



Consumer and Commercial Division Guideline August 2017

Conciliation and hearing by the same Member

What does this Guideline explain?

1. This Guideline applies when the same Member acts as a conciliator in a dispute in the Consumer and Commercial Division and, if the matter fails to resolve, conducts a hearing (or continues to conduct a hearing) and decides the application.

Definitions

2. Definitions that explain words or concepts used in this guideline are at the back of the guideline.

What is conciliation?

3. The Tribunal has a duty to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible. Where it considers it appropriate to do so, the Tribunal may use (or require parties to use) a resolution process such as conciliation to resolve or narrow the issues between them.
4. Conciliation is an informal process designed to produce agreed outcomes that are lawful and acceptable to both parties.
5. When matters are listed for hearing in metropolitan areas, a Deputy Divisional Registrar or a different Tribunal Member to the Member hearing the matter (referred to as a “Conciliator”) will often be available to assist the parties to resolve their dispute.
6. A Conciliator will generally not be available to assist parties where a matter is listed for hearing in a regional area.

When will the same Tribunal Member attempt to conciliate a dispute and hear the matter if the dispute is not resolved?

7. Where there is no allocated Conciliator, the Tribunal may use the same Member to both conciliate and hear a matter. This is in order to implement the Tribunal’s objectives of promoting the use of resolution processes and resolving the issues in dispute in a manner that is just, quick and cheap.

What process will be used where a Member is conciliating a dispute?

8. When attempting to conciliate a dispute that the Member may later proceed to hear, the following process will be adopted:

- a) The Member will explain the conciliation process to the parties in accordance with Tribunal procedures.
 - b) The Member will establish with the parties that there are no serious impediments to attempting to resolve the matter by conciliation.
 - c) The Member will explain to the parties that she or he will proceed to hear the matter if conciliation is unsuccessful.
 - d) The parties may leave the hearing room and attempt to resolve the dispute on their own.
 - e) Alternatively, the Member may facilitate discussions between the parties to assist resolution.
 - f) The Member will not provide legal advice or opinion to the parties. However, legal questions and issues may be canvassed with the parties.
 - g) Should the parties reach an agreement and both parties are present at the hearing in person rather than by telephone, the Member will have the parties sign a written agreement.
 - h) The Member will confirm that the agreed settlement is one which the Tribunal has power to make.
 - i) The Member will confirm the agreement is voluntary and that the parties understand the agreement.
 - j) The Member will explain to the parties that the agreed settlement will be made into legally binding orders to give effect to the agreed settlement.
 - k) The Member will formally make orders in accordance with the agreement.
 - l) If the Tribunal does not have power to make orders to give effect to the agreed settlement or to aspects of the settlement, the Member will note the agreement in the record of those orders which the Tribunal has power to make.
9. This process will be carried out in the hearing room in the presence of the parties.

What happens if the matter is not settled in conciliation?

10. If a matter is not resolved by conciliation the following procedure will apply:
- a) The Member will advise the parties that the conciliation process has been concluded.
 - b) The Member will ask the parties whether they are ready to proceed to have their matter heard.
 - c) If the Member has taken part in the conciliation of the matter, the Member will ask the parties if they object to the Member proceeding to determine the matter.
 - d) After considering any objections raised, the Member will determine whether she or he will conduct the hearing or adjourn the matter to a later date before another Member.
 - e) If the matter is ready to proceed to hearing, the Member will outline to the parties that:
 - i) the proceedings are no longer private and confidential and, where recording equipment is available, will be recorded;
 - ii) any statements that were made or any concessions given in conciliation cannot be raised at the hearing unless both parties agree;

- iii) any settlement offers made in conciliation by either party cannot be raised during the hearing and
- iv) the inability to informally resolve the dispute by conciliation will not affect the outcome of the hearing.
- f) When the hearing begins the Member will enquire of the parties whether there is agreement about any facts and issues so that only those issues still in dispute need to be determined at hearing.
- g) Where the parties are not ready to proceed to hearing or the Member decided she or he will not conduct the hearing, the Member will make any necessary procedural directions to prepare the matter for hearing on the next occasion.

What do some of the words in this Guideline mean?

- **Act:** *Civil and Administrative Tribunal Act 2013*
- **Conciliation:** An alternative dispute resolution process in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings.
- **Hearing:** A hearing, final hearing, interlocutory hearing, directions hearing, conclave or mediation.
- **party:** A person or entity involved in a particular case or joined to the proceedings under section 44 of the Act. The Tribunal calls the person or entity that brings an application 'the applicant' and the person or entity they seek orders against 'the respondent'.
- **Registrar:** The Principal Registrar or any other person employed as a Registrar of the Tribunal.

This Guideline applies to:

Proceedings in the Consumer and Commercial Division of the Tribunal.

Effective Date

1 August 2017

Notes

You must use the latest version of this Guideline. The latest version of this Guideline is on the [NCAT website](#).

The law about the information in this Guideline is mainly in:

- Sections 36(1), 37 and 59 of the *Civil and Administrative Tribunal Act 2013*

There is a copy of this Act on the [NSW Legislation website](#).

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