

Building and Construction Industry Security of Payment—Authorised Nominating Authorities (Code of Practice) Order 2020

[2020-623]



New South Wales

Status Information

Currency of version

Current version for 23 October 2020 to date (accessed 28 May 2024 at 3:21)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Authorisation

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File last modified 1 January 2021

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Contents

Part	3
1 Name of Order	3
2 Commencement	3
3 Code of practice	3
Schedule 1 Building and Construction Industry Security of Payment Authorised Nominating Authorities Code of Practice 2020	
	3

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New South Wales

1 Name of Order

This Order is the *Building and Construction Industry Security of Payment—Authorised Nominating Authorities (Code of Practice) Order 2020*.

2 Commencement

This Order commences on 1 January 2021 and is required to be published on the NSW legislation website.

3 Code of practice

The code of practice set out in Schedule 1 is made for the purposes of section 28A of the *Building and Construction Industry Security of Payment Act 1999*.

Schedule 1 Building and Construction Industry Security of Payment Authorised Nominating Authorities Code of Practice 2020

clause 3

Part 1 Preliminary

1 Name of code

This code is the *Building and Construction Industry Security of Payment Authorised Nominating Authorities Code of Practice 2020*.

2 Definitions

(1) In this code—

director has the same meaning it has in the *Corporations Act 2001* of the Commonwealth.

financial year means a period of 12 months commencing on 1 July.

the Act means the *Building and Construction Industry Security of Payment Act 1999* and includes the regulations made under the Act.

Note—

The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this code.

- (2) Words used in this code that are defined in the Act have the same meanings as they have in the Act.

3 Offences

The following provisions are offence provisions for the purposes of section 28A(4) of the Act—

- (a) clauses 9–11,
- (b) clause 14,
- (c) clause 15(1),
- (d) clause 17,
- (e) clause 18(1),
- (f) clause 20,
- (g) clause 21(1),
- (h) clauses 23–26.

Note—

The penalty for contravening a provision of this code identified in this code as an offence provision is 50 penalty units. See section 28A(4) of the Act.

A contravention of any provision of this code, whether or not an offence provision, constitutes grounds for the Minister to withdraw an individual's authority to nominate adjudicators for the purposes of the Act. See section 28A(5) of the Act.

Part 2 Standards of conduct

4 Authorised nominating authorities must understand relevant laws

- (1) An authorised nominating authority must understand—
- (a) the Act, and
 - (b) other relevant laws that are necessary for the authority to exercise functions under the Act.
- (2) An authorised nominating authority must take reasonable steps to ensure that an

individual involved in the nomination of adjudicators by the authority understands—

- (a) the Act, and
- (b) any other relevant laws that are necessary to enable the individual to exercise the individual's functions lawfully.

(3) In this clause—

relevant laws means laws relevant to the building and construction industry and dispute resolution, including laws relating to fair trading, trade practices, anti-discrimination and privacy.

5 Authorised nominating authorities must exercise skill, care and diligence

An authorised nominating authority must exercise all reasonable skill, care and diligence when exercising functions under the Act.

6 Authorised nominating authorities must act with honesty, fairness and professionalism

- (1) An authorised nominating authority must act honestly, fairly, transparently and professionally in all dealings with adjudicators, claimants and respondents.
- (2) An authorised nominating authority must not engage in unconscionable conduct or confer an unfair advantage on a person in dealings with adjudicators, claimants and respondents.
- (3) An authorised nominating authority must not compromise its integrity or professional independence, including by avoiding an actual or perceived conflict between the interests of the authority and the interests of adjudicators, claimants or respondents.

7 Authorised nominating authorities must not engage in disreputable conduct

An authorised nominating authority must not engage in the following conduct—

- (a) intimidation, harassment or verbal abuse,
- (b) discrimination, disadvantage or adverse treatment in relation to the nomination of adjudicators,
- (c) directing or influencing, or attempting to direct or influence, an adjudicator in the exercise of the adjudicator's functions.

