

Information gathering skills

3.51 The **guide to conducting investigations** will assist the investigator in drafting RFIs.

Part 4: Decision making

Types of decisions

4.10 As set out earlier, the finalisation outcomes will either be withdrawn, declined, or determined.

Withdrawal

4.11 It is rare for a complainant to withdraw their complaint. Examples where they might do so include where they have negotiated a settlement with the respondent and as part of that settlement, they are required to withdraw.

4.12 Where a complainant withdraws their complaint, the OAIC must not investigate. A complainant will need to indicate their intention to withdraw using clear and unambiguous language, and will need to do so in writing.

4.13 If there is any doubt the complainant withdraws the complaint, the investigator must request confirmation from the complainant in writing.

4.14 Unless the complainant does so confirm, the investigator is to continue progressing the case. Where the complainant is non-responsive, the investigator should consider declining under s 41(1)(db), rather than withdrawing the complaint.

Decline

4.15 Decline is the most frequently used finalisation outcome for the investigations team. As set out earlier, the most common decline powers for the investigations team are no-breach decline, ADW decline and not warranted decline.

4.16 There are a number of other decline powers which are set out in detail in the declines guide.

Determination

4.17 Determination is a finalisation pathway where the case cannot be declined or otherwise finalised. The Determinations Handbook sets out the practices and procedures of the determinations team. The OAIC's guide to regulatory action sets out the factors to consider when deciding whether to refer a case for determination.

Decision-making principles

4.18 As administrative decision makers, the investigator needs to ensure that the final decision is legally sound and has been made affording procedural fairness to all parties whose rights may be adversely affected. This means that decision-makers must:

- apply the law correctly
- make findings of fact based on evidence

- arrive at conclusions that are logical and rational
- only take into account relevant considerations
- do not have regard to irrelevant considerations
- bring an impartial and unbiased mind to the case
- give procedural fairness to individuals whose rights are likely to be adversely affected.

4.19 The **Guide to conducting privacy investigation** goes into detail how these principles apply to making decisions about s 36 privacy complaints.

4.20 The most important one for investigators to be mindful of in managing a s 36 privacy complaint is the procedural fairness principle.

Procedural fairness

4.21 The obligation of the decision-maker is to give procedural fairness to any party whose rights may be adversely affected by a decision. Effectively, this means parties will have an opportunity to comment on information that is credible, relevant, adverse and significant, and would be unknown to the party (**Relevant Information**) and on the critical issues.

4.22 The timing for providing procedural fairness is when it looks like the decision maker may make a decision that will adversely affect the rights of a party. For the complainant, this means when an investigator is considering making a decision to decline. For the respondent, this means when an investigator is considering making a decision to refer to Determinations.

4.23 Procedural fairness is given to a complainant is through a notice of intention to consider declining (**ITD**). Procedural fairness is given to a respondent is through an ‘investigator’s view’ (also known as a short preliminary view – ‘**short PV**’).

4.24 Procedural fairness usually requires the individual to be provided with the Relevant Information. The Relevant Information is to be provided with the ITD or the short PV, as appropriate. It will usually not be known whether information is Relevant Information until the investigator drafts their ITD or their short PV. Providing information as soon as it is received can be problematic as it lacks meaning and context, and may mislead the parties with respect to the relevant issues, which may increase the volume of irrelevant information on file.

4.25 All ITDs and short PVs are to be cleared by the director. Investigators must not advise parties that they intend to provide an ITD or a short PV until the letter is cleared and the investigator is close to sending it.

4.26 A party is not to be advised that an ITD or a short PV has been sent in relation to another party as a general practice. This is because advising one party that an investigator has formed a view as to the merits of the other party, before the other party has had a chance to respond, is premature and does not service to move the case towards finalisation. The other party may provide submissions or information that change the investigator’s views about the case. Advising a respondent of their preliminary view that they intend to decline, or advising a complainant that they intend to find breach, may raise false expectations.

4.27 Investigators can use their discretion as to whether they should be advised on a case-by-case basis. It may be appropriate where, for example, a respondent has been non-responsive and the case is likely to be referred to determinations, and the complainant needs assurance that the OAI is taking appropriate measures.

Drafting and sending the ITD

4.28 The purpose of the ITD is to provide procedural fairness to the complainant.

4.29 The ITD operates like a draft decision record, insofar as it will form the basis for the draft decision to decline (close letter) once any additional material provided in response to the ITD is considered. The ITD is not a formal administrative decision – the delegate has not yet decided to exercise their discretion to decline, and it remains open to them to decide to not make a decline decision.

4.30 The ITD sets out the delegate's preliminary findings, reasons and the decline power/s they intend to exercise.

4.31 The ITD also describes the information the delegate has taken into consideration and annexes any information not previously seen by the complainant. This prompts the complainant to state whether we are missing any documents they have provided. This will provide a level of assurance that the ultimate decline decision considers all relevant material.

4.32 There are a number of decline templates on Resolve. Specifically relevant to the Investigations team are the decline templates for ADW declines and NW declines.

4.33 The ITD will be cleared by the Director. Once cleared, the ITD is to be sent to the complainant and they will be given 2 weeks to respond.

Drafting and sending the short PV

4.34 The purpose of the short PV is to provide procedural fairness to the respondent. Additionally, it may operate as an informal mechanism to alert the respondent to where the case might be headed and to prompt them to take action if they wish to obtain a different outcome.

4.35 The short PV should be referred to as the 'Investigator's view' to the parties as this will avoid confusion in the event the matter is referred to determinations and a formal preliminary view is sent.

4.36 The short PV is usually email (4-5 paragraphs) which sets out the gist of why the investigator considers they are not satisfied the respondent has complied with a particular aspect of the privacy act.

4.37 In some cases, the short PV may need to be produced in letter form, particularly if it is necessary to extract information the respondent has provided and the reasons are lengthy. [Appendix A](#) sets out an example of a short PV in letter form.

4.38 The short PV sets out the complainant's claims, with a particular focus on the claim in relation to which the investigator thinks the respondent may have breached. The short PV tells the respondent the reason the investigator is dissatisfied, including the gaps in the information that

lead them to this view. In some cases, it may be appropriate to suggest the type of information that the decision-maker is seeking or to include specific RFIs in the short PV.

- 4.39 The short PV sets out the potential benefits for the respondent in providing a response, including the potential for the case to be declined, as well as potential consequences of a failure to provide additional information, namely, referral to the Determinations team.

Example s 40(1) email

- 4.40 An example of a short PV is follows:

Dear [name]

I refer to this privacy complaint. The purpose of my email is to advise you of my view that the respondent may not have complied with APP 6 and to invite your comment on any further information you wish to provide. If you wish to provide information, please do so by XX/XX/XX.

Complaint

As advised previously, the complainant complains that the respondent collected their personal information **ss 47E(d), 47F** [REDACTED]. The information before me (in particular, the respondent's email of xx/xx/xx) leads me to view that it was disclosed to the purposes of direct marketing.

My view

APP 6 provides, in summary, that an APP entity must not disclose personal information for secondary purposes subject to certain exceptions. On my review of the material, none of these exceptions apply. In particular, I note the complainant denies having consented to disclosures of their personal information for secondary purposes.

Invitation to provide information

You are invited to provide information in response to my view. In particular, as you have referred to a consent form you say the complainant completed enabling your disclosure, you may wish to provide this consent form. You may also wish to make any offers you are willing to provide the complainant. As advised previously, the complainant is seeking:

ss 47E(d), 47F [REDACTED]

Next steps

Please note that the information you provide will inform my next steps. Depending on the information you provide, I may:

- find that the respondent has not breached APP 6 and decline to investigate further
- find that the respondent, may making fair and reasonable offers to resolve the matter, is adequately dealing with the complaint, and decline to investigate further or

- find that the respondent has interfered with the complainant's privacy and refer the matter for consideration of determination.

Determinations are published decisions made by the Commissioner about whether the respondent has interfered with the complainant's privacy and may include declarations requiring the respondent to do certain things. You can find published determinations on our website: [Privacy determinations - Home \(oaic.gov.au\)](https://www.oaic.gov.au/privacy-determinations) and on AustLII: [Australian Information Commissioner \(austlii.edu.au\)](https://www.austlii.edu.au/au/other/oaic/decisions/)

Regards

Response to ITD

- 4.41 The investigator's duty upon receiving a response to an ITD is to give it genuine and careful consideration. The response may appraise the investigator of matters that they have misunderstood or aspects that need to be investigated further.
- 4.42 Even if the response does not change the investigators substantive the case, they may need to incorporate information in the response into the final decision in order to ensure that they are accurately representing facts and submissions. In doing so, the investigator shows that they have complied with the decision-making principle of having regard to all relevant information.

