

# **Building and Construction Industry (Security of Payment) Regulations 2022**

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## **Building and Construction Industry (Security of Payment) Regulations 2022**

Made by the Governor in Executive Council.

### **Part 1 — Preliminary**

#### **1. Citation**

These regulations are the *Building and Construction Industry (Security of Payment) Regulations 2022*.

#### **2. Commencement**

These regulations come into operation as follows —

- (a) regulation 9 — on the day on which the *Building and Construction Industry (Security of Payment) Act 2021* section 60 comes into operation;
- (b) Part 4 — on the day on which the *Building and Construction Industry (Security of Payment) Act 2021* section 71 comes into operation.
- (c) the rest of the regulations — on the day on which the *Building and Construction Industry (Security of Payment) Act 2021* section 119 comes into operation.

#### **3. Terms used**

- (1) In these regulations —  
*section* means a section of the Act.
- (2) In these regulations, a reference to an amount of money is a reference to that amount inclusive of GST.

## **Part 2 — Construction contracts**

**4. Threshold contract value for construction contracts  
required to be in writing and contain mandatory  
information**

For the purposes of section 13(2)(d), the amount is \$20 000.



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## **Part 3 — Procedure for obtaining progress payments**

### **5. Form of homeowner's notice to be included in payment claim**

The homeowner's notice required to be included in a payment claim given to a principal for home building work under section 24(2) must be in the form set out in Schedule 1.

Note for this regulation:

Section 24(2) requires a homeowner's notice if the value of the construction contract exceeds \$500 000. The notice is not required if the principal is a corporation or if the work is carried out in relation to multiple dwellings or for the purposes of a residential development business of the principal.

### **6. Limitations on submissions to adjudicators**

- (1) For the purposes of section 38(3)(c), this regulation sets out the limitations that apply to submissions (including accompanying documents) made to the adjudicator by the claimant or respondent in connection with a payment claim for not more than \$50 000.
- (2) A submission (excluding accompanying documents) —
  - (a) must not exceed 10 pages in total; and
  - (b) if the submission is typed, must have words in at least 10 point font size.
- (3) For the purposes of subregulation (2) —
  - (a) if the submission is typed, the number of pages is the estimated number of pages calculated on the basis that the submission was typed on an A4 size page with margins around the page of 2.54cm; and
  - (b) a page must be excluded if it is a cover page that deals only with the names, addresses, ABN, ACN or other contact details of the claimant, respondent, authorised nominating authority or adjudicator.

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- (4) A submission may only be accompanied by the following documents (or copies of them) —
- (a) the payment claim to which the adjudication relates (and any homeowner's notice included in the payment claim under section 24(2));
  - (b) the relevant construction contract or the relevant provisions of the construction contract;
  - (c) a payment schedule given in response to the payment claim;
  - (d) a notice given under section 28(2) of the claimant's intention to apply for adjudication of the payment claim;
  - (e) a document that accompanied the payment claim or payment schedule in support of the claim or schedule;
  - (f) a document given by a party to the adjudication to the other party in connection with the construction contract, such as correspondence agreeing to a variation of work under the contract or the time by which the work was to be done;
  - (g) an expert report obtained by a party to the adjudication on any matter to which the payment claim relates, being a report by a person who is qualified to give expert evidence on the matter;
  - (h) if the payment claim relates to the substitution of performance security – a draft of the compliant performance bond referred to in section 59;
  - (i) a statutory declaration about a matter to which the payment claim relates.
- (5) The limitations set out in this regulation do not apply to any further submission (including accompanying documents) requested by the adjudicator, as referred to in section 38(2)(e).

**7. Threshold for review of adjudication**

- (1) For the purposes of section 39(2)(b)(i), the minimum amount of difference between the claimed amount and the lesser adjudicated amount is \$200 000.
- (2) For the purposes of section 39(2)(b)(ii), the minimum claimed amount is \$50 000.
- (2) For the purposes of section 39(3)(c), the minimum amount of difference between the scheduled amount and the greater adjudicated amount is \$200 000.

**8. Maximum adjudication fees and expenses of adjudicators**

- (1) For the purposes of section 50(2), the following amounts are the maximum amounts of adjudication fees and expenses payable to an adjudicator in connection with a payment claim for not more than \$50 000 —
  - (a) if the payment claim is for not more than \$5 000 — \$825;
  - (b) if the payment claim is for more than \$5 000 but not more than \$15 000 — \$1 300;
  - (c) if the payment claim is for more than \$15 000 but not more than \$20 000 — \$2 300;
  - (d) if the payment claim is for more than \$20 000 but not more than \$25 000 — \$2 800;
  - (e) if the payment claim is for more than \$25 000 but not more than \$40 000 — \$4 300;
  - (f) if the payment claim is for more than \$40 000 but not more than \$50 000 — \$5 300.
- (2) The maximum fees and expenses under subregulation (1) do not apply to the expenses incurred by an adjudicator in arranging for a test or engaging an expert to investigate and report on any matter, as referred to in section 35(3)(d) and (e).

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- (3) This regulation does not apply to the fees and expenses of a review adjudicator in connection with an adjudication review application.

**9. Minimum credit rating for compliant performance bonds**

For the purposes of section 60(1)(i), the minimum credit rating of an authorised institution issuing a performance bond is the rating of AA under the Standard & Poor's Long-Term Issuer Credit Ratings.

## Part 4 — Retention money trusts

### 10. Prescribed retention money threshold for trust scheme

For the purposes of section 70(1)(b), the prescribed retention money threshold is —

- (a) in the case of a construction contract entered into on or after the day on which this Part comes into operation and before 1 February 2024 — \$1 000 000; or
- (b) in the case of a construction contract entered into on or after 1 February 2024 — \$20 000.

Note for this regulation:

This Part comes into operation on 1 February 2023.

### 11. Exclusion of small scale residential contracts from retention money trust scheme

- (1) In this regulation —

***associated structure*** means a granny flat, shed, patio, deck, pergola, carport, driveway, swimming pool or similar structure;

***dwelling*** means a building occupied or intended for occupation solely or mainly as a place of residence;

***lot*** has the meaning given in the *Land Tax Assessment Act 2002* Glossary clause 2.

- (2) For the purposes of section 70(1)(d), a construction contract for home building work that is a small scale residential contract is excluded from Part 4 of the Act.
- (3) A ***small scale residential contract*** is —
- (a) a construction contract in respect of a single dwelling between a head contractor and a subcontractor or between 2 subcontractors; or
  - (b) a construction contract for an associated structure connected to, or on the same lot as, an existing or proposed single dwelling; or

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- (c) a construction contract for an associated structure on common property under the *Community Titles Act 2018* or the *Strata Titles Act 1985* with a principal who is an individual.
- (4) However, a construction contract that is one of a number of separate construction contracts for home building work is not a small scale residential contract if —
  - (a) the parties to the construction contracts are the same; and
  - (b) the work is to be carried out at the same lot or at adjacent lots; and
  - (c) a single construction contract could have been entered into for the work; and
  - (d) the construction contracts were not entered into after separate tender processes.

Note for this regulation:

Section 70(2) also excludes certain other construction contracts for home building work from the retention money trust scheme in Part 4 of the Act.

**12. Withdrawal from retention money trust account of interest earned before release**

- (1) For the purposes of section 76(2)(h), another purpose for which money may be withdrawn from a retention money trust account is for the payment to the party who established and operates the account of amounts equal in total to the interest earned on the money to which that party is entitled under section 78(1).
- (2) For the purposes of section 76(4), a withdrawal from the account under subregulation (1) —
  - (a) before the retention money trust end date — may not be made more frequently than once every 6 months; and
  - (b) on or after the retention money trust end date — may be made at any time.

