



Government of **Western Australia**
Department of **Mines, Industry Regulation and Safety**



Building Commissioner Policy Approval of Adjudicator Training Courses

Building and Construction Industry (Security of Payment) Act 2021



AUGUST 2021

PURPOSE

This document sets out the policy the Building Commissioner will apply for the approval of training courses for the purposes of registration as a provisional adjudicator, adjudicator and review adjudicator under the *Building and Construction Industry (Security of Payment) Act 2021* (the Act).

Background

The new Act received Royal Assent on 25 June 2021, and will improve security of payment for all participants in the building and construction industry in Western Australia.

Sections 1, 2 and 98 of the Act have commenced operation. The remaining sections of the Act must be proclaimed to commence operation, and different dates may be set for the commencement of different sections.

It is anticipated that all remaining Parts of the Act will be proclaimed to commence operation over three (3) stages, with the first stage to be proclaimed by or before **1 August 2022**.

Registration of provisional adjudicators, adjudicators and review adjudicators

Part 5, Division 2 of the Act empowers the Building Commissioner to register individuals as an adjudicator or review adjudicator, or both.

For the purposes of Part 3 of the Act, only a registered adjudicator or review adjudicator can adjudicate an adjudication application or adjudication review application, respectively.

Section 110 of the Act also makes temporary and provisional arrangements to accommodate adjudicators registered under the existing *Construction Contracts Act 2004* (CCA).

A person who holds a registration as an adjudicator under the CCA is entitled to be provisionally registered as an adjudicator under the Act for a period of 12 months, provided the adjudicator has undertaken a course of training approved by the Building Commissioner.

Parts 3, 5 and section 110 of the Act are expected to be proclaimed to commence operation by or before 1 August 2022 as part of the first stage.

Approved training course for adjudicators

A precondition to the grant of provisional adjudicator registration under section 110 of the Act (for a period of up to 12 months) is that the individual has undertaken a training course approved by the Building Commissioner.

Likewise, regulations made under section 102 of the Act (yet to commence) will require, among other things, the completion of an approved training course for the purposes of periodic registration (for a period of up to 3 years) as an adjudicator or review adjudicator.

Whilst the Building Commissioner cannot yet officially grant an approval for a training course, he/she can grant an 'in principle' approval which will then become operative once the relevant sections of the Act are proclaimed to commence.

POLICY STATEMENT

Only 1 (one) training course

The policy of the Building Commissioner is that the training course requirement for the grant of provisional adjudicator registration under the Act, or periodic registration as an adjudicator or review adjudicator under the Act, are to be the same.

An individual seeking registration as an adjudicator under the Act – whether provisional or periodic – will only ever need to complete one single course of training, rather than having to complete multiple overlapping courses.

In practical terms, this means that an adjudicator registered under the CCA who seeks provisional registration under the Act, and individuals seeking periodic registration as an adjudicator or review adjudicator under the Act, will be required to complete a course meeting the same requirements approved by the Building Commissioner.

Mandatory content requirements for training course

To be approved by the Building Commissioner, a training course must meet the mandatory content requirements set out in **Appendix A**. The course must comprise two components, being:

- a. subject matter knowledge specific to the Act (**Component A**); and
- b. a practical component (**Component B**) in the form of both an examination of the subject matter knowledge and undertaking a mock adjudication either under the Act or an 'equivalent law of another State or Territory'.

An 'equivalent law' refers to one based on the 'East Coast' model of security of payment laws, i.e. which provides a statutory right to make monthly payment claims and a requirement for respondents to issue payment schedules to avoid liability for the full amount of payment claims they receive.

Training course undertaken for CCA registration

Prior completion of a course of approved training for the purposes of registration as an adjudicator under the CCA will **not** meet the requirements for the grant of registration under the Act (including provisional registration).

Training course undertaken in other jurisdictions in Australia

For the purposes of registration under the Act, the Building Commissioner will recognise training courses (completed within the previous 5 years) in another Australian state or territory for registration by a regulator or accreditation by an authorised nominating authority as an adjudicator in that state or territory, provided an individual has:

- a. undertaken 'top up' training covering the subject matter knowledge of the Act; and
- b. completed an examination of the subject matter knowledge of the Act.

An individual is not required to have completed a mock adjudication under the Act, if the individual has already completed a mock adjudication under an equivalent law as part of completing the relevant training course for the purposes of registration as an adjudicator in another Australian state or territory or accreditation by an authorised nominating authority.