8 Authorised nominating authorities must not disclose confidential information

- (1) An authorised nominating authority must not use or disclose confidential information about an interested person obtained in connection with the authority's functions under the Act, unless the use or disclosure is made—
 - (a) with the consent of the interested person, or

(b) with lawful excuse.

(2) An authorised nominating authority must take all reasonable steps to ensure the security of confidential information in the possession or control of the authority, including by preventing the unauthorised access, use, damage or destruction of confidential information.

(3) In this clause—

interested person means an adjudicator, claimant or respondent.

Part 3 Avoiding conflicts of interest

9 Authorised nominating authorities must have policy for avoiding conflicts of interest

- (1) An authorised nominating authority must have a policy to identify and manage actual and perceived conflicts of interest that affect, or are perceived to affect, the ability of the authority to carry out the authority's role impartially and in the interests of the parties to an adjudication.
- (2) Without limiting the operation of this Part, an authorised nominating authority has a ***conflict of interest*** in relation to the nomination and referral of adjudicators if there is a reasonable likelihood or expectation of an appreciable financial or other benefit or loss to the authority or to an associate of the authority.
- (3) An authorised nominating authority must, at the Secretary's request, give the Secretary a copy of a policy under this clause.

10 Authorised nominating authorities must not refer adjudication applications if conflict of interest

- (1) An authorised nominating authority must not refer an adjudication application to an adjudicator if the authority has a conflict of interest, or perceived conflict of interest, with—
 - (a) the adjudicator, or
 - (b) the claimant or respondent.
- (2) Without limiting subclause (1), an authorised nominating authority must not refer an adjudication application to any of the following—
 - (a) a director or employee of the authorised nominating authority,
 - (b) a spouse or former spouse of a director or employee of the authorised nominating authority,
 - (c) a de facto partner or former de facto partner of a director or employee of the authorised nominating authority,

- (d) a person who is related by family to a director or employee of the authorised nominating authority.

11 Authorised nominating authorities must not seek, accept or offer inducements

- (1) An authorised nominating authority must not seek or accept, or offer or agree to accept, an inducement from an adjudicator, claimant or respondent to refer an adjudication application to a particular adjudicator.
- (2) An authorised nominating authority must not seek or accept, or offer or agree to accept, an inducement from a claimant to provide an adjudication certificate.
- (3) An authorised nominating authority must not offer an inducement to an adjudicator, claimant or respondent.
- (4) In this clause—

inducement includes a bribe or similar corrupt conduct that creates a perception of a conflict of interest.

Part 4 Professional management arrangements

12 Authorised nominating authorities must have management policy

- (1) An authorised nominating authority must have policies and procedures about the following—
 - (a) the management of adjudication applications, including the referral of applications to adjudicators,
 - (b) the management of confidential information, including the reporting and storage of commercially sensitive information,
 - (c) the management and prevention of business continuity risks.
- (2) An authorised nominating authority must, at the Secretary's request, give the Secretary a copy of a policy or procedure under this clause.
- (3) In this clause—

commercially sensitive information means—

- (a) information a person or body controls that the person or body is required to keep confidential because of a contractual or equitable obligation, or
- (b) any other information the disclosure of which would prejudice any person's legitimate business, commercial, professional or financial interests.

13 Authorised nominating authorities must keep policies and procedures

- (1) An authorised nominating authority must keep a copy of the policies or procedures required under this code at the authority's registered place of business.
- (2) An authorised nominating authority must make the policies or procedures available for inspection by an authorised officer.

14 Authorised nominating authorities must notify Minister of intention to cease activities

- (1) An authorised nominating authority must give written notice to the Minister before the authorised nominating authority ceases to carry out activities as an authorised nominating authority.
- (2) The notice must specify the following—
 - (a) the date the authorised nominating authority intends to cease activities as an authorised nominating authority,
 - (b) the status of current adjudication applications, including the following—
 - (i) the action to be taken by the authorised nominating authority,
 - (ii) the date, or expected date, of the adjudicator's determination,
 - (c) the reasons the authorised nominating authority intends to cease its activities,
 - (d) where the authorised nominating authority's records will be kept.