Note for this regulation:

Section 78 provides that interest earned on any money held in a retention money trust account after it is required to be released by the party holding the trust money to the other party to the contract is required to be paid to that other party but is payable to the party holding the trust money if it relates to the period before the money is required to be released.

**13. Redaction of information relating to identity of other beneficiaries from trust accounts when inspected or copied (s. 79(4))**

- (1) A party to a construction contract who established and operates a retention money trust account and who allows a person having a beneficial interest in money in the account to inspect or take copies of accounting records relating to the money may redact —
  - (a) the name of another beneficiary of money in the account; and
  - (b) any other information that identifies the other beneficiary.
- (2) This regulation does not authorise the redaction of information about the amount of money in which the other beneficiary has a beneficial interest.

## **Part 5 — Nominating authorities, adjudicators and review adjudicators**

### **14. Fees prescribed**

The Table sets out the fees payable for the purposes of the Act.

**Table**

<b>Provision under which fee prescribed</b>	<b>Description of fee</b>	<b>Amount of fee</b>
Section 88(2)(b)	Application fee for authorisation as nominating authority	\$915
Section 100(3)(b)	Application fee for registration as adjudicator	\$89
Section 100(3)(b)	Application fee for registration as review adjudicator	\$89
Section 100(3)(b)	Application fee for registration as both adjudicator and review adjudicator	\$178
Section 100(3)(c)	Registration fee for registration as adjudicator	\$356
Section 100(3)(c)	Registration fee for registration as review adjudicator	\$356
Section 100(3)(c)	Registration fee for registration as both	\$712



<b>Provision under which fee prescribed</b>	<b>Description of fee</b>	<b>Amount of fee</b>
	adjudicator and review adjudicator	

Note for this regulation:

The application fee and the registration fee for registration apply under section 104(3) to the renewal of registration.

**15. Refund of registration fees**

- (1) The Building Commissioner may, on application for a refund made by an applicant for registration or renewal of registration as an adjudicator or review adjudicator, refund a registration fee paid by the applicant if the applicant is not registered or the registration is not renewed.
- (2) An application for a refund must be made in the approved form (if any).

**16. Code of practice for authorised nominating authorities (s. 97)**

The code of practice set out in Schedule 2 applies to the performance of the functions under the Act of authorised nominating authorities.

**17. Qualifications for registration as adjudicators or review adjudicators (s. 102(1)(a) and (2)(b))**

- (1) The qualifications required for registration as an adjudicator or a review adjudicator are —
  - (a) a degree from a university or other tertiary institution in Australia, or an equivalent qualification from a university or other tertiary institution in another country, in one or more of the following subjects —
    - (i) architecture;

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- (ii) engineering;
  - (iii) quantity surveying;
  - (iv) building and construction;
  - (v) construction management;
  - (vi) built environments;
  - (vii) law;
  - and
  - (b) the completion of a course approved by the Building Commissioner for registration as an adjudicator or a review adjudicator (as the case requires).
- (2) An Australian lawyer (as defined in the *Legal Profession Act 2008* section 4) is taken to have the qualification required by subregulation (1)(a).
- (3) The Building Commissioner may, for the purposes of subregulation (1)(b), approve a course for registration as an adjudicator or a course for registration as a review adjudicator if satisfied the matters covered by the course include the following —
  - (a) the role and functions of an adjudicator or a review adjudicator (as the case requires);
  - (b) a study of the Act;
  - (c) the practical aspects of adjudication;
  - (d) ethics, procedural fairness and good faith in connection with adjudication;
  - (e) the obligations under the code of practice for adjudicators or review adjudicators;
  - (f) decision making and decision writing;
  - (g) legal concepts in connection with adjudication;
  - (h) course assessment or examination.

**18. Experience for registration as adjudicators or review adjudicators (s. 102(1)(a) and (2)(b))**

- (1) In this regulation —

**judicial officer** means a judge, acting judge or auxiliary judge of —

- (a) the Supreme Court or District Court of Western Australia; or
- (b) an equivalent court of another State or a Territory; or
- (c) the Federal Court or High Court of Australia.

- (2) The experience required for registration as an adjudicator is —

- (a) at least 5 years' experience in the management and administration of construction contracts or in the resolution of disputes in connection with construction contracts; or
- (b) at least 3 years' experience in the management and administration of construction contracts or in the resolution of disputes in connection with construction contracts, and completion of an adjudicator mentoring program approved by the Building Commissioner; or
- (c) experience as a judicial officer; or
- (d) experience as an adjudicator registered under the *Construction Contracts Act 2004* or a corresponding security of payment law.

- (3) The experience required for registration as a review adjudicator is —

- (a) both of the following —
  - (i) at least 10 years' experience in the management and administration of construction contracts or in the resolution of disputes in connection with construction contracts;

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- (ii) experience (as an adjudicator under the Act, under the *Construction Contracts Act 2004* or under a corresponding security of payment law) in the determination of at least 10 adjudication applications, at least 5 of them being determinations related to payment claims or payment disputes for more than \$100 000;
  - or
  - (b) experience as a judicial officer.
- (4) In this regulation, a reference to a specified number of years of experience in an activity is a reference to the total number of years of experience calculated on engagement in that activity on a full-time basis.

**19. Grading of adjudicators (s. 101(4))**

- (1) An individual may be registered as —
  - (a) a Grade 1 adjudicator; or
  - (b) a Grade 2 adjudicator.

Note for this subregulation:

The codes of practice for authorised nominating authorities and for adjudicators deal with the size of payment claims that may be adjudicated by Grade 1 and Grade 2 adjudicators. Grade 1 adjudicators may also be subject to other restrictions in the conditions attached to their registration (for example, conditions relating to the maximum fees they may charge for an adjudication).

- (2) An individual is not eligible to be registered as a Grade 2 adjudicator unless —
  - (a) the individual has (as an adjudicator under the Act) determined at least 10 adjudication applications, at least 5 of which were related to payment claims for more than \$50 000; or
  - (b) the individual has (as an adjudicator under the *Construction Contracts Act 2004* or under a corresponding security of payment law) determined at least 10 adjudication applications, at least 5 of which

were related to payment claims or payment disputes for more than \$50 000; or

- (c) the Building Commissioner is satisfied that the individual has equivalent experience in dealing with payment disputes in the building and construction industry.
- (3) An individual must be registered as a Grade 1 or Grade 2 adjudicator when the Building Commissioner registers the individual as an adjudicator and when the Building Commissioner renews the individual's registration.
- (4) A Grade 1 adjudicator may apply to the Building Commissioner for a review of their grade of registration after the adjudicator has been registered for at least 12 months.
- (5) An application for review may be made —
  - (a) before the renewal of registration in the approved form (if any); or
  - (b) in an application for the renewal of registration.
- (6) If the Building Commissioner is satisfied that the applicant is eligible to be registered as a Grade 2 adjudicator, the applicant becomes a Grade 2 adjudicator —
  - (a) if the application was made before the renewal of registration — on the giving of a written notice to the applicant by the Building Commissioner of registration as a Grade 2 adjudicator; or
  - (b) if the application was made in an application for the renewal of registration — on the renewal of registration as a Grade 2 adjudicator.

**20. Code of practice for adjudicators and review adjudicators  
(s. 109)**

The code of practice set out in Schedule 3 applies to the performance of the functions under the Act of adjudicators and review adjudicators.

## **Part 6 — Miscellaneous**

### **21.        Electronic lock-box service of documents on authorised nominating authorities (s. 113(3)(e))**

- (1) In this regulation —

**lock-box** means a facility for the electronic receipt and storage of documents, such as Dropbox, Google Docs or Onedrive.

