



Industrial Relations Commission  
of New South Wales

# The IRC's new Workplace Conduct Jurisdiction

Justice Jane Paingakulam, Deputy President  
Deputy President Janet McDonald

2 September 2026

# Opening Remarks





## Today's seminar will:

- Provide an overview of the reforms to the Workers Compensation Scheme which have resulted in the IRC entering the arena.
- Provide an overview of the IRC's function in determining Relevant Conduct.
- Explain the IRC's practice and procedure for Workplace Conduct proceedings.



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# Overview of the Relevant Conduct Reforms



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# Relevant Conduct Reforms

- In 2025 and 2026, the NSW Government passed the:
  - *Workers Compensation Legislation Amendment Act 2025* (NSW);
  - *Workers Compensation Legislation Amendment (Reform and Modernisation) Act 2026* (NSW); and
  - *Workers Compensation Legislation Amendment Regulation 2026*.
- The parts of the Amending Acts and the Regulation that concern the IRC's new jurisdiction commenced 1 July 2026.





# Reforms

- The Amending Acts, among other things, make the IRC a gateway for certain psychological injury claims before the matter can proceed, if it needs to, to the Personal Injury Commission.
- The reforms do not apply to coal miners, certain volunteers, and those defined as an exempt worker, which includes police officers, paramedics and firefighters.



# Psychological Injuries - Pre July 1



- Psychological Injuries were treated as ‘injuries’ within the meaning of the *Workers Compensation Act 1987 Act*, s 4.
- ‘Psychological injury’ was defined in s 11A(3) as: “an injury (as defined in section 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system.”
- A worker who had received a psychological injury had to demonstrate, like any injured worker, that the injury arose out of or in the course of employment (s 4) and that their employment was a substantial contributing factor to the injury (s 9A).
- Respondents could defend a psychological injury claim on the basis that the injury was wholly or predominantly caused by “reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal discipline, retrenchment or dismissal of workers or provision of employment benefit to workers”: s 11A(1).

# Psychological Injuries - Post 1 July 2026

- A **primary psychological injury** will only be compensable if it is caused by one or more **relevant events**.
- The **relevant event** must have a real and direct connection to the employment.
- The employment must be the main contributing factor to the injury.





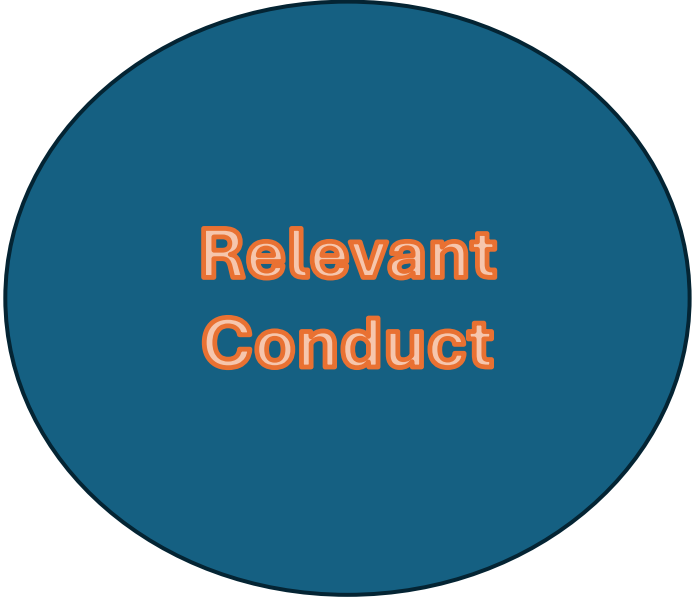
# Primary Psychological Injuries

- A “psychological injury” means an injury that is a mental or psychiatric disorder that causes behavioural, cognitive or psychological dysfunction: *1987 Act*, s 8D.
- A “**primary psychological injury**” is one that is not a “secondary psychological injury”: *1987 Act*, s 8C.
- A “secondary psychological injury” is one that arises as a consequence of, or secondary to, a physical injury: *1987 Act*, s 8H.



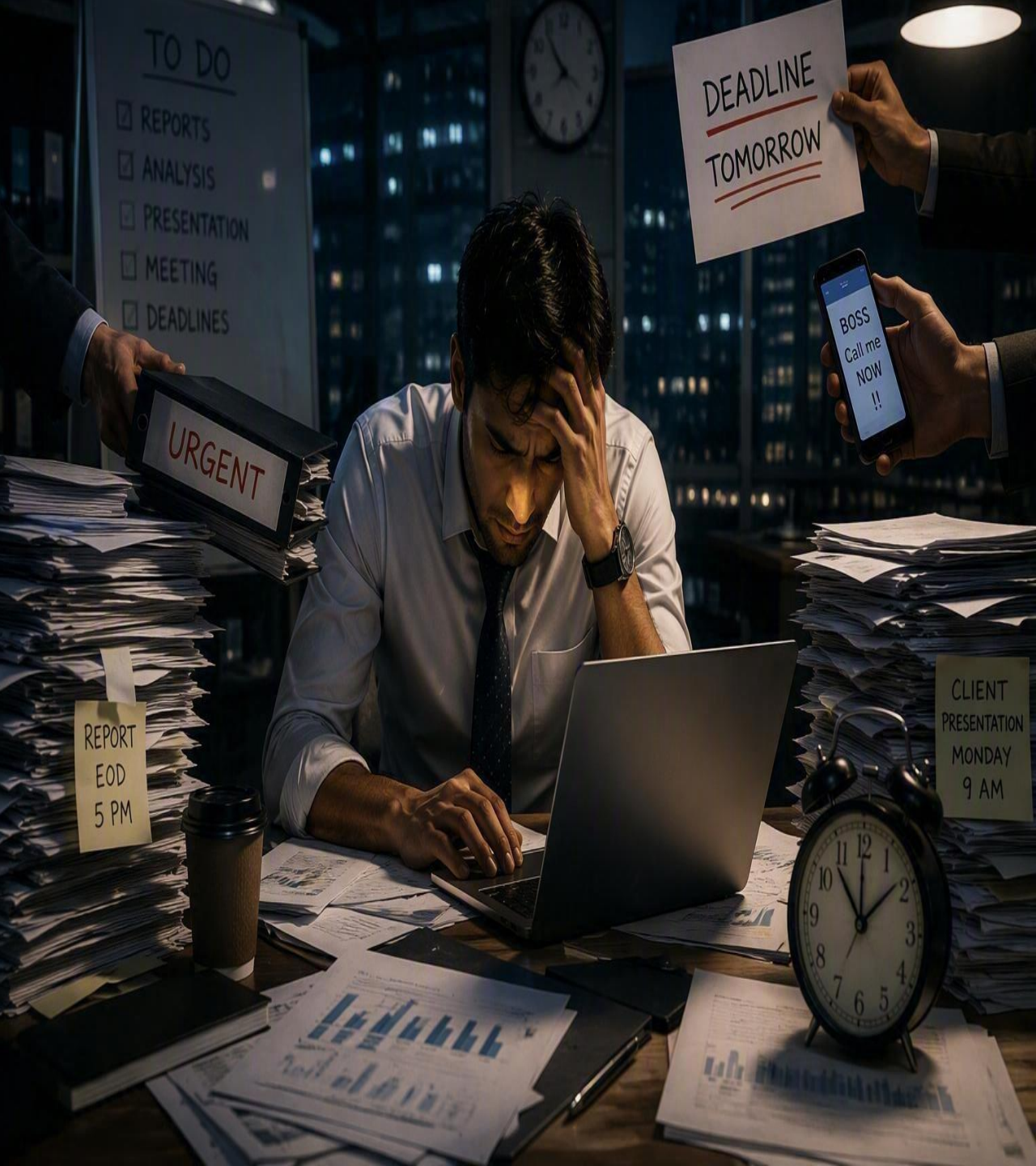
# Relevant Events (1987 Act, s 8G):