15 Authorised nominating authorities must notify Minister of certain events

- (1) An authorised nominating authority must give written notice to the Minister of the following events within 5 business days after becoming aware of the event—
 - (a) the appointment, resignation or removal of a director or board member,
 - (b) proceedings being instituted against the authorised nominating authority for an offence involving fraud or dishonesty,
 - (c) the authorised nominating authority being found guilty of an offence involving fraud or dishonesty,
 - (d) the authorised nominating authority becoming bankrupt or making a composition, arrangement or assignment for the benefit of creditors,
 - (e) if the authorised nominating authority is a body corporate or an incorporated association—the body corporate or incorporated association becoming the subject of a winding up order or having a controller or administrator appointed.
- (2) An authorised nominating authority must also, within 5 business days of becoming

aware of the event, notify the Minister in writing of any other event that may disrupt the activities of the authorised nominating authority.

(3) In this clause—

authorised nominating authority includes—

- (a) for a body corporate—a director, and
- (b) for an incorporated association—a board member.

Part 5 Complaint and internal dispute resolution policies

16 Authorised nominating authorities must have complaint and dispute resolution policies

- (1) An authorised nominating authority must have a policy about—
 - (a) the resolution of complaints made by adjudicators, claimants and respondents, including complaints made by persons acting on behalf of claimants and respondents, and
 - (b) the resolution of disputes between adjudicators and the authorised nominating authority.
- (2) The policy must specify the types of complaints and internal disputes that are covered and not covered by the policy.
- (3) The policy must also clearly outline the process for the resolution of a complaint or an internal dispute, including—
 - (a) the process for making a complaint or an internal dispute, and
 - (b) the steps involved in each stage of the complaint or internal dispute, and
 - (c) the expected actions and deadline for completing each stage of the process, including requirements to notify the complainant, and
 - (d) measures to ensure the privacy of complainants is maintained, and
 - (e) a requirement to notify the complainant of the outcome of the complaint or internal dispute, including the reasons for the outcome.

17 Authorised nominating authorities must notify Secretary of complaints and disputes

- (1) An authorised nominating authority must give written notice to the Secretary of a complaint or internal dispute within 10 business days of receiving the complaint or dispute.
- (2) The notice must include—
 - (a) the name and contact details of the complainant and the person to whom the

complaint or dispute relates, and

(b) details of the complaint or internal dispute.

- (3) An authorised nominating authority must notify the Secretary of the outcome of the complaint or internal dispute within 5 business days of the determination of the complaint or internal dispute.

18 Authorised nominating authorities must keep records of complaints and disputes

- (1) An authorised nominating authority must keep a record of the following information about complaints and internal disputes received by the authority—
- (a) details of each complaint or internal dispute, including the name and contact details of each complainant and the complainant's representative, if any, and the date the complaint or dispute was made,
 - (b) details of action taken and decisions made in response to each complaint or internal dispute, including—
 - (i) the date the action was taken or the decision was made, and
 - (ii) the date the complainant or the complainant's representative was notified of the decision,
 - (c) the reasons for action taken or decisions made in response to each complaint or internal dispute,
 - (d) the outcome of each complaint or internal dispute.
- (2) The record must be kept for a period of 5 years from the date the complaint or internal dispute was made.
- (3) An authorised nominating authority must, at the request of the Secretary, give the Secretary a copy of a record made under this clause.

Part 6 Adjudication applications and certificates

19 Referral of adjudication applications

An authorised nominating authority must consider the following matters before referring an adjudication application—

- (a) additional qualifications, skills, knowledge and experience required to adjudicate the particular dispute,
- (b) the amount claimed in the adjudication application,
- (c) the complexity of the issues in dispute,

- (d) whether the adjudicator will be able to comply with the requirements under section 21(3) of the Act.

