



Law Council
OF AUSTRALIA

Online proceedings framework

Fair Work Commission

13 July 2022

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000¹ lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Ms Margery Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

¹ Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council is grateful for the contributions of the:

- Industrial Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section;
- Access to Justice Committee;
- Australian Capital Territory Law Society;
- Law Institute of Victoria;
- Law Society of New South Wales;
- New South Wales Bar Association; and
- Queensland Law Society.

Introduction

1. The Law Council is grateful for the opportunity to provide a submission in response to the Fair Work Commission's (**Commission**) Online Proceedings Framework including in relation to the *Draft Interim Online Proceedings Framework (Framework)* and *Draft Online Proceedings Participant Guide (Participant Guide)*.
2. The Law Council commends the work undertaken by the Commission in developing the Framework and Participant Guide. Subject to the comments below, the Law Council is generally supportive of these documents and considers them to be highly useful resources which provide clearer support for those involved in the Commission's online proceedings.
3. The Law Council notes that the Commission's development of the Framework is an opportunity to engage with other courts and tribunals, particularly at the federal level, regarding the continued use of online proceedings. In the Law Council's view, there are opportunities for different jurisdictions to share and discuss their protocols for online proceedings, both to promote best practice and, to the greatest extent possible, achieve consistency in approach across jurisdictions.

Framework

When will the Commission hold a hearing or conference online?

4. The Framework provides that 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.' A range of factors that may be taken into account by the Commission when determining when to hold a proceeding online are included in Attachment B to the Framework.
5. The Law Council supports the implementation of the Framework in principle. However, the Commission must safeguard the integrity and accessibility of its processes as a fundamental priority. In this regard, the Framework must enable parties to participate fully and effectively in online proceedings without creating additional barriers to justice or undermining procedural fairness.
6. 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 (see discussion of the default position below), the Law Council 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 could, for example, provide that parties will have an opportunity to make short submissions on how proceedings should be conducted.
7. In the Law Council's view, it is highly important that decisions as to whether a hearing will be held online (after hearing submissions from the parties) occur early in the proceedings. The Law Council understands that these decisions are often made only shortly before the hearing (for example only a week prior to the hearing).
8. It is important that the parties, their representatives, and any other participants (such as witnesses) are advised of the type of hearing as soon as possible to ensure that

they can make arrangements to properly attend the hearing. For example, travel may need to be arranged in the event of an in-person hearing, or alternatively, access to the necessary technology may need to be arranged in the event of a remote hearing.

9. The Law Council submits that the Framework should be amended to require that decisions as to the type of hearing (remote or in-person) be made as soon as possible prior to the hearing date.

The 'default' position

10. The Framework sets out the statutory context in which the Commission and its Members must operate. The Law Council notes this context but underlines that in adopting the Framework, Members of the Commission must approach online proceedings with caution so as to ensure that, in fact, the manner in which proceedings are conducted are fair and just.² The Law Council accepts that a Member of the Commission retains a discretion³ to determine their own procedure with respect to online hearings and whether to have a hearing at all.⁴
11. However, the usual position ought to be to conduct the vast majority of substantive hearings in-person in order to ensure the integrity of the hearing, the processes in determining matters and the reputation of the Commission as a transparent independent body. Such an approach is supported by the often-quoted principle that 'justice must not only be done but it must be seen to be done'. The exercise of such discretion (to hold substantive hearings other than in-person) should be exercised as an exception and only for reasons that are made public by the Commission Member(s) exercising the discretion.
12. The maintenance of the public's perception of the Commission as a 'Court' capable of dispensing impartial justice may be eroded over time if most of its substantive proceedings are conducted online or via telephone. Diminishing the status of the Commission will not serve the interests of justice nor the interests of the community which it serves.
13. There have been a number of authorities which have considered online hearings at least in the context of the COVID-19 pandemic.⁵ While some of the 'disbenefits' of online proceedings are listed on page 8 of the Framework, it is important to note that there are a number of others. For example, in *Capic v Ford Motor Company of Australia*, Perram J acknowledged a number of difficulties which may arise as a result of remote proceedings, stating:

The issues raised by the Respondent as to the difficulties which may be encountered if the trial proceeds are substantial. Those submissions can be categorised as concerning:

- (1) *technological limitations;*
- (2) *physical separation of legal teams;*
- (3) *expert witnesses;*

² *Fair Work Act 2009* (Cth) ss 591 and 577(a).

³ *Ibid* s 590.

⁴ *Ibid* s 593.

