



Victoria Government Gazette

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SPECIAL

Building and Construction Industry Security of Payment Act 2002 MINISTER'S GUIDELINE

No. 1/02

AUTHORISATION OF NOMINATING AUTHORITIES

I, Mary Delahanty, Minister for Planning issue the following Guideline under section 44(1) of the **Building and Construction Industry Security of Payment Act 2002** ("the Act") relating to the giving, variation or withdrawal of authorities which may be given to persons to nominate adjudicators for the purpose of the Act. Section 42(1) of the Act provides that the Building Commission ("the Commission") may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act and may withdraw any authority so given. Before giving such an authority, the Commission must have regard to any Guidelines issued by the Minister.

1. Section 44 and purpose of this Guideline

Section 44 of the Act allows the Minister to issue guidelines relating to the giving, variation or withdrawal of authorities which may be given by the Commission to persons to nominate adjudicators for the purposes of the Act.

The purpose of this Guideline is to set out the criteria which apply when the Commission is considering applications for the authorisation of nominating authorities under the Act. An applicant for authorisation has to satisfy the Commission that the applicant has in place procedures which will enable quick nomination of suitably qualified adjudicators.

This Guideline covers:

- (a) the procedure for applying to the Commission for authorisation and the information to be provided;
- (b) the criteria to be applied by the Commission in deciding whether to authorise an applicant;
- (c) the procedure for notifying and recording the grant of authorisation;
- (d) the duration of an authorisation and renewal of authorisation;
- (e) the procedure for withdrawing an authorisation.

2. Commencement

This Guideline come into effect on the date it is published in the Government Gazette.

3. What is an "Authorised Nominating Authority"?

In section 4 of the Act "authorised nominating authority" is defined to mean "a person authorised by the Building Commission under section 42 to nominate persons to determine adjudication applications". While the "person" authorised as a nominating authority may be a corporation or an incorporated association, only a "natural person" can be nominated as an adjudicator.

4. Procedure for Applications for Authorisation as a Nominating Authority

The following procedure applies in relation to authorisation and the information to be provided by the applicant. The applicant must make a written application to the Commission. The application must include:

- (a) The name of the applicant;
- (b) The business address, telephone number and fax number of the applicant;
- (c) If the applicant is a corporation or incorporated association, the applicant's certificate of incorporation or registration, memorandum and articles or constitution, certificate of registration of any business name, and any other document evidencing the formation of the applicant. It is not intended that unincorporated associations will be authorised;

- (d) Where the applicant is a corporation or incorporated association, a profile of the membership;
- (e) Evidence of how the applicant proposes to go about nominating, including procedures for dealing with applications for nomination, procedures for quickly contacting potential nominees, how the decision of the applicant to nominate will be made and who will actually make the decision [including copies of any delegations] and how the decision will be communicated to the applicant for adjudication, the respondent and the nominee;
- (f) Evidence of how the applicant will select nominees, including any scheme for accreditation which the applicant will establish if authorised;
- (g) Details of the applicant's financial position including the latest balance sheet;
- (h) Details of Professional Indemnity Insurance, if any, held by the applicant;
- (i) Confirmation that the applicant will not charge any fee to claimants requesting the applicant to nominate an adjudicator;
- (j) An undertaking that the applicant will nominate unconditionally and will not impose or attempt to impose any conditions on claimants requesting the applicant to nominate an adjudicator;
- (k) The precautions which the applicant has in place to ensure probity in nominating;
- (l) Evidence of how the applicant proposes to address the issue of conflict of interest – either actual, perceived or potential; that it has the capacity to identify such a conflict and how it proposes to handle the issue were it to arise. The applicant must give an express undertaking that, in the event it is an authorised nominating authority, it will not nominate a person to function in the role of adjudicator where a conflict may or does exist between the adjudicator and claimant and respondent;
- (m) The background, experience and qualifications of the applicant and any other information which the applicant considers may assist the Commission to determine whether the applicant should be granted authorisation;
- (n) A statutory declaration certifying the accuracy of all copies of documents provided and all statements made in support of the application;
- (o) An undertaking to notify the Commission of any change in any matter contained in the applicant's application for authorisation.

5. Criteria for Authorisation as a Nominating Authority

The following criteria and circumstances will be taken into account by the Commission in considering applications for the authorisation of nominating authorities.

- (a) The ease with which a person can lodge an adjudication application with the applicant.
The applicant should have a place of business in Australia which is open during normal business hours and a fax number.
- (b) The procedures of the applicant for dealing with applications and promptly making a nomination.
The Commission must be satisfied that the applicant has or will have in place a procedure to deal promptly with applications. This requires that a corporation or association which is an applicant must have in place a delegation which will enable the decision of the corporation or association to be made promptly.
- (c) The capacity of the applicant, and procedures in place, to select appropriate people to act as adjudicators.

