

## PART 1 - GUIDELINES FOR AUTHORISATION OF NOMINATING AUTHORITIES

These Guidelines outline the policies and procedures for the recommending of authorisation by the Minister of Authorised Nominating Authorities (**ANAs**) under the *Building and Construction Industry Security of Payment Act 1999* (the **Security of Payment Act** or the **Act**).

### 1. Introduction

1.1 Section 4 of the Act defines "authorised nominating authority" to mean "a person authorised by the Minister under section 28 to nominate persons to determine adjudication applications".

1.2 Section 28(1) provides:

(1) *Subject to the regulations, the Minister:*

(a) *may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act, and*

(b) *may withdraw any authority so given.*

(1A) *The Minister may:*

(a) *limit the number of persons who may, for the time being, be authorised under this section; and*

(b) *refuse an application under subsection (1) if authorising the applicant would result in any such number being exceeded.*

1.3 Section 28(2) provides:

(2) *A person:*

(a) *whose application for authority to nominate adjudicators for the purposes of the Act is refused otherwise than on the ground referred to in subsection (1A(b)); or*

(b) *whose Authority to nominate adjudicators is withdrawn,*

*may apply to the Administrative Decisions Tribunal for a review of the Minister's decision to take that action*

1.4 Section 28(3)-(5) provides:

(3) *An authorised nominating authority may charge a fee for any service provided by the authority in connection with an adjudication application made to the authority. The amount that may be charged for any such service must not exceed the amount (if any) determined by the Minister.*

(4) *The claimant and respondent are:*

(a) *jointly and severally liable to pay any such fee, and*

(b) *each liable to contribute to the payment of any such fee in equal proportions or in such proportions as the adjudicator to whom the adjudication application is referred may determine.*

- (5) *An authorised nominating authority must provide the Minister with such information as may be requested by the Minister in relation to the activities of the authority under this Act (including information as to the fees charged by the authority under this Act).*

1.5 As at 16 April 2015 there are:

- (a) no regulations made with respect to authorised nominating authorities;
- (b) no proposals to set a limit on fees for services provided by an ANA;
- (c) no proposals to limit the number of authorised nominating authorities under the Act;
- (d) procedures in place within these guidelines to address unsuccessful applications for authorisation;
- (e) procedures in place within these guidelines to address the withdrawal of the authority to nominate adjudicators;
- (f) requirements to provide information to the Minister in relation to the activities of ANAs under the Act. These are detailed in the Authorised Nominating Authority Code of Practice.

## **2. Applications for authorisation**

2.1 The applicant must submit a written application to the Minister for Fair Trading.

2.2 The application must provide information as detailed in the Nominating Authority Application for Authorisation (see Part 2).

## **3. Criteria for authorisation**

3.1 In considering applications for authorisation, the Minister will take into account all information provided in the Nominating Authority Application for Authorisation.

3.2 The ANA must comply with the Authorised Nominating Authority Code of Practice, which sets out the expectations of an ANA whilst undertaking the functions of a nominating authority under the Act.

3.3 Compliance with the Authorised Nominating Authority Code of Practice will ensure substantial uniformity in the practice of ANAs, including adjudication certificates and statistical information provided to Fair Trading. These statistics are important for the purpose of monitoring the operational performance of the Act and the ANAs, and providing information for future reviews of the Act.

## **4. Procedure for notifying unsuccessful application of authorisation**

4.1 Fair Trading will notify unsuccessful applicants as soon as possible after the decision by the Minister.

## **5. Procedure for notifying and recording the grant of authorisation**

5.1 The Minister will:

- (a) notify successful applicants of the grant of authorisation;
- (b) keep a register of ANAs including full contact details;
- (c) make the register publicly available (see [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)).

**6. Duration of an authorisation and renewal of authorisation**

6.1 Authorisation is for a period stated by the Minister when granting the authorisation. A fresh authorisation may be granted on a fresh application.

