



7 June 2017

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Your Ref: AM2016/30

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Associate to Deputy President Dean
Fair Work Commission
80 William Street
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Dear Associate

AM2016/30: ALPINE RESORTS AWARD 2010

We refer to the above matter and to the email from Matt Galbraith of the SDA to Deputy President Dean's chambers on 1 June 2017.

Mr Galbraith's email followed a communication from our office dated 29 May 2017 in which we indicated that we anticipated that a number of witnesses will request to give evidence via video-link or telephone in the proceedings.

The ASAA, AWU and SDA have now indicated that they are of the view that witnesses in these proceedings should give evidence in person. It therefore seems to be the case that those organisations are opposed to any witnesses giving evidence via video-link or telephone in this matter.

In the circumstances, although the hearing is not taking place until October, our clients respectfully request that the Commission makes a ruling on this issue so that the Commission can determine the appropriate location of the hearing, having regard to the location of the various witnesses.

Our clients wish to make some submissions in support of witnesses being able to give evidence via video-link or telephone, where warranted on a case by case basis.

Those submissions are outlined overleaf.

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1. THE USE OF VIDEO-CONFERENCING & OTHER TECHNOLOGIES IN THE COMMISSION

1.1 The Fair Work Commission (the **Commission**) is required to perform its functions in a manner that is fair and just, quick, informal, avoids unnecessary technicalities and is open and transparent.¹

1.2 Against that statutory background, since 2012 the Commission has actively sought to improve and promote its technological capability, including in relation to the utilisation of hearings via telephone and video-conference, in order to improve access to the tribunal and meet the requirements of section 577.

1.3 In October 2012, Fair Work Australia (now the Commission) commenced a 'Future Directions' change program. In 2012, the tribunal set out 25 initiatives it intended to implement over the following 12 months.² One of those initiatives was to upgrade the Tribunal's video conferencing facilities.³

1.4 In the *Future Directions: Final Progress Report 2013*, the Commission reported that:

"We have undertaken a comprehensive upgrade of our video conferencing system to improve its clarity, reliability and flexibility. As Australia's national workplace relations tribunal, Members deal with matters that involve parties in multiple states and locations.

It is important that we have the appropriate technological support to ensure that parties do not feel disadvantaged even if they are not physically in the same room as the Member."⁴

1.5 During 2014 and 2015, the Commission continued its Future Directions change program and built on the initial initiatives with "*further technological innovations that will increase the Commission's efficiency and improve its service delivery*".⁵ The second phase of the program detailed a further 30 initiatives that the Commission planned to implement throughout 2014-15. One of those initiatives was as follows:

"During 2014 and 2015 we will examine how we can more effectively use technology, including live streaming of significant matters and improved access from remote areas."⁶

1.6 In its progress report titled *Continuing the change program: Future Directions 2014-15 progress report*, the Commission acknowledged the importance of efficiently engaging with all parties. At page 5 the report states that:

¹ Fair Work Act 2009, s 577(a)-(c).

² *Future Directions for Australia's national workplace relations tribunal*, Fair Work Commission, October 2012.

³ *Ibid*, page 7.

⁴ *Future Directions: 2013 Final Progress Report*, Fair Work Commission, 2013, page 2.

⁵ *Future Directions 2014 - 2015: Continuing the Change Program*, Fair Work Commission, page 3.

⁶ *Ibid*, page 2.

“While the Commission has offices in all capital cities, we understand that our parties are often located outside of metropolitan areas and as such may have different needs.

To help us better understand these needs we are currently mapping where our parties are based and how we can adequately and efficiently engage with all parties that appear before us.

*Some of the initiatives which may be considered as a result of this work include: a review of our processes for lodging applications; **extending the use of telephone, video and web-based technologies for conducting proceedings**; and exploring the use of more web-based information and services.⁷” [emphasis added]*

2. INCREASING UTILISATION OF VIDEO-CONFERENCING AND OTHER TECHNOLOGIES

2.1 The Commission’s initiatives to promote the use of telephone, video and web-based technologies for conducting proceedings have proven successful. The uptake of such technologies is clearly demonstrated in the statistics contained in the Commission’s annual reports.

