

# **EXPOSURE DRAFT**

## **CONCILIATION RULES**

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Having considered comments from Members on the draft Conciliation Rules published in the August 1985 issue of "The Arbitrator", the New South Wales Chapter Committee has revised the draft which is reproduced below. Members are invited to forward their comments on this revised draft to the N.S.W. Chapter Administrator.

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### **1. NATURE OF PROCEEDINGS**

(1) This Conciliation is not an arbitration within the meaning of any legislation dealing with commercial arbitration and the Conciliator's assessment is not final and binding upon the parties.

Unless otherwise agreed by the parties, neither this Conciliation nor any assessment or proposed settlement terms made pursuant hereto shall prejudice any right of a party at any time to submit the same dispute to arbitration or litigation.

(2) The Conciliation shall be without prejudice and shall not be relied upon in any other proceedings.

### **2. MODIFICATION OF RULES**

With the agreement of the Conciliator, the parties may modify or exclude any of these rules and may add additional rules for the conduct of the Conciliation.

### **3. PERSONAL INTEREST**

The Conciliator must disclose to the parties any personal interest which he has in the matters of difference between the parties and any dealings or acquaintance with either of the parties. The Conciliator must obtain the parties' agreement that such interest, dealings or acquaintance shall not act as a bar in proceeding in the matter.

#### 4. CONFIDENTIALITY

The Conciliator must observe strict confidentiality with respect to the Conciliation.

#### 5. DISCLAIMER OF LIABILITY

The Conciliator shall not be liable in any respect, either in contract or in tort, for the performance or non-performance of any actions pursuant to these Rules or for the conduct of the Conciliation proceedings.

#### 6. COSTS

Unless otherwise agreed, the costs of the Conciliation shall be borne equally by the parties. All expenses incurred by a party shall be met by that party.

#### 7. CONCILIATOR'S DIRECTIONS

The parties shall in good faith co-operate with the Conciliator and comply with his reasonable directions to attend meetings, provide information and evidence and to submit documents.

#### 8. THE PROCEEDINGS

(1) The Conciliator may determine a suitable place and timetable for the Conciliation and may conduct the Conciliation proceedings in such manner as he considers appropriate, having due regard to the nature and circumstances of the dispute, the wishes of the parties and the need for a speedy and efficient settlement of the dispute.

(2) The Conciliator shall perform his functions impartially, independently, fairly and objectively giving proper consideration to the nature of the dispute, the level of formality under which the Conciliation is being conducted, the interests of both parties and the rights and obligations of the parties with respect to the subject matter of the dispute.

#### 9. INSPECTION

The Conciliator may inspect the site or any other place relevant to the dispute and may inspect or observe any relevant thing, work, operation or process of his own accord or at the request of either party, provided that he has given both parties not less than 1 day's notice to enable the parties to accompany him, if they so wish.

#### 10. REPRESENTATION

Neither party shall be represented by a person with legal qualifications at the Conciliation proceedings unless otherwise agreed by the parties.

#### 11. CONCILIATOR'S ASSESSMENT

In the event that the parties fail to reach a settlement agreement, the Conciliator shall form an assessment on the matters in dispute and shall give reasons for that assessment to both parties. The Conciliator may also make a recommendation to the parties if he so wishes.

## 12. TERMINATION

The Conciliation proceedings may be terminated as follows:

- (1) Either party may terminate the Conciliation, at any time after attendance at the initial meeting convened by the Conciliator, by giving written notice to the other party and to the Conciliator.
- (2) After consultation with the parties, the Conciliator may give written notice to the parties to the effect that further efforts at conciliation are no longer justified and that he shall cease forthwith to act as Conciliator.
- (3) By the parties executing a settlement agreement.

## 13. SUBSEQUENT PROCEEDINGS

After the termination of the Conciliation proceedings, the Conciliator shall not accept appointment as arbitrator or act as advocate or expert witness or otherwise provide assistance on behalf of one of the parties in any subsequent arbitration or litigation related to the subject of the Conciliation proceedings.

## **CONCILIATION RULES EXPLANATORY NOTES**

### 1. BACKGROUND

Many disputes between contracting parties could be resolved quickly and economically with the assistance of a skilled independent third party as a Conciliator. The Institute of Arbitrators Australia has developed appropriate procedures, training and administrative facilities to make such services readily available.