Decision record – 'Close' letter

- 4.43 The decision record - colloquially referred to as the 'close' letter - is the investigator's statement of findings and reasons. It is primarily the vehicle by which the OAIC explains to the complainant why the decision has been made in order to give them transparency, fairness and a sense of closure.
- 4.44 If the complainant seeks review, the OAIC will reproduce the close letter as the primary evidence of the decision, and the reasons for decision. It will be the document that the Court will scrutinise for jurisdictional error.
- 4.45 In all but a few cases, an ITD and the complainant's response to the ITD will precede the close letter. As such, there are two ways to draft the close letter:

| Close drafting option | Advantages | Disadvantages | When to use |
|---|--|---|---|
| 1. The close letter sets out the response of the complainant, adopts the findings of the ITD and explains why | <ul style="list-style-type: none"> - efficiency for the investigator - increased readability for the complainant, as it will avoid | <ul style="list-style-type: none"> - clearance processes will take longer as the director will need to check the close against the ITD and may have difficulty assessing the soundness of the investigator's decision. - third parties will lack clarity - the fragmented nature of the | <ul style="list-style-type: none"> - the complainant has not responded to an ITD - the complainant's response is off topic and does not address the issues in the ITD |

| | | | |
|--|---|---|---|
| <p>the complainant's response does not alter those findings.</p> | <p>length and repetition of information.</p> | <p>decision will mean that anyone reading it in isolation will have difficulty understanding the context of the case.</p> <p>- reasons may come across as cursory and disjointed, and nuanced aspects of the case may be lost. This may create risk that a complainant or a review body may perceive that the decision-maker has not given genuine and careful consideration to the complainant's response.</p> | <p>- the complaint only raises one or two claims and the issues are simple.</p> |
| <p>2. The close letter replicates the information in the ITD with additional drafting, and changes to the original drafting to reflect the complainant's response.</p> | <p>- faster director clearance the letter, particularly if the investigator tracks their changes to the ITD content.</p> <p>- increased readability for any third party, including review bodies, as it provides one complete decision record</p> <p>- reduced risk that the investigator has misunderstood the response or failed to address all</p> | <p>- additional work for the investigator</p> <p>- may be a lengthy decision for the complainant.</p> | <p>- the complainant has provided extensive responses to the ITD.</p> <p>- the investigator needs to address the submissions of the complainant in their response by referring to what was discussed in the ITD.</p> <p>- the case is likely to be the subject of review.</p> |

relevant
issues.

Examples of the two alternate drafting methods are set out at **Appendix X**.

Determinations

4.46 Where decline is not appropriate, the investigator will refer the matter to the Determinations team for consideration as to whether to recommend that the Commissioner makes a determination in relation to the complaint.

4.47 Decision about whether to make a determination is informed by the matters set out under the **OAIC's Guide to Privacy Regulatory Action** and the **Privacy Regulatory Action Policy**. Broadly, the most frequently referenced principles are:

- it appears there is a prima facie interference with privacy
- there is evidence to establish an interference with privacy on the balance of probabilities
- the respondent has not cooperated with the Commissioner's inquiries or investigation, and the Commissioner believes that it is necessary to make formal declarations that the respondent must take certain steps to address the interference with privacy
- there is a disagreement between the Commissioner and the respondent about whether an interference with privacy has occurred, and the determination would allow that question to be resolved
- there is a public interest in the Commissioner making a declaration setting out their reasons for finding that an interference with privacy has occurred, and the appropriate response by the respondent
- there is educative value in determining the matter, including the deterrent or precedential value, or potential to clarify or test the law
- seriousness of the claimed conduct, including number of persons potentially affected; whether the matter involves sensitive information or other personal information of a sensitive nature; whether disadvantaged or vulnerable groups affected by the conduct; whether the conduct was deliberate or reckless; seniority and experience of person responsible for the conduct.

Part 5: Referring a matter to the Determinations team

5.10 In order for the Commissioner to issue a determination under s 52, 3 elements are required:

- the investigation of the complaint, or of the act or practice if the Commissioner initiated the investigation, is complete
- the Commissioner decides to exercise her discretion to make a determination

- the Commissioner decides upon the content of the determination that she will make.
- 5.11 On handover, the Determinations team needs to check whether the matter is suitable for determination. This will involve checking that:
- the investigation was conducted lawfully
 - there is enough evidence to make findings about whether the respondent has breached or not
 - there is enough evidence to make declarations addressing the requested remedies of the complainant.
- 5.12 As such, the investigator needs to provide the Determinations Team with handover that are sufficient to allow the determinations officers to conduct these tasks.
- 5.13 The handover documents will vary depending on the complexity of the case but generally include:
- summary of findings, evidence, reasons, and recommendations
 - summary of investigation process
 - evidentiary documents prepared in accordance with **Document Naming Conventions - [D2020/000150](#)** and **Index - [D2020/010712](#)**
 - Chronology - [D2020/010713](#).
- 5.14 Where the investigator considers a finding of breach likely, it is generally preferable that the investigator has already sent a short PV to the respondent. If a short PV has been sent, this must be clearly set out in the handover documents.
- 5.15 The handover information may be set out in the Investigation Plan or an email, or a combination. It is up to the Investigator to ensure the right level of detail is provided to the Determinations team. An example handover email is:

Example determinations handover email

Dear [Director Determinations]

I am referring this privacy complaint to the Determinations team for consideration.

Complaint

The complainant ss 47E(d), 47F raises the following acts and practices that can be summarised as:

1. Claim 1 – the respondent disclosed their sensitive information ss 47E(d), 47F without their consent. This claim raises a breach of APP 6.
2. Claim 2 - the respondent failed to notify them of the collection of their personal information. This claim raises a breach of APP 5.

3. Claim 3 - ss 47E(d), 47F

This claim raises a breach of APP 11.

4. Claim 4 - ss 47E(d), 47F

This claim raises a breach of APP 10.

Damages claim:

ss 47E(d), 47F

Remedies:

ss 47E(d), 47F

Investigation plan

An investigation was opened on ss 47E(d), 47F. The investigation plan sets out detailed background to the complaint as well as the procedural history of the complaint. The chronology and index of documents are also set out on the investigation plan/ I attach the chronology and index of documents separately to this email.

Short PV sent to respondent

I sent a short PV to on ss 47E(d), 47F. Essentially, I informed the respondent of my view that I was not satisfied the respondent had complied with APP 11 in respect of Claim 3.

I did not express a view as to whether there was compliance with APP 6, APP 10 or APP 11 in respect of the remaining claims. For the reasons set out on the Investigation plan, I am of the view the respondent has not breached in respect of these claims.

ss 47E(d), 47F

I have assessed these offers as not commensurate with the established breach and therefore not suitable for decline.

Documents

I confirm all documents are marked on Resolve consistent with the Document Conventions.

There are 15 substantive documents from the complainant (C1-C15), 8 substantive documents from the respondent (R1-R8) and 3 substantive documents of the OAIC (O1-O3).

Regards

- 5.16 The Determinations team is able to conduct simple investigations to fill in the gaps where it would be efficient for it to do so. The Determinations team may need to return a case to the investigator extensive investigations are required to make findings.
- 5.17 The Determinations team may need to consult the investigator if they have questions about the case. In some matters, they may need to seek the investigator's comment on a draft preliminary view or draft determination.
- 5.18 The Determinations team will notify the Investigations team of finalised determinations by circulating the determinations principles table when a new determination is published.

Part 6: Communicating with the parties

General

- 6.10 Once a s 36 privacy complaint has been referred to the Investigations team, the tone of written communications should err on the side of more formality rather than less formality.
- 6.11 Investigators should choose the most appropriate form of communications appropriate to the circumstances. In some cases, it might be more appropriate to telephone rather than write. Investigators must always check Resolve for an individual's preferred form of communication.
- 6.12 Investigators must check Resolve for the correct contact details of the parties and invite updated contact details on a continuing basis.

Introductory email

- 6.13 Investigators should send an introductory email as soon as they are allocated a case and have assessed the case as one they are able to take (that is, they have capacity and there are no conflicts of interest to declare).
- 6.14 This is a good time to check that the OAIC has the most up-to-date contact details for the parties on file.

Example introductory email

Subject: Privacy complaint about [respondent's name] – CPXX/XXXXX – Referral to Investigations team for assessment

Dear [name]

I refer to this privacy complaint made on XX/XX/XX, which has been referred to the Investigations team. I will be assessing your case over the next few weeks and will be in contact with you soon.

Please be aware that we will continue to use the contact details you have provided the OAIC to communicate with you. If your contact details have changed, please let us know.

Regards

Updates

- 6.15 Investigators should keep parties updated on a regular basis. Investigators should use their discretion with respect to how much detail is appropriate. It is not necessary to tell parties about each and every information request made of the other party.
- 6.16 However, parties have rights to access information. It may be an effective strategy to keep some individuals abreast of the progress of the case than other individuals.

