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Interim Online Proceedings Framework

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Interim Online Proceedings Framework

Introduction

The COVID-19 pandemic has led to unprecedented changes in the way courts and tribunals conduct proceedings. It has impacted all stages of the Fair Work Commission's processes, changing how we hear matters, conciliate and administer cases.

Based on the Commission's experience during the pandemic, it is apparent that online proceedings have both positive and negative aspects. In dealing with a matter, it may be appropriate to conduct some types or parts of proceedings online (for example, interlocutory proceedings) and others in person. The availability of parties may also require that proceedings are conducted in a 'hybrid' manner, with some parties participating in-person and others online.

Remote proceedings will remain a standard service option for the Commission in the future.

In order to provide certainty for Commission users, this interim framework will guide the Commission's utilisation of online proceedings (for conferences and hearings conducted by Members). The framework will be reviewed once it has been in operation for six (6) months.

The Commission will continue to use Microsoft Teams as the platform to conduct online proceedings.

Statutory context

Commission Members are independent statutory office holders.

The conduct of any individual matter before the Commission is at the discretion of the Member dealing with the matter. Members may make different decisions about whether to conduct a hearing or conference in-person or online, depending on the circumstances.

The *Fair Work Act 2009* (Cth) (Fair Work Act) sets out the Commission's powers and functions and how they may be exercised.



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The Fair Work Act generally provides the Commission with flexibility to inform itself as it considers appropriate in relation to an application, including by conducting a conference or holding a hearing.¹

Determinative conferences are less formal than hearings and are held in private unless the Commission directs otherwise.² Hearings are more formal and are generally held in public.³ Whether a matter is decided by determinative conference or by hearing, the parties will be afforded a fair opportunity to put their case forward, and to have their case determined impartially and according to law.⁴

Sections 577 and 578 of the Fair Work Act sets out the manner in which the Commission must perform its functions and are set out at **Attachment A** to this Framework.

The provision of a fair hearing requires Members to identify the difficulties experienced by a party, whether due to lack of representation, literacy difficulties, disability or any other reason, and find ways to overcome those difficulties and assist them through the Commission process.⁵

Fair and Just

While not bound by the rules of evidence and procedure in relation to a matter before it, the Commission must perform its functions and exercise its powers in a manner that is fair and just.⁶ The rules of evidence 'provide general guidance as to the manner in which the Commission chooses to inform itself'.⁷

Commission Members are bound to act judicially in accordance with 'notions of procedural fairness and impartiality'.⁸ The Commission must ensure that access to justice and procedural fairness are achieved in all circumstances, including in online proceedings.

¹ Fair Work Act, s.590 (subject to any requirements in the Fair Work Act).

² Fair Work Act, s.592.

³ Fair Work Act, s.593 (unless confidentiality orders have been made).

⁴ See the Commission's [Practice note: Fair hearings](#) at para. [7]. This Practice note applies to conferences and hearings conducted by Members of the Commission.

⁵ [Practice note: Fair hearings](#) at [38].

⁶ Fair Work Act, ss.591 and 577(a).

⁷ *Australasian Meat Industry Employees' Union, The v Dardanup Butchering Company Pty Ltd* [2011] FWAFB 3847 (Lawler VP, Hamberger SDP, Gay C, 17 June 2011) at para. [28], [(2011) 209 IR 1]; citing *Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* PR948938 (AIRC FB, Ross VP, Duncan SDP, Bacon C, 12 July 2004) at paras. [47]–[50], [(2004) 143 IR 354].

⁸ *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) at para. [25], [(2011) 192 FCR 78]; see also Fair Work Commission, 'Member Code of Conduct' (2 July 2021), at pp. 4-8.



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It is well settled that the Commission is obliged to observe the principles of procedural fairness in the conduct of its proceedings. One aspect of this obligation is the duty to hear a party and allow him or her to have a reasonable opportunity to present his or her case.⁹

What is procedurally fair requires a case-by-case consideration.

When will the Commission hold a hearing or conference online?