⁵ See, eg, *Quince v Quince* [2020] NSWSC 326; *Talent v Official Trustee in Bankruptcy (No 5)* [2020] ACTSC 64; *Seven Sisters Vineyard Pty Ltd v Konigs Pty Ltd* [2020] VSC 161; */KC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38; *Roach v Malsave Pty Ltd* [2020] NSWSC 364; *ASIC v GetSwift Limited* [2020] FCA 504 and *Capic v Ford Motor Company of Australia* [2020] FCA 486.

- (4) *lay witnesses, and in particular cross-examination;*
- (5) *document management;*
- (6) *future issues; and*
- (7) *trial length and expense.*⁶

14. Perram J expands on each of these issues in turn at paragraphs [9]-[22] of the judgment.⁷
15. The Law Council generally considers a default position of remote appearances for short and non-contested matters to be appropriate, including, but not limited to:
 - directions hearings;
 - conciliations;
 - interlocutory matters which are not complex; and
 - short hearings which are neither complex nor fact heavy.
16. In the Framework, the Commission outlines certain circumstances in which the proposed default position could be altered so as to accommodate face-to-face hearings. However, these seem to be overly limited to circumstances where there may be disputed facts or where there are some 'attributes' of individual participants that would warrant a departure from the default position.
17. There are other factors which the Law Council suggests should be considered, including, but not limited to:
 - whether cross-examination is required (see paragraphs 20-21 below for further discussion of the difficulties of remote cross-examination);
 - the nature of the evidence to be adduced, particularly where the nature of the evidence goes to credit issues;
 - in lengthy and complex matters, the volume of material that needs to be addressed;
 - whether witnesses will need to be shown documents whilst giving evidence, including where a witness asks to see a document in order to properly (and fairly) answer the question(s). In most cases, viewing documents can be done more quickly easily in-person than online, particularly for lay witnesses (for example, the witness would not need to try and view and read the document while also using the same device to attend the hearing); and
 - the place where a witness will be whilst giving evidence and whether it can be guaranteed that the witness will not be able to be influenced whilst giving evidence without the parties or Commission being aware that the evidence is being influenced.
18. While Attachment B of the Framework also sets out other factors which may be taken into account when determining whether to conduct a proceeding online, those matters, as identified in the attachment, are discretionary and, as such, reinforce the default position which has been adopted by the Commission.
19. The Law Council suggests that there are a number of proceedings that are more appropriately conducted face-to-face rather than online. These include, but are not limited to:

⁶ [2020] FCA 486, [23].

⁷ Ibid [9]-[22].

- multi day hearings;
 - unfair dismissals;
 - stop bullying and sexual harassment orders as these types of matters typically revolve around disputed facts and are more likely to involve, but not always, inexperienced participants appearing before the Commission;
 - lengthy and complicated appeals. Whilst, in the main, such appeals consist of oral arguments, those that are complex and involve considerable material to review and consider are best suited to in-person hearings;
 - urgent applications, in particular those involving orders seeking to stop protected industrial action. Generally, these types of matters require cross-examination of witnesses and involve a number of disputed facts that require resolution; and
 - matters that because of their subject matter have a high public profile.
20. The Commission's position seems to be that it may be appropriate to hear a witness give in-person evidence in some cases. As the Law Council commented in its previous submission, apart from in exceptional circumstances, there should always be at least the opportunity for in-person hearings if there is to be cross-examination of witnesses. Assessment of body language and demeanour can inform the Commission member's assessment of the overall credibility of a witness. The ability to observe a witness in the witness box can also inform the tactical decisions of the person undertaking the cross-examination. The issue with respect to being able to cross examine face to face has also been judicially considered in *Quince v Quince*.⁸ At paragraph [16] Sackar J notes:

However, it does seem to me that when allegations of this sort are made and where there is not an abundance of corroborative or other material, demeanour, rightly or wrongly, may well play a very significant part in the determination ultimately of whether such a serious allegation would be made out on a Briginshaw or s 140 basis.

21. Although there are some decisions where the courts have held that demeanour can be adequately assessed in online hearings,⁹ in the Law Council's view, it remains the case that cross-examination is usually best conducted in a face-to-face environment and not by way of online hearings.
22. In-person conferencing and hearings are also desirable in many circumstances as this setting emphasises to the parties the significance of the proceeding and is more likely to assist in parties being amenable to settlement, even during the hearing stage.
23. In the Law Council's view, the Framework should more strongly emphasise the importance of in-person hearings. As noted in the Law Council's previous submission, the Commission should consider clearly advising that a virtual hearing is not usually suitable in a number of circumstances.
24. The Framework, including Attachment B, should more clearly articulate that more complicated matters (such as those which involve disputed facts, examination in chief or cross-examination or excessive material and documents), will be held in-person by default. As such, the Commission should consider reversing the default

⁸ [2020] NSWSC 326, [7], [16].