- (2) A document that by or under the Act is authorised or required to be given to an authorised nominating authority may also be given by uploading the document electronically to a lock-box provided by the authority.

### **22.        Time of service of documents (s. 113(4))**

The time when a document that is authorised or required by or under the Act to be given to a person is taken to have been given is as follows —

- (a) in the case of a document delivered to the person personally — when the document is accepted by the person or, if the person refuses to accept the document, when the document is put down in the person's presence and the person is informed of the nature of the document;
- (b) in the case of a document left for the person at the person's ordinary place of business — when the document is left at the premises concerned with a person who appears to have reached 16 years of age and who appears to work there;
- (c) in the case of a document sent by post to the person's ordinary place of business — when the letter would have been delivered in the ordinary course of post unless a different time of actual delivery is established;

- (d) in the case of a document sent to a person by email — when the electronic communication is taken to be received by the person in accordance with the *Electronic Transactions Act 2011*;
- (e) in the case of a document given by uploading it to a lock-box as provided for under regulation 21 — when the document is uploaded to the lock-box.

**23. Infringement notices: prescribed offences and modified penalties**

- (1) The offences specified in Schedule 4 are offences for which an infringement notice may be issued under the *Criminal Procedure Act 2004* Part 2.
- (2) The modified penalty specified opposite an offence in Schedule 4 is the modified penalty for that offence for the purposes of the *Criminal Procedure Act 2004* section 5(3).

**24. Infringement notices: authorised officers and approved officers**

- (1) The Building Commissioner may, in writing, appoint persons or classes of persons to be authorised officers or approved officers for the purposes of the *Criminal Procedure Act 2004* Part 2 in relation to infringement notices issued under that Part for an offence specified in Schedule 4.
- (2) The Building Commissioner must issue to each authorised officer a certificate, badge or identity card identifying the officer as a person authorised to issue infringement notices.
- (3) An authorised officer may show that they are authorised to issue infringement notices for an offence specified in Schedule 4 by showing the certificate, badge or identity card issued to them under subregulation (2).

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**25.        Infringement notices: forms**

For the purposes of the *Criminal Procedure Act 2004* Part 2 —

- (a)    Schedule 5 Form 1 is the prescribed form for an infringement notice; and
- (b)    Schedule 5 Form 2 is the prescribed form for the withdrawal of an infringement notice.



**Schedule 1 — Form of homeowner's notice**

[r. 5]

**NOTICE TO PRINCIPAL FOR HOME BUILDING WORK UNDER  
SECTION 24(2) OF THE *BUILDING AND CONSTRUCTION  
INDUSTRY (SECURITY OF PAYMENT) ACT 2021* (WA)**

You have been given a payment claim under the <i>Building and Construction Industry (Security of Payment) Act 2021</i> (WA) (the “Act”) on this date:	[insert date]
The person who has given the payment claim (the “claimant”) is:	[insert name of claimant]
The amount claimed in the payment claim (the “claimed amount”) is:	\$ [insert claimed amount]
<b>TAKE NOTICE</b>	<p>Under the Act, you are required to pay the claimed amount in full by the due date.</p> <p><b>If you do not intend to pay the claimed amount in full by the due date, or if you dispute the claimed amount, then you should give a payment schedule --</b></p> <p>(a) <b>within 15 business days of receiving the payment claim; or</b></p> <p>(b) <b>if applicable, by the earlier date specified in the construction contract being: [insert date].</b></p> <p>If you do not provide a payment schedule, or make payment in full by the time required, the claimed amount can be enforced against you in a court of competent jurisdiction.</p> <p>Under the Act, the payment schedule must:</p> <ul style="list-style-type: none"><li>• be given in writing and be in the approved form (if any); and</li><li>• identify the payment claim to which it relates; and</li><li>• indicate the amount of the payment (if any) that you propose to make.</li></ul>

	<p>If you do not propose to make any payment, the payment schedule must indicate \$0 or NIL and indicate why no payment is proposed and, if the reason is that you are withholding payment, the reason(s) for withholding payment.</p> <p>OR</p> <p>If you propose to pay an amount less than the claimed amount, the payment schedule must indicate the amount to be paid and why the amount is less and, if the reason is that you are withholding payment, the reason(s) for withholding payment.</p> <p>Please note that you must include all the reasons for withholding payment, as you will be limited to the reasons you have provided if a dispute is referred to an adjudicator.</p> <p>If you do not provide a payment schedule within the required time, you will not be entitled to make a submission to the adjudicator in the event that the dispute is referred to an adjudicator.</p>
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## **Schedule 2 — Code of practice for authorised nominating authorities**

[r. 16]

### **Division 1 — Preliminary**

#### **1. Citation**

This code of practice is the *Building and Construction Industry (Security of Payment) Authorised Nominating Authorities Code of Practice*.

#### **2. Terms used**

(1) In this code of practice—

*Act* means the *Building and Construction Industry (Security of Payment) Act 2021*;

*confidential information* means information that is the subject of a duty of confidentiality or secrecy or that is of a commercially sensitive nature;

*conflict of interest* includes a perceived or potential conflict of interest.

(2) A term used in this code of practice has the same meaning as it has in the Act.

#### **3. Compliance with code of practice**

Authorised nominating authorities are, under section 97 of the Act, required to perform their functions under the Act in accordance with this code of practice.

Note for this clause:

Under section 97(3) of the Act, a contravention of this code of practice by an authorised nominating authority may be taken into account by the Building Commissioner under Part 5 Division 1 of the Act (for example, in deciding to impose conditions on the authorisation of the authority or to revoke the authorisation of the authority).

**Division 2 — Standards of business conduct**

**4. Compliance with laws**

- (1) An authorised nominating authority must comply with the requirements of —
  - (a) the Act, the regulations, the conditions of their authorisation and this code of practice; and
  - (b) other relevant written laws that apply to the performance of its functions under the Act (such as the Australian Consumer Law and laws relating to fair trading, anti-discrimination, equal opportunity and privacy).
- (2) An authorised nominating authority must take all reasonable measures to ensure that any individuals involved in the nomination by the authority of adjudicators or review adjudicators have a sufficient knowledge of those requirements to enable the lawful performance of that function.

**5. Duty of care, diligence and skill**

An authorised nominating authority must perform its functions under the Act with all reasonable care, diligence and skill.

**6. Duty to act honestly, fairly and professionally**

- (1) An authorised nominating authority must act honestly, fairly and professionally in all its dealings with adjudicators, review adjudicators, claimants and respondents.
- (2) In particular, an authorised nominating authority must not engage in any of the following conduct in performing its functions under the Act —
  - (a) intimidation, harassment or abuse;
  - (b) discrimination, disadvantage or procedural unfairness in the nomination of adjudicators or review adjudicators;
  - (c) any conduct that is unconscionable or that compromises its integrity or professional independence.

**7. Duty not to direct or influence adjudicators or review adjudicators**

An authorised nominating authority must not direct or influence, or attempt to direct or influence, adjudicators or review adjudicators in the performance of their functions under the Act.

**8. Duty not to delegate or abrogate responsibility**

- (1) An authorised nominating authority must not delegate or abrogate any of its functions under the Act.
- (2) However, an authorised nominating authority may employ or engage individuals to assist the authority in nominating adjudicators or review adjudicators or performing its other functions under the Act.

**9. Duty to ensure security of confidential information**

An authorised nominating authority must take all reasonable measures to ensure the security of confidential information that the authority obtains under or for the purposes of the Act.

Note for this clause:

Under section 116 of the Act, an authorised nominating authority commits an offence if it uses or discloses (except as authorised under that section) any confidential information obtained by the authority under or for the purposes of the Act.