2.2 For example, both the 2015-16 Annual Report and the 2014-15 Annual Report note that:

“Commission Members are increasingly holding hearings and conferences by telephone and video conference. This means that the parties often do not have to leave their home or workplace in order to participate, reducing their costs.”⁸

2.3 Further, the 2015-16 Annual Report records that there were 4,440 telephone and video conferences and hearings during the relevant period, which represented an increase of 25.8% over four years.⁹

2.4 Both the 2015-16 and 2014-15 Annual Reports also note that “The Commission has continued to reduce its carbon footprint by utilising video conferencing as a viable alternative to travel”.¹⁰

2.5 In a recent paper published by Commissioner Johns titled *The virtual Commission – improving access to justice and efficiency in dispute resolution through technology*, the Commissioner noted that:

“With 16,683 hearings and conferences being held in 2015-16, the use of telephone and video conferencing facilities now accounts for nearly 27% of all hearings and conferences.”¹¹

⁷ *Continuing the change program: Future Directions 2014-15 progress report*, Fair Work Commission, 2015, page 5.

⁸ *Annual Report 2015-16: Continuing the momentum*, Fair Work Commission, page 30; *Annual Report 2014-15: New approaches to workplace relations*, Fair Work Commission, page 48.

⁹ *Annual Report 2015-16: Continuing the momentum*, Fair Work Commission, page 30.

¹⁰ *Annual Report 2015-16: Continuing the momentum*, Fair Work Commission, page 130; see also *Annual Report 2014-15: New approaches to workplace relations*, Fair Work Commission, page 193.

¹¹ Commissioner Leigh Johns OAM, *The virtual Commission – improving access to justice and efficiency in dispute resolution through technology*, delivered (via video-link) at the Industrial Relations Society of NSW Annual Convention, May 2017.

2.6 Based on the above, it is clear that the Commission has progressively moved away from requiring people to attend the Commission in person. The benefits of such an approach were articulated by the President of the Commission, his Honour Justice Ross, in his Honour's submission to the Productivity Commission in March 2015. In that submission, his Honour commented that the:

"Commission has also invested in improved video conferencing facilities to improve both access to the Tribunal (where parties can participate by video or telephone, rather than having to travel to Commission premises) and internal efficiencies (through reducing the need for travel and enabling workload to be managed as matters do not need to be dealt with in the location of the parties)."

2.7 The extent of utilisation of telephone and video-conferencing facilities is also reflected in the recent action of the Commission in developing a draft practice note to guide how requests are made and determined.¹²

2.8 The *Draft Practice Note: 1/2017 (Requests to appear remotely)* was published on or around 2 May 2017, with feedback from stakeholders open until 23 May 2017 (**Draft Practice Note**).

2.9 To date, the Draft Practice Note has not been published in final form or implemented. However, it reflects the fact that appearing remotely is becoming an increasingly common occurrence in the Commission.

3. THE APPROACH TAKEN DURING OTHER 4 YEARLY REVIEW PROCEEDINGS

3.1 Testimony by either video-link or telephone has been a common occurrence in other Commission proceedings as part of the 4 yearly review of modern awards where matters have proceeded to a contested arbitration and where witness evidence was adduced and the witness was required for cross-examination.

3.2 Perhaps the best example of this was in the common issues part-time employment and casual employment proceedings (matters AM2014/196 and 2014/197), where at least 19 witnesses gave evidence by telephone and 24 witnesses gave evidence by video link.¹³

3.3 Other common issue proceedings which took contested evidence by video link or telephone include:

- (a) the Penalty Rates Case (where a number of witnesses gave evidence by video link);
- (b) the Annualised Salaries Case (where a witness gave evidence on behalf of a range of rail companies by video link); and
- (c) the Accident Pay Case.

3.4 In the individual award stage of the review, the following are examples of proceedings that have involved witness evidence being taken remotely:

¹² Draft Practice Note: 1/2017 (Requests to appear remotely).

¹³ These numbers have been derived from a very cursory review of the transcript available on the FWC website. It is likely that the number of telephone and video link witnesses is actually higher than the numbers quoted in this correspondence.

- (a) in the review of the Textile, Clothing, Footwear and Associated Industries Award (AM2014/91), the Bench sat in Melbourne with a video-link to Sydney, and heard witness evidence both via video-link¹⁴ and via telephone¹⁵;
- (b) in the review of the road transport awards (AM2016/32), the Bench sat in Sydney with a video-link to Melbourne, and heard witness evidence both via video-link¹⁶ and via telephone¹⁷;
- (c) in the review of the construction group awards (AM2016/23), the Bench sat in Melbourne. There were twenty-three (23) witnesses who gave evidence at the final hearing, with one (1) witness giving evidence¹⁸ via telephone and sixteen (16) witnesses giving evidence via video-link¹⁹; and
- (d) in the review of the educational services awards (AM2016/6), the Bench sat in Melbourne and took evidence by video link from witnesses in a variety of different locations including Adelaide, Sydney, Brisbane and Perth.²⁰