Holding email

- 6.17 Holding emails should be sent where matters may take longer than expected.

Example holding email

Subject: Privacy complaint about [respondent's name] – CPXX/XXXXX – Update

Dear [name]

Thank you for your patience in awaiting my update in relation to your privacy complaint. I am continuing to assess your case and will be in contact with next steps by XX/XX/XX.

Regards

Change of investigator email

- 6.18 Where an investigator has taken carriage of a case from another investigator, they must check the file to see whether the parties have been advised of the change and, as appropriate, send an email to let them know.

Example change of investigator email

Subject: Privacy complaint about [respondent's name] – CPXX/XXXXX – Change of investigator

Dear [name]

I refer to this privacy complaint. I advise that I have taken carriage of this case.

I will be in contact with next steps but in the meantime, please contact me if you have any queries about your case.

Regards

- 6.19 The [Investigator's Emails Guide](#) has further examples of how to communicate with the parties.

Extensions of time

- 6.20 Investigations should ideally progress in accordance with the timeframes as planned by the investigator. By the time a matter comes for investigation, the parties will ideally have already actively engaged in the issues, provided at least some information relevant to the complaint, and had a meaningful opportunity to conciliate.
- 6.21 There are circumstances where an investigator will need to consider whether to grant an extension of time (EOT) in investigations matters:
- where the respondent, complainant or a third party seeks an extension to respond to an RFI or a s 44 notice
 - a respondent seeks an extension to respond to a preliminary view (PV)
 - a complainant seeks an extension to respond to a decline.
- 6.22 Any extension of time will have the effect of delaying the finalisation of the case.
- 6.23 If one party fails to provide information within the required timeframe, this will delay the OAIC's consideration of the material and may lead to further requests for EOTs as a flow on effect. This has implications for the OAIC and the parties, and the administration of the case more generally. It makes it difficult for the OAIC, and the other party, to plan their work and allocate resources effectively.
- 6.24 Additionally, there is a broader public interest in ensuring the timely resolution of matters and administrative certainty, particularly where publish determinations provide educational value for the community.
- 6.25 On the other hand, the administration of the case also requires that the parties be treated fairly and equitably in all the circumstances. If the OAIC fails to provide a party with a reasonable time frame within which to comment on credible, relevant, adverse and significant issues that will influence the decision, it likely will be found to have denied procedural fairness. A decision on an EOT is itself an administrative decision capable of review.
- 6.26 In order to balance the obligation to ensure the timely resolution of matters with the obligation to treat parties fairly, it is important that officers turned their mind to relevant considerations in making an EOT decision and ensure that EOT decisions are made consistently.

Timeframes for responses

- 6.27 There are no statutory timeframes by which a s 36 privacy complaint, or an investigation, is to be progressed.
- 6.28 In order to process cases efficiently, the OAIC has decided on a general timeframe of two weeks for each party to respond to an RFI, a s 44 notice, short PV or decline. However, what is a reasonable timeframe to respond (and therefore, what is a fair opportunity to present a case) will vary from case to case, depending on a number of matters, including the complexity of the case and the volume of the documents to be considered.
- 6.29 The OAIC will set out indicative timeframes when sending a s 40(1) letter opening the investigation. The OAIC will also specify the relevant two-week period by which a party is to

respond in the correspondence inviting the response. It is then up to the party to request an EOT.

Principles for deciding EOTs

- 6.30 There is no statutory requirement in the Privacy Act relevant to the making of EOT decisions. An officer is to grant an EOT where it is reasonable in all the circumstances to do so. In deciding whether the grant of an EOT is reasonable in all the circumstances, officers should take into account the non-exhaustive principles from *Hunter Valley Development Pty Ltd v Cohen, Minister for Home Affairs and Environment* (1984) 3 FCR 344 (Hunter Valley Development) as relevant to the case:
- 1) **Explanation for the requested EOT** - where the requesting party has an acceptable reason for requesting the additional time, this will weigh in favour of granting the EOT. The acceptability of an explanation will also depend on whether the explanation connects with the amount of time requested.
 - 2) **Length of the requested EOT** - a short period of additional time requested may weigh in favour of granting an EOT, whereas an excessively lengthy period may weigh against.
 - 3) **Prejudice to the parties** - consider whether granting the additional time would have an adverse effect on the other party, including their ability to organise their case. Consider whether refusing the EOT would have an adverse effect on the requesting party, including the ability to put forward their best case.
 - 4) **Public considerations** - consider the nature of the complaint and the action on which findings of fact are to be made, and whether there is a public interest in granting the EOT, including the desirability in resolving matters expeditiously and use of public resources.
 - 5) **Merits of the substantive case** - where the nature of the case is such that it is unlikely that a response from the requesting party will have a substantive effect on the outcome, this may weigh in favour of refusing the EOT.
 - 6) **Consistency** - consider whether granting the EOT would ensure fairness as between the requesting party and other individuals in a similar position to the requesting party. This is about ensuring consistency across all cases beyond the particular case being considered.
- 6.31 There may be other relevant factors to consider in any given case. For example, where the OAIC has failed to advise parties of its expectations as to timeframes, or where the OAIC itself has delayed processing.
- 6.32 The EOT principles should not be approached as a checklist – some will be relevant, others will not. The principles should be considered holistically to determine whether on balance it is reasonable in all the circumstances to grant the extension of time.
- 6.33 EOTs must not be refused merely because a party has requested EOTs previously. Each EOT must be considered on its own merits. Only if the pattern or tendency revealed by previous EOTs made by the particular individual reasonably affects the factors set out above, should that history be taken into account.

Documenting a decision

- 6.34 As with all administrative decisions, the reasons should be documented. The extent of the documentation should be commensurate with the significance of the decision to be made. In most cases, a short decision setting out dot points as in the example will be sufficient. Examples are set out at the end of this document.

Advising the parties of EOT decisions

- 6.35 An EOT decision should be made in a timely manner and notified to the parties as soon as possible.
- 6.36 Where an EOT is being granted consistent with the request of the party (EOT grantee), it is not legally necessary to send reasons to the EOT grantee, unless these are requested. Short reasons should be provided to the requesting party where a decision is not in accordance with their request, that is, where an EOT is refused or where less time than requested is provided.
- 6.37 Even though it is not necessary to send reasons to an EOT grantee, in some cases, it may be beneficial to communicate with the EOT grantee the basis upon which they are allowed the additional time. This will put the EOT grantee on notice that the grant of an EOT is for a specific purpose, not to enable them to delay engaging in the case.
- 6.38 It is not necessary to provide reasons to the other party. In cases where the investigator has kept the other party updated with respect to request for information, and have an expectation that information will be received by particular date, it will be appropriate to let them know that an extension of time has been granted.

Example EOT grant email to EOT grantee

Subject: Privacy complaint about [respondent's name] – CPXX/XXXXX – Your request for an extension of time to respond

Dear [name]

I refer to your request for an extension of time to respond to my request for information sent to you on XX/XX/XX. I have decided to grant the extension of time for the following reasons:

- the length of the additional time you request is short – only one week
- the reason for the additional time is acceptable – you have been affected by floods
- there will be no prejudice to the other party - considering the short amount of time you seek, and the nature of the case, I am satisfied that the other party will not be unfairly disadvantaged by granting the additional time.

A look forward to receiving your response by XX/XX/XX.

Regards

Example EOT refusal email EOT requestor

Subject: Privacy complaint about [respondent's name] – CPXX/XXXXX – Your request for an extension of time to respond

Dear [name]

I refer to your request for an extension of time to respond to my request for information sent to you on XX/XX/XX. I have decided to refuse to extend time for the following reasons:

- the length of the additional time you request is excessive – 3 months
- the reason for the additional time is not acceptable – you state that you 'have a lot of work on at the moment' without any particulars.
- prejudice to the other party – ss 47E(d), 47F [REDACTED] and there is a strong need to bring this complaint to a conclusion.

It remains open for you to provide the information by XX/XX/XX. After this date, I will progress the case to the next stage.

Regards

Example EOT grant email to other party

Subject: Privacy complaint about [respondent's name] – CPXX/XXXXX – Time extended

Dear [name]

I refer to this privacy complaint. On XX/XX/XX I updated you that I was expecting information from the respondent by XX/XX/XX. I have decided to grant them an extension of time to provide this information.

I will update you after I receive and consider the information.

