

Australian Capital Territory

# Workers Compensation (Conciliation Protocol) Approval 2005 (No 1)\*

Notifiable Instrument NI2005—145

made under the

*Workers Compensation Regulations 2002*, r 47 (Approval of conciliation protocol)

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I approve the *Conciliation Protocol for the ACT Workers Compensation Scheme* for use as a protocol about the administration of conciliations and the costs and disbursements of, and incidental to, conciliations for the ACT workers compensation scheme.

Katy Gallagher

Minister for Industrial Relations

Dated 20 April 2005.

\*Name amended under Legislation Act, s 60



## ***WORKERS COMPENSATION ACT 1951***

### **CONCILIATION PROTOCOL FOR THE ACT WORKERS COMPENSATION SCHEME**

This protocol is intended for the use of conciliators, injured workers, employers and their representatives for the conciliation process.



***OFFICE OF INDUSTRIAL RELATIONS  
CHIEF MINISTER'S DEPARTMENT***

## **Introduction**

This protocol has been developed to assist conciliators, injured workers, employers, insurers and their representatives with the conciliation process of the ACT Workers Compensation Scheme.

The protocol reflects the provisions of the *Workers Compensation Regulations 2002*.

The ACT Government acknowledges the New South Wales, Victorian State Governments, the Australian Industrial Relations Commission and Jennifer David & Associates for granting permission to source the following documents:

- Registrar's Guideline for the Conciliation/ Arbitration Process in the Workers Compensation Commission (NSW),
- Resolving Workers Compensation Disputes: the conciliation process (VIC), and
- Australian Industrial Relations Commission's conciliation process.

## **What is conciliation?**

Conciliation helps resolve issues and disputes arising from a claim for workers compensation to ensure that injury management for an injured worker can continue. Research into the relationship between compensable injuries and the legal system shows that filing an application for arbitration usually results in the cessation of injury management.

To improve outcomes for injured workers, their employers and the general community, it is essential that the focus of the workers compensation scheme be early intervention with appropriate rehabilitation that results in a durable and safe return to work.

Conciliation has been introduced to prevent legal issues from impeding the injury management process.

## **Who is a conciliator?**

A conciliator is an impartial person appointed by the Minister who has no particular alliance to injured workers, employers, or insurers. The conciliator has expertise in dispute resolution relating to workers compensation.

## **When must conciliation be held?**

When a dispute arising from a worker's claim for workers' compensation occurs a conciliation must be held before the injured worker, employer or insurer makes an application for arbitration of the matter.

Once a claim for compensation is accepted an injured worker and/or the worker's employer and/or the insurer may have a dispute over any part of the claims process. For instance disputes can occur about the amount of weekly benefits, or over different expectations about an injury management program such as medical treatment, medical assessments, details of a personal injury plan, rehabilitation and the return to work plan for the injured worker.

Conciliation is not available if the insurer has rejected a worker's claim for compensation. The rejection of a claim for compensation is a matter which must be resolved by the parties or through arbitration.

## **Who requests the conciliation?**

Any party to a dispute arising from a claim for workers compensation including the injured worker, the employer, or the employer's insurer, or the injured worker's representative, can contact a conciliator directly and seek a conciliation. .

## **What must a conciliator do when requested to convene a conciliation?**

When a conciliator receives a request to assist the parties to a dispute to reach agreement, the conciliator must, as soon as practicable, set a time and place for the conciliation and write to both parties notifying them of the time and place of the conciliation.

The conciliator will also request three copies of relevant information and three copies of an overview of the issue(s) (the written details documents) that each party believes is causing the dispute. The letter should note the date the information is due with the conciliator.

The letter from the conciliator should also set out the intent of the conciliation process, the ground rules and the procedures.

### **Service of documents**

Information about the time, date and place of conciliation may be given to a person directly, or by post, fax or email.

Documents relevant to the conciliation may be served at the home or business address of the person by leaving them with someone who appears to be at least 16 years old and live at that address or be employed at that address.

In the case of a corporation or an agency, the documents may be served on an executive officer of the corporation/agency or to the usual fax number or email address of any of the corporation's registered offices or agency's usual places of business.

### **Evidence of service of documents**

There is a rebuttable presumption that documents sent by prepaid post to an address in Australia are received on the fourth day after posting.

Documents faxed or emailed are presumed to be served on the recipient unless the equipment used to send the document gives an indication that the document/message was not sent; or it transpires that the fax number or the email address are not in fact the fax number or email address of the recipient.

### **General principles**

It is expected that all parties and their representatives will adhere to the following general principles. They should:

In presenting their party's case, adhere to that party's instructions, prior to and during proceedings.

Honestly represents the party to the proceedings, i.e., not knowingly put forward any information that is untrue, or assist or encourage a party to do anything, which is dishonest, or misrepresents known facts.

Behave courteously and respectfully to the other party, and his or her representative, and the conciliator.

Not engage in behaviour that could reasonably be perceived to be inappropriate, unprofessional, or an abuse of process.

## **Sharing relevant information on the issue**

At least seven days before the date scheduled for the conciliation, each party to the conciliation must give to each other party and the conciliator written details of the matters in issue arising from the worker's claim for compensation. This is referred to as the **written details document** and should explain or describe the nature of the issue and why it is causing difficulty for the party.