The Commission may hold a hearing or conference online for a number of reasons. These include:

- To better support accessibility requirements of participants
- To reduce travel cost and time for participants
- To hear the case, or a specific part of the case, quicker or more efficiently
- Where any of the participants involved have concerns about meeting in-person
- Where government health restrictions prevent participants meeting in person

The Commission will need to balance a number of considerations when deciding whether to hold proceedings online or in person. These considerations are outlined at **Attachment B** to this Framework.

It 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.

The Commission's default position will be to deal with the following proceedings, (or parts of the following proceedings) online:

- 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)

⁹ *Rabel, Andrew v Selmar Holdings Pty Ltd/Career Training Group Pty Ltd (CTG) T/A Selmar Institute of Education* [2014] FWCFB 8037 at [11].



- 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.

The Commission will usually vacate this default position where:

- the attributes of individual participants would result in them being unable to effectively participate in the proceeding if it was held online
- the attributes of individual participants would cause significant delays or inconvenience to the progress of a proceeding if the person participated online
- a participant does not have access to the reliable technology to enable their effective participation in the proceeding, and
- the Member(s) dealing with the matter considers that it is more appropriate to conduct the proceedings (or part of the proceedings) in person (for example, where the Member considers it critical to assess the credibility of each of the witnesses involved by observing them in person, or one of the parties is strongly opposed to the proceeding being conducted).

Online proceedings may not be appropriate where the attributes of a person involved in the proceedings means that they cannot effectively participate electronically (for example, where the person has difficulty accessing or communicating online). Online proceedings may also be inappropriate where this would adversely impact on procedural fairness or the administration of justice (for example, by leading to undue delays).

The use of online proceedings has been essential for the efficient resolution of matters, as required by the Fair Work Act.

In a non-COVID-19 context, in-person hearings may lead to additional delays if there are logistical issues around the availability of Commission hearing/conference rooms or regional venues, or due to the limited availability of parties' representatives. Holding proceedings online allows Members to make best use of participants' availability and also means that proceedings will not need to be adjourned if COVID-19 requirements change (as might be the case with an in-person hearing).

Online proceedings are arguably a less formal setting than proceedings held in-person as they lack 'the (generally) solemn atmosphere of a courtroom in the presence of a judge'.¹⁰

¹⁰ See *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 3)* [2009] FCA 1306; (2009) 181 FCR 152 at para. [78] (per Buchanan J).



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Resources for participants

For online proceedings to be effective, participants need to be informed of the format and provided with sufficient material to understand the procedural and technical processes of the proceeding. Providing consistent and detailed information helps parties participate effectively in proceedings.

The Commission has prepared a Participants Guide providing procedural information and guidance for participants about the conduct of online proceedings.

Two additional technical guides are available to assist participants in preparing for an online proceeding – an MS Teams specific technical guide and a technical information guide for witnesses appearing in an online proceeding.

Procedures and rules for online proceedings

Online proceedings require additional rules than an in person proceeding. These mainly relate to technology and are:

- All participants (including the Commission Member, applicant, respondent, representatives and witnesses) should generally have their video turned on at all times, unless the Member has made a direction to turn the camera off or the proceeding is adjourned for a short time. One exception to this will be if the proceeding is listed for a Mention via telephone or audio conference. If any participant does not have video capability they must inform the Associate to the Member prior to the proceedings.
- All participants must have their microphone muted until it is their turn to speak.
- A witness must not be in a room with someone else, coached, or passed notes (see section on Witnesses for more information)
- All participants must turn off any device that is not being used for the hearing, or have any other devices on silent mode. Mobile phones may need to be used (i.e. the Commission may need to contact parties via mobile phone) if technical problems arise during the online proceeding.
- Parties are not permitted to record or transmit the hearing in any way (see the 'recording online hearings' section of this guide for further information).
- There will be short breaks in online proceedings, offered at least every 2-2.5 hours. If parties need more frequent breaks a request can be made to the Member during the proceedings.