⁹ See, eg, *KN v R* (2017) 95 NSWLR 767; *Australian Securities and Investments Commission v GetSwift Ltd* [2020] FCA 504, [33].

position for substantive proceedings, that is to state that the default position is for hearings to be conducted on a face-to-face basis and in open court unless certain considerations indicate that a remote hearing is more appropriate. Only in circumstances that warrant the exercise of the discretion to depart from the normal 'open justice process' should substantive hearings be held online.

Self-represented litigants

25. At page 8 of the Framework, the Commission states that:

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.

26. While the Law Council agrees with the premise of this statement, the Law Council suggests that the Framework should also recognise that for some self-represented parties, the benefits of in-person hearings or conferences may outweigh the benefits of appearing online. When proceedings involving unrepresented participants are held in-person, the Member and Commission staff can explain certain steps of the proceeding and provide a level of support that is difficult to achieve online. In some cases too, parties can treat remote appearances differently, that is, with less importance, than they would if they were appearing in-person.
27. The Law Council submits that an additional consideration could be included in Attachment B to the Framework which notes that the Commission may consider the representation (or lack thereof) of a party, and whether, in the circumstances, an online hearing may be more or less appropriate.
28. Appropriate guidance material is critical to a party's understanding of a proceeding, including regarding appearances. The Law Council commends the Commission for producing some very useful material which is likely to be of benefit to self-represented litigants and parties generally. Assisting self-represented litigants to appear remotely in an appropriate way will not only assist that person, but also the other party and the Commission to ensure the effective conduct of a proceeding.

Access to justice and accessibility

29. A Commission Member, when deciding whether to hold proceedings online or in-person, should give significant weight to access to justice considerations and should be informed by participants' own views about their access needs. The participant's preference should not be assumed on the basis that a participant has a particular attribute. For example, one individual with a disability may benefit from online proceedings, while another would benefit from attending in-person. Similarly, while online proceedings are beneficial for many people in rural, regional or remote (RRR) areas, the Commission should also consider that an applicant who does not have a personal phone or computer may need to access a community resource or borrow another person's equipment in order to participate online, potentially compromising their confidentiality in a small community.
30. While the discretion of the Member is required to balance the competing access needs of multiple participants, participants are best placed to understand the barriers they personally face. As noted at paragraph 6 above, consideration could be given to providing parties with an opportunity to make short submissions on how proceedings should be conducted.

31. Additionally, consideration of the accessibility needs of participants should include the needs of legal representatives involved in a hearing. For example, there are a number of legal practitioners with physical disabilities who may benefit from (or in fact, be disadvantaged by) a proceeding being held online.

Proceedings with RRR participants

32. The Law Council is supportive of the default position of using online hearings for those working or living in a RRR area. The Law Council understands from members of the profession that not having to travel to a regional centre or city is of great assistance to their clients, particularly those on a low income.
33. While there are many advantages to online hearings for RRR participants, resources must still be provided to ensure in-person hearings continue to take place in these areas. There will still be circumstances where in-person hearings in remote and regional areas are more appropriate than attending online. A lack of Members' attendance may also contribute to the isolation often experienced by those in RRR areas. The move towards an increase in online proceedings would be detrimental if resources are weighted such that there are limited proceedings conducted in RRR areas.

Resources for participants

34. Members of the profession have raised concerns about the barriers faced by participants with limited literacy skills when attending an online proceeding, particularly for those from RRR areas who may have less access to support. Participants with limited literacy are more likely to struggle to understand what is expected of them when attending online proceedings. The Commission may also have difficulty identifying which participants are impacted as they may not readily disclose these difficulties.
35. In addition to the materials already produced by the Commission, the Law Council suggests that a version of the Participant Guide with key information in Easy English should be made available to all participants. Both the full Participant Guide and the Easy English Participant Guide should make clear that a participant can request an in-person hearing or hybrid hearing if they are more comfortable.

