



Workers Compensation  
Commission

***Conciliations, Arbitrations and Mediations  
will be conducted by telephone from Monday, 23 March 2020***

**PROTOCOLS FOR TELEPHONE  
CONCILIATIONS, ARBITRATIONS AND MEDIATIONS**

The Workers Compensation Commission is continuing to deliver services during the coronavirus pandemic, while making its top priority the health and safety of its staff, arbitrators, mediators, doctors, parties, legal representatives and other stakeholders.

Commencing **23 March 2020** and until further notice,  
**conciliations, arbitrations mediations** will be conducted by telephone.

Given the current national health emergency, face-to-face conciliation, arbitration and mediation will only be held if approved by the President of the Workers Compensation Commission.

This document sets out protocols and expectations of the Commission, which are intended to assist parties and their legal representatives to resolve disputes and conduct proceedings by telephone.

**PREPARATION BY PARTIES AND LEGAL REPRESENTATIVES**

- 1. Parties must notify the Commission** of the names and telephone numbers of all their participants (e.g. Counsel, the worker, the insurer) if not previously provided. Contact details should be provided at least two working days prior to the telephone conciliation/ arbitration (con/arb) or mediation.

**Note:** It is a matter for parties and their legal representatives to determine the best way to conduct the telephone con/arb or mediation (i.e. at the same premises or at different locations). The Law Society of NSW is continuing to provide mediation and arbitration rooms on Level 12, 170 Phillip Street, Sydney. Bookings can be made online or by calling (02) 9926 0333.

- 2. Legal representatives (including Counsel) MUST consult with their clients prior to the telephone con/arb or mediation**, preferably before the day of the listing and, in any event, well before the con/arb or mediation commences, to ensure that the matter is ready to proceed. The Commission **strongly discourages legal practitioners** from obtaining instructions immediately before a scheduled con/arb or mediation - the

consequences of such practices are delay, the poor use of Commission resources and fewer settlements.

**Note:** It is extremely important that an insurance representative attend each telephone event. This will ensure minimum delays for their legal representatives to obtain instructions and will enhance opportunities for resolution.

3. Parties are **strongly encouraged** to consult with each other, preferably before the day of the con/arb or mediation and, in any event, well before the con/arb or mediation commences to maximise the likelihood that the matter will settle. Ideally, the parties should identify any agreed issues and those in dispute and be ready to articulate them.

## **THE MECHANICS OF A TELEPHONE CON/ARB AND MEDIATION**

### **4. Scheduling the telephone con/arb**

- (a) Con/arbs will be scheduled in the standard morning timeslot of 10:00 am however the afternoon con/arb will be moved to 2:30 pm to avoid listing clashes with 2:00 pm initial teleconferences.
- (b) Con/arbs will be scheduled for the standard 3 hours; participants must be available for the entire 3 hours and the prohibition on Counsel being briefed in more than one matter concurrently applies.
- (c) Second con/arbs will only be approved in exceptional circumstances.
- (d) The Commission will book con/arbs through telephone service provider Streamlined Communications.
- (e) Parties and legal representatives will be contacted by Streamlined Communications on the contact numbers provided by the legal representatives. It is therefore important that the Commission is provided with all contact names and numbers well in advance of the con/arb.

### **5. Scheduling the telephone mediation**

- (a) Mediations will be scheduled in the standard timeslots of 10:00 am and 2:00 pm.
- (b) Mediations will be scheduled for the standard 3 hours; participants must be available for the entire 3 hours and the prohibition on Counsel being briefed in more than one matter concurrently applies.
- (c) Second mediations will only be approved in exceptional circumstances.
- (d) The Commission will book mediations through telephone service provider Streamlined Communications.
- (e) Parties and legal representatives will be contacted by Streamlined Communications on the contact numbers provided by the legal representatives.

It is therefore important that the Commission is provided with all contact names and numbers well in advance of the mediation.

