PRACTICE NOTE NO 38

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

Issued pursuant to Section 185A of the *Industrial Relations Act 1996*

and Section 15 of the *Civil Procedure Act 2005*

WORKPLACE CONDUCT PROCEEDINGS

PURSUANT TO CHAPTER 7, PART 3, DIVISION 3A OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*

COMMENCEMENT

1. This Practice Note commenced on 6 July 2026. This amendment is effective from 27 July 2026.

APPLICATION

2. This Practice Note applies to applications to determine relevant conduct made under s 280AH of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) ('**workplace conduct proceedings**').

3. The purpose of this Practice Note is to set out the procedure for the filing, listing, and hearing of workplace conduct proceedings.

COMMENCEMENT OF PROCEEDINGS AND APPEARANCES

4. A workplace conduct proceeding must be commenced by filing Form 67 – Application to Determine Relevant Conduct. It can be filed by email to IRC.Registry@courts.nsw.gov.au. Alternatively, Form 67 may be filed in person or by post in accordance with r 2.5 of the Industrial Relations Commission Rules 2022 (NSW) (IRC Rules). It is intended that the Application to Determine Relevant Conduct form will be able to be filed using the Online Registry, and once that is possible, it can only be filed by email if, by reason of system error, it cannot be filed using the Online Registry.

5. Pursuant to IRC Rules, r 7E.2, at the time the Application to Determine Relevant Conduct is filed, an applicant must also file:

    a. a single, paginated, PDF document containing:

        i. a copy of the applicant's claim as made to the insurer (including any annexures, to the extent they describe the conduct that is claimed to be relevant conduct); and

ii. a copy of the insurer's review decision under the *Workplace Injury Management and Workers Compensation Act 1998*, s 280AE(5), disputing the claim or an aspect of the claim; and

b. all evidence in chief, with each statement or affidavit with its annexures or exhibited documents being filed as a single PDF document, with each page consecutively numbered from the first page of the statement or affidavit.

6. After filing the documents required to commence proceedings, the applicant must serve copies of those documents on each other party to the proceedings as soon as practicable in accordance with IRC Rules, r 7E.6.

7. A failure to file evidence in chief with an application in accordance with IRC Rules, r 7E.2 may result in an application being rejected, in accordance with Uniform Civil Procedure Rules (UCPR), r 4.10(4).

8. Within 7 days of being served with an application, a respondent must enter an Appearance – Workplace Conduct Jurisdiction, in accordance with IRC Rules, r 7E.3.

9. The respondent must, by that form:

a. indicate whether it takes a jurisdictional objection and identify the nature of the objection; and

b. briefly state the basis upon which the claim is disputed.

JURISDICTIONAL OBJECTIONS AND APPLICATIONS FOR SUMMARY DISMISSAL

10. An application for summary dismissal of the proceeding pursuant to UCPR 13.4 is to be filed with any supporting evidence and an outline of submissions.

11. If a jurisdictional objection is taken in the appearance form, or an application for summary dismissal filed, the matter will be listed for hearing before a member, ordinarily within 14 days of the filing of the respondent's appearance or the application for summary dismissal.

12. A request to delay or change the date or time set for the jurisdictional objection or summary dismissal hearing requires a written application, which copies in the other party or parties and includes their views on the application. Applications of this nature will be granted only on clear and compelling grounds. The consent of the other party or parties to the proceedings will be a factor taken into account, but is not determinative.

13. The jurisdictional objection will be determined by reference to the materials filed by the applicant, unless the respondent makes a successful application for leave to rely on further material. The need for further written submissions or an in person hearing will be determined by the presiding member. Parties should be prepared for the matter to be heard on the first listing day.

ALLOCATION OF LISTING DATE FOR CONCILIATION

14. A workplace conduct proceeding will ordinarily be listed for conciliation before a member of the Commission within 14 days of the application being filed, or if a jurisdictional objection has been taken, within 14 days of the determination of that objection.

15. The Commission may vacate the conciliation and proceed to list the matter for hearing on receipt of a joint written application of the parties if the Commission considers there are no prospects of resolution at conciliation. Any such application must be by consent and must include the information which would have been obtained by a Commissioner at the end of an unsuccessful conciliation as listed in paragraph 28(a)-(c). In considering whether to grant the application, the Commission will have regard to:

    a. whether each party is legally represented;

    b. the nature and extent of any negotiations or discussions that the parties have had; and

    c. any other factor the Commission considers relevant.