**Division 3 — Conflicts of interest**

**10. Conflicts of interest policy**

- (1) An authorised nominating authority must have a written policy for the identification and management of conflicts of interest that could affect, or might be perceived to affect, the ability of the authority to perform its functions impartially and in the interests of the parties to an adjudication or adjudication review.
- (2) For the purposes of this clause, a conflict of interest includes a reasonable likelihood or expectation of an appreciable financial or other benefit or loss to the authority or to an officer or employee of the authority.

**11. Applications for adjudication or adjudication review not to be referred if conflict of interest**

- (1) An authorised nominating authority must not refer an adjudication application or adjudication review application to an adjudicator or review adjudicator if the authority has a conflict of interest with —
  - (a) the adjudicator or review adjudicator; or
  - (b) the claimant or respondent.
- (2) In particular, an authorised nominating authority must not refer an adjudication application or adjudication review application to any of the following —
  - (a) an officer or employee of the authority;
  - (b) the spouse or de facto partner, or former spouse or de facto partner, of an officer or employee of the authority;
  - (c) an immediate family member of an officer or employee of the authority.
- (3) An authorised nominating authority is not precluded by this clause from referring an adjudication application or adjudication review application to an individual merely because the individual is a current or former financial or non-financial member of the authority, unless the authority is precluded by subclause (2) from referring the application to the individual.

**12. Authorised nominating authority not to seek, accept, agree to or offer inducements**

- (1) In this clause —  
**inducement** includes a bribe or other corrupt benefit, but does not include a fee that a nominating authority is entitled to charge for the performance of its functions.
- (2) An authorised nominating authority must not seek, accept or agree to an inducement from an adjudicator, review adjudicator, claimant or respondent to refer an adjudication application or adjudication review application to a particular adjudicator or review adjudicator.
- (3) An authorised nominating authority must not offer an inducement to an adjudicator, review adjudicator, claimant or respondent.

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**Division 4 — Professional management arrangements**

**13. Professional management policy**

An authorised nominating authority must have a written policy about the following matters —

- (a) the management of adjudication applications and adjudication review applications;
- (b) the management of confidential information (including its storage and use);
- (c) the management and prevention of business continuity risks.

**Division 5 — Complaints and internal disputes resolution**

**14. Complaints and internal disputes resolution policy**

- (1) An authorised nominating authority must have a written policy for —
  - (a) the resolution of complaints about the performance of its functions made by claimants or respondents or by adjudicators or review adjudicators; and
  - (b) the resolution of disputes between adjudicators or review adjudicators and the authority.
- (2) The policy must clearly outline the process for the resolution of those complaints or internal disputes, including the following —
  - (a) the process for making a complaint or notifying an internal dispute;
  - (b) the steps involved in each stage of the resolution of a complaint or internal dispute and the expected actions and deadlines for completing those stages;
  - (c) a requirement to inform the person making a complaint or notifying an internal dispute of the outcome of the complaint or dispute, including the reasons for the outcome;
  - (d) measures to maintain the privacy of a person making a complaint or notifying an internal dispute.

**15. Notification of Building Commissioner of complaints and internal disputes**

- (1) An authorised nominating authority must give the Building Commissioner written notice of a complaint or internal dispute within 10 business days after it receives the complaint or internal dispute.
- (2) The notice must include —
  - (a) the name and contact details of the person who made the complaint or notified the internal dispute; and
  - (b) details of the complaint or internal dispute.
- (3) An authorised nominating authority must notify the Building Commissioner of the outcome of the complaint or internal dispute within 5 business days after it makes a decision on the complaint or internal dispute.

**16. Records of complaints and internal disputes**

- (1) An authorised nominating authority must keep a record of the following information about each complaint or internal dispute received by the authority —
  - (a) details of the complaint or internal dispute, including the name and contact details of the person who made the complaint or notified the internal dispute and the date on which it was made or notified;
  - (b) details of the action taken and decision made in response to the complaint or internal dispute;
  - (c) the reasons for the action taken or decision made in response to the complaint or internal dispute.
- (2) The record of a complaint or internal dispute must be kept for the period of at least 5 years from the date of the receipt of the complaint or internal dispute.
- (3) An authorised nominating authority must, at the request of the Building Commissioner, provide a copy of the record of a complaint or internal dispute to the Building Commissioner.



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**Division 6 — Adjudication applications**

**17. Adjudicator appointment policy**

- (1) An authorised nominating authority must have a written policy on the appointment of adjudicators to determine adjudication applications, including on the following —
  - (a) how an adjudicator will be appointed to determine the adjudication application, having regard to their grade, qualifications, experience and skills and to their availability;
  - (b) how the authority will identify and deal with any conflicts of interest that disqualify an adjudicator from being appointed under section 33 of the Act or under this code of practice;
  - (c) how the authority will ensure that adjudicators are appointed within the time required by the Act.
- (2) The policy must ensure that —
  - (a) a Grade 1 adjudicator is appointed to determine an adjudication application only if the payment claim is for not more than \$100 000; and
  - (b) a Grade 2 adjudicator is appointed to determine an adjudication application —
    - (i) if the payment claim is for more than \$100 000; or
    - (ii) if the payment claim is for not more than \$100 000 but a Grade 1 adjudicator is not available or the nature of the payment claim requires a Grade 2 adjudicator.

**18. Appointment of adjudicators**

- (1) An authorised nominating authority must maintain access to a pool or panel of adjudicators who are available to be appointed to determine adjudication applications made to the authority.
- (2) An authorised nominating authority must ensure that any adjudicator it appoints is registered under the Act.
- (3) An authorised nominating authority must ensure that, as far as reasonably practicable, appointments of adjudicators are made in accordance with its written policy on their appointment.

- (4) An authorised nominating authority must, as far as reasonably practicable, appoint the same adjudicator to determine 2 or more adjudication applications made by a claimant if —
  - (a) they are made in respect of the same respondent; and
  - (b) they are made at the same time or within 1 business day of each other.
- (5) An authorised nominating authority must suspend an adjudicator from the pool or panel of adjudicators available for appointment if —
  - (a) the adjudicator has been found by an Australian court, within the last 5 years, to have made technical errors in undertaking adjudications; and
  - (b) the authority is not satisfied that the cause of those errors has been resolved.
- (6) An agreement or arrangement entered into between an authorised nominating authority and an adjudicator it appoints must require the adjudicator to determine the adjudication application in accordance with the Act, the regulations and the code of practice for adjudicators.

### **Division 7 — Adjudication review applications**

#### **19. Review adjudicator appointment policy**

An authorised nominating authority must have a written policy on the appointment of review adjudicators to determine adjudication review applications, including on the following —

- (a) how a review adjudicator will be appointed to determine the adjudication review application, having regard to their qualifications, experience and skills and to their availability;
- (b) how the authority will identify and deal with any conflicts of interest that disqualify a review adjudicator from being appointed under section 44(8) of the Act or under this code of practice;
- (c) how the authority will ensure that review adjudicators are appointed within the time required by the Act.

**20. Appointment of review adjudicators**

- (1) An authorised nominating authority must maintain access to a pool or panel of review adjudicators who are available to be appointed to determine adjudication review applications made to the authority.
- (2) An authorised nominating authority must ensure that any review adjudicator it appoints is registered under the Act.
- (3) An authorised nominating authority must ensure that, as far as reasonably practicable, appointments of review adjudicators are made in accordance with its written policy on their appointment.
- (4) An authorised nominating authority must appoint a review adjudicator who is an Australian lawyer (as defined in the *Legal Profession Act 2008* section 4) if the adjudicator decided that they did not have jurisdiction to determine the adjudication application as referred to in section 39(2)(b)(ii) of the Act.
- (5) An authorised nominating authority must suspend a review adjudicator from the pool or panel of review adjudicators available for appointment if —
  - (a) the review adjudicator has been found by an Australian court, within the last 5 years, to have made technical errors in undertaking adjudications; and
  - (b) the authority is not satisfied that the cause of those errors has been resolved.
- (6) An agreement or arrangement entered into between an authorised nominating authority and a review adjudicator it appoints, must require the review adjudicator to determine the adjudication application in accordance with the Act, the regulations and the code of practice for review adjudicators.

