years' experience in Contract Administration, Contract Management, Contract Supervision or dispute resolution relating to building or construction contracts (or similar industry contracts).

3. Adjudication training

3. Successful completion of an adjudication qualification that attests to the adjudicator possessing the essential skills and knowledge set out below. Except where the Nominating Authority is satisfied that an adjudicator has acquired an adjudication qualification in another complementary Australian jurisdiction (and is a practicing adjudicator in another complementary Australian jurisdiction) and that person has undertaken a 'bridging' course which enables that person to be deemed as a competent adjudicator under the Tasmanian *Building and Construction Industry Security of Payment Act 2009*.

3.1 Overview of the Building and Construction Industry Security of Payment Act 2009

- 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
- Relationship between the Act and contractual provisions
- Consequences of acting outside jurisdiction.

3.3 Regulatory framework

- Role and functions of the Security of Payments Official
- Role and functions of Nominating Authorities (NAs)
- Relationship between Security of Payments Official and NAs
- Relationship between NAs 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 NA and the Security of Payments Official

3.5 Appointment of adjudicators

- Eligibility requirements and restrictions specified in the Act
- Factors the NA must consider in nominating an 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 NA and other adjudicators
 - Prior or current connections with parties to the contract, perceived or actual
 - Previous or current involvement in the matter (e.g. 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 building or construction work carried out
- Valuation in any previous adjudication
- Managing / responding to 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
- Providing copies of determinations to NA

3.10 Adjudication Certificates

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

3.11 Complaint handling

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



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