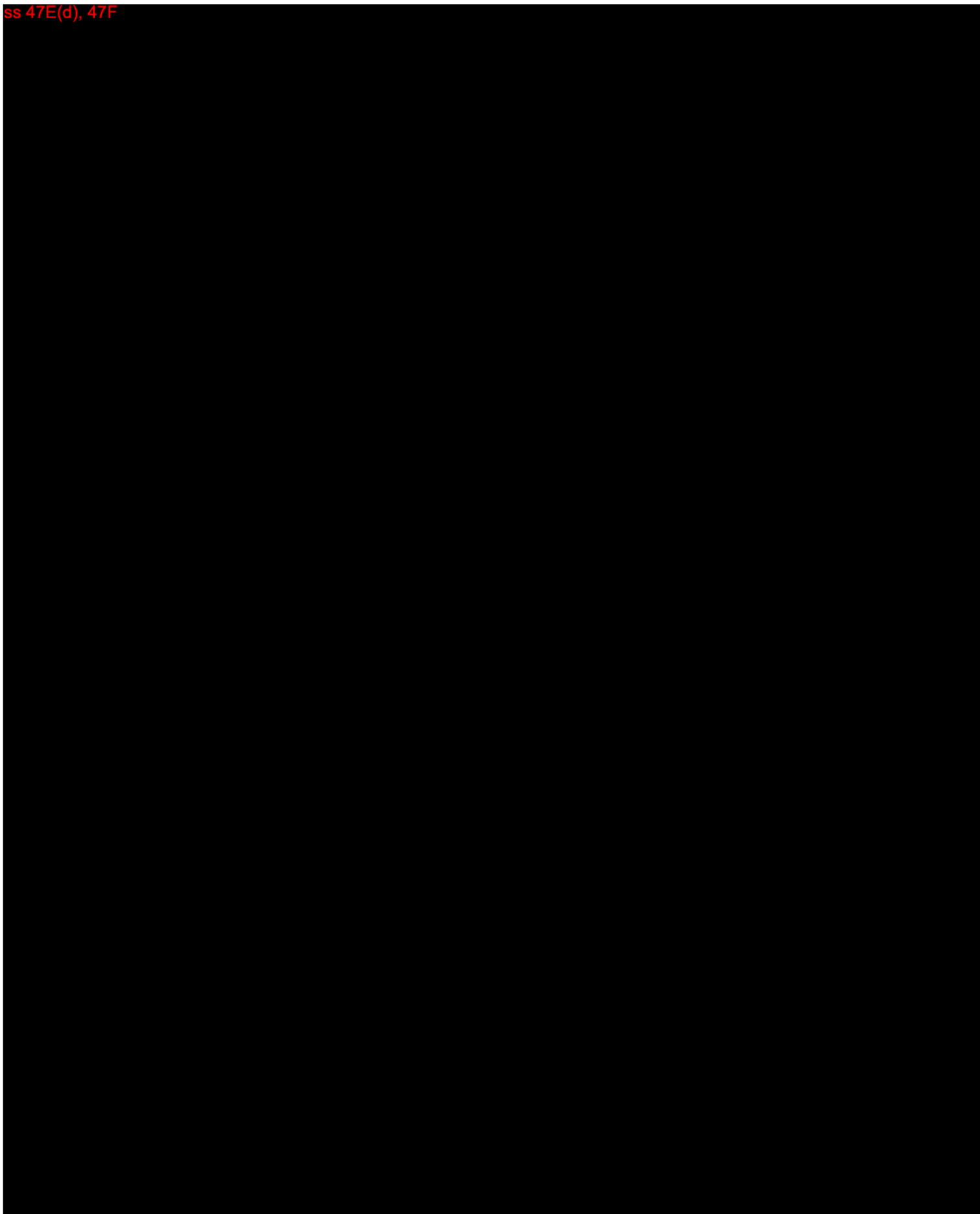
Regards

Part 7: Appendices

ss 47E(d), 47F



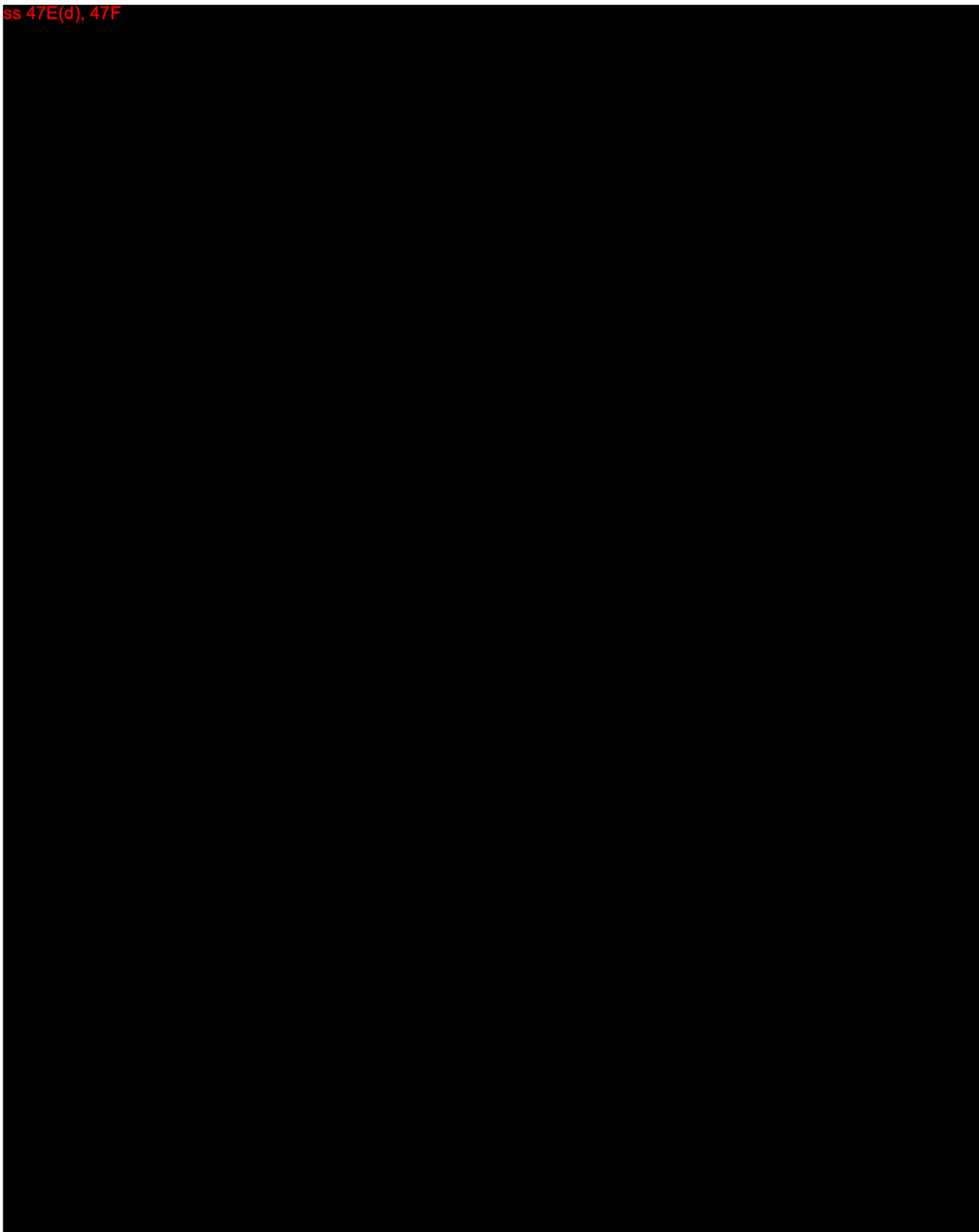
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Conciliations

Operational policy and procedures manual



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Table 1 – Version History

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| 0.1 | 4/09/2020 | Joel Livingston | Initial draft |
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Table 2 – Approvals

| Name | Role | Date |
|------|------|------|
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Introduction

Purpose of this manual

This operational policy and procedures manual has been created by the Office of the Australian Information Commissioner (OAIC) to instruct staff regarding procedures to be followed when arranging, conducting, and resolving complaints via conciliation. It is intended to provide staff with the necessary information to enable them to carry out work associated with the OAIC's conciliation functions and powers from beginning-to-end. This Guide should be read in conjunction with the *Operational Policy on s 40A of the Privacy Act (D2020/013553)* where relevant.

Background

Section 40A(1) of the *Privacy Act 1988 (Cth)* (Privacy Act) requires that the Commissioner must make a reasonable attempt to conciliate a complaint made under s 36, if the Commissioner considers it reasonably possible that the complaint may be conciliated successfully. This means that in most cases the OAIC will attempt to conciliate privacy complaints in the early (pre-investigative) stages of handling privacy complaints.

Conciliation is a widely recognised form of Alternative Dispute Resolution (ADR) where an independent and disinterested third-party (the conciliator) manages discussions between parties, helps develop options to address the issues, and encourages participants to reach a mutually acceptable resolution wherever possible.

Conciliation provides an opportunity for parties to resolve complaints more quickly and informally than is possible through the investigative process. Parties also remain in control of the outcome during conciliation and can take ownership of any results. For this reason, where conciliation is successful, parties may come away more satisfied about the complaint process than they otherwise would.