A capacity for making a prompt nomination requires that the applicant has ready access to a number of people who would be willing and able to act as adjudicators and are suitably qualified to act as adjudicators. The actual number of potential adjudicators is not a criterion. The Commission wants to be satisfied that the applicant has a procedure for selecting adjudicators which is likely to result in the selection of suitable people.

- (d) The precautions which the applicant has established to ensure probity in nominating.

The constitution, membership, reputation and history of the applicant are relevant.

- (e) The capacity of the applicant and the procedures it has in place to identify, address and manage the issue of conflict of interest, either actual, perceived or potential.

The Commission wants to be satisfied that there must be absolute confidence that the bodies authorised as nominating authorities are cognisant of conflicts and will not allow any spurious relationships, actual, perceived or potential, to adversely impact on their nominations.

- (f) The assets of the applicant and Professional Indemnity Insurance, if any, held by the applicant.

It is not intended to fix a minimum level of assets or minimum level of insurance. However, if an applicant was to have no assets, no insurance and no history of carrying on a successful enterprise in a relevant field, the Commission may decide not to grant authorisation.

- (g) Where the applicant is a corporation or association, the memorandum and articles or constitution, the membership and delegations relevant to nomination of adjudicators.

The Commission can authorise an individual, or individuals in partnership, or a body corporate such as a company or incorporated association. Individuals are unlikely to have all the necessary qualifications but an association could, instead of itself being the nominating authority, have several individuals authorised for various geographic areas.

- (h) The history and reputation of the applicant.

- (i) Whether the applicant has given the Commission a written undertaking that the applicant will not charge a fee or impose conditions upon claimants requesting a nomination.

An authorised nominating authority should not charge a fee to claimants requesting a nomination. Otherwise, one party to a construction contract could, by a particular term in the contract, require the other party to use a particular authorised nominating authority that charges a high fee. This could be used to discourage claimants from exercising their rights under the legislation.

An authorised nominating authority should not impose conditions on the exercise of its power. The authorised nominating authority would not be permitted to require, as a condition of making a nomination, that the claimant agrees to indemnify the authorised nominating authority against claims.

- (j) All other information provided in the applicant's application for authorisation.

6. Requirement to Notify Commission of Change in Circumstances

The Commission is empowered under section 43 of the Act to impose conditions on any authorisation or to vary or revoke those conditions. The Commission may require any applicant to give an undertaking to notify the Commission of any change in any of the matters set out in the application. A breach of this undertaking may be grounds for withdrawing authorisation.

7. Procedure for Notifying and Recording Grant of Authorisation

The Commission will maintain a register of authorised nominating authorities which will be available for public inspection. On application by any person, the Commission will make available a list of currently authorised nominating bodies.

8. Duration of an Authorisation and Renewal of Authorisation

Authorisation will be for a period stated by the Commission when granting the authorisation, but will not exceed, 3 years. A fresh authorisation may be granted on a fresh application.

9. Procedure for Withdrawing an Authorisation

If it appears to the Commission that any authorised nominating authority:

- (a) failed to promptly nominate an adjudicator after receipt of an adjudication application;
- (b) nominated as an adjudicator who is not a suitable person to adjudicate the particular dispute;
- (c) failed to maintain the Professional Indemnity Insurance which the nominating authority described in its application for authorisation;
- (d) charged a fee or attempted to charge a fee to a claimant for requesting a nomination of an adjudicator;
- (e) imposed or attempted to impose a condition on a person lodging an adjudication application;
- (f) failed to follow any procedure described in the nominating authority's application for authorisation;
- (g) had a material change in its membership, articles of association or constitution;
- (h) failed to provide an express undertaking that, in the event it is an authorised nominating authority, it will not nominate a person to function in the role of adjudicator where a conflict may or does exist between the adjudicator and claimant and respondent;
- (i) provided any incorrect information in the authorised nominating authority's application for authorisation;
- (j) ceased to have an office in Australia which is open during normal business hours;
- (k) failed to notify the Commission of any change in any matter contained in the applicant's application for authorisation;
- (l) has for any reason ceased to be a person or authority which should be authorised as a nominating authority;

the Commission may give the authorised nominating authority written notice to show cause in writing to the Commission, by a date required by the Commission, why the Commission should not withdraw authorisation. If the authorised nominating authority fails within the time required by the Commission to show cause to the satisfaction of the Commission that the authorised nominating authority should continue to be authorised, the Commission may withdraw the authorisation.

10. Appeal of Commission's Decision

Section 53 of the Act allows an appeal to the Building Appeals Board in regard to a decision by the Commission to refuse applications or to withdraw a person's authority to nominate an adjudicator. There is a further right of appeal to the Building Appeals Board where the Commission has imposed a condition on a person's authority to nominate an adjudicator or has varied such a condition.

THE HON. MARY DELAHUNTY, MP
Minister for Planning

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