Procedures and rules for online proceedings

Use of video

36. As noted in the Law Council's previous submission, it is critically important in any hearings that are not in-person, that the presiding Member(s), advocates, and any current witness have their camera turned on at all times when the hearing is in session.
37. At page 7 of the Framework, the Commission states that:

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.
38. However, members of the profession have reported that on a somewhat regular basis this principle has not been met. Of particular note, the Law Council

understands that Members of the Commission have turned their video off on many occasions, especially during appeals.

39. This raises a number of concerns for those lawyers (and others) appearing before the Commission. Members of the profession report that appearing before Commission Members who are not visible can be disconcerting and create unnecessary additional difficulties, particularly when questions are asked by one or more of the Commission Members and whilst generally engaging with a Member or Members of the bench. Appearances of this type can create confusion as to which Member of the Commission a representative is addressing and moreover, removes the very often necessary visual contact between the Member and the representative.
40. The combination of these factors may also have the adverse effect of reducing the appearance of a proper determination of the matter before the Commission. That is, parties may feel that their case has not been heard if they have not been able to see and interact with their adjudicator effectively.
41. It is important for the parties to understand how arguments, put on their behalf, are being received by Members of the bench. The visual impact of hearing is an important factor to consider. Parties to the proceedings – the ultimate users of the Commission's processes – should be able at all times to see how their position is impacting the Members hearing their matter.
42. Online proceedings may also give rise to a perception by clients of a lack of formality and may leave them feeling as if they have not had their 'day in court'. For example, the Law Council is aware of instances where complicated and lengthy interlocutory type matters and unfair dismissal hearings, which have run for multiple days, have been conducted by way of telephone. This can give rise to confusion with respect to who is talking at any point in time and result in parties talking over each other. Such situations are clearly not conducive to a proper hearing or having justice 'seen to be done'.

Witness interference and tampering

43. In its previous submission, the Law Council noted that it was aware of instances across Australia's judicial (and quasi-judicial) systems of witnesses receiving assistance such as pre-prepared notes, coaching or prompting while appearing (despite saying that no-one else is in the room). The Law Council is particularly aware of circumstances in which witnesses have several screens where they can view messages or documents while giving evidence or have notes in front of them.
44. The Law Council notes that these issues can be difficult to monitor in reality, particularly in circumstances where hearings are being conducted by telephone. In many circumstances while conducting online hearings it is not possible for the Commission or the parties to know if other persons are in the room with the witness or if the witness has access to undisclosed documents/notes/screens/etc.
45. On this basis, the Law Council suggested that the Commission develop guidance material which identifies what is expected of a witness, including that they are required to be alone in a room and avoid reading notes or documents whilst giving their evidence.
46. The Law Council is pleased to note that both the Framework and the Participant Guide emphasise these requirements.

47. The Framework and Participant Guide each identify that witnesses in online hearings will be required to affirm that they are not being assisted by a third party. The example affirmation included on page 10 of the Framework states:

.... 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.

48. In the Law Council's view, this example affirmation (and other descriptions of this requirement in the Framework and Participants Guide) should be broadened to emphasise that witnesses will also be required to attest to the fact that they do not have any material in front of them, either in hard or soft copy.

Observers to Hearings

49. Given the premise that Commission hearings are open to the public, it seems appropriate that, in addition to an opportunity for the public to participate as observers online, in many cases it would be appropriate that there also be an option for observers to participate other than online as well (for example, by attending a hearing room where the proceeding is broadcast). The Commission could give consideration to amending the Framework (at page 11) and the Participant Guide to provide for additional options for members of the public to view hearings in-person when they are being held online.

Participant Guide

Quiet and private location

50. The Law Council suggests that the requirement that participants find a quiet place to participate in an online hearing (page 9 of the Participant Guide) should be more clearly defined.
51. It is acknowledged that it is not appropriate for participants to attend the online proceeding while commuting. However, the Law Council is aware that witnesses often dial in to hearings remotely from noisy or busy locations (such as building sites). In such cases, they may be asked to drive off site and sit in their parked car to participate, rather than from their lunch shed or site office where they would be competing with background noise.
52. Participants should be encouraged by their representatives to dial in from an office or another quiet space where they are not going to be distracted by external noise or outside considerations. However, to accommodate participants who are in a similar position to those described above, the requirement in the Participants Guide could instead state either that:
- participants should not participate in a proceeding in a situation where the participant is not otherwise able to give full attention to the proceedings or the proceedings are hampered by external noise, such as while driving a motor vehicle; or
 - participants must not participate in a proceeding while driving, sitting in a moving vehicle or sitting in the driver's seat of a vehicle except with the permission of the presiding Member.