Note—

Section 17(6) of the Act requires an authorised nominating authority to which an adjudication application is made to refer the application to an eligible adjudicator as soon as practicable.

20 Authorised nominating authorities must provide adjudication certificate

An authorised nominating authority must provide an adjudication certificate within 3 business days of—

- (a) receiving a claimant's request for an adjudication certificate, or
- (b) if the authority charges a fee for the provision of an adjudication certificate—receiving payment of the fee.

Part 7 Notice of fees and information

21 Authorised nominating authorities must disclose fees to claimants and respondents

- (1) An authorised nominating authority must, immediately after receiving an adjudication application, notify the claimant and respondent of the following fees—
 - (a) the fee for the adjudication application,
 - (b) the fee for the adjudication certificate.
- (2) If the Minister has not determined the amount of an application fee or a fee for services provided by the authorised nominating authority under section 17(4) or 28(3) of the Act, an authorised nominating authority must not charge an unreasonable or disproportionate fee for a service provided by the authority.

22 Authorised nominating authorities must refund application fees in certain circumstances

If a claimant withdraws an adjudication application under section 26(2)(a) of the Act, the authorised nominating authority must refund the application fee unless the claimant consents to the fee being kept as the application fee for a new adjudication application made by the claimant.

Note—

Section 17(4) of the Act provides that an authorised nominating authority may charge an application fee that does not exceed the amount determined by the Minister, if any.

23 Authorised nominating authorities must maintain website

- (1) An authorised nominating authority must maintain a publicly accessible website that contains the following—

- (a) information about the services provided by the authority,
 - (b) information about the making of adjudication applications to the authority,
 - (c) the fees charged by the authority for services in connection with adjudication applications made to the authority, including the fee charged for the provision of an adjudication certificate,
 - (d) the authority's telephone number, email address and address for service,
 - (e) information about the making of complaints,
 - (f) the authority's complaint and internal dispute policy.
- (2) If an authorised nominating authority ceases to carry out activities as an authorised nominating authority, the authorised nominating authority must, immediately after ceasing those activities, update the website to state that fact.

Part 8 Reporting requirements

24 Authorised nominating authorities must report adjudication applications and determinations

- (1) An authorised nominating authority must, by 30 April, 31 July, 31 October and 31 January in each year, give the Secretary a quarterly report that includes the following information—
- (a) for each adjudication application received by the authorised nominating authority in the relevant quarter—
 - (i) the name of the claimant, and
 - (ii) the name of the respondent, and
 - (iii) the name of the adjudicator to whom the adjudication application was referred, and
 - (iv) the payment claim and the payment schedule, if any, to which the application relates, and
 - (v) the application fee charged, if any,
 - (b) for each claim for which the authorised nominating authority provided an adjudication certificate in the relevant quarter—
 - (i) the name of the claimant, and
 - (ii) the name of the respondent liable to pay the adjudicated amount, and
 - (iii) the adjudicated amount, and

- (iv) the date the adjudicated amount was due to be paid to the claimant, and
- (v) any interest payable on the adjudicated amount, and
- (vi) the fee charged for the adjudication certificate, if any.

(2) In this clause—

relevant quarter means the 3 months immediately preceding 31 March, 30 June, 30 September and 31 December.

25 Authorised nominating authorities must submit annual reports

An authorised nominating authority must, within 28 days after the end of each financial year, give the Secretary an annual report including—

- (a) the full name of each adjudicator to whom the authority referred an adjudication application, and
- (b) information about changes to the authority's policies and procedures.

26 Authorised nominating authorities must submit report after ceasing activities

An authorised nominating authority that has ceased activities as an authority must, within 28 days after ceasing those activities, give a report to the Secretary that includes information required by clauses 24 and 25 for the period since the last quarterly report or annual report was given to the Secretary.