

ARCANA(AB) Code of Conduct for Construction Adjudicators

This is an interim Code of Conduct. The Partners have individual Codes of Conduct and are working to harmonize a common Code of Conduct that will apply to Construction Adjudicators. The GOA will be advised when this is complete.

Terms used - In this Code of Conduct

- **Act** means the *Prompt Payment and Construction Lien Act*
- **Regulation** means the Prompt Payment and Adjudication Regulation
- **Confidential information** means information that is the subject of a duty of confidentiality or secrecy or that is of a commercially sensitive nature
- **Conflict of interest** includes a perceived or potential conflict of interest
- **Family member** means a spouse or de facto partner, former spouse or de facto partner, child, mother, mother-in-law, father, father-in-law, grandparent, sibling or sibling-in-law

Any terms used in this Code of Conduct have the same meaning as it has in the Regulation.

An adjudicator appointed by ARCANA(AB) means a person to whom an adjudication application is made under a relevant construction contract that provides that the person is to be the adjudicator for the application.

Confidential information means information that is the subject of a duty of confidentiality or secrecy or that is of a commercially sensitive nature.

1. Compliance with Code of Conduct

1.1 Adjudicators are required to perform their functions under the Act and Regulation in accordance with this Code of Conduct.

Note: a contravention of this Code of Conduct by an adjudicator may lead to the imposition of conditions on the registration of the adjudicator on the ARCANA(AB) roster or suspension from the roster, cancellation of registration on the roster.

2. Professional conduct

- 2.1 An adjudicator must comply with the requirements of:
- (a) the Act, the regulation, the conditions of their registration and this Code of Conduct; and
 - (b) other relevant written laws that apply to the performance of their functions under the Act and Regulation (such as consumer law and laws relating to fair trading, anti-discrimination, equal opportunity and privacy).

- 2.2 An adjudicator must not engage in any of the following conduct in performing their functions:
- (a) intimidation, harassment or abuse
 - (b) discrimination or disadvantage in dealings with claimants or respondents
 - (c) undue influence on the exercise by a party of their functions in relation to an adjudication
 - (d) any conduct that is unconscionable or that compromises the integrity or professional independence of the adjudicator.
- 2.3 An adjudicator must be impartial. An adjudicator must not accept an appointment and, if appointed, must withdraw from the adjudication if they are aware that they have a conflict of interest.
- 2.4 An adjudicator must not delegate or abrogate any of their functions, however an adjudicator may engage legal and/or technical advisers whose role is to provide advice on matters that fall outside the adjudicator's personal sphere of knowledge and experience. Such advice can be used to inform the adjudicator's decision on all or part of the dispute before them.
- 2.5 An adjudicator who engages legal and/or technical advisers
- (a) must take all reasonable measures to ensure that the engagement does not give rise to a conflict of interest; and
 - (b) if a conflict of interest does arise, must immediately terminate the engagement.

3. Duty to maintain eligibility for registration

- 3.1 An adjudicator:
- (a) must not accept an appointment or conduct an adjudication if they are not eligible to be registered; and
 - (b) must notify ARCANA(AB) in writing as soon as possible if they cease to be eligible to be registered.

4. Duty to ensure security of confidential information

- 4.1 An adjudicator must take all reasonable measures to ensure the security of confidential information they obtain in performing their functions.
- 4.2 An adjudicator must, during and after an adjudication:
- (a) avoid engaging in publicity or making public statements about the conduct of the adjudication that may lead to the unauthorized use or disclosure of the confidential information; and
 - (b) notify the parties to the adjudication, as soon as possible, of any breach of confidentiality of which they become aware.

5. Conflicts of interest

- 5.1 An adjudicator must not accept appointment if they are, or are related to, an employee of ARCANA(AB)

- 5.2 An adjudicator must not accept an appointment by ARCANA(AB), if the adjudicator:
- (a) is aware of any involvement with the claimant and/or respondent that gives rise to a real conflict of interest
 - (b) is aware of any involvement with the claimant and/or respondent that could give rise to the perception of possible bias
 - (c) is an employee of ARCANA(AB), or
 - (d) has given advice to ARCANA(AB) on the appointment of the adjudicator

An adjudicator is not precluded from accepting an appointment merely because the individual is a current or former employee or officer of ARCANA(AB), unless their role is connected with the day-to-day function of ARCANA(AB) as an authorized Nominating Authority.

5.3 Checking for conflicts of interest

- (a) An adjudicator, who has been invited by ARCANA(AB) to put themselves forward for appointment as adjudicator must undertake checks to determine whether they have a conflict of interest before accepting an invitation.
- (b) An adjudicator appointed by the parties must check whether they have a conflict of interest when they receive an adjudication application and when they receive information during the course of the adjudication (being a check that includes a review of the documents received by the adjudicator).
- (c) An adjudicator may avoid withdrawing from an adjudication because of a potential (not real) conflict of interest by obtaining and recording the informed consent of the claimant and respondent to proceed despite there being a perception of a possible conflict of interest.

5.4 Inducements

In this clause inducement:

- (a) includes a bribe or other corrupt benefit; but
- (b) does not include adjudication fees and expenses to which an adjudicator is entitled to.

An adjudicator must not, directly or indirectly, seek, accept or agree to an inducement from a claimant or respondent, or from ARCANA(AB), in connection with the determination of an adjudication.

