



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 adjudicators and review adjudicators

Schedule 3 of the Building and Construction Industry
(Security of Payment) Regulations 2022 (WA)

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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*;

adjudicator appointed by the parties means a person to whom an adjudication application is made under a relevant construction contract that provides that the person is to be the adjudicator for the application;

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

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

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).

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 not to engage in unprofessional conduct

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 or disadvantage 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.

6. 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 adjudication review if they are aware that they have a conflict of interest.

7. 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.

8. 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.

9. 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 use or disclosure 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

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

- (1) An adjudicator or review adjudicator must not accept an appointment by an authorised nominating authority if the adjudicator or review adjudicator is:
 - (a) the authority; or
 - (b) an officer or employee of the authority; or
 - (c) a family member of an officer or employee of the authority.
- (2) An adjudicator or review adjudicator is not precluded by subclause (1)(a) from accepting an appointment merely because the individual is a current or former financial or non-financial member of the authority, unless the adjudicator or review adjudicator is precluded by subclause (1)(b) or (c) from accepting the appointment.

11. Checking for conflicts of interest

- (1) In this clause:

conflict of interest has the same meaning as in section 33 of the Act.
- (2) An adjudicator (other than an adjudicator appointed by the parties) and a review adjudicator must check whether they have a conflict of interest before accepting an appointment by an authorised nominating authority and when they receive information during the course of the adjudication or adjudication review.
- (3) An adjudicator appointed by the parties must check whether they have a conflict of interest when they receive an adjudication application and when they receive information during the course of the adjudication (being a check that includes a review of the documents received by the 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.

12. Adjudicators and review adjudicators must not seek, accept, agree to or offer inducements

- (1) In this clause:

inducement

- (a) includes a bribe or other corrupt benefit; but
 - (b) 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, directly or indirectly, seek, accept or agree to an inducement from a claimant or respondent, or from an authorised nominating authority, 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 an authorised nominating authority, claimant or respondent.

Division 4: Appointment of adjudicator or review adjudicator

13. 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) 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 a lawyer.
- (3) 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.

Division 5: Making of determinations

14. Form of determinations

- (1) An adjudicator or review adjudicator must use computer word processing software for the preparation of the determination of an 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.

15. Correction of determinations

An adjudicator or review adjudicator must not, after giving the determination of an 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.

16. 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 an 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.

Division 6: Adjudication fees and expenses

17. 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 9.

- (2) If the amount of adjudication fees and expenses are not so agreed, the amount of the adjudication fees and expenses that an adjudicator or review adjudicator determines in accordance with the rates so approved and published must be a reasonable amount having regard to:
 - (a) the complexity of the dispute; and
 - (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.

18. 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.

19. 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.

Note for this subclause:

An adjudicator or review adjudicator may require a deposit or security under section 51(4) of the Act if a deposit or security is not held by the authorised nominating authority. 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.

20. 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.

21. 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

22. Information that must be provided by adjudicator appointed by parties

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 given 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.

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

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