



GRAHAM MORROW
Member

**Construction Contractor
October 2005**

As legislators work to harmonise the building and construction industry's various Security of Payments Acts around the country, the Institute of Arbitrators and Mediators Australia (IAMA), in conjunction with technology provider Eurofield Information Solutions (EIS), has launched *The Adjudicator's Guide*.

The Adjudicator's Guide is a fully searchable and interactive publication that provides updates and analysis of relevant legislation and case law, together with guidance and practical tips for those using or administering the adjudication process.

Based on Queensland's Building and Construction Industry Payments Act 2004, the Guide has been introduced ahead of imminent changes to the NSW and Victorian Security of Payment Acts.

Using eComPress technology, sections of the publication can be re-cast as the law dictates. The eComPress technology enables the permanent compression of the publication, allowing the Guide to be used off-line in a far superior way than PDF or Web based formats.

Without impacting or threatening the integrity of the actual publication, users can add their own annotations into the publication. When the publication is revised, all personal notes are automatically transcribed, in context, into the new version. Over time users can build up their own intellectual property into the Guide. Phone (03) 9607 6908.



IAMA RRP \$55

Review **The Adjudicator's Guide**

The second edition of *The Adjudicator's Guide* (of the Australian Building & Construction Industry) will be released in October to coincide with the amendment of the *Queensland Judicial Review Act*. The Institute's first eCompress publication is an indispensable tool for adjudicators, reports Graham Morrow.

The Adjudicator's Guide

W Fischer, E Pratt QC and K Reardon (2005 IAMA)

This publication's genesis was a successful effort by the authors in complying with the requirements for Queensland's Certificate in Adjudication, under the *Building & Construction Industry Payment Act (Queensland) 2004*. The title clearly identifies the subject matter contained within, but does not tell the whole story. This publication appears to be a first for several reasons including -

1. IAMA are the publishers.
2. It is more than a book, being an online publication (more accurately a piece of computer software).
3. Purchase of the publication entitles the recipient to automatic updates.
4. Like all books, one can scribble useful notes and cross references into the book.

It comes complete with a *help guide*, for those of us who see computers and technology as a necessary evil (or even just plain evil). This *help guide* shows how to navigate, how to pick up links, search, and even add notes. This can be used, for example, to note any differences in the wording of a section of the NSW or Vic Acts and is most useful. Word Processing features are also available to allow customising of the publication, but not the original text. Readers of the publication can keep up to date by perusing the periodic revisions which were supplied electronically. This facility alone confirms that this technology, allowing instant upgrades, may be preferable to the more conventional loose leaf style or book style of publication. It may explain also the very reasonable subscription price of \$55.

The layout is clear, logical and straight forward. The contents are displayed at the front of the publication and on a side contents screen of readers' computers. The publication totals 180 pages and comprises six parts, including:-

A: Overview of the Act

Not only does the publication refer to cases, it includes their relevant quotes. The number of cases covered is impressive, given the short duration of the various Construction Contract/Security of Payment Acts in Australia. Also impressive is the cross referencing between Queensland and New South Wales Acts; this occurs even in the selected case quotations.

Rather than shrouding adjudication in mystery, the process is explained as simply as possible. This Part helpfully includes a section entitled "*Language of Adjudication*" which gives the special meaning of certain terms in adjudication.

B: Analysis of the Act

This Part commences with a flow diagram of the Queensland Act, a most useful tool for adjudicators and participants in adjudication alike; it is divided into 30 sub-headings which ask many practical questions essential for adjudicators to be aware of, including:-

- What if the payment claim is delivered before the reference date?
- Can reference dates arrive after a construction contract has been terminated?
- Does an adjudicator need to make a finding as to the reference date?

Adjudicators are advised to "keep their blinkers on" in any inspection of the work, there are no allowable frolics or indulgences. Advisers should remember to include any relevant submissions as to costs in the materials submitted for adjudication.

C: Practical Tips for Making a Decision as an Adjudicator

This Part is a real and comprehensive list of "dos and don'ts" for all would be adjudicators and considers:

- Adjudicator's roles and functions
- Conduct of the adjudication by a adjudicator
- Identify the issues
- Making a finding on each issue with reasons
- According the parties natural justice
- Relationship between contractual provisions, relevant contract law and the Queensland Act
- Applying the contract when deciding an adjudication
- Proof
- Formatting the decision and reasons
- Anatomy of a written decision
- Conflict of interest and bias
- No duty of disclosure
- Stepping down
- After adjudicator makes decision

Adjudicators should not forget that the requirements of an adjudication include indicating the due date for payment even when no progress payment amount is due. Likewise the rate of interest applicable needs to be stated even if the progress payment is found to be nil.

Many traps for new adjudicators are identified. Examples include the limits of the materials from which to work from, being the relevant Act, the construction contract, the payment claim/submission, payment schedule and any inspection. The difference with arbitration is made and is no doubt of particular interest to all arbitrator/adjudicator members. With no statement of claim (or agreed facts) the adjudicator must identify every point in dispute - failure to given adequate reasons can be a reason to mount a successful judicial challenge. An adjudicator is reminded to up hold the traditions of integrity and impartiality.

New adjudicators should avoid making any findings unsupported by the material present. Adjudicators should recite details of the application to the ANA, the correspondence referring the application to the adjudicator, the adjudicator's registration and the adjudicator's acceptance of the application. A decision of an adjudicator should also include confirmation of the contract and any disputed items, and the contract provisions applicable where the act nominates an alternative in the absence of an expressed decision. Such a list is a very useful checklist for adjudicators.

Conclusion

This publication is very easy to read and comes in an interesting user friendly format, which none should be fearful of. I have found it very useful. The updateable nature means that the publication will not become obsolete or dangerous to use without further research. The cost of the publication represents exceedingly good value for money. It allows all adjudicators to equip themselves with an indispensable tool of the trade that is adjudication. It is an essential and unique publication to any adjudicator or adviser on adjudication.

With updates and amendments, I believe that this publication will grow over time by encompassing all Acts and associated case law. This will allow it to become a truly national publication; it may become the Australian Adjudicator's Guide.

Graham Morrow is a Solicitor with Downings Legal, Perth.