



13 March 2015

Mr Peter Harris AO
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Productivity Commission
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By e-mail: workplace.relations@pc.gov.au

Dear Mr Harris

Submission: Review of Australian Workplace Relations Framework

As requested, I attach a submission to assist the Productivity Commission in its inquiry into the workplace relations framework and, in particular, matters relating to the efficiency and effectiveness of various institutions that operate under the Fair Work Act 2009, including the Fair Work Commission (the Commission).

The Commission's role is to administer its jurisdiction in accordance with statute. The Commission does not enter the legal policy debate other than where technical changes may make the administration of the law simpler. Accordingly, this submission does not respond to questions posed by the Productivity Commission that go to matters of legal policy.

I welcome any inquiries you may have regarding this submission and the operation of the Commission.

Yours sincerely,

JUSTICE IAIN ROSS AO
President

Submission by the President of the Fair Work Commission to the Productivity Commission Inquiry into the Australian Workplace Relations Framework

March 2015

Submitted by Justice Iain Ross AO

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SECTION ONE: Executive Summary

As Australia's national workplace relations tribunal the Fair Work Commission (the Commission) delivers an important service to the Australian community by:

- setting the minimum wage and award safety net provisions;
- dealing with workplace bargaining and disputation; and
- dealing with individual matters including unfair dismissal and anti-bullying applications.

Over time the national workplace relations tribunal has undergone many changes in jurisdiction, name, functions and structure. The tribunal has endured by successfully adapting to changes to its legislative environment and because it provides an independent, competent and professional dispute resolution service.

The challenge the Commission faces, along with most public organisations, is to continue to deliver quality services efficiently and effectively within the resources provided by Government.

The Commission is committed to an ongoing change program called *Future Directions* to improve its performance and efficiency and the quality of its services. The initiatives are set out in the *Future Directions* Program and are grouped under four key themes:

- promoting fairness and improving access;
- efficiency and innovation;
- increasing accountability, and
- productivity and engaging with industry.

These initiatives are directed to ensuring the Commission fulfils its role as an accessible, fair, efficient and accountable national institution which responds appropriately to change and pursues continual improvement of the services it delivers to the community.

The Commission is also responding to a significant shift in its work, from primarily dealing with matters of a collective nature (such as large scale industrial disputes) to more individual rights-based matters. This shift is reflected in the number and nature of applications being brought before the Commission and the profile of parties.

The Commission regularly consults with its clients, stakeholder groups and the broader community to ensure the services it provides meet the demands of a modern workplace relations system, and to strengthen the design and content of Commission systems and resources.

The Commission is also committed to addressing change internally so as to direct its resources to where they will deliver the greatest benefit to clients and to operate in a manner consistent with best practice in Australian tribunals and courts. To this end, the Commission continues to review best practice management and structures in other similar tribunals and the courts.

The focus of this submission is not on the structure of the workplace relations system. It has been prepared at the request of the Productivity Commission to provide information on the changing nature of the work of the Commission and how the organisation is responding to that change.

INTRODUCTION

This submission has been prepared to assist the Productivity Commission in its inquiry into the workplace relations framework and, in particular, matters relating to the efficiency and effectiveness of various institutions that operate under the *Fair Work Act 2009* (Cth) (Fair Work Act), including the Fair Work Commission (the Commission). Particular issues from *Productivity Commission Issues Paper 5, Workplace Relations Framework: Other Workplace Relations Issues* (January 2015) which are considered in this paper are:

- efficiency and effectiveness of the Commission;
- the degree to which the Commission imposes costs on parties, including (in particular) small business and steps which have been taken to reduce these costs through process efficiencies and targeted provision of information;
- process and governance arrangements that are directed towards achieving consistency of decision making;
- assessment of the Commission's performance; and
- the Commission's dispute resolution procedures.

The Commission's role is to administer its jurisdiction in accordance with statute. The Commission does not enter the legal policy debate other than where technical changes may make the administration of the law simpler. Accordingly, this submission does not respond to questions posed by the Productivity Commission that go to matters of legal policy.

Section two of this submission discusses the structure, role and workload of the Commission and provides a brief overview of its history. Section three discusses the changing nature of the work of the Commission and Section four discusses reforms that have been delivered or are underway to address this change. Section five provides an overview of the Commission's management of specific types of matters that come before it.

SECTION TWO: OVERVIEW OF THE COMMISSION

Background and history

The Commission is Australia's national workplace relations tribunal. The Commission has jurisdiction over a national system which, in broad terms, covers:

- all employers and employees in Victoria (with limited exceptions in relation to State public sector employees), the Northern Territory and the Australian Capital Territory;
- private sector employers and employees in New South Wales, Queensland and South Australia;
- private sector employers and employees and local government employers and employees in Tasmania;
- employers that are constitutional corporations and their employees in Western Australia; and
- the employers of waterside employees, maritime employees and flight crew officers in interstate and overseas trade and commerce, and these employees.

The first national workplace relations tribunal, the Commonwealth Court of Conciliation and Arbitration, was established in 1904 by the *Conciliation and Arbitration Act 1904* (Cth).

Since that time, the tribunal has undergone many changes in jurisdiction, name, functions and structure, in line with substantial legislative, social and economic changes.

The Commission, formerly named Fair Work Australia, was established by the Fair Work Act and commenced operation on 1 July 2009.¹ The Commission took over the functions of the Australian Industrial Relations Commission (AIRC), the Australian Industrial Registry and the Australian Fair Pay Commission. The Commission is an independent statutory agency.

Functions

The Commission is the specialist tribunal responsible for administering the provisions of the Fair Work Act and the *Fair Work (Registered Organisations) Act 2009* (Cth) (Registered Organisations Act).