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Benefits and disbenefits

For parties, the benefits of participating in a proceeding online might include:

- reductions in travel time and costs (for their own travel and that of any representative)
- reductions in the stress and uncertainty that go with participating in legal processes (assuming the person finds online participation less intimidating – see further below)
- greater certainty around hearing dates, and
- for small businesses in particular, reduced time away from their business.

For Commission Members and staff, the benefits of conducting a proceeding online (or partially online) include:

- reductions in travel time and costs, particularly for regional proceedings
- increased flexibility, particularly for scheduling regional proceedings

Online hearings can be less intimidating for self-represented parties and hearing participants generally. Anecdotally, many participants appear more relaxed and comfortable giving their evidence online.

The Commission seeks to provide a safe environment for parties. Online proceedings can prove to be more suitable for vulnerable witnesses who might be intimidated by the hearing room experience or by being in the same room as someone they have accused of wrongdoing.

Research suggests Indigenous Australians may be able to participate more effectively in the justice system when they do not have to physically attend a hearing.¹¹

Similarly, some research has suggested that people with mental illness can more easily become stressed in a court environment.¹²

While there are clear benefits to holding a hearing or conference online, this may not always be possible. Users may not have consistent, stable access to required technologies like a PC, smart phone or stable internet. They may also have accessibility issues when using the technology e.g. users with hearing impairments may find it difficult to use an interpreter over video.

The stability of internet connections is vital to the success of online proceedings. The availability of reliable internet connections is very much dependent on what is available to a participant in their area (for example, this may be affected by whether the person is based in a major city or remote area).

¹¹ Michael Legg and Anthony Song, 'The Courts, the remote hearing and the pandemic: From action to reflection' (2021) 44(1) *UNSW Law Journal*, 126, 132.

¹² Michael Legg and Anthony Song, 'The Courts, the remote hearing and the pandemic: From action to reflection' (2021) 44(1) *UNSW Law Journal*, 126, 132.



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The quality of internet connections impacts the parties, Members and staff alike, and if the connection is poor, this may create an access to justice issue.

Other issues impacting online proceedings

Tendering documents

In most online proceedings, the Commission or the parties will provide a Court Book containing the documents they rely on in the proceeding. The parties, representatives and witnesses can experience challenges accessing the Court Book when it is a particularly large file. Sometimes these can be overcome by the Commission 'sharing' the relevant documents on the screen. Other difficulties and delays may arise when a party wishes to refer to a document that is not included in the Court Book. Unlike in an in-person hearing, the party cannot simply hand up a copy of the document to the Commission and provide a hard copy to the other parties.

Witnesses

In some instances, there may be a preference to hear particular witness testimony in person 'to assess the nature, quality and reliability of responses by a witness, both to questions and to the overall situation presented by the necessity to give evidence in court'.¹³ This may particularly be the case where the evidence is contested and the Member believes that the witness' demeanour should be closely observed to assess the credibility of their evidence.

Other ways of testing the reliability of a witness' evidence might include through corroborating evidence or assessing whether a witness' evidence is internally consistent. Ultimately, Members will need to balance all of the circumstances in deciding whether an issue would be better determined in the context of a conventional hearing, rather than an electronic one, or whether particular evidence should be received in that way.

Witness interference and tampering

The Fair Work Act makes it an offence to threaten, intimidate, coerce or prejudice a person who has or will provide information or documents to the Commission,¹⁴ or induce, threaten or intimidate a witness to give false or misleading evidence in a Commission matter.¹⁵

¹³ See *Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 3)* [2009] FCA 1306; (2009) 181 FCR 152 at para. [78] (per Buchanan J).

¹⁴ Fair Work Act, s.676.

¹⁵ Fair Work Act, s.678. See also offences in the Criminal Code (contained in the Schedule to the *Criminal Code Act 1995* (Cth) and the *Crimes Act 1914* (Cth).



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Where a matter is being conducted online, the parties and the Member may have difficulty in identifying if a witness is being coached by a third party; whether third parties are listening into the proceedings (for example, other witnesses who are yet to give evidence), or if a third party is potentially coercing or intimidating a witness.