## **6. Connecting the parties to the telephone conference**

- (a) *Connecting*: The operator will connect all participants before calling the Arbitrator/Mediator.
- (b) *Delay*: If it appears that the teleconference will be connected more than 3 minutes after the scheduled time, the operator will call the Arbitrator/Mediator to advise of the delay.
- (c) *Introductions*: The operator will advise the Arbitrator/Mediator of the names of all participants.
- (d) *Participant roll call*: The operator will ask the Arbitrator/Mediator if they would like a roll call of participants before being joined to the teleconference.
- (e) *Signalling for assistance*: If the Arbitrator/Mediator requires the operator's assistance, they will **press \*1** on their telephone.
- (f) *Moving participants into a private conference*: Parties may be placed in private conference. If the Arbitrator/Mediator wants the parties placed into a private conference, they will signal the operator by **pressing \*1** and, when the operator joins the call, the Arbitrator/Mediator will advise the operator who they would like to be moved into a private conference.
- (g) *Returning to the main conference*: The operator will then advise the participants in the private conference to return to the main conference by **pressing \*1**.
- (h) If a party is disconnected, the Arbitrator/Mediator will ask the operator to reconnect them.

## **7. Managing interpreters who are not physically present with the worker**

- (a) If an interpreter is not able to be physically present with the worker during the con/arb or mediation, consecutive interpreting will be used (i.e. the interpreter listens to a segment, may take notes and interprets while the speaker pauses).
- (b) The Arbitrator/Mediator will remind the legal practitioners and any other participants to adapt their participation to facilitate the interpreter's participation. It is likely that increased time will be needed for interpreting and interpreters must be able to finish interpreting and must not be stopped or interrupted.

## **CONDUCTING THE CON/ARB**

### **8. Standard procedure**

- (a) The conciliation phase of the proceeding will be conducted in a similar manner to an initial teleconference.
- (b) Arbitrators will explain the following:
  - (i) all participants must be in a stable location (i.e. not driving or similar<sup>1</sup>) during the con/arb and their location must be sufficiently quiet for the matter to proceed without interruption;
  - (ii) participants must mute their telephone when they are not speaking, to ensure background noise is minimised;
  - (iii) the con/arb has all the standard features, powers and expectations of an 'in-person' con/arb;
  - (iv) the conciliation will not be recorded but the arbitration will be recorded;
  - (v) the process for telephone con/arbs, including:
    - A. the Arbitrator will strictly manage time and will, for example, allocate the time for private conferences by parties and enforce a maximum recommended allocation of **one hour** for conciliation;
    - B. how interpreters work in a telephone con/arb (i.e. if the interpreter is not physically sitting with the worker during the telephone conciliation – **see point 7** above); and
    - C. the Arbitrator will assist the parties and/or legal advisers to move into private conferences for confidential discussions.
- (c) If the matter settles, the Arbitrator will record the settlement as they would in an initial teleconference and Commission staff will subsequently issue a Certificate of Determination – Consent Orders, as per the usual practice.
- (d) If the matter does not settle at conciliation, the Arbitrator may allow the parties a period of time to conduct private negotiations before proceeding to an arbitration hearing. A maximum of **one hour** will be allowed for this and the Streamlined Communications operator will be asked to reconnect all parties into a new telephone conference at a designated time.
- (e) If, at the end of conciliation (or upon being reconnected after private negotiations), the matter does not resolve, the Arbitrator may:

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<sup>1</sup> Participants who drive while participating in a telephone con/arb are at risk of injury and pose a safety risk to others using the roads. Further, legal representatives who drive while acting for a party during a telephone con/arb are likely to be in breach of their professional duties.

- (i) Determine the dispute 'on the papers';
  - (ii) Direct the parties to lodge written submissions; or
  - (iii) Proceed to arbitration hearing.
- (f) If the matter proceeds to arbitration hearing, the Arbitrator will:
- (i) identify the agreed issues and the disputed issues;
  - (ii) identify what is blocking settlement in relation to the disputed issues;
  - (iii) advise the parties that the matter will now move into a formal hearing;
  - (iv) request the Streamlined Communications operator to commence recording the hearing;
  - (v) commence and conduct the formal hearing, as would occur with an in-person arbitration.