- being subjected to an act of violence or a threat of violence, or
- being subjected to indictable criminal conduct, or
- witnessing—
  - a traumatic incident happen, or
  - a dead or seriously injured person at the scene of a traumatic incident, or
- experiencing vicarious trauma, or
- being subjected to **sexual harassment**, or
- being subjected to **racial harassment**, or
- being subjected to **bullying**, or
- being subjected to **excessive work demands**, or
- another event prescribed by the regulations.



Relevant  
Conduct





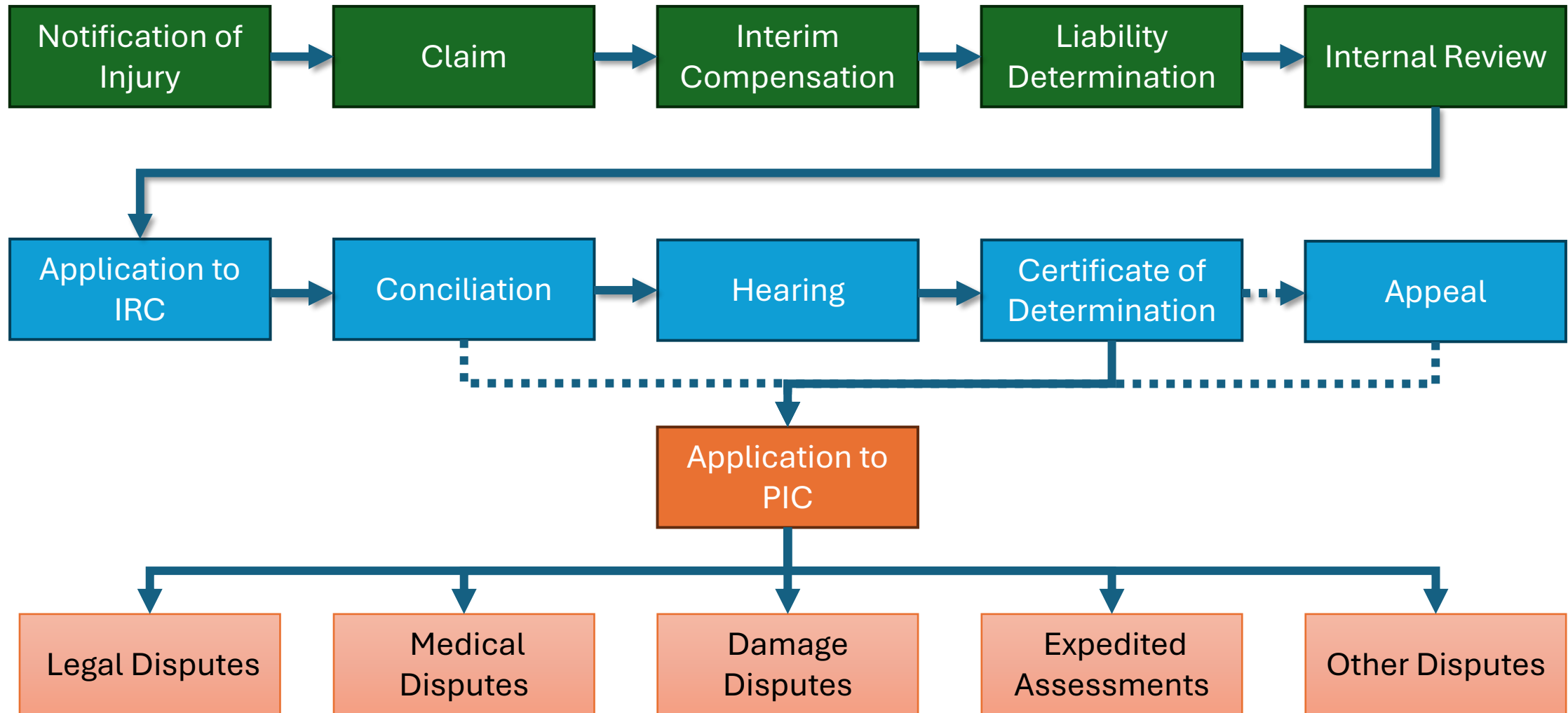
# Relevant Conduct

- sexual harassment, or
- racial harassment, or
- bullying, or
- excessive work demands.

If a primary psychological injury is caused by being subjected to **relevant conduct** it is defined to be a **relevant injury**: *Workplace Injury Management and Workers Compensation Act 1998, s 280AB.*



# The new claims process for Relevant Injuries





# The IRC Gateway

## 1998 Act, s 280AH,

- If the insurer disputes a claim for a **relevant injury** on the basis the conduct the subject of the claim was not **relevant conduct**, (whether or not the insurer also disputes the claim on other grounds), the claimant must obtain a determination from the IRC that the conduct was **relevant conduct** before they may proceed to PIC for a determination on any other issues.
- This is the extent of the IRC's jurisdiction.





# The IRC's Functions 280AH(3)

The IRC may:

- resolve the dispute about whether the conduct was relevant conduct by conciliation, or
- if the dispute about whether the conduct was relevant conduct cannot be resolved by conciliation—
  - determine whether the conduct was or was not relevant conduct, and
  - give a certificate (a certificate of determination) about the matters determined by the IRC.





# The role of the IRC

The IRC's jurisdiction is limited to conciliating the dispute about whether the conduct the subject of the claim was relevant conduct and making a determination that relevant conduct did, or did not, occur.