The Commission may require an additional affirmation to be made by witnesses giving evidence online, to incorporate a declaration addressing these concerns.

Further information regarding witnesses is set out in the Participants Guide, including the nature of the additional affirmation for witnesses to affirm during an online proceeding.

Below is an example affirmation that may be used in proceedings requiring witness evidence to be given online:

"I solemnly and sincerely declare and affirm that the evidence I am about to give in this matter before the Commission will be the truth, the whole truth and nothing but the truth.

I will give my evidence independently, without reliance on any third party, and without the assistance of any other person, whether in their presence, or through the use of any technological device."

Interpreters

The use of interpreters in online proceedings remains challenging. In an in-person hearing, an interpreter can sit with the participant and provide simultaneous interpretation of their evidence or submissions. This avoids impacting the progress of submissions, evidence or the hearing generally.

In comparison, in an online proceeding, participants must interrupt the flow of conversation to allow for interpretation to occur on the same audio channel as all other speech. Accordingly, online interpretation can impede the progress of proceedings.

While the Commission will make interpreters available for online proceedings, the requirement for an interpreter will be a consideration taken into account by Members when deciding if a hearing should be online or in person. Additional time may be allocated in proceedings where an interpreter is involved and the proceeding is held online (or partially online). In some instances, it may be suitable to hold a 'hybrid' proceeding where an interpreter is present in the same room as the part requiring interpretation (i.e. in a Commission hearing or conference room).



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Observers to hearings

Where the Commission decides to hold a hearing, the hearing must be held in public except in limited circumstances.¹⁶

Online hearings can enhance the transparency and accessibility of court or tribunal proceedings, by enabling interested observers who would otherwise be unable to attend the hearing in person to participate online.

Members of the public are given information on how to access a particular proceeding, they are able to see and observe the proceedings (on a computer or smart phone) as if they were in the hearing room. In this way, high-profile cases like the Commission's national wage case can be livestreamed. This allows proceedings to potentially be viewed by a far greater number of persons, regardless of where they are located.

Information about how members of the public can access Commission proceedings online is set out in the Online Proceedings Participants Guide – see 'Observers to Hearings'.

¹⁶ Fair Work Act, ss.593(1)-(3).



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Attachment A – relevant provisions of the *Fair Work Act 2009*

577 Performance of functions etc. by the FWC

The FWC must perform its functions and exercise its powers in a manner that:

- (a) is **fair and just**; and
- (b) is **quick, informal** and avoids unnecessary technicalities; and
- (c) is **open and transparent**; and
- (d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).

578 Matters the FWC must take into account in performing functions etc.

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

- (a) the objects of this Act, and any objects of the part of this Act; and
- (b) equity, good conscience and the merits of the matter; and
- (c) the need to respect and value the diversity of the work force **by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.** [Emphasis added]



Attachment B – considerations for online proceedings

The following considerations may be taken into account by the Commission when determining whether to conduct a proceeding online (or to conduct part of a proceeding online):

- Is the ability of a participant to actively participate in the proceeding adversely impacted in an online setting, due to their:
 - ability to communicate in proceedings;
 - ability to comprehend proceedings; or
 - ability to access the proceeding itself?
- Does any impact in the participants ability to participate arise due to circumstances such as:
 - a physical or mental disability;
 - the participant’s language or heritage (e.g. Aboriginal or Torres Strait Islander)
 - any other individual characteristic?
- Are there individual characteristics of a participant that would favour an online proceeding or a hybrid-mode hearing? For example, these may include mobility issues or caring responsibilities.
- Does the nature of the dispute favour an online proceeding?
- Are there any other factors that weigh in favour of an in-person or online proceeding? These may include:
 - the location of the participants;
 - the use of an interpreter
 - the expected duration of the proceeding;
 - access to suitable technology;
 - the vaccination status of participants;
 - any health directives or orders that impact any participant’s ability to participate; and
 - the impact a proceeding will have on a business, for example if the required witnesses, travel or other factors would require the closure of a business or significantly impact operations.
- Any other factor the Commission Member considers appropriate.