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Building and Construction Industry Security of Payment Act 2002 MINISTERIAL GUIDELINES

No. 1/07

AUTHORISATION OF NOMINATING AUTHORITIES

I, Justin Madden, Minister for Planning, issue the following Guidelines under section 44(1) of the **Building and Construction Industry Security of Payment Act 2002** ('the Act').

1. The purpose of these Guidelines

Under section 42(1) of the Act 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.

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

The purpose of these Guidelines is to set out the matters the Commission must have regard to when considering applications for the authorisation of nominating authorities under the Act.

The Guidelines cover:

- (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 varying and withdrawing an authorisation.

2. Commencement

These Guidelines come into effect on the date they are published in the Government Gazette.

3. Application of Guidelines

These Guidelines replace the Minister's Guideline published in Special Gazette S167 on 19 September 2002. They apply to all authorised nominating authorities from the date of publication.

4. What is an 'Authorised Nominating Authority' ('ANA')?

In section 4 of the Act an 'authorised nominating authority' is defined to mean 'a person authorised by the Building Commission under section 42 to nominate persons to determine adjudication applications'.

The 'person' authorised as a nominating authority may be a corporation or an incorporated association. However, under section 19, only a 'natural person' can be nominated as an adjudicator.

5. Procedure for Applications for Authorisation as a Nominating Authority

The following procedure applies in relation to authorisation as an ANA and the information to be provided by the applicant. The applicant must apply in writing to the Commission, in the approved form.

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The applicant will be required to attest to the accuracy of all copies of documents provided and all statements made in support of the application.

The application must provide the following information:

- (a) The applicant's name, business address, telephone number, fax number, email and website address.
- (b) Where 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.
Unincorporated associations will not be authorised.
- (c) Where the applicant is a corporation or incorporated association, a profile of its membership.
- (d) Information as required about the applicant's panel of adjudicators, including:
 - i. selection criteria for adjudicators and any training program, accreditation or pre qualification scheme
 - ii. number of adjudicators, their areas of expertise, geographical coverage and methods of monitoring their performance
 - iii. procedures for nominating adjudicators.
- (e) Information as required about the applicant's nominating process, including:
 - i. procedures for dealing efficiently and impartially with applications for nomination
 - ii. the precautions which the applicant has in place to ensure probity in nominating.

Where the applicant is an industry body whose members are likely, from time to time, to request nomination of an adjudicator, the applicant's precautions to ensure probity in nominating are relevant.

- (f) Information about the applicant's fees and fee structures, including:
 - i. the method by which they will charge a fee for their work as ANAs
 - ii. any costs to parties to the adjudication
 - iii. any fee or financial arrangement between the ANA and nominated adjudicators
 - iv. any fee or financial arrangement between the parties and nominated adjudicators.

Note in relation to fees

Under the 2002 Act ANAs were not permitted to charge fees to parties to adjudication. The Minister's Guideline issued in 2002 required applicants to undertake to the Building Commission that they would not charge any fees to claimants requesting the Applicant to nominate an adjudicator.

The 2006 Act provides for ANAs to charge fees for any service provided in connection with an adjudication application or an adjudication review application. Under s44(1)(b) the Minister may issue Guidelines about appropriate fees that may be charged by an ANA.

- (g) Details of the applicant's complaints resolution procedures.
ANAs must demonstrate a strong commitment to investigating and responding to complaints in relation to all aspects of their service and functions.

- (h) Information demonstrating the applicant's capacity to identify conflict of interest, whether actual, perceived or potential, and its processes in place to handle such an issue.
An ANA must not nominate a person as an adjudicator where a conflict may or does exist between the adjudicator and claimant and respondent.
- (i) Details of the applicant's financial position including the latest balance sheet.
- (j) 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.

6. Criteria for Authorisation as a Nominating Authority

The Commission must have regard to the following criteria and circumstances in considering applications for the authorisation of an ANA.