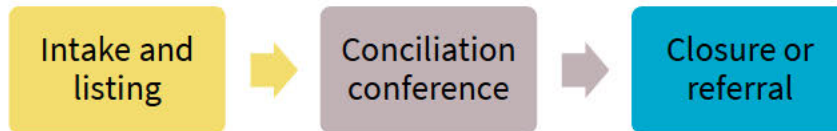
At the OAIC, conciliations are held via teleconference, between two or more parties to a complaint, which is overseen by a neutral conciliator. An OAIC conciliator may be an OAIC staff member with the necessary experience and training, or an external ADR professional providing conciliator services under-contract. Staff conciliators and contractors will typically be Accredited Mediators under the National Mediator Accreditation System (NMAS). When conducting conciliation of a complaint, OAIC conciliators are expected to comply with the NMAS Practice Standards¹.

Conciliation is a confidential process. Before proceeding with conciliation, the conciliator will verbally confirm that the participants agree to keep the content of conciliation confidential. Under s 40A(5) of the Privacy Act, anything said or done during a conciliation is inadmissible in any hearing before the Commissioner, or in other legal proceedings relating to the complaint, except in limited circumstances or unless the parties agree otherwise.

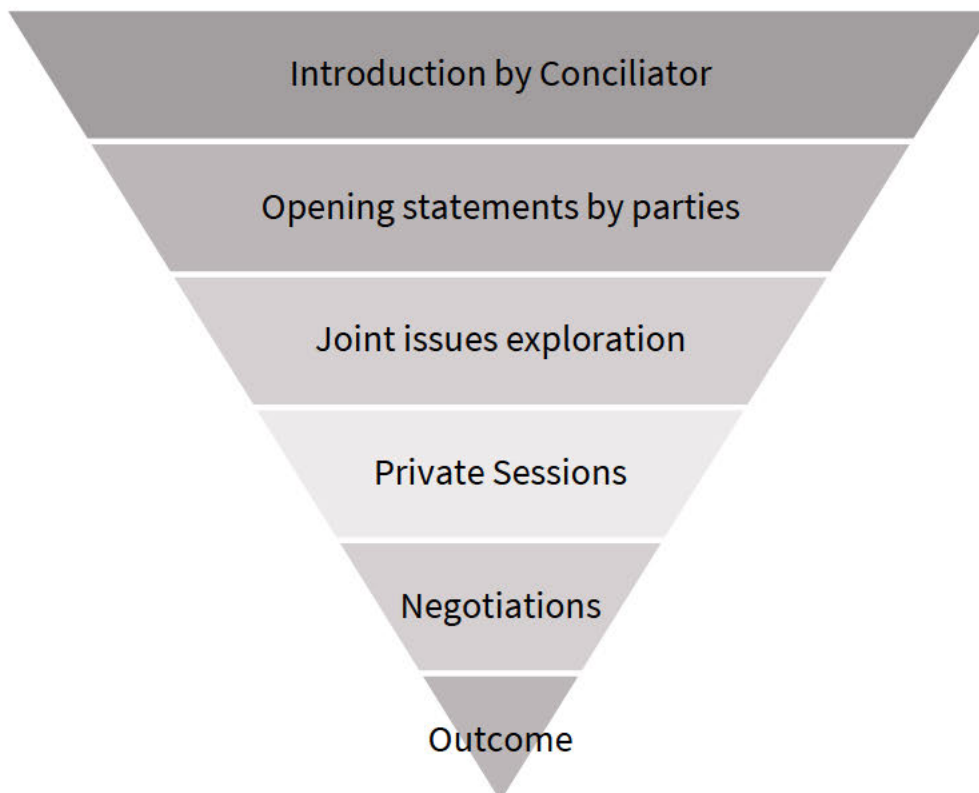
¹ See: <https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf>

Overview of conciliation process

Complaints are mostly listed for a conciliation conference immediately following referral to the Conciliation Team. The workflow of complaints within the Conciliation Team is:



Conciliation conventionally involves both joint conferences between the parties, and private caucuses between the conciliator and each side of the complaint. A typical conciliation conference will look like this:



This format is appropriate for most matters. It encourages better communication about the issues between parties. As such, these should be the default steps in the conduct of most conciliation conferences.

However, the conciliation process can be adjusted to suit the individual needs of participants. For example, conciliation may be conducted entirely via private caucuses (shuttle conciliation) in those limited cases where it is justified by the circumstances of the parties. The National Mediator

Accreditation Standards (NMAS)² require mediators to be alert to the comfort and safety of participants and where necessary take steps that may include using separate sessions, communication technology or other protective arrangements (section 4).

Conciliation should provide parties with a structure to facilitate constructive discussion of the issues, with enough flexibility to meet the different needs of the individuals.

Referrals to conciliation

The OAIC's view is that there is a reasonable likelihood that most privacy complaints may be conciliated successfully. Accordingly, in most cases the OAIC will attempt to conciliate privacy complaints in the pre-investigative stages, unless a factor which would indicate unsuitability is evident.

A complaint will generally be appropriate for referral to conciliation where:

- both parties to the complaint have been contacted
- jurisdiction under the Privacy Act has been established
- a response has been received from the respondent (i.e. we have had contact from the respondent regarding the complaint), and
- it appears prima facie that a breach of privacy may have occurred.

Complaints are generally inappropriate for referral where the above factors are not met, or where:

- threats or acts of violence have been made by either party
- there is any order in place which prohibits contact between the parties, including a protection order (such as a domestic violence order) or there are other reasons for safety concerns
- a party has advised they will not treat the conciliation as confidential, or
- a party has expressly refused to take part in conciliation. (refer to page 9: 'Objection or refusal to conciliate').

This list is not intended to be exhaustive or prescriptive. Referrals to conciliation teleconference will be considered on a case by case basis.

Before referring a complaint to the Conciliation Team, set the ER Outcome dropdown-box on the Resolve record to 'Refer to Conciliation'. Also, complete a referral file note and add it to the documents for the complaint in Resolve (see Appendix A). The parties must then be advised of the progress of the complaint. The referral is completed by assigning the case file to the Conciliation queue in Resolve.

² <https://msb.org.au/themes/msb/assets/documents/practice-standards.pdf>

Fast-track conciliations

Since February 2021, matters may also be fast-tracked to conciliation from the assessment stage, where certain criteria are met (see Appendix B — NB: this criteria may be amended as the fast-track process matures).

For the Respondent this includes where the:

- complaint is against a bank, utility provider, credit reporting body or telecommunications provider; or
- complaint is against government agency where interference with privacy is conceded; or
- Respondent has expressed willingness to resolve the matter.

For the Complainant this includes where the:

- Complainant appears able to participate in a teleconference without issue; and
- Complainant does not insist upon penalties against respondent; and
- Complainant has identified the outcome(s) they are seeking to resolve the matter.

Conciliation intake and listing process

The officer responsible for coordinating conciliation listings notifies the parties of the listing time and provides them with the explanatory material at Appendix C and D. These documents set out the process, NMAS and other useful information. The officer will also confirm that all required steps have been completed, and that there are no apparent factors to indicate the complaint is not suitable for conciliation.

Listing new referrals

Once a complaint is referred to the Conciliation queue, it is to be listed for a conciliation conference, and the parties notified of the details, as soon as possible, and ordinarily within a week from the referral of the matter to the queue. The time and date of the conciliation conference is the next available timeslot which falls at least 14 days from the date the parties are notified of the listing. This is to ensure parties have reasonable notice to plan for their availability and properly prepare for the conference.

Conciliations are listed on Mondays – Fridays, for a 3-hour duration at either:

- 10:00 AM – 1:00 PM, or
- 2:00 PM – 5:00 PM (Sydney local time).

The conciliation listing is created as a meeting invitation within the Conciliation calendar and sent to the assigned conciliator. The complaint reference, respondent, listing time and assigned conciliator are also recorded in the Conciliation Register ([D2020/003855](#)).

When parties are notified of the conciliation listing, they are to be provided with the Conciliation Factsheet (see Appendix C) and the Conciliation Preparation Toolkit (see Appendix D).

Template emails used when providing notification of the conciliation listing are included below.

Example — Notice of conciliation email to complainant

Our reference: [REFERENCE NO]

Dear [COMPLAINANT]

I refer to your privacy complaint about [NAME OF THE RESPONDENT], made under s 36 of the Privacy Act 1988 (Cth) (the Privacy Act).

Conciliation listing

Section 40A of the Privacy Act states that, where it is reasonably possible that the complaint may be conciliated successfully, the OAIC must make a reasonable attempt to conciliate the complaint.

Accordingly, the matter has been listed for an OAIC conciliation teleconference on [DAY OF LISTING, DATE OF LISTING, TIME AEST/AEDT].