### 2. CONCILIATION SERVICES

At the request of parties in dispute, the Chairman of the State Chapter of IArbA will appoint a Conciliator, and the Institute will provide appropriate administrative services and advice. The Institute maintains panels of members willing to act as Conciliators, who are qualified and experienced in conciliation procedures. When making an appointment, the Chairman will select a panel member with appropriate skill and experience in the technical and practical aspects of the matters in dispute.

### 3. INITIATION OF CONCILIATION

Conciliation procedures may be initiated in accordance with the terms of an express provision in the contract between the parties; by a joint submission to the Institute after a dispute has arisen; or by the parties themselves agreeing on a Conciliator.

### 4. FUNCTIONS OF THE CONCILIATOR

The Conciliator will perform the functions requested of him by the parties, as appropriate to the particular type of dispute. These functions may include any one or more or part of the following:

- attempt to obtain a compromise agreement from the parties to settle the dispute;

- provide an assessment of the respective rights and obligations of the parties under their agreement or otherwise and at law;
- value work performed or services rendered;
- provide an assessment of quality or performance;
- provide an opinion as to whether work is defective;
- give an opinion as to the probable outcome of arbitration or litigation proceedings on the dispute;
- review any decision of an architect, engineer, superintendent, construction manager, project manager or similar;
- provide a determination on the matters in dispute;
- make an assessment of damages;
- propose and prepare the terms of a settlement agreement;
- any other appropriate function expressly requested of him by the parties.

## 5. THE PROCEEDINGS

Upon his appointment, the Conciliator may request each party to submit to him and to the other party a brief written statement describing the nature of the dispute and the points at issue. At any time during the proceedings the Conciliator may request further written submissions, including settlement proposals, which may be supported by any documents or evidence which the party considers to be appropriate. Either party may, at any time, submit proposals for settlement.

Unless the parties have agreed upon the place where meetings with the Conciliator will be held, the Conciliator may determine a suitable place having regard to the nature of the dispute. After consultation with the parties, the Conciliator will determine a timetable for the proceedings.

It is anticipated that no recordings or transcripts will be made of the proceedings other than notes taken by the parties and the Conciliator for their own use. In certain cases, however, full recording may be appropriate and so required by the Conciliator.

The parties will not be represented by persons with legal qualifications unless otherwise agreed.

The Conciliator may conduct the proceedings in such a manner as he considers appropriate, having regard to the nature of the dispute, the wishes of the parties, and the desirability of a speedy and just settlement of the dispute.

The Conciliator shall perform his functions impartially, independently, fairly and objectively, giving proper consideration to the nature of the dispute, the level of formality required by the proceedings, the interests of both parties and the rights and obligations of the parties with regard to the matter in dispute.

## 6. SETTLEMENT

Either party or the Conciliator may at any stage in the Conciliation proceedings make proposals for a settlement of the dispute. If the parties reach agreement on the terms of a settlement of the dispute, the Conciliator shall draw up the settlement agreement or assist the parties in doing so. The Conciliator may at any stage in the Conciliation proceedings make proposals for a settlement of the dispute.

## 7. COSTS

Unless otherwise agreed by the parties, each party will pay half the costs and expenses of the Conciliation. These costs and expenses will include the following:

- administrative fee payable to the Chapter of the IArbA for nomination of Conciliator and administration of security deposits;
- Conciliator's fees which, unless otherwise agreed, will be charged at an hourly rate as recommended from time to time by the IArbA;
- any travelling or other expenses properly incurred by the Conciliator in the discharge of his duties;
- any costs properly incurred for room hire for the proceedings.

## 8. DEPOSITS

Where the proceedings are initiated by a joint request from the parties, both parties will lodge deposits for security of the costs of the Conciliation as required with the submission.

Where the reference is initiated by one party pursuant to an express provision in a contract, deposits will be lodged accordingly. During the course of the proceedings, the Conciliator may direct that supplementary deposits be lodged by each party in equal amounts. On termination of the proceedings, the Conciliator will render an account to the parties of the costs and return any balance of moneys then held as deposit, or require further payments if the amount on deposit is insufficient to cover the costs. ■

# **HAVE YOU CHANGED YOUR ADDRESS?**

**If so, have you advised the Institute?**

**If no, please do so—We would like to hear  
from you.**