# NOT the role of the IRC

It is **not** the IRC's role to determine:

- whether the applicant has actually suffered a primary psychological injury or any injury;
- whether relevant conduct caused the alleged injury; or
- whether there is a real and direct connection between the relevant event or series of relevant events and the worker's employment.





# Not the Role of the IRC

It is **not** the IRC's role to determine:

- whether the employment was the main contributing factor to the primary psychological injury;
- whether the worker is entitled to compensation (including by reason of the claim having been made out of time), or the amount or type of compensation the worker is entitled to.



# After the IRC

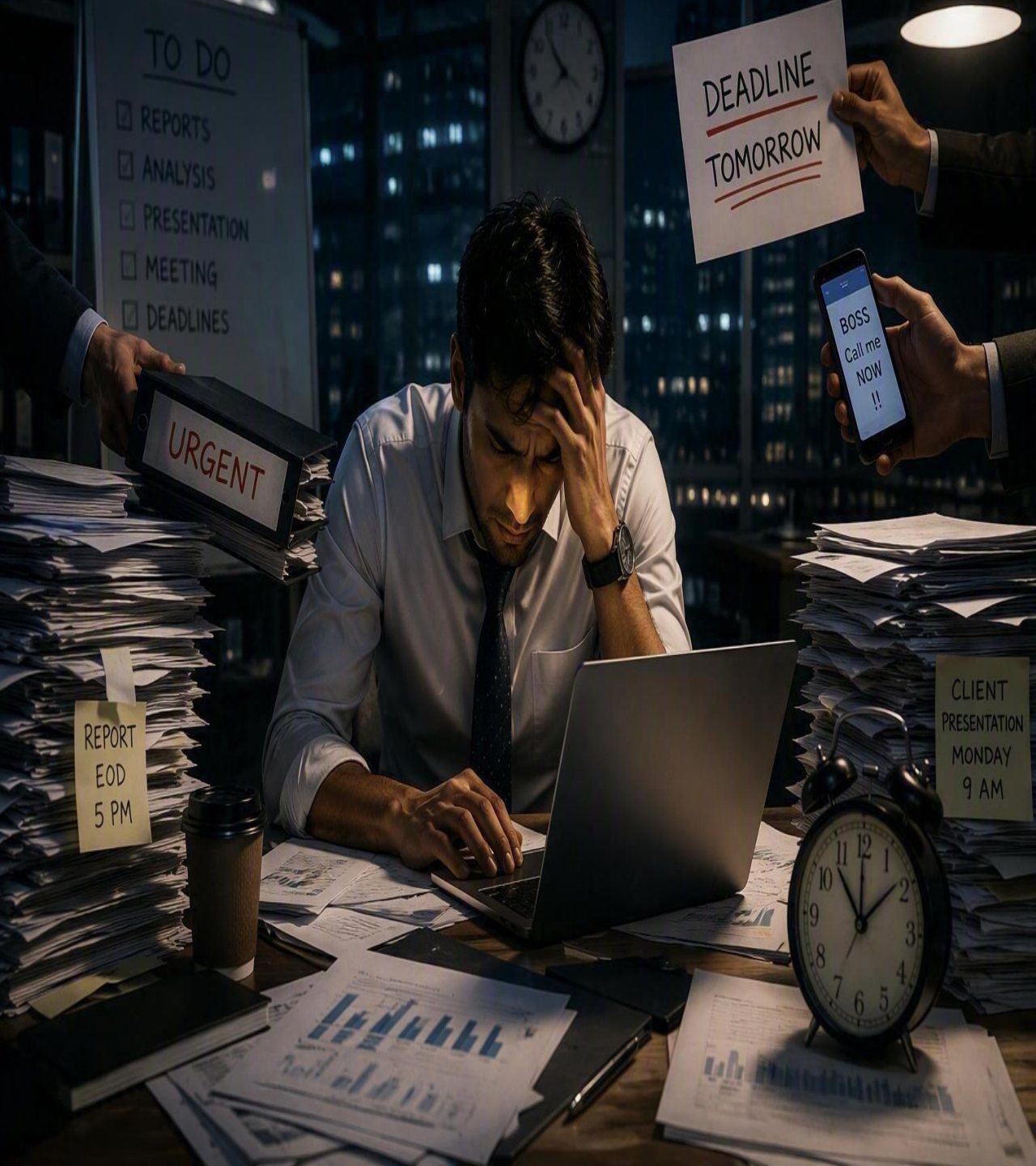
- If the IRC decides the conduct was not relevant conduct, no further compensation is payable to the worker in relation to the injury: *1987 Act*, s 280AI(1).
- If the IRC decides the conduct was relevant conduct:
  - the worker must give a copy of the certificate of determination to the insurer, and
  - the insurer must, not later than 7 days after receiving the certificate, issue a decision notice about the claim.
  - If the insurer accepts liability for the claim for the relevant injury, the worker is entitled to compensation from the date the claim was made.
  - If the insurer continues to dispute liability for the claim for the relevant injury, the dispute must be referred for determination by the Personal Injury Commission.





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# Relevant Conduct



# To recap ... Relevant Conduct

Is being subjected to:

- **sexual harassment, or**
- **racial harassment, or**
- **bullying, or**
- **excessive work demands.**



# Bullying

- *1987 Act s 8A:*

Bullying in relation to a worker, means an individual or a group of individuals repeatedly behaving unreasonably towards the worker or a group of workers of which the worker is a member.



# Sexual harassment

*1987 Act s 81:*

In this Act, sexual harassment, in relation to a worker, means a person who makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the worker or engages in other unwelcome conduct of a sexual nature in relation to the worker.



# Racial harassment

*1987 Act s 8E:*

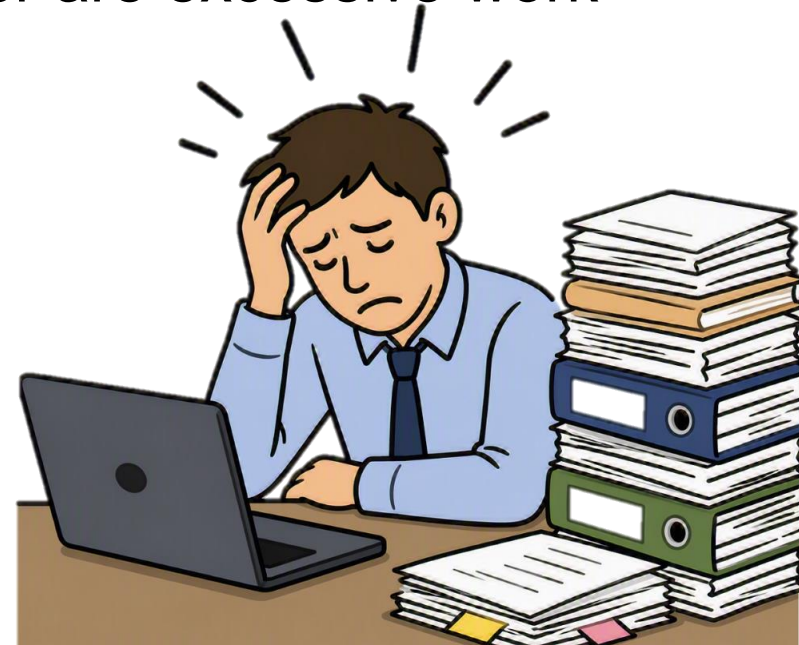
In this Act, racial harassment, in relation to a worker, means an act that is—

- (a) reasonably likely in all the circumstances to offend, insult, humiliate or intimidate the worker, and
- (b) done because of the race, colour or national or ethnic origin of the worker.