16. A request to delay or change the date or time set for the conciliation requires a written application, which copies in the other party or parties and includes their views on the application. Applications of this nature will be granted only on clear and compelling grounds. The consent of the other party or parties to the proceedings will be a factor taken into account, but is not determinative.

CONCILIATION

17. Parties who appear before the Commission should do all they can to assist the Commission to facilitate the just, quick and cheap resolution of matters before the Commission.

18. The Commission will ordinarily conduct conciliations online via audio-visual platforms such as Webex. In exceptional circumstances and on application, conciliations may be conducted in person.

19. Unless there is good reason not to, the Commission will grant leave for parties to be represented at the conciliation by an Australian legal practitioner.

20. The Commission expects that the parties or their representatives will make contact with the opposing party prior to the conciliation to attempt to narrow the issues in dispute and to explore the basis on which the dispute might be resolved.

21. Applicants are to attend the conciliation whether or not they are represented. The respondent or a representative of the respondent is encouraged to attend the conciliation in addition to the insurer of the respondent or a representative of the insurer. Respondents, including those who are legally represented, must ensure that there is a person in attendance at the conciliation with the power to make decisions to enable the resolution of the dispute.

22. At the conciliation parties and their representatives will be expected to:

    a. identify the real issues in dispute;

    b. express the basis on which they are willing to resolve the dispute; and

    c. use their best efforts to resolve the issues in dispute.

23. In most cases, there will only be one conciliation. If the Commissioner forms a view during the conciliation that there are prospects of settlement that would be enhanced by more time, the Commissioner can stand the conciliation down to a later time that day, or to a later date, to be conducted either in person or by audio-visual platform

such as Webex. If the Commissioner forms the view that the presence of an appropriately empowered officer of the respondent employer would assist in the resolution of the dispute, the Commissioner may require the attendance of that person at a conciliation.

24. Following a failed conciliation and the listing of the matter for hearing, the parties may make an application to have the matter removed from the hearing list and the timetable for hearing vacated, if the parties consider that the matter would benefit from further conciliation or private mediation. Applications must be made in writing. Applications may be made by email where the application is by consent of all parties, or otherwise by motion in the usual way. If the application is granted, the hearing and timetable will be vacated and the matter will be listed for report back by the Registrar on a date after the conciliation or mediation.

25. If the matter resolves at conciliation or following private conferences or mediation, on the basis of the insurer accepting that the conduct the subject of the claim was relevant conduct, or the worker accepting that there was no relevant conduct, the Commissioner will issue a Certificate of Determination to that effect, if it is satisfied it is appropriate that such a Certificate be issued.

26. If the matter resolves on any other basis, the proceedings will either need to be discontinued in accordance with UCPR, r 12.1 or dismissed.

27. If the dispute does not resolve at conciliation, the presiding Commissioner will consider and determine any application by the applicant to file further evidence in chief at the conclusion of the conciliation, where such an application is made. The Commissioner will also obtain procedural details from the parties and refer the matter to the Registrar for listing of the hearing dates and programming of the dispute for hearing. Such details will include but may not be limited to:

    a. the expected length of the hearing;

    b. the expected number of witnesses to be called at any hearing;

    c. dates on which the parties are unavailable for hearing; and

    d. whether either party will exercise the right pursuant to *Industrial Relations Act* (IR Act), s 173 to have a different member of the Commission conduct the hearing.

PROGRAMMING FOR HEARING

28. After the matter is referred to the Registrar, the Registrar will make directions in chambers, programming the matter for hearing in accordance with Annexure A.

29. Pursuant to IRC Rules, r 7E.4, a respondent must file and serve Form 69 - Certificate Pursuant to Workers Compensation Act 1987, section 195 by the date directed by the Registrar which will ordinarily be 10 days after the conciliation.

30. The matter may be listed for hearing before a different member of the Commission than the member who conducted the conciliation, regardless of whether a party has exercised their rights under IR Act, s 173.

READINESS HEARINGS

31. Readiness hearings will be held at least 1 week after the evidence has closed, and to the extent possible, no fewer than 3 weeks before the hearing date. A matter may have more than one readiness hearing.