Note for this clause:

Under section 44(9) of the Act, the adjudicator who made the determination the subject of an adjudication review application cannot be appointed as the review adjudicator.

**21. Disputed adjudicated amounts and deposits or security held on trust**

(1) In this clause —

*trust money* means —

- (a) any amount disputed by the respondent in an adjudication review application made by the respondent that is paid into a trust account with a recognised financial institution established by an authorised nominating authority under section 40(1)(b) of the Act; or
  - (b) any deposit or security held by an authorised nominating authority in a trust account with a recognised financial institution under section 51(5) of the Act.
- (2) An authorised nominating authority must have a written policy to ensure the proper handling and accounting of any trust money it receives.
- (3) The policy must —
- (a) specify the BSB number and account number into which the trust money will be paid; and
  - (b) set out how the trust money will be accounted for (including the accounting records to be kept and the measures to ensure the trust money will not be misappropriated by the authority or by its officers, employees or agents).
- (4) The accounting records for the trust money must be kept for the period of at least 6 years from the date of the receipt of the trust money.
- (5) An authorised nominating authority must, at the request of the Building Commissioner, provide a copy of the accounting records to the Building Commissioner.
- (6) An authorised nominating authority that becomes aware of a breach of trust (or likely breach of trust) in respect of any trust money it receives must, within 5 business days, notify the Building Commissioner of the breach (or likely breach).

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**Division 8 — Fees and expenses**

**22. Charging of fees and expenses**

- (1) An authorised nominating authority must not charge an adjudicator or review adjudicator appointed by the authority fees that contravene a condition of its authorisation or that are inconsistent with the fees notified on its website.

Note for this subclause:

Section 51(7) of the Act provides that conditions may be imposed on the authorisation of a nominating authority about the maximum amount that the authority may charge an adjudicator or review adjudicator for performing administrative duties for the adjudicator or review adjudicator.

- (2) An authorised nominating authority must not charge claimants or respondents any fees or other amounts in connection with adjudication applications or adjudication review applications made to the authority, other than —
- (a) an application fee determined by the authority and notified on its website (and any transaction fee charged by a financial institution for collecting payment of the fee); or
  - (b) a deposit or security for adjudication fees and expenses that the authority requires under section 51(3) of the Act.
- (3) An authorised nominating authority must ensure that the adjudicators or review adjudicators it appoints do not charge adjudication fees and expenses that contravene Part 3 Division 4 of the Act.

**23. Notification of deposit or security for adjudication fees and expenses**

An authorised nominating authority must, promptly after receiving an adjudication application or adjudication review application, notify the claimant and the respondent whether a deposit or security for adjudication fees and expenses is required under section 51(3) of the Act and, if so, the amount of the deposit or security.

**24. Refund of application fee**

If an authorised nominating authority fails to appoint an adjudicator or review adjudicator within 5 business days after the adjudication application or adjudication review application is made as required by the Act, the authority must refund any application fee paid to the authority, unless the applicant consents to the fee being retained by the authority for a subsequent application.

**Division 9 — Reports and information for Building Commissioner**

**25. Quarterly reports by authorised nominating authorities**

- (1) An authorised nominating authority must give the Building Commissioner a quarterly report on the performance of its functions.
- (2) The quarterly reports are to be given by the following dates —
  - (a) 30 April for the January, February and March quarter;
  - (b) 31 July for the April, May and June quarter;
  - (c) 31 October for the July, August and September quarter;
  - (d) 31 January for the October, November and December quarter.
- (3) If an authorised nominating authority ceases to perform its functions, the authority must give the Building Commissioner a report within 28 days for the period since the end of the last quarter.
- (4) A report must be given in the approved form (if any).

**26. Notifications to Building Commissioner**

An authorised nominating authority must, within 5 business days after it becomes aware of any of the following events, give the Building Commissioner written notice of the event —

- (a) the appointment, resignation, death or removal of an officer of the authority;
- (b) the institution of proceedings against the authority, or an officer of the authority, for an offence involving fraud or dishonesty;
- (c) the authority, or an officer of the authority, being found guilty of an offence involving fraud or dishonesty;

- (d) if the authority is an individual — the authority becoming (according to the *Interpretation Act 1984* section 13D) a bankrupt or a person whose affairs are under insolvency laws;
- (e) if the authority is a corporation — the authority having a liquidator, provisional liquidator, administrator (including an administrator of a deed of company arrangements) or a receiver appointed or otherwise being wound up;
- (f) any other event that may disrupt the performance of the functions of the authority.

**27. Information to be provided before surrender of authorisation**

- (1) An authorised nominating authority must, before the surrender of its authorisation under section 94(4) of the Act, give the Building Commissioner written notice of its intention to cease to perform its functions as an authorised nominating authority.
- (2) The notice must include the following information —
  - (a) the date on which the authority intends to cease to perform its functions;
  - (b) the status of current adjudication applications and adjudication review applications, including —
    - (i) the actions that have been taken by the authority in connection with the applications; and
    - (ii) the date, or expected date, of the determination of the applications;
  - (c) the reasons why the authority intends to cease to perform its functions;
  - (d) the place where the authority will store the records kept by the authority in performing its functions.

**28. Inspection and provision of copies of written policies of authorised nominating authorities**

- (1) In this clause —  
**written policy** means a written policy of an authorised nominating authority under clauses 10, 13, 14, 17, 19 or 21.

- (2) An authorised nominating authority must, on request, make its written policies available for inspection by the Building Commissioner at the registered place of business of the authority.
- (3) An authorised nominating authority must, on request, provide a copy of its written policies to the Building Commissioner.

Note for this clause:

Under section 96 of the Act, an authorised nominating authority must provide information to the Building Commissioner about adjudications and adjudication reviews, the appointment and grading of adjudicators and review adjudicators, the rates of fees charged by the authority or the adjudicators or review adjudicators it appoints or other requested information about the performance of its functions.

### **Division 10 — Miscellaneous**

#### **29. Authorised nominating authority to maintain website**

An authorised nominating authority must maintain a publicly accessible website that contains the following information —

- (a) information about the services provided by the authority;
- (b) information about the making of adjudication applications or adjudication review applications to the authority (including any application fee determined by the authority);
- (c) information about the fees adjudicators and review adjudicators are charged by the authority for services in connection with adjudication applications or adjudication review applications made to the authority;
- (d) the authority's telephone number, email address, and address for service;
- (e) the authority's complaints and internal disputes policy and how complaints may be made or internal disputes notified.

#### **30. Service of documents**

- (1) In this clause —  
*give* includes serve, send or otherwise provide.



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- (2) An authorised nominating authority must maintain an address in Western Australia for the receipt by post of documents relating to adjudications or adjudication reviews if the documents are required to be given to the authority by post.
  - (3) An authorised nominating authority must maintain an operative electronic facility for the receipt of documents relating to adjudications or adjudication reviews if the authority purports to accept the documents by electronic means.

**31. Building Commissioner's practice notes**

- (1) The Building Commissioner may publish practice notes that give authorised nominating authorities guidance on how to perform their functions in accordance with the Act, the regulations and this code of practice.
- (2) Authorised nominating authorities must have regard to relevant practice notes in the performance of their functions.
- (3) The practice notes are to be published on a website maintained by the department of the Public Service principally assisting in the administration of the Act.