Please find attached:

- an information sheet which explains the conciliation process, and
- a conciliation preparation toolkit.

Information required

Please provide the following by [ONE WEEK BEFORE THE DATE OF THE CONCILIATION]:

- confirmation of your attendance
- the contact number that we can call you for the conciliation teleconference
- whether you intend to have a support person and, if so, their name, their relationship to you (e.g. if they are a friend, family member, legal representative, or paid agent, etc.) and phone number (if they will be in a different location to you).

The OAIC's conciliator will contact you on the date and time above, on the contact number you confirm.

Kind regards

Example — Notice of conciliation email to respondent

Our reference: [REFERENCE NO]

Dear [STAFF OF RESPONDENT]

I refer to the privacy complaint made by [NAME OF COMPLAINANT] about [NAME OF RESPONDENT] under s 36 of the Privacy Act 1988 (Cth) (the Privacy Act).

Conciliation listing

Section 40A of the Privacy Act states that, where it is reasonably possible that the complaint may be conciliated successfully, the OIAC must make a reasonable attempt to conciliate the complaint.

Accordingly, the matter has now been listed for an OIAC conciliation teleconference on [DAY OF LISTING, DATE OF LISTING, TIME AEST/AEDT].

Please find attached:

- an information sheet which explains the conciliation process, and
- a conciliation preparation toolkit.

Information required

Please provide the following by [ONE WEEK BEFORE THE DATE OF THE CONCILIATION]:

- confirmation of your attendance
- the contact number that we can call you for the conciliation teleconference
- if you intend to have a support person and, if so, their name, their relationship to you (e.g. if they are a friend, family member, legal representative, or paid agent, etc.) and phone number (if they will be in a different location to you).

The OIAC's conciliator will contact you on the date and time above, on the contact number you confirm.

Kind regards

Rescheduling

If a party advises the OIAC that they are unable to attend conciliation on the original listing date, it may sometimes be appropriate to relist the conciliation conference on another date. Relisting where unnecessary is to be avoided, however, as this creates a further impost on the OIAC's resources.

Where a party asks that conciliation be relisted, they should provide a reason. Examples of satisfactory reasons to relist conciliation may include:

- where a party is ill, dealing with a bereavement, or must attend a medical appointment
- where a legal representative appearing for a party is in other proceedings on the day, or
- where crucial staff of a respondent are on leave during that time.

If the party seeking to have conciliation rescheduled requests an alternative time, that is compatible with the OIAC's scheduling practices and where there is a conciliator available, a new listing may be made for that time and both parties notified accordingly. Where no alternative times are specifically requested, the party seeking rescheduling should be directed to confirm their availability for conciliation at 3 other listing timeslots within an adjacent week. The other party will then be allowed to select their preferred listing time from those 3 times.

If the second party is unable to attend at any of the 3 times offered, the process may be repeated in the opposite order i.e. seeking 3 confirmed availabilities from the second party and allowing the first part to select one. In the event that a conciliation time still cannot be settled between the parties after these steps, the case should then be considered under s 40A(3) of the Privacy Act for referral to the next stage of the complaint process.

Objection or refusal to conciliate

Parties may sometimes be reluctant to take part in conciliation, for reasons including, but not limited to:

- a presumptive belief that conciliation will not achieve anything
- lack of trust in the process or in the other party to act in good faith
- anxiousness about interacting with the other party directly
- concerns over the conciliation not remaining confidential, or
- not wanting to spend or set aside the time required.

Attempts to avoid conciliation may be driven by conflict avoidance behaviours, or a lack of understanding of the process. If an officer encounters resistance from a party, they should attempt to overcome the party's objections.

Effective ways to overcome objections include normalising conciliation and focussing on the benefits of the process. This might include:

- explaining that conciliation is an important part of the complaints process under the Privacy Act
- reassuring the parties that the referral of the complaint to conciliation is not a punitive step or an escalation of the OAIC's process
- emphasising that conciliation may allow for a very quick resolution
- explaining that discussions at the conciliation are confidential, and
- reassuring the parties that the conciliator's role includes managing discussions.

It is appropriate to escalate a matter to the assigned conciliator for follow up when:

- an officer is unable to overcome a party's objections without significant time and effort
- a party advises they may have difficulty due to access concerns, or
- a party is atypically apprehensive about taking part in the conciliation process.

Where parties' objections cannot be overcome, or an express refusal to take part in the conciliation process is communicated, the parties should be issued with s 40A(3) Privacy Act notifications, setting out the reasons why conciliation is unable to take place.³

³ Refer to the *Operational Policy on s 40A of the Privacy Act* (D2020/013553)

Conducting a conciliation conference

It is critical for all OAIC conciliations that the conciliator ensure that all participants are identified. The conciliator must ensure that those in attendance are proper participants, for the purpose of conciliation, and have the authority to resolve the complaint by agreement, if consensus on mutually suitable solution is reached.

The conciliator must confirm that all participants understand that conciliation is conducted on a condition of confidentiality, and that they agree to abide by this condition. The conciliator must also ensure that the parties understand the process to be followed and relevant rules of conduct.

Situations may arise where:

- a party is suspected of misusing the process or breaching its conditions
- a party acts (or continues to act) in bad faith, or.
- an individual's health or safety is at risk

If the conciliator has any cause for concern when convening a conciliation, they may speak with the parties separately to address and resolve those concerns, or terminate the conciliation process, as they think appropriate. Conciliators are *not* obligated to proceed with conciliation where they are not comfortable that it is appropriate.⁴ If a conciliation is terminated, the conciliator should notify the relevant Director.

Teleconferences

Conciliation at the OAIC is conducted via teleconference, rather than in person, in almost all instances. The benefits include:

- greater efficiency and convenience
- lower impost on the time and resources of participants
- a less confronting process for many parties, and
- reduced risk of intimidation by one party of another.

Teleconferences are convened by the conciliator, who will contact participants on their nominated numbers at the time of the conciliation listing. The conciliator may briefly speak to each party separately, before introducing the participants to the teleconference, if they choose to.

Call conferencing can be accomplished using a Polycom device in an OAIC meeting room, or through the call or meeting functionality of a desktop application, such as Skype for Business or Microsoft Teams, when working from home.

Teleconferences may present heightened risks for the misuse of the conciliation process. It is extremely important that the conciliator exercises care when moving from joint discussions to private sessions and vice versa, to ensure that they are speaking with the intended parties only.

⁴ See paragraph 5.1 the *National Mediator Accreditation System Practice Standards*.

A party's exit from the teleconference when transitioning to private sessions should be checked visually on the device or application, before continuing discussions, to ensure that a breach of confidence does not occur.

If in any doubt, the conciliator should instruct parties to leave the teleconference and then call the parties back individually as needed. For clarity, the conciliator should also notify the parties of who is on the call upon the outset of each call made.

Shuttle conciliation

It may sometimes be appropriate to conduct conciliation exclusively via private sessions, in what is often known as 'shuttle conciliation'. Here, the parties will not speak together directly at any point during the conciliation. Rather, the conciliator will conduct separate calls with each party from the outset of the conciliation and 'shuttle' between each party as the conciliation progresses.

Shuttle conciliation should not be conducted where it is possible to conduct a conventional conference.

Cases where it is impractical or inappropriate for parties to converse directly may include where there are medical or mental health concerns, previous violence, intimidation, or threats, where court ordered restrictions on direct contact are in place, or otherwise where a party is subject to significant vulnerability (and where conciliation is not considered inappropriate—see Referrals to Conciliation on page 5).

In addition, a decision may be made to shift to shuttle conciliation during a conciliation conference where the joint conciliation process is not conducive to resolution (e.g. due to technical issues, time constraints on the parties, or relationship breakdown between the parties).

Where shuttle conciliation is conducted, participants are still required to be available at the same time and for the usual duration of a conciliation conference. Shuttle conciliation should be held in 'real-time', not via staggered sessions with the parties, to ensure the efficacy of the process.

Face-to-face conferences

In very limited circumstances, conciliation may be conducted via a face-to-face conference. An in-person conciliation should only be considered where necessitated by uncommon circumstances. This may include where one or both parties have access concerns, which make them unable to join a conciliation, or participate effectively, by telephone.

Physical conferences will require additional time and resources compared to a teleconference. They should therefore only be relied upon where all other options have been considered but are found unable to overcome impediments faced by participants.

When a face-to-face conciliation is required, an Australian Human Rights Commission public conciliation meeting room should be booked on level 3. At least one secondary room should be booked on the same floor, for the purpose of conducting private breakouts with the parties.

In the context of the Covid 19 pandemic, it is important to observe hygiene and sterilisation practices when using public access conciliation rooms, and to ensure that participants stay distanced from each other by at least 1.5 meters throughout the conference.