# Excessive work demands

- *1987 Act* s 8B:
  - ...work demands that are—
    - (a) beyond the requirements expected of the worker's role, and
    - (b) repeated or persistent, and
    - (c) not reasonable in all the circumstances.
- Section 8M sets out a non-exhaustive list of matters that **must** be considered in determining whether work demands made of a worker are excessive work demands.





# Determining Relevant Conduct

There is no limit to the matters to which the IRC may have regard, however:

- An objective test must be applied – *1987 Act*, s 8L.
- Regard may be had to any evidence from the employer that the conduct was reasonable management action.
- Likely that regard will be had to the matters or circumstances an insurer must take into account when determining whether an injury is a primary psychological injury for which compensation is payable as set out in reg 42I.



# Objective Test – 1987 Act, s 8L

In determining whether an act or omission amounted to a worker being subjected to bullying, excessive work demands, racial harassment or sexual harassment that caused a primary psychological injury—

- (a) an objective test must be used, and
- (b) the worker's perception of the relevant event is relevant, but only to the extent the worker's perception of the event is reasonable, and
- (c) consideration must be given to the matters prescribed by the regulations.

Note— In applying an objective test under this section, the conduct that constitutes the act or omission is taken to occur in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, insulted, humiliated, intimidated or otherwise consider the act or omission to amount to being subjected to bullying, excessive work demands, racial harassment or sexual harassment.



# Reasonable Management Action

- The IRC may have regard to any evidence from the employer that the conduct was **reasonable management action** taken or proposed to be taken by the employer when determining whether conduct the subject of the claim was or was not relevant conduct.
- *1987 Act*, s 8F(1): Reasonable management action means management action:
  - (a) taken in a reasonable way, and
  - (b) that is reasonable in all the circumstances.
- Section 8F(2) sets out, without limitation, actions which, if taken in a reasonable way and reasonable in all the circumstances, will amount to reasonable management action.



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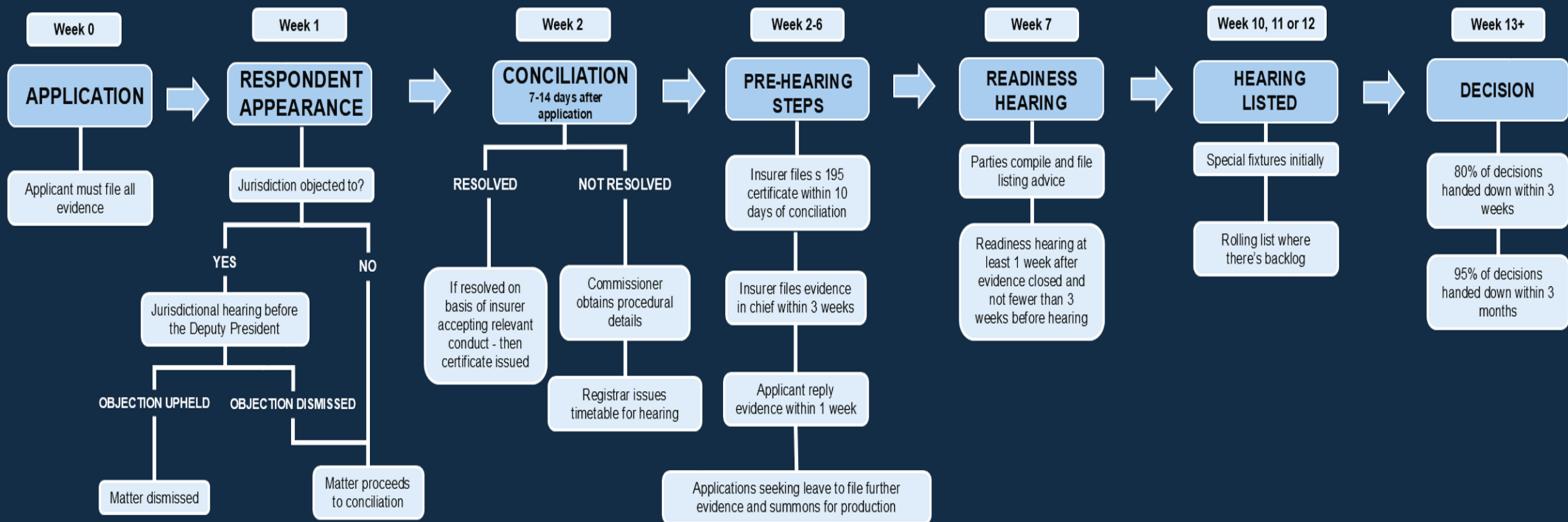
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# Practice and Procedure before the IRC



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# Sources of Information and Important Documents

- The IRC's Website – <https://irc.nsw.gov.au/my-legal-problem/workers-compensation-workplace-conduct-proceedings.html>
- Practice Note 38: Workplace Conduct Proceedings
- Practice Note 32 – Filing, Length, Presentation and Formatting of Documents and Courtbooks
- Practice Note 33 – Use of Generative Artificial Intelligence (GEN AI)