## **Schedule 3 — Code of practice for adjudicators and review adjudicators**

[r. 20]

### **Division 1 — Preliminary**

#### **1. Citation**

This code of practice is the *Building and Construction Industry (Security of Payment) Adjudicators and Review Adjudicators Code of Practice*.

#### **2. Terms used**

(1) In this code of practice —

*Act* means the *Building and Construction Industry (Security of Payment) Act 2021*;

**confidential information** means information that is the subject of a duty of confidentiality or secrecy or that is of a commercially sensitive nature.

(2) A term used in this code of practice has the same meaning as it has in the Act.

#### **3. Compliance with code of practice**

Adjudicators and review adjudicators are, under section 109 of the Act, required to perform their functions under the Act in accordance with this code of practice.

Note for this clause:

Under section 109(3) of the Act, a contravention of this code of practice by an adjudicator or review adjudicator may be taken into account by the Building Commissioner under Part 5 Division 2 of the Act (for example, in deciding to impose conditions on the registration of adjudicators or review adjudicators or to suspend or cancel registration).

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**Division 2 — Professional conduct**

**4. Compliance with laws**

An adjudicator or review adjudicator must comply with the requirements of —

- (a) the Act, the regulations, the conditions of their registration and this code of practice; and
- (b) other relevant written laws that apply to the performance of their functions under the Act (such as the Australian Consumer Law and laws relating to fair trading, anti-discrimination, equal opportunity and privacy).

**5. Duty of care, diligence and skill**

An adjudicator or review adjudicator must perform their functions under the Act with all reasonable care, diligence and skill.

**6. Duty to act honestly, fairly and professionally**

- (1) An adjudicator or review adjudicator must act honestly, fairly and professionally in all dealings with claimants and respondents.
- (2) In particular, an adjudicator or review adjudicator must not engage in any of the following conduct in performing their functions under the Act —
  - (a) intimidation, harassment or abuse;
  - (b) discrimination, disadvantage or procedural unfairness in dealings with claimants or respondents;
  - (c) undue influence on the exercise by a party of their functions in relation to an adjudication or adjudication review;
  - (d) any conduct that is unconscionable or that compromises the integrity or professional independence of the adjudicator or review adjudicator.

**7. Duty to act independently and impartially**

An adjudicator or review adjudicator must be impartial and independent.

Note for this clause:

Under the Act, an adjudicator or review adjudicator must not accept an appointment and, if appointed, must withdraw from the adjudication or review adjudication if they are aware that they have a conflict of interest in relation to the adjudication or adjudication review.

**8. Duty not to delegate or abrogate responsibility**

- (1) An adjudicator or review adjudicator must not delegate or abrogate any of their functions under the Act.
- (2) However, adjudicators or review adjudicators may engage an authorised nominating authority to assist them with administrative duties.
- (3) An adjudicator or review adjudicator who engages an authorised nominating authority to assist with administrative duties —
  - (a) must take all reasonable measures to ensure that the engagement does not give rise to a conflict of interest with the authority; and
  - (b) if a conflict of interest does arise, must immediately terminate the engagement.

**9. Duty to maintain eligibility for registration**

An adjudicator or review adjudicator —

- (a) must not accept an appointment or conduct an adjudication or adjudication review if they are not eligible to be registered; and
- (b) must notify the Building Commissioner in writing as soon as possible if they cease to be eligible to be registered.

**10. Duty to protect privacy**

- (1) An adjudicator or review adjudicator must protect the privacy of persons in connection with any information that they collect, use or disclose in performing their functions under the Act.

- (2) An adjudicator or review adjudicator must take all reasonable measures to remove or minimise privacy risks, including by —
- (a) maintaining confidentiality in relation to the identities of the parties to the adjudication or adjudication review; and
  - (b) being transparent with the parties about the collection, use and disclosure of information; and
  - (c) preventing unauthorised access to information, including by using password protection or encryption for electronic files and by securing physical files from unauthorised access.

**11. Duty to ensure security of confidential information**

- (1) An adjudicator or review adjudicator must take all reasonable measures to ensure the security of confidential information they obtain in performing their functions under the Act.
- (2) An adjudicator or review adjudicator must, during and after an adjudication or adjudication review —
- (a) avoid engaging in publicity or making public statements about the conduct of the adjudication or adjudication review that may lead to the unauthorised disclosure or use of the confidential information; and
  - (b) notify the parties to the adjudication or adjudication review, as soon as possible, of any breach of confidentiality of which they become aware.

Note for this clause:

Under section 116 of the Act, adjudicators or review adjudicators commit an offence if they use or disclose (except as authorised under that section) any confidential information obtained by them under or for the purposes of the Act.

**Division 3 — Conflicts of interest**

**12. Adjudicator or review adjudicator not to accept appointment if they are, or are related to, authorised nominating authority**

- (1) An adjudicator or review adjudicator must not accept an appointment by a nominating authority if the adjudicator or review adjudicator is —
- (a) the authority; or

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**cl. 13**

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- (b) an officer or employee of the authority; or
  - (c) the spouse or de facto partner, or former spouse or de facto partner, of an officer or employee of the authority; or
  - (d) an immediate family member of an officer or employee of the authority.
- (2) An adjudicator or review adjudicator is not precluded by this clause from accepting an appointment merely because the individual is a current or former financial or non-financial member of the authority, unless the authority is precluded by subclause (1) from accepting the appointment.

**13. Checking for conflicts of interest**

- (1) In this clause —  
*conflict of interest* has the same meaning it has in section 33 of the Act.
- (2) An adjudicator or review adjudicator must check whether they have a conflict of interest when they receive an adjudication application or adjudication review application and when they receive information during the course of the adjudication or adjudication review.
- (3) The conflict of interest check requires a review of the documents received by the adjudicator or review adjudicator.
- (4) An adjudicator or review adjudicator cannot avoid withdrawing from an adjudication or adjudication review because of a conflict of interest by obtaining the informed consent of the claimant and respondent to proceed despite the conflict of interest.

**14. Disclosing close personal relationships**

- (1) An adjudicator or review adjudicator must disclose to the parties to an adjudication or adjudication review any close personal relationship they have with —
- (a) a party to the adjudication or adjudication review; or
  - (b) any person providing evidence in the adjudication or adjudication review.

- (2) An adjudicator or review adjudicator must also disclose to the parties to an adjudication or adjudication review any other close personal relationship that might reasonably be perceived as affecting the impartiality of the adjudicator or review adjudicator.

**15. Adjudicators and review adjudicators not to seek, accept, agree to or offer inducements**

- (1) In this clause —  
*inducement* includes a bribe or other corrupt benefit, but does not include adjudication fees and expenses to which an adjudicator or review adjudicator is entitled under the Act.
- (2) An adjudicator or review adjudicator must not seek, accept or agree to an inducement from a claimant or respondent in connection with the determination of an adjudication application or adjudication review application.
- (3) An adjudicator or review adjudicator must not offer an inducement to a claimant or respondent.

**Division 4 — Conduct of adjudications and adjudication reviews**

**16. Acceptance of appointments**

- (1) An adjudicator or review adjudicator must, before accepting an appointment to determine an adjudication application or adjudication review application, satisfy themselves that —
- (a) they are eligible to be appointed in accordance with the Act, the regulations and this code of practice; and
  - (b) they are available to determine the application within the time required by the Act.
- (2) A Grade 1 adjudicator must not accept an appointment to determine an adjudication application if the payment claim is for more than \$100 000.
- (3) If an adjudication review application relates to a matter in which the adjudicator decided that they did not have jurisdiction to determine the adjudication application as referred to in section 39(2)(b)(ii) of the Act, a review adjudicator must not accept appointment unless they are

an Australian lawyer (as defined in the *Legal Profession Act 2008* section 4).

