

**BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENTS ACT  
2009**

**MINISTERIAL GUIDELINES**

No. 1/10

**AUTHORISATION OF NOMINATING AUTHORITIES**

I, Lisa Singh, Minister for Workplace Relations, issue the following Guidelines to the Security of Payments Official appointed under Section 30 of the *Building and Construction Industry Security of Payment Act 2009* ('the Act').

**1. The purpose of these Guidelines**

Under section 31(4) of the Act the Security of Payments Official may, on application made by any person, authorise the applicant to nominate adjudicators for the purposes of this Act and may impose a condition, vary a condition or revoke a condition imposed on the authorisation. Before giving such an authority, the Security of Payments Official must have regard to any Guidelines issued by the Minister.

The purpose of these Guidelines is to set out the matters the Security of Payments Official 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 Security of Payments Official for authorisation and the information to be provided;
- (b) the criteria to be applied by the Security of Payments Official 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 11 February 2010.

**3. Application of Guidelines**

These Guidelines apply to all authorised nominating authorities.

**4. What is a "Nominating Authority"?**

Section 4 of the Act defines a "nominating authority" (NA) to mean "a person authorised by the Security of Payments Official under section 31 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 22, 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 NA and the information to be provided by the applicant. The applicant must apply in writing to the Security of Payments Official, in the approved form.

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.
- (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 NAs
  - ii. any costs to parties to the adjudication
  - iii. any fee or financial arrangement between the NA and nominated adjudicators
  - iv. any fee or financial arrangement between the parties and nominated adjudicators.
- (g) Details of the applicant's complaints resolution procedures.
 

NAs must demonstrate a strong commitment to investigating and responding to complaints in relation to all aspects of their service and functions.
- (h) Whether the applicant represents the interests of a particular sector of the building or construction industry.
- (i) 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 NA must not nominate a person as an adjudicator where a conflict may or does exist between the adjudicator and claimant and respondent.
- (j) Details of the applicant's financial position including the latest balance sheet.
- (k) The background, experience and qualifications of the applicant and any other information which the applicant considers may assist the Security of Payments Official to determine whether the applicant should be granted authorisation.

#### 6. Criteria for Authorisation as a Nominating Authority

The Security of Payments Official must have regard to the following criteria and circumstances in considering applications for the authorisation of an NA.

- (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 Security of Payments Official may authorise an individual 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 is 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 Security of Payments Official 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 Security of Payments Official 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 conflict of 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 NA must not impose conditions on the exercise of its power. For example, an NA may not require, as a condition of making a nomination that the claimant agree to indemnify the NA against claims. Likewise, an NA must not hinder or interfere with the independent exercise of an adjudicator's responsibilities under the Act.

The Security of Payments Official should have regard to whether the applicant represents the interests of a particular sector of the building or construction industry and, if so, whether this would make the applicant unsuitable to appoint adjudicators.

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 Security of Payments Official may decide not to grant authorisation.

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

**7. Requirement to Notify Security of Payments Official of Change in Circumstances**

The Security of Payments Official is empowered under section 31 of the Act to impose conditions on any authorisation or to vary or revoke those conditions. The applicant must notify the Security of Payments Official 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 Security of Payments Official will maintain a list of NAs. This list will be available on the Workplace Standards Tasmania 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 Security of Payments Official when granting the Authorisation, but will not exceed 3 years. Re authorisation may be granted on a fresh application at the end of the Authorisation period.

**10. Procedure for Withdrawing and Imposing Conditions on Authorisation**

Section 31 of the Act allows the Security of Payments Official to impose conditions on authority given under section 31, which are in accordance with these Guidelines. Pursuant to section 31, the Security of Payments Official has issued Conditions of Authorisation which set out the functions, duties and requirements on NAs. It is a condition of authorisation that NAs demonstrate to the Security of Payments Official their ongoing compliance with these Conditions of Authorisation.

**11. Procedure for Withdrawing Authorisation**

(a) Section 31 of the Act gives the Security of Payments Official power to withdraw authorisation.

(b) If it appears to the Security of Payments Official that an NA has breached any part of the Conditions of Authorisation (or any other condition) issued in accordance with these Guidelines, has failed to comply with a request made to the NA under section 31(1), or has otherwise failed to comply with a requirement of the Act the Security of Payments Official may give the NA written notice to show cause in writing to the Security of Payments Official, by a date required by the Security of Payments Official, why the Security of Payments Official should not withdraw authorisation.

(c) If the NA fails within the time required by the Security of Payments Official to show cause to the satisfaction of the Security of Payments Official that the NA should continue to be authorised, the Security of Payments Official may withdraw the authorisation.

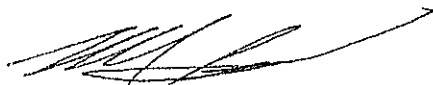
**12. Procedure for Imposing Conditions on Authorisation**

(a) Section 31 of the Act gives the Security of Payments Official power to impose, vary or revoke any conditions on an authority given under section 31. If it appears to the Security of Payments Official that an NA has breached any part of the Conditions of Authorisation the Security of Payments Official may impose such condition or conditions it considers appropriate to address this breach.

- (b) If it appears to the Security of Payments Official that an NA has breached any part of the Conditions of Authorisation the Security of Payments Official may give the NA written notice to show cause in writing to the Security of Payments Official, by a date required by the Security of Payments Official, why the Security of Payments Official should not impose a condition or conditions on authorisation which address this breach.
- (c) If the NA fails within the time required by the Security of Payments Official to show cause to the satisfaction of the Security of Payments Official that the Security of Payments Official should not impose a condition or conditions which address the breach, the Security of Payments Official may impose such condition or conditions it considers appropriate to address this breach.

### 13. Appeal of Security of Payments Official's Decision

Section 31 of the Act allows an appeal to the Magistrate's Court (Administrative Appeals Division) in regard to a decision by the Security of Payments Official to refuse applications or to withdraw a person's authority to nominate an adjudicator. There is a further right of appeal to the Magistrates Court (Administrative Appeals Division) where the Security of Payments Official has imposed a condition on a person's authority to nominate an adjudicator or has varied such a condition.



Lisa Singh  
Minister for Workplace Relations

Date: 10.2.10