# Sources of Information and Important Documents

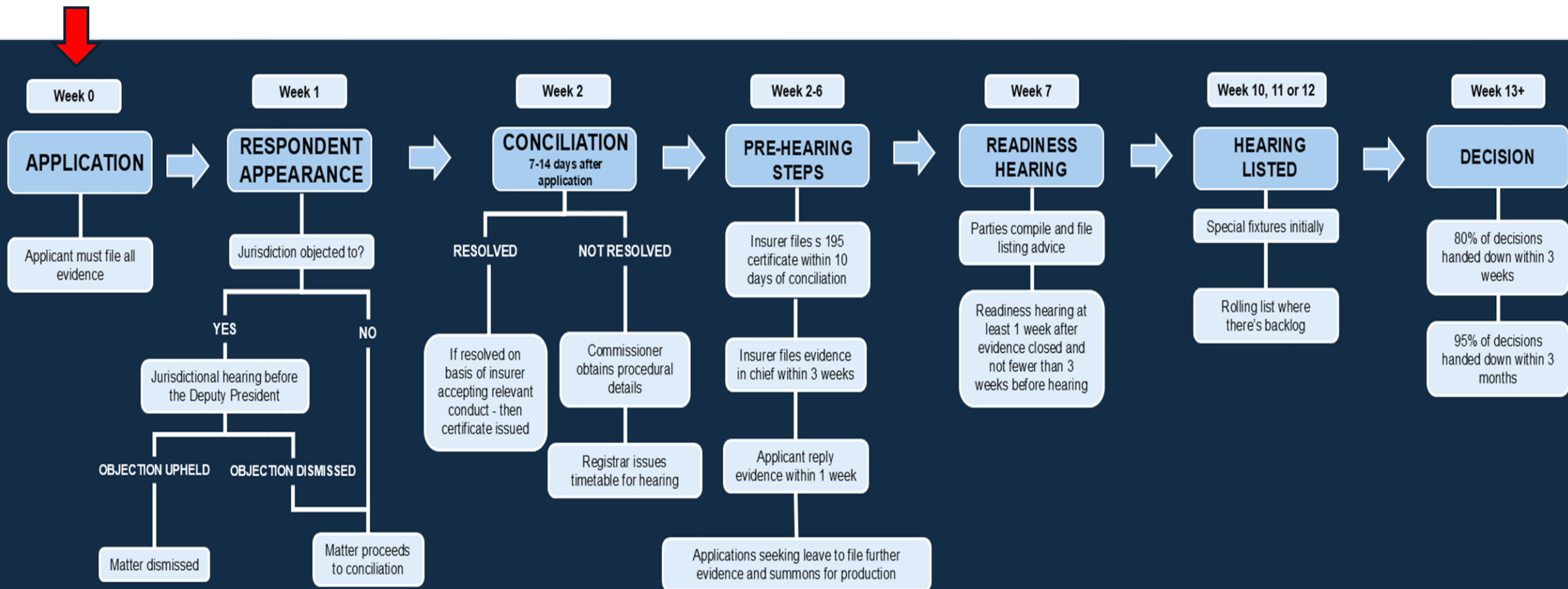
- *Industrial Relations Act 1996*
- *Industrial Relations Commission Rules 2022*, especially Part 7E
- IRC Form 67 - Application to determine relevant conduct
- IRC Form 68 - Appearance – Workplace Conduct Jurisdiction
- IRC Form 69 – Certificate pursuant to *1987 Act*, s 195
- Readiness Hearing Listing Advice





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# Application



# Application - IRC Rules, r 7E.2

To initiate proceedings, Applicants must file:

- an application in the approved form – Form 67 – Application to Determine Relevant Conduct;
- a copy of the applicant's claim as made to the insurer, including annexures to the extent the annexures describe the relevant conduct;
- a copy of the insurer's review decision under the *1998 Act*, s 280AE(5) disputing the claim or an aspect of the claim; and
- **all evidence in chief – failure to file evidence in chief may result in an application being rejected in accordance with UCPR 4.10(4).**

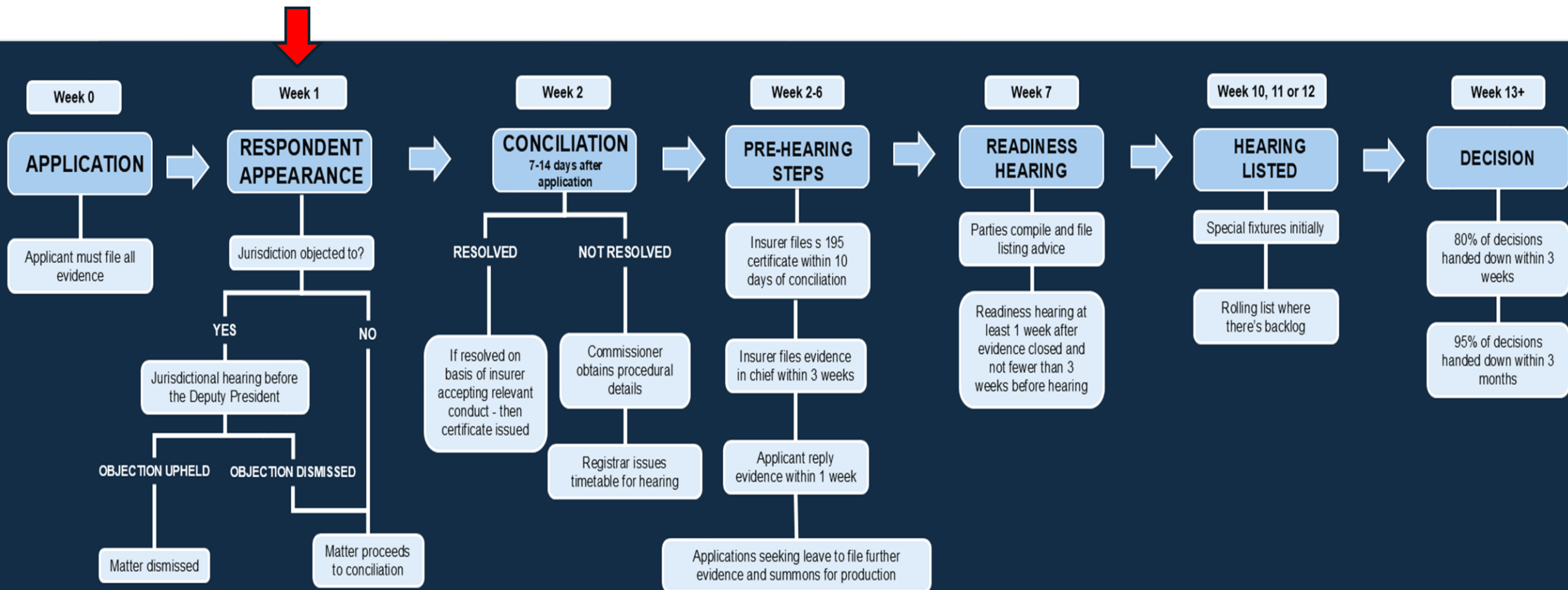
After filing the documents, the applicant must serve copies on each other party as soon as practicable. Service may be by email if the insurer or employer uses email to communicate with the applicant about the claim: IRC Rules, r 7E.6.