32. Prior to the readiness hearing, parties must each complete, file and serve on one another a Readiness Hearing Listing Advice. The time for filing and serving this document will form part of the programming orders made in the matter. The template for the Readiness Hearing Listing Advice is located at Annexure B of this Practice Note.

33. Counsel briefed to appear at the hearing are expected to appear at the readiness hearing, as its purpose is to identify and resolve any issues that may prevent the matter from being efficiently finalised on the listed hearing date(s).

EVIDENCE AND PRESENTATION OF DOCUMENTS FOR TENDER IN THE PROCEEDINGS

34. Evidence in the proceedings is to be given by way of signed statements or affidavits along with any relevant annexures or exhibits filed and served by a party.

35. Artificial Intelligence (AI) must not be used to generate statements, affidavits or annexures to those documents. Consistent with Practice Note 33, every statement and affidavit prepared for workplace conduct proceedings must include a declaration confirming that AI was not used to generate, draft, strengthen, rephrase or otherwise alter the witness's evidence, or to generate any annexure to the statement or affidavit.

36. As set out at paragraph 5, the applicant's evidence in chief must be filed with the Application to Determine Relevant Conduct, and each statement or affidavit with its annexures or exhibited documents must be filed as a single PDF document, with each page consecutively numbered from the first page of the statement or affidavit.

37. Practice Note 32 applies to workplace conduct proceedings.

Note, Practice Note 32 requires amongst other matters:

a. Without leave, a witness statement or affidavit must not exceed 25 pages before annexures and must not have more than 100 pages of documents, whether annexed or exhibited.

b. An outline of written submissions must not exceed 10 typed pages spaced line and a half.

c. Formatting and presentation of all witness statements, affidavits and submissions must be in typeface that is no smaller in appearance than an Arial font in 11-point size or a Times New Roman font in 12-point size and otherwise be in accordance with the formatting and requirements contained in cl 4.3 of the Uniform Civil Procedure Rules 2005.

FAILURE TO ATTEND

38. If a party fails to attend a listing of the matter, the application may be heard and determined in the absence of that party.

39. Where the applicant fails to attend a conciliation, readiness hearing or hearing and has not provided a clear and compelling reason for their non-attendance, the Commission may dismiss the application. Before doing so, the Commission may adjourn the matter and direct that notice be given to the applicant advising that the application may be dismissed if there is no attendance at the adjourned hearing.

40. Where the respondent fails to attend, the Commission may proceed to determine the matter against them in their absence, provided that the applicant has presented sufficient evidence to support the claim.

41. The Commission may, at any time, dismiss the proceedings for other reasons, including where they are frivolous, vexatious, disclose no reasonable cause of action, or constitute an abuse of process.

SECTION 164A IR ACT ORDERS

42. Certificates of Determination may be published by the Commission. Applications for orders pursuant to IR Act, s 164A must be made before the conclusion of proceedings to enable the application to be considered before a determination is published.

43. Applications for orders pursuant to IR Act s 164A must be made by way of motion and supporting affidavit unless leave has otherwise been granted by the Registrar or member to make the application in another way.

44. Applications for IR Act s 164A orders may be made after the conclusion of a matter, but will not necessarily be dealt with on an urgent basis.

JUSTICE I TAYLOR
PRESIDENT
27 JULY 2026

AMENDMENT HISTORY

6 July 2026: This Practice Note was first issued on 6 July 2026.

27 July 2026: This Practice Note replaced former Practice Note 38 Workplace Conduct Proceedings which was issued on 6 July 2026.

ANNEXURE A – STANDARD DIRECTIONS FOR HEARING

1. The matter is listed for hearing before _____ on _____ [day or dates] noting the matter has an estimate of ____ days.

2. The applicant is to file and serve its outline of submissions of no more than 10 pages in length by 4:00pm on _____. (*within 7 days of the relevant date**).

3. The respondent must, by 4:00pm on _____, file a s 195 certificate certifying it has reasonable prospects of success (*within 10 days of the relevant date**).

4. The respondent must, by 4:00pm on _____, 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**).

5. The applicant must, by 4:00pm on _____, file and serve any evidence in reply and its reply submissions (*within 7 days of the respondent's filing and service of evidence and chief*).