An adjudicator must not offer an inducement to ARCANA(AB), claimant or respondent for any reason

6. Appointment of Adjudicator

6.1 Acceptance of appointments

- (a) An adjudicator must, before accepting an appointment to determine an adjudication application, satisfy themselves that they:
 - i. are eligible by virtue of their qualifications, experience and knowledge to deal with the issue(s) in the dispute between the claimant and the respondent;

- ii. are available to undertake the adjudication within timescales required by the Act, Regulation and contract;
 - iii. have no conflicts of interest;
 - iv. have appropriate professional indemnity insurance cover; and
 - v. are not precluded from taking on the appointment for any other reason.
- 6.2 If an adjudication relates to a matter which another adjudicator has previously decided an adjudicator who has accepted an appointment must withdraw and notify the parties accordingly.
- 6.3 If an adjudicator considers that it is necessary to seek legal advice on the question of their eligibility to undertake an adjudication after being appointed by ARCANA(AB) (or on any other question concerning the validity of an adjudication) they must notify the parties and inform them as to how they intend to allocate the costs of obtaining that legal advice as between the parties.

7. Making of determinations

- 7.1 An adjudicator must provide the parties with the determination of their dispute within the timescales set out in the Act, Regulation, contract or as otherwise agreed by all parties.

The determination should be prepared using computer word processing software so that it can be given to the parties electronically, at the same time and in a commonly used file format.

- 7.2 The determination must have a cover page that specifies the following:
- (a) the name and registration number (if appropriate) of the adjudicator
 - (b) the identities of the parties
 - (c) the date of the determination
 - (d) the reference number created by ARCANA(AB) to identify the determination
 - (e) the determination, which will normally be an amount to be paid (or repaid) by a party and the amount of any interest payable on that amount
 - (f) the total amount of adjudication fees and expenses payable
 - (g) the date by which any payment (or repayment) is due.

- 7.3 The determination must:
- (a) be signed by the adjudicator (including by way of an electronic signature); and
 - (b) have each page sequentially numbered.

- 7.4 An adjudicator must not, after giving the determination of an adjudication application or to the parties, make any changes to the determination other than a correction authorized under the Act or Regulation.

8. Record keeping with respect to determinations

- 8.1 An adjudicator must keep a copy of the following for at least 6 months after determining an adjudication application:
- (a) the adjudication application
 - (b) submissions made by the parties to the adjudication
 - (c) the determination
 - (d) any other document given to the adjudicator by the parties in connection with the adjudication.

9. Adjudication fees and expenses

- 9.1 An adjudicator may only charge the amount of adjudication fees and expenses to which they are entitled to as a result of:
- (a) the adjudicator has been appointed jointly by the parties to the adjudication and the amount of fee has been agreed between the parties and the adjudicator: or
 - (b) the adjudicator has been appointed by ARCANA(AB), the amount of fee has not been agreed beforehand and the amount is at a rate approved and published by ARCANA(AB).

Note for this subclause:

- 9.2 The amount of adjudication fees and expenses that an adjudicator may charge must be a reasonable amount having regard to the ARCANA(AB) Fee Schedule and:
- (a) the value and complexity of the dispute; and
 - (b) the time spent by the adjudicator on the adjudication; and
 - (c) any other relevant matter.
- 9.3 An adjudicator must not seek adjudication fees and expenses to which they are not entitled under the Act, Regulation or ARCANA(AB) policies.

Note: An adjudicator is not entitled to adjudication fees and expenses if they fail to determine the adjudication application within the time allowed under the Act or Regulation. If an adjudication application is withdrawn by the parties, the adjudicator is entitled to fees and expenses that are reasonable and cover work they have undertaken up to the time of withdrawal.

- 9.4 An adjudicator must provide the following information to ARCANA(AB) at the time and in the form the ARCANA(AB) requires:
- (a) information about the adjudication fees (inclusive of tax) that the adjudicator charges, including the basis on which fees are charged e.g. an hourly rate
 - (b) information about the adjudication expenses that the adjudicator charges, including whether they are at cost or cost plus a particular percentage.
- 9.5 As soon as practicable after any change to the information about adjudication fees or adjudication expenses that the adjudicator has previously provided to ARCANA(AB), the adjudicator must provide information about the change to ARCANA(AB) in the form ARCANA(AB) requires.

- 9.6 An adjudicator must ensure that information about the adjudication fees or adjudication expenses they charge is included in any promotional or other document they publish or authorize about their services as an adjudicator.
- 9.7. Where an adjudicator proposes, unless all the parties object, to arrange for legal or technical expertise for the purposes of determining an adjudication application, the adjudicator must:
- (a) advise the parties of the proposal and ensure that they are given an opportunity to object; and
 - (b) advise the parties of the amount of adjudication expenses (or likely adjudication expenses) that they will incur.
- 9.8 The adjudicator must take all reasonable measures to ensure that the adjudication expenses for are reasonable in the circumstances and are in proportion to the claimed amount.
- 9.9 An adjudicator cannot withhold giving their determination of an adjudication application or adjudication review application because the adjudication fees and expenses have not been paid.

10. Miscellaneous

- 10.1 An adjudicator on the ARCANA(AB) roster who is appointed by the parties must provide the following information to ARCANA(AB) at the time and in the form ARCANA(AB) requires:
- (a) the names of the parties to the adjudication application
 - (b) the claimed amount
 - (c) any other information relating to the matter that ARCANA(AB) requires the adjudicator to provide.
- 10.2 ARCANA(AB) may publish guidance and practice notes for adjudicators to help them perform their functions in accordance with the Act, the Regulation and this code of practice.

Adjudicators must have regard to the guidance and practice notes in the performance of their functions.

The practice notes and guidance must be published on a website maintained by the NA for the benefit of adjudicators on the ARCANA(AB) roster.

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