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# Appearance



# Appearance – IRC Rules, Part 4 and Rule 7E.3

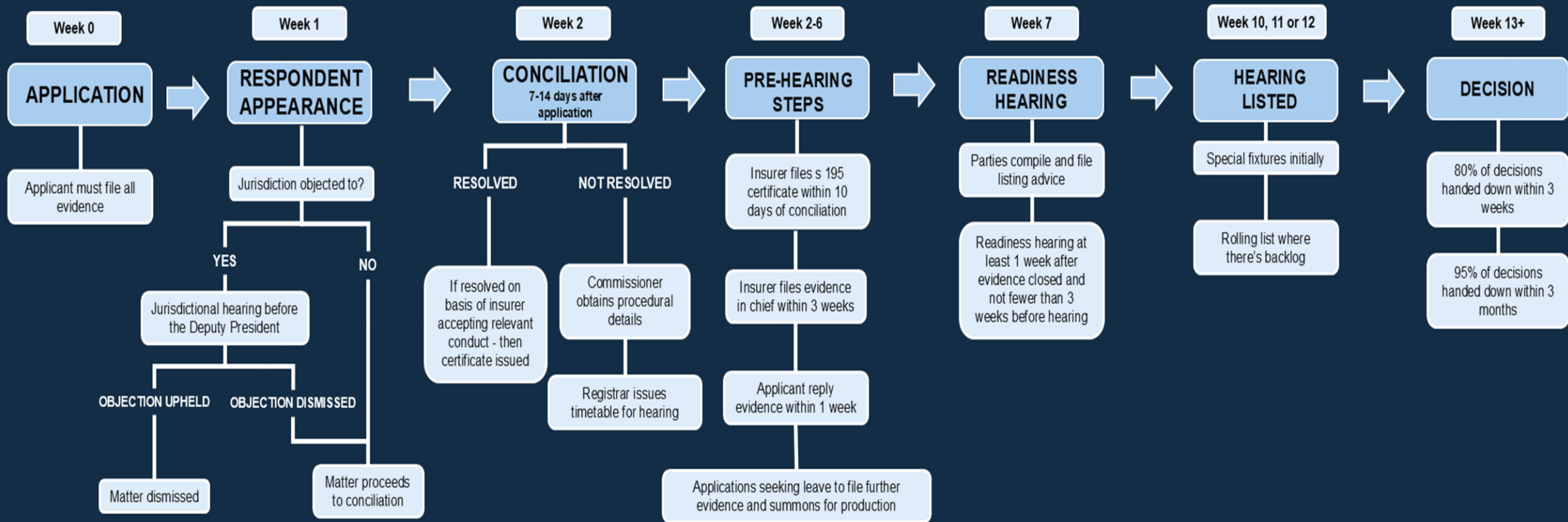
- A Notice of Appearance must be in the approved form – Form 68.
- Respondents, by their Notice of Appearance can indicate whether they take a jurisdictional objection.
- A jurisdictional objection may also be taken subsequently by Notice of Motion.
- Jurisdictional hearings will be held, ideally, before conciliation, and ordinarily within 14 days of the Appearance/Notice of Motion being filed.





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# Conciliation



# Conciliation – PN 38 [17] – [27]

- Ordinarily listed for conciliation within 14 days of the Application being filed.
- Webex will be used for conciliations.
- In exceptional circumstances, conciliations will be held in person.
- Ideally no longer than 1 ½ hours.
- Ideally only one conciliation listing per matter.
- Parties may make a joint application that the matter proceed directly to a hearing if there are no prospects of the resolution at conciliation – see PN 38 [15] for the procedure to be followed.



# What is being conciliated?

- The IRC is only empowered to conciliate the relevant conduct aspect of the dispute: *1998 Act*, s 280AH(3).
- IRC is not empowered to issue a Certificate of Determination or make consent orders that go beyond whether the conduct the subject of the claim was, or was not, relevant conduct.
- Parties may therefore still need to go to PIC to have the claim finalised.



# At the conclusion of an unsuccessful conciliation:

- The Applicant may seek leave to file further evidence (PN 38 [28]), which will ordinarily be heard and determined immediately by the presiding member.
- The presiding member will obtain procedural details from the parties and then refer the matter to the Registrar for listing of the hearing dates and programming of the matter for hearing. Such details will include but need not be limited to:
  - the expected length of the hearing;
  - the expected number of witnesses to be called at any hearing;
  - dates on which the parties are unavailable for hearing; and
  - whether either party will exercise the right pursuant to s 173 of the *IR Act* to have a different member of the IRC conduct the hearing.



# Further conciliations

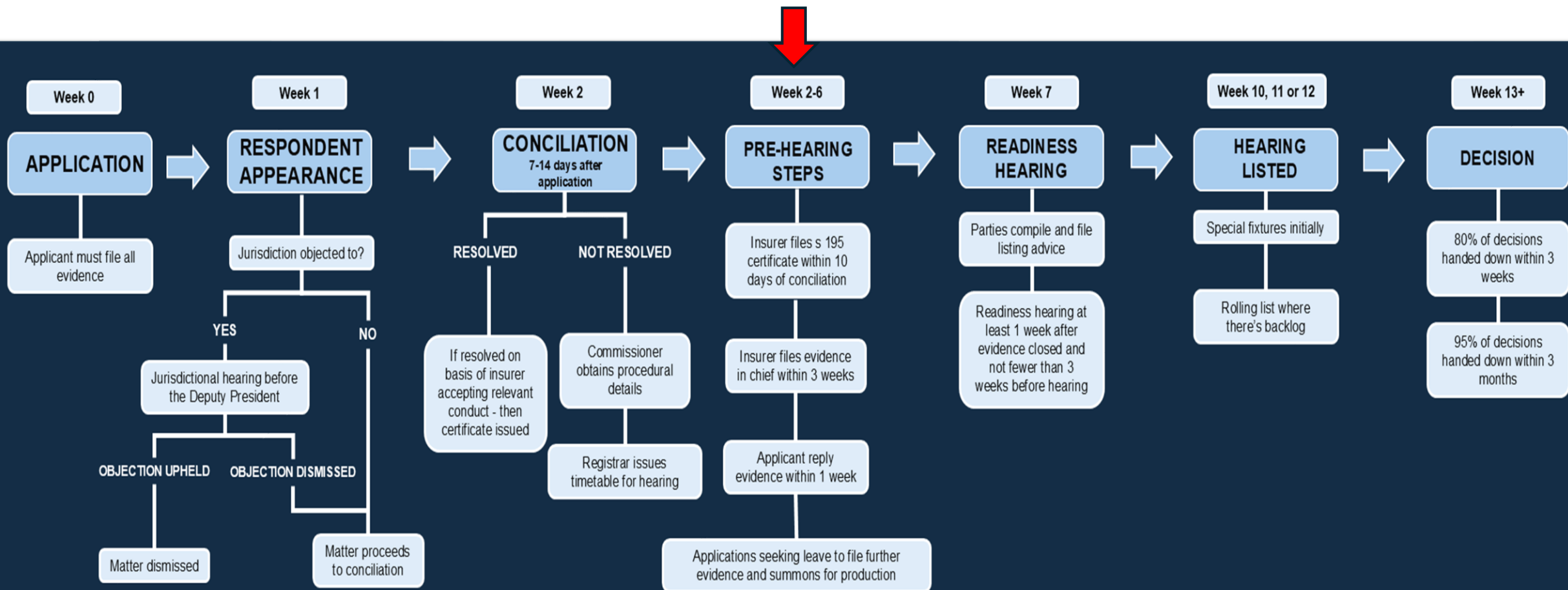
- Following a failed conciliation, and the listing of the matter for hearing, the parties may make an application to have a matter removed from the hearing list if the parties consider that the matter would benefit from further conciliation or private mediation.





