



Government of **Western Australia**
Department of **Mines, Industry Regulation and Safety**



Building and Construction Industry (Security of Payment) Act 2021 (WA)

Code of practice for authorised nominating authorities

Schedule 2 of the Building and Construction Industry
(Security of Payment) Regulations 2022 (WA)

AUGUST 2022

CONTENTS	.
Division 1: Preliminary	3
Division 2: Standards of business conduct	3
Division 3: Conflicts of interest	4
Division 4: Professional management arrangements	5
Division 5: Complaints and internal disputes resolution	5
Division 6: Adjudication applications	6
Division 7: Adjudication review applications	7
Division 8: Fees and expenses	8
Division 9: Information for Building Commissioner	8
Division 10: Miscellaneous	9

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;

family member means a spouse or de facto partner, former spouse or de facto partner, child, mother, mother-in-law, father, father-in-law, grandparent, sibling or sibling-in-law;

officer has the meaning given in the *Corporations Act 2001* (Commonwealth) section 9.

(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 its 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 nomination 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 of 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 or disadvantage 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

- (1) 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.
- (2) An authorised nominating authority does not breach that duty merely because:
 - (a) the authority provides adjudicators or review adjudicators with editorial assistance to identify any of the following in their determinations or draft determinations:
 - (i) a clerical mistake or defect of form;
 - (ii) an error arising from an accidental slip or omission;
 - (iii) a material arithmetic error or a material mistake in the description of any person, thing or matter;or
 - (b) the authority provides adjudicators or review adjudicators with training or continuing professional development in connection with the conduct of adjudications or review adjudications 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 must not 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) the authority;
 - (b) an officer or employee of the authority;
 - (c) a 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)(b) or (c) from referring the application to the individual.

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

(1) In this clause:

agent, in relation to a claimant or respondent, includes a person who is engaged by the claimant or respondent to prepare, or assist in the preparation of, the adjudication application or adjudication review application;

inducement:

- (a) includes a bribe or other corrupt benefit; but
 - (b) does not include a fee that an authorised nominating authority is entitled to charge for the performance of its functions.
- (2) An authorised nominating authority must not, directly or indirectly, 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 refer or offer to refer an adjudication application or adjudication review application to a particular adjudicator or review adjudicator at the direction or request of an agent of the claimant or respondent unless the claimant and respondent both agree in writing to the referral.
- (4) An authorised nominating authority must not offer an inducement to an adjudicator, review adjudicator, claimant or respondent.

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;
 - (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.

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 provide that, whenever possible, a Grade 2 adjudicator is preferred for appointment to determine an adjudication application if the payment claim is for more than \$100 000.

18. Appointment of adjudicators

- (1) An authorised nominating authority must maintain access to a sufficient number 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 construction contract; 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 adjudicators available for appointment if:
 - (a) the adjudicator has been found by an Australian court, within the last 5 years, to have acted in bad faith or made jurisdictional errors of law in undertaking adjudications; and
 - (b) the authority is not satisfied that the cause of the adjudicator's conduct 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 sufficient number 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 a lawyer 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 review adjudicators available for appointment if:
 - (a) the review adjudicator has been found by an Australian court, within the last 5 years, to have acted in bad faith or made jurisdictional errors of law in undertaking adjudications; and
 - (b) the authority is not satisfied that the cause of the review adjudicator's conduct 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 that 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).

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: Information for Building Commissioner

25. 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 arrangement) or a receiver appointed, or otherwise being wound up, under the *Corporations Act 2001* (Commonwealth);
- (f) any other event that may disrupt the performance of the functions of the authority.

26. Information that must 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 dates, or expected dates, 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.

27. 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, 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 adjudication applications and adjudication review applications, the appointment and grading of adjudicators and review adjudicators, the rates of fees charged by the authority and the adjudicators or review adjudicators it appoints or other requested information about the performance of its functions.

Division 10: Miscellaneous

28. Authorised nominating authority must 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) the authority's adjudicator appointment policy;
- (d) information about the fees adjudicators and review adjudicators are charged by the authority in connection with adjudication applications or adjudication review applications made to the authority (including any percentage of the fees collected by adjudicators or review adjudicators that the authority charges and the reasons for the fees the authority charges);
- (e) the authority's telephone number, email address and address for service;
- (f) the authority's complaints and internal disputes policy and how complaints may be made or internal disputes notified.

29. Service of documents

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

30. 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 must be published on a website maintained by the department of the Public Service principally assisting in the administration of the Act.

**Department of Mines, Industry Regulation and Safety
Building and Energy**

Office: Level 1, 303 Sevenoaks Street, Cannington WA 6107

Post: Locked Bag 100 East Perth WA 6892

Phone: (08) 6251 1900 Fax: (08) 6251 1901

Email: be.info@dmirs.wa.gov.au

Web: www.dmirs.wa.gov.au/building-and-energy

National Relay Service: 13 36 77

Quality of service feedback line: 1800 304 059

This publication is available in other formats on request to assist people with special needs.