



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Ms Margery Nicoll  
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Dear Margery,

### **Fair Work Commission Consultation: Online Proceedings Framework**

Thank you for the opportunity to contribute to the Law Council submission to the Fair Work Commission (**'the Commission'**) regarding its Online Proceedings Framework (**'the Framework'**).

The Law Society previously contributed to the Law Council's submission in response to the Commission's Discussion Paper entitled *The future of online proceedings*. In that submission, the Law Society drew on the results of its survey regarding the impact of COVID on the justice system, which demonstrated that the majority of those members who responded support permanently adopting many of the changes brought about by the pandemic. In particular, a shift towards online proceedings in most circumstances is generally seen as having a positive impact in terms of time efficiencies and cost efficiencies to legal practitioners and their clients.

We note that the Commission's development of the Framework is an opportunity to engage with other courts and tribunals regarding their intended use of online proceedings. In consultations that the Law Society has conducted with Heads of Jurisdiction and other legal stakeholders since the release of the survey results, it has become clear that there are opportunities for different jurisdictions to share and discuss their protocols for online proceedings, both to promote best practice, but also to try and achieve, to the greatest extent possible, consistency in approach across jurisdictions.

While we support in principle the implementation of the Framework, we note that the Commission must nevertheless safeguard the integrity and accessibility of its processes. In this regard, we suggest that the Framework should enable parties to participate fully and effectively in online proceedings without creating additional barriers to justice or undermining procedural fairness.

### **When will the Commission hold a hearing or conference online?**

The Framework provides that "[i]t will be at the discretion of the Member hearing the case to decide whether the proceeding will be in person, partly online, or fully online." Attachment B sets out a number of considerations that may be taken into account by the Commission in making this decision.

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The Framework also sets out a variety of circumstances in which the Commission's default position will be to deal with proceedings online, including:

- urgent applications, including protected action ballot orders and orders to stop industrial action
- short matters, including mentions and most conciliations
- hearings and determinative conferences that do not involve disputed facts and only require oral argument (for example, some jurisdictional objections in unfair dismissal matters)
- proceedings where a participant has significant concerns about physically attending Commission premises (for example, in a stop bullying and/or stop sexual harassment matter)
- other matters where at least one party is based in a state or territory other than the presiding Member's 'home' state, or lives at a significant distance from Commission premises (for example, in a regional area)
- where the vaccination status of an individual participant or health directive would prevent the participant from physically attending the Commission, and
- where attendance at the Commission would have a significant impact on a participant's business, for example, where a specific witness's attendance, or the number of witnesses called, would require a business to close for the duration of the proceeding, particularly if the business is a small or medium-sized enterprise.

Given the Commission's broad discretion to determine how proceedings should be conducted, and the range of circumstances in which online proceedings will be the default, the Law Society considers the Framework should enable participants to play a more active role in influencing how proceedings will be conducted. In particular, while the Framework notes the "individual characteristics of a participant" may form part of the Member's determination, it does not appear to specify a process by which participants can inform the Commission of relevant considerations or advocate for a particular form of proceeding prior to any such determination. Accordingly, the Framework should, for example, provide that parties will have an opportunity to make short submissions on how proceedings should be conducted.

If you wish to discuss these issues or require further information, please contact Nathan Saad, Policy Lawyer, on (02) 9926 0174 or email [nathan.saad@lawsociety.com.au](mailto:nathan.saad@lawsociety.com.au).

Yours sincerely,



Joanne van der Plaats  
**President**