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# Pre-Hearing Steps



# Timetabling

- After conciliation, the matter will be referred to the Registrar for timetabling.
- Usual directions can be found in Annexure A to Practice Note 38
- Some directions are made by reference to the “relevant date”.
- The “relevant date” is either the last day of the unsuccessful conciliation, or the day the applicant is to file any further evidence in chief in accordance with an order of the Commission.
- The matter may be listed for hearing before a different member than the member who conducted the conciliation, regardless of whether a party has exercised their rights under *IR Act*, s 173.



# Standard Timetable

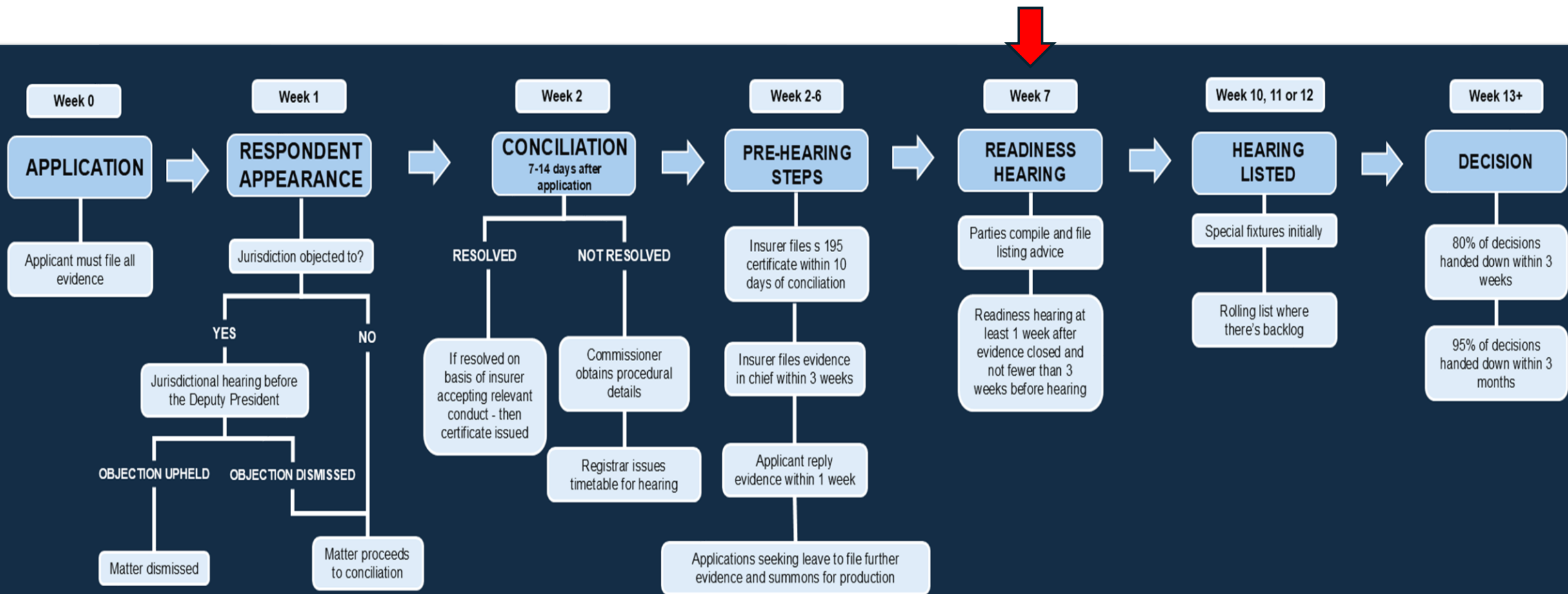
- The applicant is to file and serve its outline of submissions of no more than 10 pages in length within 7 days of the relevant date.
- Insurers must file a certificate pursuant to s 195 of the *1987 Act* that certifies reasonable prospects of success within 7 days of the relevant date – IRC rules, r 7E.4;Form 69.
- The respondent must file and serve its outline of submissions of no more than 10 pages in length and all evidence in chief within 3 weeks of the relevant date.
- The applicant must file and serve any evidence in reply and its reply submissions within 7 days of the respondent's filing and service of evidence in chief.





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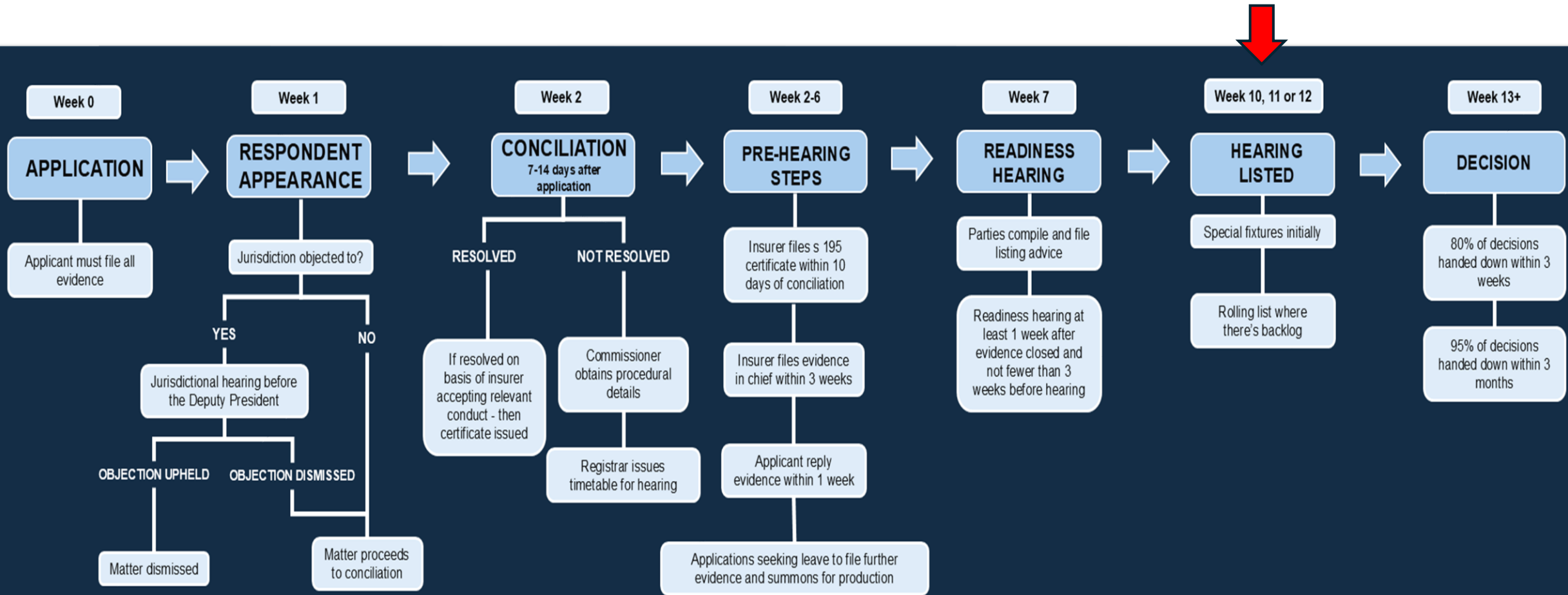
# Readiness Hearings