Applying for approval of an adjudicator training course

An organisation may apply to the Building Commissioner for approval of an adjudicator training course by sending the application to sopreform@dmirs.wa.gov.au.

The application must:

- a. detail the organisation's capability to develop and deliver the training course; and
- b. include a copy of the suite of training materials to be used, including:
 - i. the course syllabus;
 - ii. synopsis of the course content;
 - iii. training manual for participants and/or the presenter (if relevant);
 - iv. supporting training materials, e.g. PowerPoint slides and pre-reading materials (if relevant);
 - v. the proposed date(s), time(s) and location(s) of the training course; and
 - vi. the assessment materials, including the knowledge-based examination and mock adjudication materials (and marking guides for both).

No fee is payable for the application.

Evidence of completion of a training course

A provider must issue a Certificate of Completion for an approved training course.

An applicant for registration as a provisional adjudicator, adjudicator or review adjudicator under the Act will be required to provide the Certificate of Completion as evidence that they have undertaken the training course approved by the Building Commissioner.

The Certificate of Completion must:

- a. state the full name of the individual to which it is issued;
- b. the date the training course was completed;
- c. the name of the training course provider;
- d. include a statement that the individual has successfully completed the requirements of the training course, including the assessments; and
- e. be signed by a person on behalf of the training provider who can attest to matters in (a) to (d) above.

APPENDIX A – MANDATORY COURSE CONTENT

A training course must cover the following core competencies and assessment requirements.

Component A – Core competencies:

1. Overview and analysis of bespoke elements of the Act, including, but not limited to:
 - a. key differences between the Act and the CCA and/or equivalent security of payment laws;
 - b. endorsement of payment claims made under the Act;
 - c. voiding of unfair notice based time bars;
 - d. the operation of retention money trust accounts;
 - e. making an adjudication determination on the grounds of complexity or frivolous/vexatious payment claims.
2. Practical aspects of, and legal considerations relating to, adjudications and review adjudications arising under the Act including, but not limited to:
 - a. construction contracts to which the Act applies;
 - b. rights to progress payments;
 - c. payment claims and schedules;
 - d. adjudication and review adjudication of payment disputes;
 - e. adjudication fees and expenses;
 - f. rights and obligations in respect of performance security (including right of substitution); and
 - g. questions of jurisdiction to adjudicate.
3. The Code of Practice for adjudicators/review adjudicators to be prescribed by regulations (yet to commence).

Key principles include, but are not limited to, professional ethics, probity, good faith and concepts of natural justice and procedural fairness.
4. Determination-making and writing, including, but not limited to:
 - a. what an adjudicator can/cannot consider in making a determination;
 - b. requirement to give reasons;
 - c. requirements relating to the release of determinations to the parties and the Building Commissioner.
5. Common law principles of contract relevant to adjudicators, key terms of construction contracts, onus of proof, estoppel, rules of evidence and void determinations.

6. Role and functions of the Building Commissioner under the Act.

Component B - Assessment requirement

The course must include each of following assessment components. A course participant must achieve a pass mark in each component before a Certificate of Completion is given. For the purposes of assessing a candidate's competency, the marking of the assessments may be graded or pass/fail.

Assessment	Description
Examination	<p>The examination component must take the form of a written exam, undertaken after candidates have attended the training course. The exam may be undertaken 'in-class' or as a 'take home'.</p> <p>The examination must comprise of the following elements:</p> <ul style="list-style-type: none"> • multiple choice questions; • short answer questions; and • extended answer questions. <p>Candidates must have a reasonable period of time after attending the training course to complete and submit their examination response.</p> <p>The content of the examination should be sufficiently detailed and robust so as to require the candidate to demonstrate a sound knowledge and understanding of the Act.</p>
Mock adjudication	<p>Documentation for a 'mock adjudication' must be issued to candidates from which point they are to have a reasonable period of time to complete an adjudication determination in writing.</p> <p>The mock adjudication documentation must include at least the following documents:</p> <ul style="list-style-type: none"> • payment claim made under the Act in respect to various types of works; • payment schedule; • appointment documentation; • adjudication application; and • adjudication response. <p>The volume and complexity of the mock adjudication documentation should enable the candidate to demonstrate that they are competent to write a reasoned determination.</p>

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