4. REASONS WHY EVIDENCE BY VIDEO-LINK / TELEPHONE IS APPROPRIATE IN THESE PROCEEDINGS

4.1 The present matter is not a party-party dispute.

4.2 It is part of a broad review of modern awards applying across Australia. This is relevant for a number of reasons:

- (a) Firstly, the award review proceedings are open for any employee and employer across the country to participate in, whether by making submissions or by providing a witness statement. The broad application of and contributions to the award review process lends itself to providing a hearing process which promotes access efficiency.
- (b) Secondly, given that the proceedings do not relate to a party-party dispute, witnesses are rarely directly impacted by the proceedings. Instead, the impact of the award review proceedings on witnesses is usually indirect. That is, the submissions made might give rise to award variations that will ultimately affect an employer's business or an employee's employment conditions. The lack of a direct connection between the proceedings and the relevant witnesses can make it difficult to secure witnesses to appear in the Commission in person.

¹⁴ Adam Jones (from Sydney).

¹⁵ Roy Wilkinson, Tim Hicks and Tony Butler.

¹⁶ Daryl Coghill, Maxwell Bird, Robert Anderson, Bradley Foenander (all from Melbourne).

¹⁷ Lyle Fear.

¹⁸ Dean Reilly

¹⁹ David Soloman, Peter Middleton, Graham Pallot, Paul Ferreira, Danny Callaghan, Josh Burling, Roland Cummins, David Kelly, Kris Woodward, Robert Wilson, Cameron Spence, Peter Glover, Jeff Buhler, Anthony Callinan, Geoff Muller and David Castledine

²⁰ By way of example, see the joint timetable provided by the parties at <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20156-joint-timetable-nteu-150716.pdf>

- (c) Thirdly, given the industry-wide scope of the award review process, the nature of witness evidence in award review proceedings (including this proceeding) is typically of a general nature (for example, general information about the nature of an employer's business). It is rare for there to be a competing versions of events surrounding a particular incident (like there might be in party-party disputes).
 - (d) Fourthly, in light of the above, issues around the credibility of witnesses are less likely to occur in award review proceedings compared to part-party disputes.
 - (e) Fifthly, although the review is conducted by the Commission, the Commission ordinarily relies upon the evidence of witnesses in order to inform itself of employment conditions and the effect of award provisions. It is obviously desirable for the Commission to have as much material before it as possible and if facilitating the provision of video/telephone evidence secures the provision of further evidence, then this course should be adopted by the Commission.
- 4.3 In this matter, the witnesses are located in two separate regional areas, being:
- (a) the NSW alpine regions of Thredbo and Perisher; and
 - (b) the Victorian alpine regions of Falls Creek and Mount Hotham.
- 4.4 Those regional areas are not in close proximity to any of the Commission's registries or offices. For example:
- (a) the nearest office to Thredbo and Perisher is the Canberra registry, which is more than 200 kilometres from Thredbo/Perisher; and
 - (b) the nearest office to Mount Hotham and Falls Creek is the Melbourne registry, which is more than 350 kilometres from Mount Hotham/Falls Creek. Mount Hotham and Falls Creek are in fact approximately 500 kilometres from the currently proposed hearing location of Canberra.
- 4.5 The distance between these business locations and the Commission registries mean that, in some cases, significant practical difficulties might arise if witnesses were required to give evidence in person.
- 4.6 On the other hand, the arguments against permitting witness testimony via telephone or video-link are of limited weight. None of the opposing parties (the ASAA, SDA and AWU) have advanced submissions of substance as to why the witnesses should not be permitted to give their evidence remotely. Nor have they asserted that they will be prejudiced if witnesses are permitted to give evidence remotely.
- 4.7 To the extent that practical difficulties arise from a party having to cross-examine witnesses who are not in the same location, this issue is neither novel nor particularly significant. In any event, to the extent practical issues arise, those difficulties can be ameliorated by the

issuing of directions such as those issued in the common issues casual/part-time proceedings.²¹

5. CONCLUSION

- 5.1 For all of the above reasons, our clients submit that witness evidence should be permitted by video link or telephone on a case by case basis, where it is apparent that a witness will have difficulty attending the Commission in person.
- 5.2 As foreshadowed by the ASAA, AWU and SDA, this makes it likely that most if not all of the Victorian evidence would be sought to be given by video link or telephone - given that these businesses are located approximately 500 kilometres away from Canberra.
- 5.3 Our clients would be willing to participate in a directions hearing or further correspondence should it assist the Commission in determining the appropriate hearing location and ascertaining the means by which evidence will likely be taken during the October 2017 hearing of these proceedings.

Yours sincerely



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²¹ See for example: <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2014196and197-witnesslist-060716.pdf>