- (4) If an adjudicator or review adjudicator considers that it is necessary to seek legal advice on the question of their eligibility to be appointed or on any other question concerning the adjudication or adjudication review, expenses incurred in obtaining that legal advice cannot be charged to the parties.

**17. Procedure for conduct of adjudication or adjudication review**

- (1) Under the Act, an adjudicator or review adjudicator may determine their own procedure to the extent that their procedure is not otherwise regulated under the Act.

Note for this subclause:

Section 35(1) of the Act requires an adjudicator to determine an adjudication application fairly and as quickly, informally and inexpensively as possible.

- (2) An adjudicator or review adjudicator must ensure that any procedure they adopt (including any call for a conference of the parties) is commensurate with the nature of, and amount involved in, the adjudication application or adjudication review application.
- (3) The adjudicator or review adjudicator must inform the parties of the procedures that the adjudicator or review adjudicator intends to apply during the adjudication or adjudication review.
- (4) The information must include —
  - (a) directions on the timetable for the adjudication or adjudication review and deadlines to which the parties must adhere; and
  - (b) the limits on the length of written documents.
- (5) If the adjudicator or review adjudicator considers that it is necessary to change the procedures notified to the parties, the adjudicator or review adjudicator must promptly inform the parties of those changes.
- (6) The adjudicator or review adjudicator must promptly inform the parties of any matter that will delay a determination of the adjudication application or adjudication review application and, if required, seek the consent of the parties to any necessary extension of



the time for making the determination that complies with the time limits imposed by the Act.

- (7) Information that is required by this clause to be given to the parties by the adjudicator or review adjudicator must be given to each party at the same time.

**18. Contacting parties for further information**

- (1) An adjudicator or review adjudicator who requires further information from any of the parties to an adjudication or adjudication review must not make a unilateral request for further information from that party but must inform all of the parties of the request for further information.
- (2) In making any such request for further information, the adjudicator or review adjudicator must avoid unnecessary cost or delay while maintaining procedural fairness.

**19. Withdrawal from adjudication or adjudication review**

An adjudicator or review adjudicator who withdraws from an adjudication or adjudication review before making a determination must take all reasonable steps to protect the interests of the parties, including by returning to the parties all confidential, personal and other documentary evidence obtained during the adjudication or adjudication review.

**Division 5 — Making of determinations**

**20. Form of determinations**

- (1) An adjudicator or review adjudicator must use computer word processing software for the preparation of the determination of the adjudication application or adjudication review application so that it can be given to the parties electronically in a commonly used file format.
- (2) The determination must have a cover page that specifies the following —
- (a) the name and registration number of the adjudicator or review adjudicator;

- (b) the names of the parties (including any ABN, ACN or trading name);
  - (c) the date of the determination;
  - (d) the reference number created by the authorised nominating authority or by the adjudicator or review adjudicator to identify the determination;
  - (e) the amount to be paid (or repaid) by a party and the amount of any interest payable on that amount;
  - (f) the total amount of adjudication fees and expenses payable;
  - (g) the date by which any payment (or repayment) is due.
- (3) The determination must —
- (a) be signed by the adjudicator or review adjudicator (including by way of an electronic signature); and
  - (b) have each page sequentially numbered.

**21. Correction of determinations**

An adjudicator or review adjudicator must not, after giving the determination of the adjudication application or adjudication review application to the parties, make any changes to the determination other than a correction authorised by section 38(7) or 48(7) of the Act.

**22. Record keeping with respect to determinations**

An adjudicator or review adjudicator must keep a copy of the following for at least 6 months after determining the adjudication application or adjudication review application —

- (a) the adjudication application or adjudication review application;
- (b) any adjudication response or adjudication review response;
- (c) the determination;
- (d) any other document given to the adjudicator or review adjudicator by the parties in connection with the adjudication or adjudication review.

**23. Proceedings to enforce or challenge determinations**

An adjudicator or review adjudicator must not, after determining the adjudication application or adjudication review application, assist the parties in any proceedings brought to enforce or challenge the determination.

**24. Notification to Building Commissioner about judicial challenges to determinations**

An adjudicator or review adjudicator must, within 10 business days after becoming aware of any judicial review decision relating to the validity of any determination of the adjudicator or review adjudicator, give the Building Commissioner notice of the decision.

**Division 6 — Adjudication fees and expenses**

**25. Amount of adjudication fees and expenses that may be charged**

- (1) An adjudicator or review adjudicator may only charge the amount of adjudication fees and expenses to which they are entitled under the Act, namely —
- (a) the amount agreed between the adjudicator or review adjudicator and the parties to the adjudication or adjudication review; or
  - (b) if the amount is not agreed – the amount determined at the rates approved and published by the Building Commissioner.

Note for this subclause:

The amount of adjudication fees and expenses that an adjudicator may charge in connection with a payment claim for not more than \$50 000 is also subject to the maximum amount prescribed by the *Building and Construction Industry (Security of Payment) Regulations 2022* regulation 8.

- (2) The amount of adjudication fees and expenses that an adjudicator or review adjudicator determines are payable must, unless the amount is so agreed and if not agreed subject to the rates so determined, be a reasonable amount having regard to —
- (a) the complexity of the dispute; and

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- (b) the time spent by the adjudicator or review adjudicator on the adjudication or adjudication review; and
  - (c) any other relevant matter.
- (3) An adjudicator or review adjudicator must not seek adjudication fees and expenses to which they are not entitled under the Act.

Note for this subclause:

Section 50(8) of the Act provides that an adjudicator or review adjudicator is not entitled to adjudication fees and expenses if they fail to determine the adjudication application or adjudication review application within the time allowed under the Act. Section 50(9) of the Act provides that if an adjudication application or adjudication review application is withdrawn, the adjudicator or review adjudicator is only entitled to adjudication fees and expenses up to the time of withdrawal.

- (4) An adjudicator or review adjudicator must not enter into any agreement or arrangement with the parties for the payment of additional fees or expenses in connection with the adjudication or adjudication review.

**26. Notification of adjudication fees and expenses**

- (1) An adjudicator or review adjudicator must provide the following information to the Building Commissioner at the time and in the form the Building Commissioner requires —
  - (a) information about the adjudication fees (inclusive of GST) that the adjudicator or review adjudicator charges, including whether fees are charged at an hourly rate or as a lump sum;
  - (b) information about the adjudication expenses that the adjudicator or review adjudicator charges, including whether they are at cost or cost plus a particular percentage.
- (2) As soon as practicable after any change to the information about adjudication fees or adjudication expenses that the adjudicator or review adjudicator has previously provided to the Building Commissioner, the adjudicator or review adjudicator must provide information about the change to the Building Commissioner in the form the Building Commissioner requires.
- (3) An adjudicator or review adjudicator must ensure that information about the adjudication fees or adjudication expenses they charge is

included in any promotional or other document they publish or authorise about their services as an adjudicator or review adjudicator.

**27. Deposit or security for adjudication fees and expenses**

- (1) This clause applies if an adjudicator or review adjudicator requires, under section 51(4) of the Act, one or both of the parties to provide a reasonable deposit or security for adjudication fees and expenses in any case in which a deposit or security is not held by the authorised nominating authority.

Note for this subclause:

The deposit or security must, under section 51(5) of the Act, be held in a trust account with a recognised financial institution and dealt with in accordance with the relevant provisions of the Act relating to the payment of adjudication fees and expenses.