**7. Procedure for withdrawal of an authorisation**

7.1 The Minister may withdraw the authorisation where the Minister is satisfied that the authorised nominating authority has failed to abide by the undertaking made on the application.

7.2 The Minister may give the authorised nominating authority written notice to show cause in writing, by a date required, why the Minister should not withdraw authorisation.

7.3 If the authorised nominating authority fails within the time required by the Minister to show cause to the satisfaction of the Minister that the authorised nominating authority should continue to be authorised, the Minister may withdraw the authorisation.

7.4 In accordance with Section 28(2) of the Act an applicant whose application for authorisation is refused or an authority whose authorisation is withdrawn, may apply to the Administrative Decisions Tribunal for a review of the Minister's decision.

## PART 2 - NOMINATING AUTHORITY APPLICATION FOR AUTHORISATION

### 1. Contact for information for completing this application:

NSW Fair Trading

Building & Construction Industry Security of Payment

PO Box 972, Parramatta NSW 2124

DX 28437

Tel: 13 32 20

Email: [SecurityofPayment@finance.nsw.gov.au](mailto:SecurityofPayment@finance.nsw.gov.au)

#### Authorisation Application

- 1.1. The application must be an original. Faxed copies will not be accepted.
- 1.2. Applications should address fully all the requirements requested below and lodged in the following order:
  - (d) Corporation Details (Section 1)
  - (e) Profile of Applicant and Membership (Section 2)
  - (f) Selection Criteria for adjudicators (Section 3)
  - (g) Procedures for processing applications and nominating adjudicators (Section 4)
  - (h) Financial Information (Section 5)
  - (i) Insurance information (Section 6)
  - (j) Further information (Section 7)

Applications must be made by posting or delivering a completed application form and appendices to the contact address shown above.

### 2. Corporation Details (Section 1)

- 2.1. If the applicant is a corporation, the application should be executed under seal of the corporation. The applicant is to provide at Section 1 copies of the applicant's:
  - (a) certificate of incorporation or registration;
  - (b) memorandum and articles of Association or constitution;
  - (c) certificate of registration of any business name;
  - (d) seal of the corporation; and
  - (e) any other document evidencing the formation of the applicant.

### 3. Profile of Applicant and Membership (Section 2)

3.1. The applicant is to provide at Section 2:

- (a) A profile of the membership of the corporation or incorporated association (if applicable) and the names of the directors and managers.
- (b) The background, experience and qualifications of the applicant and the applicant's management and any other information that the applicant considers might assist the Minister to determine whether the applicant should be granted authorisation. This will include but not be limited to:
  - past performance and, in particular, experience (if any) as an authorised nominating authority;
  - professional or industry connections;
  - number of members;
  - evidence of time management and standard of service;
  - capability and number of staff;
  - commitment to the application and intent of the Act.
- (c) If the applicant has previously been an ANA, a full list of adjudicators accredited by the ANA at the time of application or actually nominated under the Act by the ANA as adjudicators including their:
  - qualifications;
  - experience (both within and outside the NSW Act);
  - competencies;
  - geographical location and coverage.
- (d) A full list of nominations previously made under the Act. This listing shall include, in respect of each nomination, the:
  - Claimant's Name and occupation;
  - Respondent's Name and occupation;
  - Project description;
  - Location of project;
  - Adjudicator's name;
  - Date of adjudicator's determination;
  - Payment Claim amount;
  - Payment Schedule amount;
  - Adjudication determination;

- Adjudicator's fees and expenses; and
- If the nomination did not ultimately lead to a determination under the Act, the reason.

#### 4. Selection criteria for adjudicators (Section 3)

4.1. The applicant is to provide at Section 3:

(a) the criteria that the applicant proposes to use in nominating adjudicators. This includes but is not limited to:

- training programs conducted or proposed;
- existing or proposed accreditation scheme;
- existing or proposed pre-qualification requirements;
- performance monitoring processes;
- proposed procedures in the identification, reporting and rectification of unsatisfactory adjudicator performance.