The written details document must include information that the party reasonably believes would assist all parties to the conciliation to reach agreement about the matter. This means that the information should include possible options for resolving the issue.

If a party to the dispute does not provide information relating to the dispute, then the conciliator could conclude that the party has not made a genuine effort to reach an agreement that allows injury management to continue for the injured worker. The conciliator may then make a recommendation about the matter.

## **Actions by conciliator upon receipt of written details documents – medical referee**

Upon receiving the information from the parties, the conciliator must then decide whether a medical referee's report would assist the process. The conciliator must obtain the agreement of both parties before asking a medical referee to prepare a report to help the parties to reach agreement.

### **Medical referee's report**

If a medical referee is asked to prepare a report for a conciliation, then the medical referee must—

- (a) review the medical evidence about the injured worker; and
- (b) review any relevant approved medical guidelines or clinically relevant research about the worker's injury; and
- (c) apply the referee's clinical expertise to the review under paragraphs (a) and (b); and
- (d) do a medical assessment of the worker, unless the referee considers it unnecessary.

The medical referee's report must state—

- (a) the results of the referee's assessment of the aetiology or diagnosis of, or the prognosis or recommended medical treatment for, the worker's injury; and
- (b) if the referee's assessment differs from the medical evidence about the worker's injury—
  - (i) how the assessment differs and why; and
  - (ii) why the referee's assessment is preferable; and

(c) if the referee considered it unnecessary to assess the worker—why the referee did not consider it necessary.

The medical referee must give the report to the conciliator.

The conciliator must give a copy of the report to each party.

Representatives of parties to the conciliation should not communicate directly with the medical referee appointed by the conciliator to undertake a medical assessment.

### **Who should attend the conciliation?**

The injured worker and the employer and/or insurer must attend the conciliation.

Any of the parties to a conciliation may have a representative attend with them. Representative may include a partner, spouse, friend, colleague, union official, solicitor, employee of employer or an officer of a corporation.

### **Parties must make genuine effort to agree**

The workers compensation scheme is focused on providing injury management for injured workers. Therefore, at conciliation, the parties must make a genuine effort to reach an agreement that allows injury management to continue for the injured worker. This means that either of the parties to the conciliation may have to compromise regarding a particular aspect of the injured worker's treatment under the injury management program.

It is also expected that representatives of both parties will:

- assist the worker and/or employer to understand and participate in the conciliation process;
- cooperate fully in exploring a durable agreement with the other party; and
- inform the worker and/or employer if in the representative's opinion, it is in that party's best interests to accept a compromise/agreement, that in the representative's opinion is reasonable.

### **What happens in conciliation?**

Generally, each conciliation session will have a set duration; it is recommended that a session takes no longer than one and a half hours. At the start of each session the conciliator will explain the conciliator's role and the manner in which the session is to follow.

Having read the accompanying documentation before the conciliation commences the conciliator will be familiar with the content of the dispute and will have identified the areas of disagreement as well as any areas of potential agreement.

The conciliator's role is to steer the process in order to achieve agreement. The conciliator will ask each party to briefly outline their area of dispute including what happened and any relevant facts they would like to have considered. The conciliator may then allow each party to ask questions to enable a discussion of any issues arising from the dispute.

The conciliator role is to ensure that both the injured worker and employer have equal opportunity to contribute to the discussion.

Conciliation may include negotiation between the parties who may remain in separate rooms throughout the process. However, this will depend on the individual style of the conciliator and views of both parties.

By identifying common ground, the conciliator is able to suggest agreements, give evaluations of the acceptability and workability of agreements. If a conciliator forms the view that an agreement reached by the parties is unfair or clearly not in the interests of one or more of the parties they can veto agreements.

### **Decision or recommendation by conciliator**

It is likely that there will be disputes where the conciliator forms the view that a matter is not suitable for resolution by conciliation.

If the parties establish an agreement outside the conciliation, the conciliator must be satisfied that the agreement is appropriate and both parties genuinely agree. An agreement of this type must be in writing.

If the parties establish agreement during the conciliation, the parties must, with the help of the conciliator, record the agreement in writing.

If the parties cannot reach agreement by the completion of the conciliation, the conciliator may make a recommendation about the matter.

### **Confidentiality of conciliation**

The written details documents, evidence given during a conciliation, or anything said or done during conciliation, cannot be admitted in evidence at arbitration.

However, any recommendation by the conciliator may be admitted in evidence at arbitration.

### **Who pays for conciliation?**

The insurer must meet all costs and disbursements of, and incidental to, the conciliation.

If a party is represented at conciliation by a representative (including a solicitor), the conciliator may allow the representative to claim from the insurer reasonable costs and disbursements of, and incidental to, the conciliation.



It is expected that the reasonable cost of legal representation for a party to the dispute at a conciliation will be limited to the engagement of a solicitor.

For the purposes of conciliation, reasonable costs must not exceed 2/3 of the prescribed scale of costs set out in the Supreme Court Rules, schedule 3.

### **What may happen next?**

If an injured worker and employer have participated in a conciliation and either the matter was not resolved at the conciliation or the conciliator decided that the matter was not suitable for conciliation, then the injured worker or the worker's employer may file an application for the arbitration of a matter in issue arising from the worker's claim for compensation.