



# The Adjudicator's Guide

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## What Can The Adjudicator's Guide Do For You?

Adjudication is a skill which must be practised, and the Institute of Arbitrators and Mediators Australia believes all adjudicators must be equipped with quality tools so that they may develop their adjudication skills, and deliver reliable and fair adjudication decisions/determinations.

The authors of *The Adjudicator's Guide* are Queenslanders, and the first edition of *The Adjudicator's Guide* was written to satisfy the elements of Queensland's Certificate in Adjudication.<sup>1</sup> For this reason, *The Adjudicator's Guide* has been written directly in response to Queensland's *Building and Construction Industry Payments Act 2004* ('BCIPA'). However, BCIPA is based on similar legislation which has been in effect in New South Wales (in its current amended form) since 3 March 2003, and in respect of which a significant body of case law has developed. The New South Wales legislation is known as the *Building and Construction Industry Security of Payment Act 1999* ('BCISPA').

<sup>1</sup> The elements are prescribed by s3 and Schedule 1 Part 2 of the *Building and Construction Industry Payments Regulation 2004* (Qld), together with further sub-elements which the Queensland registrar has included in IAMA's conditions of registration as a body which may issue a Certificate in Adjudication under BCIPA. The syllabus for the Certificate in Adjudication under BCIPA is included in Part F (Appendices).

Queensland's BCIPA has adopted many features of NSW's BCISPA: some with slight modification. It follows that the case law that has developed in New South Wales provides insight as to how Queensland's BCIPA provisions are likely to be applied. *The Adjudicator's Guide* analyses the Queensland provisions in the light of the New South Wales cases.

BCISPA is also very similar to Victoria's *Building and Construction Industry Security of Payment Act 2002* ('BCISPAV'), with the most significant difference being that BCISPAV allows respondents to provide security for adjudicated amounts, rather than requiring payment of adjudicated amounts directly to the claimant. Western Australian and Northern

Territorian legislation also provides for adjudications of disputed payments for construction work and related goods and services (*Construction Contracts (Security of Payments) Act 2004* (Northern Territory) ('CCANT') and *Construction Contracts Act 2004* (Western Australia) ('CCAWA')).

Although there are many subtle differences between BCIPA, BCISPA, BCISPAV, CCAWA and CCANT, *The Adjudicator's Guide* will provide insight and guidance to adjudicators proceeding under each of these Acts, and a comparative table of the various Acts is included in Part F (Appendices).

### **A Special Note of Thanks**

A considerable amount of effort has been invested in the preparation of *The Adjudicator's Guide*, and the authors particularly wish to thank and acknowledge the contributions of Stephanie Foreman, who assisted with research and drafting of several sections of the first edition. They are also grateful for the assistance generously provided by Jennifer McVeigh, who prepared the section in Part C (How Does the Adjudicator Apply the Contract when Deciding an Adjudication?) Jennifer also provided valuable feedback in relation to other parts of the first edition of *The Adjudicator's Guide*, as did George Strohfeldt.

### **Snapshot of BCISPA's Impact in New South Wales**

Between 3 March 2003 (when BCISPA was amended) and 31 August 2004 (the last available statistical reporting period), there have been 994 Adjudication Applications made in New South Wales: in excess of two applications for each and every business day!

Those applications have ranged in value from approximately \$39.5 million (determined at the full amount of the claim) to as little as \$255. While no direct statistics are available to confirm the volume of claims of various sizes made, it would appear that approximately 20% of all applications are for less than \$10,000 and at the other extreme approximately 20% of all applications are for in excess of \$250,000. Approximately 11% of determinations have been for nil, while approximately 44% of determinations have been for

the full amount of the claim.

The total value of all the above applications is in excess of \$338 million. Determinations having been made for in excess of \$224 million. The value of applications in New South Wales pending determination as at 31 August 2004 was in excess of a further \$27 million.

Analysis of the statistics provides some surprising insights. Of the 994 adjudication applications made only 522 (52.5%) have been for a disputed payment claim. At least 345 applications (34.5%) were made as optional adjudications where no payment schedule had been issued. This is particularly surprising when you consider that in those circumstances the respondent would have had two opportunities to provide a payment schedule, at least one of which on direct notice that an adjudication application will be made! A further interesting fact about the latter applications is that only 74% have been determined for the full amount of the claim.

Even after adjudication, it would appear the respondents have resisted making payment in accordance with the determinations, with 203 Adjudication Certificates (30% of determinations made) having been issued to enforce payment.

Fees are a difficult area as they are proportionately quite significant on the smaller applications and much less so on the larger applications, though it is true to say that on average fees have run at about 12% of the amount of the claim. That 12% has been split approximately 88% / 12% between the adjudicator and the ANA. Of the total fees charged during the period, claimants have contributed approximately 34% and respondents approximately 66%.

As at 1 March 2005, there have also been 79 Supreme Court judgments concerning BCISPA. Of these, 34 judgments were handed down before the amendments of 3 March 2003 were made to BCISPA, and 16 subsequent to the Court of Appeal judgments in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*<sup>2</sup> and *Transgrid v Siemens Ltd*.<sup>3</sup> The judgments have included several summary judgments, including one for approximately \$14 million (*Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd*).<sup>4</sup> Of the 79 judgments, there have been at least 47 associated with matters initially the subject of adjudication. Four adjudicators' determinations were quashed by the court prior to *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport (Emag Constructions Pty Limited v*

*Highrise Concrete Contractors (Aust) Pty Limited*,<sup>5</sup> *Multiplex Constructions Pty Ltd v Luikens*,<sup>6</sup> *Quasar Constructions v Demtech Pty Ltd*,<sup>7</sup> *John Holland Pty Limited v Cardno MBK (NSW) Pty Limited*<sup>8</sup>) and one subsequently injuncted (*TQM v Dasein*).<sup>9</sup>

<sup>2</sup> [2004] NSWCA 394

<sup>3</sup> [2004] NSWCA 395

<sup>4</sup> [2003] NSWSC 266

<sup>5</sup> [2003] NSWSC 903

<sup>6</sup> [2003] NSWSC 1140

<sup>7</sup> [2004] NSWSC 116

<sup>8</sup> [2004] NSWSC 258

<sup>9</sup> [2004] NSWSC 1216

If BCIPA has a similar effect on the Queensland construction industry, it will revolutionise the industry and the procedures used to administer construction contracts.