



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELC:BMsh220224

22 February 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: john.farrell@lawcouncil.asn.au

Dear Dr Popple,

Exposure Draft Fair Work Commission Rules 2024

Thank you for the opportunity to contribute to a Law Council submission providing feedback on the Exposure Draft Fair Work Commission Rules 2024 (**draft Rules**). The Law Society's Employment Law Committee contributed to this submission.

General comments

The Law Society considers that, generally, the draft Rules are structured in a logical and useful way. Overall, we support the changes proposed through the draft Rules, including the proposals to remove rules and forms that have been rendered obsolete by changes to legislation or practice.

Our specific suggestions are set out below.

Chapter 1 – General procedures

Rule 10 – Discontinuance

Draft rule 10 sets out the process for discontinuing an application. While provision is made for an applicant to notify the Fair Work Commission (**FWC**) of the discontinuance, there is no provision for notifying the other party or parties to the matter. We suggest that draft rule 10 should either require the discontinuing applicant to inform the other party or parties to the matter, or require the FWC to do so, as soon as reasonably practicable, after the FWC has been notified.

Rule 13 – Representation by lawyers and paid agents

Under draft rule 13(1)(a), a lawyer or paid agent must not represent a person in a FWC conference or hearing without the permission of the FWC, unless the conference or hearing relates to a matter set out in draft rule 13(2).

Based on the experience of our members, we suggest that it would assist the conduct of all matters where permission is required if that issue could be determined before the date and time allocated for the conference or hearing to occur. While in practice this can occur in some

matters through prior directions hearings, there is no formal process in place for a pre-determination of permission to be represented. As a result, in many matters it is necessary for our members to prepare not only on the basis that permission will be granted for them to appear and advocate on behalf of their client, but also on the basis that no permission will be granted and that the client will need to represent themselves. This can cause unnecessary cost and anxiety for clients until the issue of permission is determined, possibly as late as at the commencement of the conference or hearing. We suggest draft rule 13 should require the FWC, wherever possible, to determine the question of representation on the papers as soon as practicable after the relevant application, response and/or Form F53 (Notice that lawyer or paid agent acts for a person), is lodged.

Rule 16 – Lodging documents by email

The Law Society supports the provision of multiple ways of lodging documents at the FWC under draft rule 15(2), including by physically delivering the document, emailing the document, posting the document or creating and lodging the document electronically. However, as a general principle, we suggest it would help to avoid confusion if the layout and appearance of the filed documents be materially identical or as consistent as possible, regardless of the method of lodgment.

We also support processes that provide certainty as to the date and time on which a document is taken to have been filed.

Draft rules 16(2) and (3) set out methods for establishing the lodging date of documents lodged by email and electronically, respectively. We suggest that it would facilitate the smoother conduct of matters if the FWC could return a document that resembles the relevant physical form, and which features an electronic ‘stamp’ indicating the date and time on which the document is taken to have been lodged. This would assist practitioners and their clients, particularly where the practitioner is asked to assist the client after an application is lodged, in circumstances where it can be unclear as to which document was filed by the client and when. We appreciate that implementing this process may have resourcing implications for the FWC.

Thank you again for the opportunity to comment on the draft Rules. We note that further changes may be required to implement recent and ongoing legislative reform (including the ‘Secure Jobs, Better Pay’ and ‘Closing Loopholes’ reforms) and look forward to the opportunity to provide further comment in due course.

Any questions in relation to this letter should be directed to Sue Hunt, Senior Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,



Brett McGrath
President