As a precaution, the conciliator should also arrange to be accompanied by a colleague, who will attend as an observer to the conciliation. Any risks involving face-to-face contact should be assessed before proceeding with the conciliation.

Post conciliation and closure

After the conciliation conference, it should be clear whether the parties have reached an in-principle agreement to resolve the complaint, or the complaint remains unresolved. However, sometimes the final result of the conciliation may not be known immediately after the conference. This is most common where one party seeks time to deliberate on a settlement proposal, or to obtain further instructions.

Conciliators may exercise their discretion to permit parties limited additional time, to pursue actions or options which might lead to a full and final resolution of the complaint.

This exercise of discretion should be reserved for matters where genuine progress was achieved at conciliation, and there is a real prospect of a delayed agreement being reached. Additional time should not be allowed where it is reasonably evident that further efforts are unlikely to lead to an agreed resolution.

Any additional period should be brief, and reasonable in the circumstances of the complaint. Conciliators should avoid keeping carriage of cases for protracted periods after the conference is ended.

Where a complaint is resolved

Where complaints are resolved through conciliation, the parties are advised what the next steps will be to give effect to their agreed outcome.

When writing to confirm the agreed resolution, it is preferable to email the parties jointly. This ensures consistency, transparency, and allows for more efficient communication or exchange of documents. The conciliator must confirm beforehand that the parties' consent to a joint email being sent for this purpose. If a party does not consent, the conciliator should email the parties separately.

Following conciliation, where an in-principle agreement is reached between the parties for the resolution of a complaint, a three-day cooling off period may be applied with the agreement of the parties. Parties are advised of this cooling off period and made aware that any issues should be raised before the expiry of the period. Where the parties sign the conciliation agreement or confirm their acceptance of the agreed terms within the three days, they are taken to have accepted the agreed terms of settlement.

The complaint may be finalised after the complainant has withdrawn the complaint under section 41(1A) of the Privacy Act (this is usually included as part of the terms of the agreement/conciliation agreement). In certain circumstances, parties may choose to draft their own Deed of Settlement and the OAC Conciliator may hold the matter open to allow for this to occur.

Parties must always be properly notified when closing a complaint, whether upon the confirmation or execution of the agreement, as relevant.

If the complaint is not withdrawn or one of the parties declines to finalise/accept the agreement, then the conciliator may refer the matter to the investigation team for further assessment.

Formal conciliation agreements

It is common practice for conciliators to draft a formal conciliation agreement for execution by the parties when a full and final resolution has been agreed (see Appendix E). Parties should be made aware that the conciliator can provide them with a conciliation agreement.

Standard correspondence used when notifying parties of conciliation outcomes is included below.

Example — Joint email to parties issuing conciliation agreement

CONCILIATION IN CONFIDENCE

Our reference: [REFERENCE NO.]

Dear [PARTIES NAMES]

I confirm that the Office of the Australian Information Commissioner (OAIC) has conducted a conciliation conference for the above referenced privacy complaint on [DATE].

During conciliation, the parties reached an agreement for the resolution of this matter. This is reflected in the conciliation agreement attached.

Next Steps

The agreement may be executed in counterparts. A three-day cooling off period applies unless mutual execution has occurred earlier.

The steps from here are:

1. each party should review and sign the agreement at their earliest opportunity, and no later than three (3) business days (being day/date)
2. once you have signed the agreement you should email a copy of this to the other party and to the OAIC for our records
3. any actions required should be performed in accordance with any relevant timeframes specified in the agreement.

The OAIC will finalise the complaint upon the mutual execution of the agreement.

Should you have questions, find a material error in the conciliation agreement, or determine you are unable to proceed with the agreed resolution, please contact me immediately.

Kind regards

Confirming conciliation result by email

Some parties may not wish to execute a formal conciliation agreement upon agreeing on a resolution outcome, or an agreement appears unnecessary in the context of the specific outcomes

agreed. The conciliator has the option to document this via email/s to the parties in these instances, instead.

It is also acceptable for one party to provide their own agreement or deed should they prefer, provided the other party agrees. The conciliator may still issue the parties with a confirmation of the resolution in-principle and setting out heads of agreement.

Sample correspondence which may be used in this context can be found below.

Example — Joint email to parties outlining agreed actions for resolution

CONCILIATION IN CONFIDENCE

Our reference: [REFERENCE NO.]

Dear [PARTIES NAMES]

I confirm that the Office of the Australian Information Commissioner (OAIC) has conducted a conciliation conference for the above referenced privacy complaint on [DATE]. Through the conciliation process an agreement for the resolution of the privacy complaint was reached between the parties.

Next Steps

The agreed next steps are:

1. [details of actions agreed to]
2. The Complainant withdraws the complaint.

Both parties are asked to respond to this email at their earliest opportunity to confirm their agreement to the above actions in resolution of the complaint.

Please note that a three-day cooling off period will apply to the resolution of the complaint on the basis of the steps above.

The OAIC will finalise the complaint pursuant to s 41(1A) of the Privacy Act after the three-day cooling off period has elapsed, unless an issue is raised beforehand, or upon receiving confirmation of acceptance from both parties (whichever comes first).

Should you have questions, find a material error in the conciliation agreement, or determine you are unable to proceed with the agreed resolution, please contact me immediately.

Kind regards

Where a complaint remains unresolved

If a complaint is not resolved through conciliation, the case should be reassigned to the Investigation (New) queue at the earliest opportunity. The conciliator then advises the parties of this referral and the next steps in the complaint process, including that the investigation team may decline to investigate the matter.

Any correspondence between the conciliator and the parties during the conciliation process must still be saved to Resolve, marked as confidential, and categorised as ‘conciliation material’.

Correspondence to the parties confirming that conciliation did not resolve the complaint must be careful to avoid reference to the content of conciliation discussions. These emails are *not* considered to be confidential and are not to be categorised as ‘conciliation material’. This ensures downstream teams can rely on this record as confirmation that conciliation has been attempted under s 40A(1), when progressing a complaint through an Investigation or Determination process.

Standard correspondence used to advise that a complaint remains unresolved following conciliation is included below.

Example – Confirmation that complaint remains unresolved

Our reference: [REFERENCE NO.]

Dear [PARTY NAME]

I confirm that the Office of the Australian Information Commissioner (OAIC) conducted conciliation in the above referenced privacy complaint on [Date]. No resolution was reached.

Next Steps

As no resolution to the complaint was reached during conciliation, the complaint will be referred to the Privacy Investigation for further consideration.

Once the complaint is assigned to an Investigation Officer, the matter will be assessed to decide on the next steps to be taken. This may be:

- to seek further information under s 42 of the Privacy Act
- to decide not to investigate further, under s 41 of the Privacy Act, or
- to open an investigation under s 40 of the Privacy Act.

The conciliation remains confidential and will not be used by the OAIC in the assessment process.

Please note that further assessment may take some time. However, the complaint can still be resolved at any stage should the parties reach agreement independently upon a resolution. Should you wish to provide any further information please send this to: pdr@oaic.gov.au.

Kind regards

Recording conciliation outcomes

A conciliation action item must be created in every instance where conciliation is held, including when the matter remains unresolved. A note should be made in the action item confirming:

- the date the conciliation was held, and
- whether resolution was reached or not.

Details of the agreed outcomes or discussions within the conciliation must *not* be noted.

When a complaint has been resolved through conciliation, outcomes should be appropriately recorded in the case file on Resolve. Issues fields should be populated with relevant information as to compensation or other outcomes agreed between the parties. Unless the parties have elected to waive confidentiality, the 'confidential agreement' option should also be selected.

The Conciliation Register ([D2020/003855](#)) is to be updated with the outcome of the conciliation.

All correspondence between the conciliator and the parties in the course of conciliation and confirming outcomes reached is confidential. When saving correspondence to Resolve prior to closing the file, the conciliator must ensure that they mark the document/s clearly as 'Confidential' and set the category to 'Conciliation Material'. This will ensure the conciliation material is assigned to a separate tab in Resolve which will not be accessed outside of the conciliation process.

Complaints about conciliation

If a complaint is received in relation to the conciliation process itself, or a participant in the conciliation other than the conciliator, those concerns should be referred to the relevant conciliator in the first instance for consideration and appropriate follow up, where necessary.

Where a complaint is received from a participant to a conciliation about the conduct or performance of the conciliator, this should be brought to the attention of the relevant Director within the Dispute Resolution Branch, at the earliest opportunity.

It is important that confidential conciliation discussions or materials are not disclosed during discussions about a complaint. If the individual refers to what was said in the conciliation, the staff member should interject to remind the individual that the conciliation is confidential and therefore, they cannot discuss it with them.

The person making the complaint should be asked whether their concerns relate to how the process took place or what was said by the other side, for example, or about the behaviour of the conciliator themselves. This will allow the officer to determine who the complaint should be directed to.

