



## **GUIDE TO CONCILIATION PROCEDURE**

1.1. The main difference between Conciliation and Arbitration is that the outcome of a Conciliation is not imposed and only becomes binding with the consent of each party. Conciliation therefore allows the parties to the dispute the freedom to explore ways of settling the dispute with the assistance of an independent impartial person – the Conciliator.

Unlike an arbitration which goes through several stages before progressing to a hearing and which may take several months before an award is published, conciliation is a speedy process. Normally, a conciliation process will take a period measured in days rather than weeks or months. Conciliation is essentially an assisted negotiation.

1.2. The aim of Conciliation is to reach an agreed solution. If for any reason such an agreed solution does not prove possible, then the Conciliator is required to make a Recommendation as to how, in his opinion, the matter should be settled.

1.3. Because the aim is to reach a settlement, the Conciliation proceedings are conducted on a “without-prejudice” basis. That means that everything disclosed by any party during the proceedings, or stated or written by the Conciliator to the parties in the course of the Conciliation which is the subject of legal privilege, may not be used in evidence by the other party in any subsequent proceedings (whether arbitration or litigation) unless both parties agree otherwise.

1.4. The ITAA Procedure permits the Conciliator to communicate privately and separately with each party and, unless specifically authorised, the Conciliator will not

subsequently reveal to any other party what he has been told; this is a procedure which is not available to an arbitrator or judge.

1.5. The Conciliator's job is to explore with the parties their interests; to find their strengths, weaknesses and needs; to identify possible areas of accommodation or compromise; and to search for possible alternative solutions. Solutions may be explored which could lead the parties to an agreed settlement. Where the Conciliation follows an Engineer's Decision, the parties are equally free to explore options that were not available to the Engineer.

1.6. The information given to the Conciliator is not given under oath or affirmation; it need not be comprehensive; and there is no cross-examination. The Conciliator is not bound by the rules of evidence and will be guided only by what the parties choose to tell him and by his own professional knowledge and experience.

1.7. If the parties can reach a settlement on the whole of the dispute(s) or any part thereof by way of interim agreements, the Conciliator will assist them to ensure that any such agreement is recorded in writing in a form which is enforceable. If all the Parties so agree, the Conciliator may be appointed as an arbitrator for the purpose of issuing a consent award or otherwise. The Conciliator shall not accept appointment as arbitrator in connection with or arising out of the related Contract in any other circumstances. If agreement cannot be reached, the Conciliator will make a Recommendation on the unresolved portion of the dispute(s) not subject to interim agreement.

1.8. If no Party rejects the Recommendation by notice in writing to the Conciliator and to the other Party within two weeks of the date of receipt of the Recommendation or within such other period as the Contract entered into by the Parties may specify, then the Recommendation becomes final and binding on the Parties. It is important to realise that for the Recommendation to be rejected, a decision has to be made by someone to make such rejection and to assume the responsibility for the consequences of so doing.

1.9. The Recommendation is not comparable to the award of an Arbitrator or the judgement of a Court. The Recommendation is the Conciliator's opinion of how the dispute might be resolved in the most practical way.

1.10. Conciliation may be used at any time, by the agreement of the Parties, to resolve disputes that arise, but it also can be used as a stage in the dispute resolution process.

1.11. Conciliation is mandatory in some standard Conditions of Contract and may be used with other conditions with the agreement of the Parties. Such agreement may be either before or after the contract is formed.

1.12. If it is agreed to refer a dispute to Conciliation under a Contract which does not include a provision for the referral of disputes to Conciliation, it is important to check the timetable under the dispute resolution clauses to ensure that any limits stated therein will not be exceeded because of the Conciliation. If there is such a likelihood, the agreement to conciliate should include provision for suspending such a timetable for the period of the Conciliation.

1.13 If, in the case of a Contract which does not include a provision for the referral of disputes to Conciliation, it is agreed by the Parties to refer a dispute to Conciliation, then any appointing authority to be named in the Conciliation Agreement between the parties must give prior consent to being so named. The President of ITAA will always consent if the ITAA Procedure is used