4.2. The criteria should be detailed and address issues concerning the:

- (b) number of adjudicators;
- (c) areas of expertise;
- (d) geographical coverage; and
- (e) methods of monitoring adjudicator performance.

#### 5. Procedures for processing applications and nominating adjudicators (Section 4)

5.1. The applicant is to provide at Section 4:

(a) A sample of the applicant's proposed form for Adjudication Application;

(b) Evidence of the applicant's procedures (or proposed procedures) for:

- promoting the services of the ANA and drawing to the attention of the construction industry the existence of the ANA, the services which it will provide in connection with adjudication and the fees which it will charge;
- dealing with adjudication applications in a timely manner;
- nominating an adjudicator including procedures for quickly contacting potential nominees;
- deciding on the adjudicator and who will be nominated to make the decision;
- ensuring probity in nominating an adjudicator;
- communicating to the claimant, the respondent and the adjudicator in a timely manner;

- obtaining the information from adjudicators which the ANA will require to satisfy the reporting requirements of the ANA Code of Practice;
- proposed procedures for certifying the adjudication determination;
- certification delegation details including names, positions held and the delegation parameters;
- maintaining records and statistics relating to adjudication applications.

**6. Financial Information (Section 5)**

6.1. The applicant is to provide at Section 5 details of the applicant's financial position including the latest balance sheet and annual profit and loss accounts.

**7. Insurance Information (Section 6)**

7.1. The applicant is to provide at Section 6 details of insurance for Professional Indemnity, Public Liability and insurance of employees held by the applicant at the time of application. Details are to include the type and the period of coverage.

**8. Further Information (Section 7)**

8.1. The applicant is to provide at Section 7, any other information, not included in other Sections, which the applicant considers might assist the Minister to determine whether the applicant should be authorised to nominate adjudicators. Such other information may include:

- (a) proposed complaints resolution procedure, and
- (b) proposed publication of information on the operation of the adjudication process.

# CHECKLIST

## 1. CORPORATION DETAILS

The applicant is to provide at Section 1 copies of the applicant's:

- (a) certificate of incorporation or registration;
- (b) memorandum and articles of Association or constitution;
- (c) certificate of registration of any business name;
- (d) seal of the corporation; and
- (e) any other document evidencing the formation of the applicant.

## 2. PROFILE OF APPLICANT AND MEMBERSHIP

The applicant is to provide at Section 2:

- (a) A profile of the membership of the corporation or incorporated association (if applicable) and the names of the directors and managers.
- (b) The background, experience and qualifications of the applicant and the applicant's management and any other information that the applicant considers might assist the Minister to determine whether the applicant should be granted authorisation. This will include but not be limited to:
  - past performance and, in particular, experience (if any) as an authorised nominating authority;
  - professional or industry connections;
  - number of members;
  - evidence of time management and standard of service;
  - capability and number of staff;
  - commitment to the application and intent of the Act.
- (c) If the applicant has previously been an ANA, a full list of adjudicators accredited by the ANA at the time of application or actually nominated under the Act by the ANA as adjudicators including their:
  - qualifications;
  - experience (both within and outside the NSW Act);
  - competencies;
  - geographical location and coverage.
- (d) A full list of nominations previously made under the Act. This listing shall include, in respect of each nomination, the:



<ul style="list-style-type: none"> <li>• Claimant's Name and occupation;</li> </ul>
<ul style="list-style-type: none"> <li>• Respondent's Name and occupation;</li> </ul>
<ul style="list-style-type: none"> <li>• Project description;</li> </ul>
<ul style="list-style-type: none"> <li>• Location of project;</li> </ul>
<ul style="list-style-type: none"> <li>• Adjudicator's name;</li> </ul>
<ul style="list-style-type: none"> <li>• Date of adjudicator's determination;</li> </ul>
<ul style="list-style-type: none"> <li>• Payment Claim amount;</li> </ul>
<ul style="list-style-type: none"> <li>• Payment Schedule amount;</li> </ul>
<ul style="list-style-type: none"> <li>• Adjudication determination;</li> </ul>
<ul style="list-style-type: none"> <li>• Adjudicator's fees and expenses; and</li> </ul>
<ul style="list-style-type: none"> <li>• If the nomination did not ultimately lead to a determination under the Act, the reason.</li> </ul>