Appendix A – Conciliation referral checklist

Referral to Conciliation / Investigation team DELETE AS APPROPRIATE] – assessment

[CASE REFERENCE] – [RESPONDENT]

| The complaint (tick any box that is relevant) | |
|---|---|
| <input type="checkbox"/> | Collection |
| <input type="checkbox"/> | Notification |
| <input type="checkbox"/> | Disclosure |
| <input type="checkbox"/> | Security, deletion or de-identification |
| <input type="checkbox"/> | Access |
| <input type="checkbox"/> | Other – provide brief details: |

| Jurisdiction | | [If the field below is ticked, the file should not be referred without EL1 / EL 2 clearance] |
|--------------------------|---|---|
| <input type="checkbox"/> | <p>The act/practice falls under the Privacy Act or any other law that the OAIC regulates (such as the Crimes Act). Consider:</p> <p>Do any exemptions under the Privacy Act apply? For example:</p> <p>Small business operator (s 6D)</p> <p>Employee records (consider whether TFN or job applicant info involved)</p> <p>State or territory entity, CSPs</p> <p>Australian link</p> | <input type="checkbox"/> |
| | | <p>It remains unclear if the act/practice falls under the Privacy Act, despite reasonable inquiries being undertaken.</p> |

| Referral criteria [If any fields below are not ticked, the file should not be referred without EL1 / EL 2 clearance] | |
|--|---|
| <input type="checkbox"/> | Both parties have been advised of the complaint and the referral to conciliation |
| <input type="checkbox"/> | The respondent has responded to the complaint |
| <input type="checkbox"/> | <p>The complainant has complained to the respondent</p> <p>OR if the complainant did not complain to the respondent, it was not appropriate for the complainant to have done so – insert reason(s):</p> <p>_____</p> |
| <input type="checkbox"/> | All relevant information has been exchanged between the parties |
| <input type="checkbox"/> | If the complainant is represented, a signed authorisation has been obtained. |

| | |
|--------------------------|---|
| <input type="checkbox"/> | <p>Based on the information received to date, it appears that the act or practice may be an interference with the complainant's privacy if the allegations are established (s 40)</p> <p>If so, provide brief reasons¹:</p> <p>[Please <u>briefly</u> summarise the complaint, the submissions from both parties, and why the matter is not appropriate for finalisation at this time under s 41]</p> |
|--------------------------|---|

| Further information | | |
|--------------------------|--------------------------|--|
| Y | N | [If yes, provide brief details] |
| <input type="checkbox"/> | <input type="checkbox"/> | Has the complainant made a proposal to resolve the matter? |
| <input type="checkbox"/> | <input type="checkbox"/> | Has the complainant provided evidence of loss? |
| <input type="checkbox"/> | <input type="checkbox"/> | Has the respondent made a proposal to resolve the matter? |
| <input type="checkbox"/> | <input type="checkbox"/> | Has the respondent taken any other steps to deal with the complaint? |

| Other flags | | |
|--------------------------|--------------------------|---|
| Y | N | |
| <input type="checkbox"/> | <input type="checkbox"/> | Seriousness – are there any factors to consider here? For example: <ul style="list-style-type: none"> • Sensitive information or other information of a sensitive nature (such as financial information) • the adverse consequences alleged to have resulted from the conduct • whether the alleged conduct was deliberate or reckless |
| <input type="checkbox"/> | <input type="checkbox"/> | Has there been any media interest? |
| <input type="checkbox"/> | <input type="checkbox"/> | Are there any current or closed complaints made by the complainant that relate to the same respondent, and/or the same factual circumstances? If so, provide the case number of the related complaint/s: |
| <input type="checkbox"/> | <input type="checkbox"/> | Does this matter indicate a systemic issue? |

| Recommendation | |
|--------------------------|--|
| <input type="checkbox"/> | Refer to conciliation |
| <input type="checkbox"/> | Escalate for EL review prior to referral |
| [comments/reason] | |

¹ Please address any relevant provisions and briefly explain why the conduct may be an interference with privacy. Identify any evidentiary gaps or further information that may be required. If the respondent has taken steps to deal with the complaint, explain why those steps were not adequate.

Approval

Approved by EL1 / EL2

Appendix B — Conciliation fast-track referral tool

If the below factors are present in the assessment of a privacy complaint, the complaint may be appropriate for 'fast-tracked' referral to the Conciliation Team. Ordinary threshold considerations must be met for this protocol to apply i.e. the complaint is considered to fall within jurisdiction, meets the requirements of s 36 of the Privacy Act, the complainant has complained to the respondent before the OAIC and the complaint would not be more conveniently or effectively dealt with by a recognised external dispute resolution scheme.

These factors are non-exhaustive. If the assessor believes that a particular complaint would be suitable for fast-tracked referral to the Conciliation Team, based on the unique circumstances of the case, this can be raised with the appropriate Director.

Where **ANY** of the following apply

✓

- Complaint against a bank
- Complaints against a utility provider
- Complaint against a credit reporting body
- Complaint against a telecommunications provider
- Complaint against government agency where interference is admitted ^[1]
- Respondent has expressed willingness to resolve ^[1]

^[1] If apparent from complaint form or respondent's communication with complaint made available at lodgement of complaint.

^[2] Complainants who do not have any obvious accessibility concerns — where complainants do have accessibility concerns it is preferable that the normal ER process is conducted first to ensure appropriate support is provided to them.

Where **ALL** the following apply

✓

- Complainant appears able to participate in a teleconference without issue ^[2]
- Complainant does not insist upon penalties against respondent ^[3]
- Complainant has identified outcome(s) sought

^[3] Where apparent by outcomes sought by complainant in complaint form (e.g. civil penalties, prosecution by OAIC etc.).

Appendix C — Factsheet for conciliation

Conciliation Fact Sheet

Under s 40A(1) of the Privacy Act, the OAIC must make a reasonable attempt to conciliate complaints where the Commissioner considers it reasonably possible that the complaint may be conciliated successfully.

Conciliation process

A conciliation is a meeting facilitated by an OAIC conciliator, to discuss the complaint and attempt to resolve it. It is your opportunity to have input into the outcome of the complaint.

Conciliation at the OAIC is generally conducted by teleconference. You will be separately notified of the listing time for the conciliation teleconference.

A conciliation is usually conducted in the following steps:

1. Introduction by Conciliator
2. Opening statement by Complainant
3. Opening statement by Respondent
4. Joint discussion between parties to explore the issues
5. Private Sessions (between Conciliator and each party)
6. Further joint discussions of resolution options
7. Confirmation of outcome and next steps

The steps followed in a conciliation may vary, depending on what will best meet the needs of the participants. For example, if an agreement is reached to resolve the complaint during opening discussion, private sessions may not be necessary. The Conciliator will keep you informed about the steps being taken within the teleconference.

Conciliation at the OAIC follows a blended-mediation model. This means that the OAIC Conciliator may provide guidance and information about Australian privacy laws, where this may assist the party to resolve the complaint. Information or guidance given by the Conciliator is not legal advice.

Confidentiality

The conciliation teleconference is confidential. This confidentiality will cover:

- anything you tell the conciliator in private
- anything discussed during the conciliation, and
- documents prepared in connection with the conciliation (to the extent permitted by law).

At the start of a conciliation teleconference, we confirm that parties are to keep the discussions confidential to the extent permitted by law.

If the matter proceeds to investigation or determination the OAIC will not use anything said in the conciliation without your consent.

Outcomes

Often complaints can be resolved through conciliation following an explanation about what happened and why. To resolve a complaint, the parties might agree on an apology, payment of compensation, a commitment to review or change practices and procedures, or some other way to resolve the complaint.

Where an in-principle agreement to resolve a complaint is reached between the parties, the Conciliator will document the outcomes of that agreement. This will often be in the form of a written Conciliation Agreement.

Other processes

Further investigation

If the matter cannot be resolved through conciliation, the OAIC will consider whether to investigate further. The OAIC may also decide to finalise the complaint after conciliation but before further investigation is conducted.

Determination

A determination is a published decision of the Commissioner, which states whether there has been a breach of an individual's privacy, and what the Respondent should do to remedy that breach.

If the matter proceeds to a determination the OAIC will notify both the Complainant and the Respondent.

Under s 40A(5) of the Privacy Act, evidence of anything said or done in the course of the conciliation is not admissible in any hearing before the Commissioner, or in any legal proceedings, relating to the act or practice complained about unless:

- The Complainant and the Respondent otherwise agree; or
- The thing was said or done in furtherance of the commission of a fraud or an offence, or the commission of an act that renders a person liable to a civil penalty.

Determinations are usually made without holding a hearing. The Commissioner assesses relevant information, including the complaint and submissions, against the Privacy Act.

A determination **will not be** confidential. To inform the community about Privacy Act matters, the OAIC publishes the Commissioner's determinations on its website.