6. The matter is listed for Readiness Hearing before the Registrar at 2pm on _____.

7. Each party must, by 4:00pm on _____, file and serve a Readiness Hearing Listing Advice [Annexure B] (*not less than 1 day before the readiness hearing*).

8. The parties are to file a statement of agreed facts and issues in dispute by 4:00pm on _____(not less than 4 days before hearing).

9. The applicant must, by 4:00pm on _____, file an electronic copy of a Court Book in accordance with Practice Note 32 and serve an electronic copy of that Court Book on the other party (*not less than 3 days before hearing*).

10. The applicant's outline of submissions should summarise, plainly, concisely and directly:

    a. the primary legal grounds for a determination that the conduct the subject of the claim was relevant conduct;

    b. the important facts giving rise to the claim; and

    c. the nature of and the party against whom the claim is brought.

11. The respondent's outline of submissions should summarise, plainly, concisely and directly:

    a. any legal or factual issues in dispute; and

    b. why the Commission should not find that the conduct the subject of the claim was relevant conduct.

12. Any request for leave to depart from these orders should be made in writing no less than 48 hours before the relevant document is due to be filed, after consulting with the other party and must convey the view of that party.

13. The parties must comply with Practice Note 33 – Use of Generative Artificial Intelligence (Gen AI), including the requirement at paragraph 15 to declare in any statement or affidavit that Generative AI has not been used in the preparation of the material.

14. Without prior leave of the Commission, no Summons for the production of documents may issue.

15. Without prior leave from the Commission, no further evidence may be adduced by either party after the respondent has filed their evidence in chief and the applicant has filed their reply evidence.

16. A party may not be able to rely on evidence filed which is not compliant with the orders made in the matter, including the time by which the evidence must be filed.

* *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.*

WORKPLACE CONDUCT PROCEEDINGS

ANNEXURE B - READINESS HEARING LISTING ADVICE

Required pursuant to [32] of Practice Note No 38

(Add rows or annex an additional page if there is insufficient space to provide the required information)

CASE NUMBER:							
CASE NAME:							
HAVE ALL NEGOTIATIONS BEEN EXHAUSTED	**YES**			**NO**			
WITNESSES TO BE CALLED BY APPLICANT	**Is there a witness statement/affidavit ?**		**Required for cross-examination?**		**Has a summons been served?**		
1.	**YES**	**NO**	**YES**	**NO**	**YES**	**NO**	**N/A**
2.	**YES**	**NO**	**YES**	**NO**	**YES**	**NO**	**N/A**
3.	**YES**	**NO**	**YES**	**NO**	**YES**	**NO**	**N/A**
4.	**YES**	**NO**	**YES**	**NO**	**YES**	**NO**	**N/A**
WITNESSES TO BE CALLED BY RESPONDENT	**Is there a witness statement/affidavit ?**		**Required for cross-examination?**		**Has a summons been served?**		
1.	**YES**	**NO**	**YES**	**NO**	**YES**	**NO**	**N/A**
2.	**YES**	**NO**	**YES**	**NO**	**YES**	**NO**	**N/A**
3.	**YES**	**NO**	**YES**	**NO**	**YES**	**NO**	**N/A**
4.	**YES**	**NO**	**YES**	**NO**	**YES**	**NO**	**N/A**
ESTIMATED DURATION OF HEARING IN HOURS OR DAYS							
HAVE ALL JURISDICTIONAL OR INTERLOCUTORY ISSUES BEEN RESOLVED? (this includes applications for witnesses to give evidence by AVL)	**YES**			**NO**			
IS IT ANTICIPATED THAT AN APPLICATION UNDER S 128 OF THE EVIDENCE ACT WILL BE MADE? IF SO, WHAT IS THE IMPACT TO THE ESTIMATE FOR HEARING?							
ARE INTERPRETERS REQUIRED?	**YES**			**NO**			

IF AN INTERPRETER IS REQUIRED: • **specify how many interpreters are required,** • **the witnesses who require the interpreters,** • **whether the estimated time for hearing has taken into account the need for interpreter(s) and** • **confirmation that any applicable interpreters have been organised.**	
ARE YOU AWARE OF ANYTHING ELSE WHICH MAY DELAY THE COMMENCEMENT OF THE HEARING?	
NAME AND SIGNATURE OF SOLICITOR, REPRESENTATIVE OR COUNSEL	