**Note:** Section 354(4) of the *Workplace Injury Management and Workers Compensation Act 1998* expressly permits parties and witnesses to participate in proceedings before the Commission by telephone: *Brines v Westgate Logistics Pty Limited* [2008] NSWCCPD 43.

#### **9. Adjournment is only permissible with the Commission's permission**

- (a) As a general principle, second events are discouraged, especially in the current circumstances.
- (b) Outstanding issues should generally be dealt with by written submissions by a specified date (or dates).
- (c) A second arbitration hearing cannot be agreed with the parties unless the Arbitrator has first sought and obtained express permission from the Commission to set the matter down for a second arbitration hearing. Second arbitration hearings should not be agreed subject to later Commission approval.
- (d) If a matter is listed for a second arbitration hearing, the Arbitrator must:
  - (i) agree with the parties on a specific date and time for the listing of the second arbitration hearing, to be held within seven days wherever possible;
  - (ii) request the Streamlined Communications operator to re-convene the proceedings at that time.

## **CONDUCTING THE MEDIATION**

### **10. Standard procedure – mechanics**

- (a) The Mediator must explain to the participants:
  - (i) all participants must be in a stable location (i.e. not driving or similar<sup>2</sup>) during the mediation and their location must be sufficiently quiet for the matter to proceed without interruption;
  - (ii) participants must mute their telephone when they are not speaking, to ensure background noise is minimised;
  - (iii) the process for telephone mediations, including:
    - A. The mediation has all the standard features, powers and expectations of an 'in-person' mediation;
    - B. how interpreters work in a telephone mediation (i.e. if the interpreter is not physically sitting with the worker during the telephone mediation – **see point 7** above); and
    - C. the Mediator will assist the parties or legal advisers to move into private conferences for confidential discussions.
- (b) If the matter settles before the allocated 3 hours expires, the parties should record the settlement as soon as possible and exchange the agreement.
- (c) If the matter does not settle before the allocated 3 hours, the Mediator will (**subject to points 12 and 13** below) advise the parties that the Certificate of Mediation Outcome will be issued under Rule 17.12 of the *Workers Compensation Commission Rules 2011*.

### **11. Standard procedure – conducting the mediation**

- (a) In opening the mediation, the Mediator will emphasise the following aspects and characteristics of the mediation:
  - (i) who is in attendance;
  - (ii) confidentiality of the mediation process;
  - (iii) opening statements;
  - (iv) bilateral party-to-party dialogue via telephone;
  - (v) bilateral mediator-to-party dialogue via telephone;
  - (vi) all-party dialogue (perhaps on the hour or as required to check on progress).

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<sup>2</sup> Participants who drive while participating in a telephone mediation are at risk of injury and pose a safety risk to others using the roads. Further, legal representatives who drive while acting for a party during a telephone mediation are likely to be in breach of their professional duties.

- (b) The Mediator will be easily available for direct dialogue with either party via private telephone conversations or in all-party sessions.
- (c) The full mediation group will be reconvened to close the mediation with either confirmation of settlement, certificate offers or adjournment.

## **12. Adjournment of mediation**

- (a) As a general principle, second mediations are discouraged, especially in the current circumstances.
- (b) Mediations must be resolved in one event unless the Commission approves a second mediation conference. A second mediation should only be sought if the parties are close to resolution or if further medical evidence is required, and only if the parties are ready to proceed in seven days' time.
- (c) Mediators will pause the mediation and contact the Commission to request approval for a second mediation conference.
- (d) If a matter is listed for a second mediation, the Mediator must:
  - (i) agree with the parties on a specific date and time for the mediation, to be held within seven days;
  - (ii) request the Streamlined Communications operator to re-convene the proceedings at that time.

## **13. Post mediation negotiations**

- (a) The mediation may be left 'open' for up to 14 days after the conference to allow parties to continue discussions.
- (b) At the end of 14 days, a Certificate of Mediation Outcome will be issued, unless the Commission/Mediator has been advised in writing, by 5.00 pm on the end date, that the matter has settled.
- (c) Settlement offers to be included in a Certificate of Mediation Outcome must be delivered to the Commission/Mediator by 5.00 pm on the end date.