- (a) The ease with which a person can lodge an adjudication application with the applicant, and the capacity for prompt administrative response.
The applicant must have a place of business in Australia which is open during normal business hours. The applicant must also have a fax number and email address. An internet website or web page is desirable.
- (b) Where the applicant is a corporation or association, its memorandum and articles or constitution, its membership and any delegations relevant to nomination of adjudicators.
The Commission may authorise an individual, individuals in partnership, or a body corporate such as a company or incorporated association.
- (c) The history and reputation of the applicant.
The history and reputation of the applicant are important in maintaining industry confidence in the bodies authorised to nominate adjudicators.
- (d) The applicant's procedures for dealing promptly with applications and making a nomination in a timely manner.
The Commission will consider the efficiency of the applicant's administrative processes. An applicant which is a corporation or association must have in place a delegation which will enable the decision of the corporation or association to be made promptly.
- (e) The capacity of the applicant to nominate suitable people to act as adjudicators.
The Commission must be satisfied that the applicant's nomination process is likely to result in the selection of suitably qualified adjudicators whose skills are appropriate to the particular application.
The applicant should demonstrate ready access to a number of suitably qualified people who would be willing and able to act as adjudicators.
The applicant's nomination procedures should demonstrate the nomination of adjudicators is carried out fairly and without interest.
- (f) The precautions which the applicant has established to ensure probity in all its processes.
It is important for effective operation of the Act that the industry has confidence in the bodies authorised to nominate adjudicators.
The applicant's selection and nomination processes are relevant to this criterion. These processes should demonstrate the applicant's capacity to identify, address and manage issues such as self-interest, favouritism and fairness.

The question of conflict of interest, whether actual, perceived or potential, is of particular concern.

An ANA must not impose conditions on the exercise of its power. For example, an ANA may not require, as a condition of making a nomination, that the claimant agree to indemnify the ANA against claims. Likewise, an ANA must not hinder or interfere with the independent exercise of an adjudicator's responsibilities under the Act.

The constitution, membership, reputation and history of the applicant are relevant. The applicant's fee structures are also relevant.

- (g) The applicant's assets.

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

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

7. 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 applicant must notify the Commission of any change in any of the matters set out in the application. Failure to provide this notification as soon as practicable after that change is a breach of the Conditions of Authorisation and may be grounds for imposition of conditions or withdrawal of authorisation.

8. Procedure for Notifying and Recording Grant of Authorisation

The Commission will maintain a list of ANAs. This list will be available on the Commission's website, or on request by any person.

9. 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.

10. Procedure for Withdrawing and Imposing Conditions on Authorisation

Section 43(a) of the Act allows the Commission to impose conditions on authority given under s42, which are in accordance with these Guidelines. Pursuant to section 43(a), the Commission has issued Conditions of Authorisation which set out the functions, duties and requirements on ANAs. It is a condition of authorisation that ANAs demonstrate to the Commission their ongoing compliance with these Conditions of Authorisation.

11. Procedure for Withdrawing Authorisation

- (a) Section 42 of the Act gives the Building Commission power to withdraw authorisation.
- (b) If it appears to the Commission that an ANA has breached any part of the Conditions of Authorisation issued in accordance with these Guidelines the Commission may give the ANA written notice to show cause in writing to the Commission, by a date required by the Commission, why the Commission should not withdraw authorisation.
- (c) If the ANA fails within the time required by the Commission to show cause to the satisfaction of the Commission that the ANA should continue to be authorised, the Commission may withdraw the authorisation.

12. Procedure for Imposing Conditions on Authorisation

- (a) Section 43 of the Act gives the Commission power to impose, vary or revoke any conditions on an authority given under s42. If it appears to the Commission that an ANA has breached any part of the Conditions of Authorisation the Commission may impose such condition or conditions it considers appropriate to address such breach.
- (b) If it appears to the Commission that an ANA has breached any part of the Conditions of Authorisation the Commission may give the ANA written notice to show cause in writing to the Commission, by a date required by the Commission, why the Commission should not impose a condition or conditions on authorisation which address this breach.
- (c) If the ANA fails within the time required by the Commission to show cause to the satisfaction of the Commission that the Commission should not impose a condition or conditions which address the breach, the Commission may impose such condition or conditions it considers appropriate to address such breach.

13. 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.

JUSTIN MADDEN MLC
Minister for Planning

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