

Guidelines for Expert Conferrals

These guidelines are to assist parties and experts preparing for an expert conferral in the Canterbury Earthquakes Insurance Tribunal (CEIT)

Expert conferrals are an important step in the CEIT process. Conferrals involve expert witnesses meeting to discuss the evidence and provide their qualified opinions on relevant matters. The process is intended to allow for the experts to identify areas of agreement and disagreement, and to develop their opinions in a setting conducive to technical discussions. The process is facilitated by Tribunal appointed experts. Tribunal appointees are preferred as the topics under discussion are technical, and it is more efficient and effective for the process to be managed by experts in the relevant field. There will be instances however where it may be appropriate for a Tribunal member to chair an expert conferral. This may occur if a claim is on a hearing pathway.

An expert conferral is not a forum for advocacy. Parties' lawyers and advocates have no role in the process. The experts themselves are subject to the Code of Conduct for Expert Witnesses¹ during the conferral process.

Who may attend?

- An expert must be qualified in the area of their expertise. This may be due to study or experience in the relevant area. Experts may provide opinion evidence in their area of expertise on the proviso that their duties as a witness are to the Tribunal.²
- Parties may choose to retain an appropriately qualified expert to attend a conferral (or any other stage of the application) but are within their rights not to do so. However, a conferral will produce evidence which will be given due weight.
- Conferrals are not settlement negotiations. If a party does retain an expert, any concessions made by the expert during conferral do not bind that party. However, should an expert retreat from a position held during conferral or if a party disagrees with their expert's position, the Tribunal may legitimately question why the position has changed, and give less weight to the amended opinion. This is not to say that a change of view will be fatal to an expert's evidence. It is legitimate and necessary that an expert should change their opinion when faced with new evidence or a better understanding of the situation. However, if there is a change of mind, and the change is to be preferred by the Tribunal, cogent and compelling reasons will be needed as to why the expert has abandoned their earlier position.³

Preparing for the conferral

- At a case management conference, the need for a conferral and the type of expertise necessary will be discussed. The presiding Tribunal member will produce an issues list for the experts to consider which will be recorded in a minute. This may be accompanied by a supplementary list of questions depending on the issues in dispute.

¹ The Code of Conduct for Expert Witnesses is set out in Chapter 5 of the CEIT Practice Notes 2022.

² See John Katz KC *Expert Evidence in Civil Proceedings* (Thompson Reuters New Zealand, Wellington, 2018) at 8.3

³ See *EE v IAG* at [18]

- If parties or their counsel have identified areas where they believe investigations would be useful, or topics for which they would find clarification helpful after the minute has been issued, it is entirely appropriate for suggestions to be put to the Tribunal's expert via the Tribunal Member. The inclusion of these suggestions is at the discretion of the presiding Tribunal Member.
- The Tribunal appointed expert will produce documents which record the outcome of the conferral which may reference any relevant evidence produced during the conferral. This means there is no need for experts to produce detailed reports prior to conferral. Parties may choose to have their expert produce written advice prior to conferral for their own purposes, however, there is no requirement for this.

The conduct of conferrals

- Facilitations occur under the direction and authority of the Tribunal. The attendance and participation of experts is directed by the Tribunal. As such there is no need for parties to provide written authorisation of their expert's attendance. Conferrals do not lead to binding decisions and experts are not agents of their instructing party, so there is no need for parties to provide their experts with authority to settle or make decisions.
- The Tribunal's expert has the discretion to preside over the conferral as they see fit, bound by the requirement that all experts attending are heard. The facilitators appointed are expert advisers in terms of the Canterbury Earthquakes Tribunal Act 2019 (the Act).⁴ Attendees are expected to behave in a professional manner and to follow the directions of the presiding expert.
- There is a tension between the need to protect personal information, the need for free-flowing discussions between the experts, and the requirements of natural justice. Natural justice requires that the parties are given access to all relevant information. Conferrals need to be open to the oversight of the Tribunal and the scrutiny of the parties. Conferrals are not negotiations which are protected by the conventions around without prejudice discussions, nor should they be.
- However, any personal information involved in conferral discussions is protected by the Privacy Act 2020, subject to the Tribunal's procedures, and natural justice requirements around parties' access to relevant information. The discussions during conferral are not recorded, but instead are captured by the outcome statement and, in many cases, by a Scott schedule. Experts attending conferrals are witnesses for the purposes of the Act. As such they are protected against liability and cannot be compelled to give evidence relating to their involvement in conferral in a civil case outside of the Tribunal.⁵

⁴ Ss 24, 25, 27, 39 and 41 Canterbury Earthquakes Tribunal Act 2019

⁵ Ibid s65 and Sch2, cl18.