**3. SELECTION CRITERIA FOR ADJUDICATORS**

<p>The applicant is to provide at Section 3:</p>
<p>(a) the criteria that the applicant proposes to use in nominating adjudicators. This includes but is not limited to:</p>
<ul style="list-style-type: none"> <li>• training programs conducted or proposed;</li> </ul>
<ul style="list-style-type: none"> <li>• existing or proposed accreditation scheme;</li> </ul>
<ul style="list-style-type: none"> <li>• existing or proposed pre-qualification requirements;</li> </ul>
<ul style="list-style-type: none"> <li>• performance monitoring processes;</li> </ul>
<ul style="list-style-type: none"> <li>• proposed procedures in the identification, reporting and rectification of unsatisfactory adjudicator performance.</li> </ul>
<p>The criteria should be detailed and address issues concerning the:</p>
<p>(b) number of adjudicators;</p>
<p>(c) areas of expertise;</p>
<p>(d) geographical coverage; and</p>
<p>(e) methods of monitoring adjudicator performance.</p>

**4. ADJUDICATION APPLICATION PROCEDURES**

<p>The applicant is to provide at Section 4:</p>
<p>(a) A sample of the applicant's proposed form for Adjudication Application;</p>

(b) Evidence of the applicant's procedures (or proposed procedures) for:
<ul style="list-style-type: none"><li>• promoting the services of the ANA and drawing to the attention of the construction industry the existence of the ANA, the services which it will provide in connection with adjudication and the fees which it will charge;</li></ul>
<ul style="list-style-type: none"><li>• dealing with adjudication applications in a timely manner;</li></ul>
<ul style="list-style-type: none"><li>• nominating an adjudicator including procedures for quickly contacting potential nominees;</li></ul>
<ul style="list-style-type: none"><li>• deciding on the adjudicator and who will be nominated to make the decision;</li></ul>
<ul style="list-style-type: none"><li>• ensuring probity in nominating an adjudicator;</li></ul>
<ul style="list-style-type: none"><li>• communicating to the claimant, the respondent and the adjudicator in a timely manner;</li></ul>
<ul style="list-style-type: none"><li>• obtaining the information from adjudicators which the ANA will require to satisfy the reporting requirements of the ANA Code of Practice;</li></ul>
<ul style="list-style-type: none"><li>• proposed procedures for certifying the adjudication determination;</li></ul>
<ul style="list-style-type: none"><li>• certification delegation details including names, positions held and the delegation parameters;</li></ul>
<ul style="list-style-type: none"><li>• maintaining records and statistics relating to adjudication applications.</li></ul>

## **5. FINANCIAL INFORMATION**

The applicant is to provide at Section 5 details of the applicant's financial position including:

- (a) the latest balance sheet
- (b) annual profit and loss accounts

## **6. INSURANCE DETAILS**

The applicant is to provide at Section 6 details of insurance for Professional Indemnity, Public Liability and insurance of employees held by the applicant at the time of application. Details are to include the type and the period of coverage.

- (a) Professional Indemnity
- (b) Public Liability
- (c) Insurance of employees

## **7. FURTHER INFORMATION**

The applicant is to provide at Section 7, any other information, not included in other Sections, which the applicant considers might assist the Minister to determine whether the applicant should be authorised to nominate adjudicators. Such other information may include:

- (a) proposed complaints resolution procedure, and

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(b) proposed publication of information on the operation of the adjudication process.