# Readiness hearing

- Held at least 1 week after the evidence has closed and to the extent possible, no fewer than 3 weeks before hearing.
- At present the intention is that readiness hearings will be held in person, and counsel are expected to appear, as the purpose is to identify and resolve any issues that may prevent the matter being efficiently finalised on the listed hearing date(s).
- Parties are to complete, file and serve on one another a Readiness Hearing Listing Advice (PN 38, Annexure B and IRC general forms page) in accordance with the timetabling orders made by the Registrar.







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# Hearings



# Conduct of Hearings

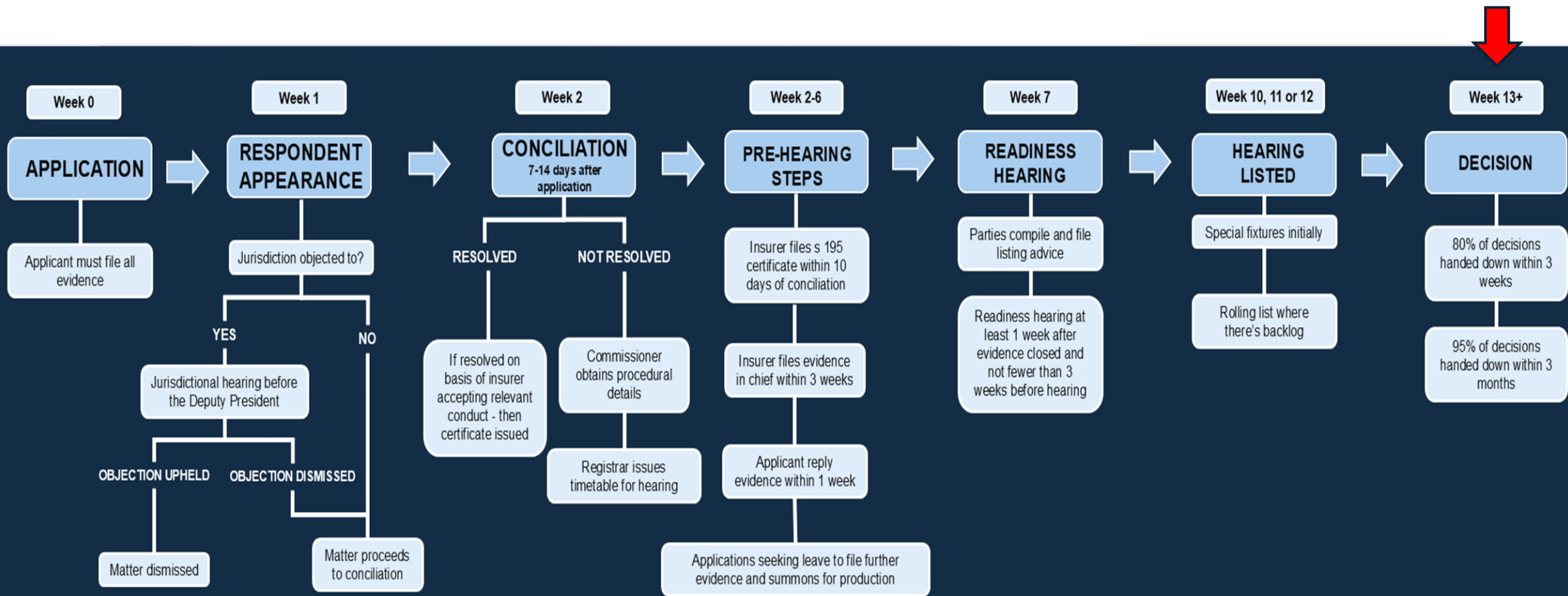
- For the most part, held in the usual manner.
- Evidence is to be given by way of signed statements or affidavits along with any relevant annexures or exhibits.
- Without prior leave of the IRC no further evidence may be adduced by either party.
- It may be appropriate for some matters to be determined on the papers, but this is likely to be rare.





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# Certificates of Determination





# Certificates of Determination

- If the matter resolves at conciliation or following a hearing, the Commission must give a Certificate of Determination.
- The Certificate of Determination must:
  - Set out the details of the determination and the reasons for determination;
  - Be in the approved form – a form has been approved by the President for use by members





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# Some Issues to be Aware of

## ***Evidence Act 1995, s 128***

- *IR Act*, s 162(2) and (3) confirms *Evidence Act 1995*, s 128 (privilege against self-incrimination) applies to Commission proceedings, despite the rules of evidence generally not applying in the Commission.
- Be alive to the potential for the conduct or elements of the conduct alleged to have been engaged in by a witness to involve a criminal offence and whether s 128 is engaged and a certificate under that provision may need to be issued.



# Section 164A – Non-Disclosure Orders

- PN 38 alerts parties to the need to apply for s 164A orders, where appropriate, before the conclusion of proceedings to enable the application to be considered before a determination is published.
- Applications may be made however, after the conclusion of the proceeding, but may not be dealt with urgently.
- Applications must be made by way of a motion and supporting affidavit unless leave has otherwise been granted by the Registrar or member to make the application in another way.



# Interaction between Workplace Conduct Jurisdiction and Stop Bullying and Sexual Harassment Jurisdictions and Other Jurisdictions

- If proceedings are commenced in both jurisdictions of the IRC consideration may need to be given as to whether it is in the interests of justice to hear and determine the matters together.
- If proceedings are commenced in another jurisdiction, the IRC may need to consider, on application, whether it is in the interests of justice for the proceedings to be stayed pending resolution of the other proceedings.





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# Questions