- (2) An adjudicator or review adjudicator must ensure that there are procedures in place and appropriate records kept to ensure the proper handling and accounting of the deposit or security.
- (3) The accounting records for the deposit or security must be kept for the period of at least 6 years from the date of the receipt of the deposit or security.
- (4) An adjudicator or review adjudicator must, at the request of the Building Commissioner, provide a copy of the accounting records to the Building Commissioner.
- (5) An adjudicator or review adjudicator who becomes aware of a breach of trust (or likely breach of trust) in respect of the deposit or security must, within 5 business days, notify the Building Commissioner of the breach (or likely breach).

**28. Expert and testing adjudication expenses**

- (1) This clause applies if an adjudicator proposes, unless all the parties object, to arrange for a test or engage an expert for the purposes of determining an adjudication application.
- (2) Before arranging for a test or engaging an expert, the adjudicator must —
- (a) advise the parties of the proposal and ensure that they are given an opportunity to object; and

- (b) advise the parties of the adjudication expenses (or likely adjudication expenses) that they will incur for the test or expert.
- (3) The adjudicator must take all reasonable measures to ensure that the adjudication expenses for the test or expert are reasonable in the circumstances and are in proportion to the claimed amount.

Note for this clause:

The adjudicator may, under section 51(4) of the Act, require a reasonable deposit or security (or further reasonable deposit or security) for the adjudication expenses for the test or expert.

**29. Withholding determination**

An adjudicator or review adjudicator cannot withhold giving their determination of an adjudication application or adjudication review application because the adjudication fees and expenses have not been paid, unless authorised to do so under section 51(1) of the Act.

Note for this clause:

Section 51(1) of the Act authorises the adjudicator or review adjudicator to withhold giving the determination if the adjudicator or review adjudicator has given the parties an invoice for the adjudication fees and expenses before the time allowed under the Act for determining the adjudication application or adjudication review application.

**Division 7 — Miscellaneous**

**30. Assistance with resolving complaints**

- (1) An adjudicator or review adjudicator appointed by an authorised nominating authority must give the authority all necessary assistance to enable the authority to determine the merits of any complaint made to the authority in connection with an adjudication or adjudication review by the adjudicator or review adjudicator.
- (2) An adjudicator or review adjudicator must give the Building Commissioner all necessary assistance to enable the Building Commissioner to determine the merits of any complaint referred to the Building Commissioner in connection with an adjudication or adjudication review by the adjudicator or review adjudicator.

**31. Information to be provided by adjudicator appointed by parties**

- (1) In this clause —
- adjudicator appointed by the parties* means an adjudicator who is not appointed by an authorised nominating authority and to whom an adjudication application is made under the relevant construction contract.
- (2) An adjudicator appointed by the parties must provide the following information to the Building Commissioner at the time and in the form the Building Commissioner requires —
- (a) the names of the parties to the adjudication application;
  - (b) the claimed amount and the scheduled amount (if any);
  - (c) any other information relating to the matter that the Building Commissioner requires the adjudicator to provide.

Note for this clause:

Under section 32 of the Act, an adjudicator appointed by the parties must give the Building Commissioner a copy of the written notice given to the claimant and respondent of acceptance of the appointment and a copy of a written notice to the claimant and respondent of withdrawal from the adjudication. Under section 38(4)(c) of the Act, an adjudicator must give the Building Commissioner a copy of the determination of an adjudication application by the adjudicator.

**32. Building Commissioner's practice notes**

- (1) The Building Commissioner may publish practice notes that give adjudicators and review adjudicators guidance on how to perform their functions in accordance with the Act, the regulations and this code of practice.
- (2) Adjudicators and review adjudicators must have regard to relevant practice notes in the performance of their functions.
- (3) The practice notes are to be published on a website maintained by the department of the Public Service principally assisting in the administration of the Act.

**cl. 32**

**Schedule 4 — Prescribed offences and modified penalties**

[r. 23]

Offence under the Act		Modified penalty
s. 13(3)	Construction contract not in writing or does not contain mandatory information	\$400
s. 13 (4)	Varied contract not in writing or does not contain mandatory information	\$400



## Schedule 5 — Infringement notice forms

[r. 25]

### Form 1 — Infringement notice

<i>Building and Construction Industry (Security of Payment) Act 2021</i>		Infringement notice no.
<b>INFRINGEMENT NOTICE</b>		
<b>Alleged offender</b>	Name	
	Address	
<b>Alleged offence</b>	Date or period	
	Time	
	Place	
	Details of offence	
<b>Written law contravened</b>		
<b>Date</b>	Date of notice	
<b>Issuing officer</b>	Name	
	Office	
	Signature	
<b>Modified penalty</b>	\$	
<b>TAKE NOTICE</b>	<p>It is alleged that you have committed the above offence.</p> <p><b>If you do not want to be prosecuted in court for the offence,</b> pay the modified penalty to the Approved Officer within 28 days after the date of this notice.</p>	

**Form 1**

	<p><b>If you do not pay</b> the modified penalty within 28 days, you may be prosecuted or enforcement action may be taken under the <i>Fines, Penalties and Infringement Notices Enforcement Act 1994</i>. Under that Act, some or all of the following action may be taken — your driver’s licence may be suspended, your vehicle licence may be suspended or cancelled, you may be disqualified from holding or obtaining a driver’s licence or vehicle licence, your vehicle may be immobilised or have its number plates removed, your details may be published on a website, your earnings or bank accounts may be garnished, and your property may be seized and sold.</p> <p><b>If you need more time</b> to pay the modified penalty, you should contact the Approved Officer at the address below.</p> <p>Paying the modified penalty will not be regarded as an admission for the purposes of any civil or criminal court case.</p> <p><b>If you want this matter to be dealt with by prosecution in court</b>, sign and date here:</p> <p>_____ / ____ /21</p> <p>and post this notice to the Approved Officer at the address below within 28 days after the date of this notice.</p>	
<b>How to pay</b>	By post	<p>Tick the box below and post this notice to:</p> <p>Approved Officer — <i>Building and Construction Industry (Security of Payment) Act 2021</i></p> <p>[Address]</p> <p><input type="checkbox"/> I want to pay the modified penalty. A cheque or money order (payable to ‘Approved Officer’ — <i>Building and Construction Industry (Security of Payment) Act 2021</i>) for the modified penalty is enclosed.</p>
	In person	<p>Pay the cashier at:</p> <p>[Address]</p>

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Infringement notice forms

**Schedule 5**

**Form 2**

<b>Method of service</b>		<b>Date of service</b>	
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**Form 2 — Withdrawal of infringement notice**

<i>Building and Construction Industry (Security of Payment) Act 2021</i>		Withdrawal no.
<b>WITHDRAWAL OF INFRINGEMENT NOTICE</b>		
<b>Alleged offender</b>	Name	
	Address	
<b>Details of infringement notice</b>	Infringement notice no.	
	Date of issue	
<b>Alleged offence</b>	Date or period	
	Time	
	Place	
	Details of offence	
	Written law contravened	
<b>Approved Officer withdrawing notice</b>	Name	
	Office	
	Signature	
<b>Date</b>	Date of withdrawal	

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**Schedule 5**      Infringement notice forms

**Form 2**

<b>Withdrawal of infringement notice</b>  <i>[*Delete whichever is not applicable]</i>	<p>The above infringement notice issued against you for the above alleged offence has been withdrawn.</p> <p>If you have already paid the modified penalty for the alleged offence, you are entitled to a refund.</p> <p>*      Your refund is enclosed</p> <p>or</p> <p>*      If you have paid the modified penalty but a refund is not enclosed, you may claim your refund by signing and dating this notice and posting it to:</p> <p>Approved Officer — <i>Building and Construction Industry (Security of Payment) Act 2021</i> [Address]</p>		
<b>Your signature</b>		<b>Date</b>	

Clerk of the Executive Council