The Fair Work Act empowers the Commission to perform a range of functions including to:

- resolve unfair dismissal claims;
- deal with applications for orders to prevent bullying at work;
- deal with general protections and unlawful termination disputes;
- annually review and determine national minimum wages and minimum wage rates in modern awards;
- make and regularly review and vary modern awards;
- make orders to ensure equal remuneration for work of equal or comparable value;
- make orders in relation to transfer of business;
- make orders to facilitate enterprise bargaining (including orders for ballots on protected industrial action and good faith bargaining) and deal with bargaining disputes;
- make workplace determinations in certain circumstances in which enterprise bargaining parties have been unable to reach agreement;
- approve, vary and terminate enterprise agreements;
- make orders to stop or suspend industrial action;
- deal with disputes brought to the Commission under the dispute resolution procedures of modern awards and enterprise agreements;
- issue, suspend and revoke entry permits and deal with disputes concerning rights of entry;
- deal with disputes about stand downs;
- promote cooperative and productive workplace relations and prevent disputes; and
- provide assistance and advice about its functions and activities.²

In addition, the Registered Organisations Act confers certain functions upon the Commission and the General Manager of the Commission in relation to the regulation of organisations of employers and employees registered under that Act.

¹ Fair Work Australia was renamed the Fair Work Commission on 1 January 2013. This change was brought about by Schedule 9 of the *Fair Work Amendment Act 2012* (Cth).

² Fair Work Act s.576.

The Commission is required to perform its functions and exercise its powers in a manner that:

- is fair and just;
- is quick, informal and avoids unnecessary technicalities;
- is open and transparent; and
- promotes harmonious and cooperative workplace relations.³

The Fair Work Act provides the Commission with broad powers and discretions as to how it informs itself and how it deals with matters, subject to certain express limitations. Members of the Commission perform quasi-judicial functions under the Fair Work Act, including by conducting public hearings and private conferences. When a hearing is conducted:

- it is generally held in public;
- Members are bound to act 'judicially' in the sense that they are obliged to afford procedural fairness and to determine matters impartially;
- reasons for decisions must be given and published; and
- decisions are subject to appellate review before a Full Bench of the Commission and to judicial review in the Federal Court and High Court.

Commission staff also provide assistance and support to the Road Safety Remuneration Tribunal, which is an independent tribunal established by the *Road Safety Remuneration Act 2012* (Cth). The Road Safety Remuneration Tribunal is comprised of six Members of the Commission who hold dual appointments to the Tribunal and a number of representatives of industry.

Structure

The Commission comprises Members who are independent, statutory office holders appointed by the Governor-General on the recommendation of the Australian Government of the day. Appointees must have appropriate knowledge or experience in relevant fields such as workplace relations, law, business, industry or commerce.

The Commission consists of a President, two Vice Presidents and such number of Deputy Presidents and Commissioners as, from time to time, hold office under the Fair Work Act.⁴ There are currently 44 Members of the Commission. Members are appointed until the age of 65 on a full-time basis (but may perform duties on a part-time basis with the approval of the President). Additionally, there are presently six members of state industrial tribunals who hold a dual appointment with the Commission and five Expert Panel Members who are appointed on a part-time basis for a specified period of not more than five years.

The President is responsible for ensuring that the Commission performs its functions and exercises its powers in a manner that is efficient, and that adequately serves the needs of employers and employees throughout Australia.⁵

Much of the work of the Commission is administered through a panel system overseen by the President. This system seeks to ensure that matters are dealt with efficiently by Members with appropriate levels of experience and expertise in various fields. In addition to the five industry panels, specialist panels deal with Anti-Bullying matters, Termination of

³ Fair Work Act s.577.

⁴ Fair Work Act s.575.

⁵ Fair Work Act s.581.

Employment matters, Organisations matters and Major Resources/Infrastructure projects. There are also two Expert Panels with particular functions in relation to annual wage reviews and the assessment of default superannuation funds in modern awards.

The Commission is supported by the General Manager and administrative staff. In addition to assisting the President in ensuring that the Commission performs its functions and exercises its powers, the General Manager performs functions in relation to the regulation of organisations under the Registered Organisations Act (particularly in respect of financial and other reporting) and is the head of the public service agency that employs the administrative staff of the Commission.

The administrative staff of the Commission are employed under the *Public Service Act 1999* (Cth) and are organised into four branches—Client Services, Corporate Services, Regulatory Compliance and Tribunal Services. As at 31 December 2014 the Commission employed 299 administrative staff (of whom 251 were employed on an ongoing basis and 48 on a non-ongoing basis).⁶

A significant proportion of the Commission's resources are dedicated to dealing with inquiries from the public, which are received via the Commission's website, telephone inquiry line, emails and visits to the Commission's offices in each capital city.

Commission offices are located in the capital cities of each state and territory.

Budget KPIs

The Commission's key performance indicators outlined in the Portfolio Budget Statements are that it will:

- complete Annual Wage Reviews to enable an operative date of 1 July (by June);
- improve or maintain the time taken to list applications relating to industrial action (median time of 3 days);
- improve or maintain the time taken to approve agreements (median time of 32 days);
- improve or maintain the time elapsed from lodging applications to finalising conciliations in unfair dismissal applications (median time of 34 days); and
- assess for compliance 95 per cent of financial reports required to be lodged under the Registered Organisations Act, within 40 working days.

The first three KPIs were met in the 2013–14 financial year, with the Annual Wage Review 2013–2014 completed on 4 June 2014; a 33 per cent reduction in the time taken to list applications relating to industrial action; and a median agreement approval time of 17 days. The result for the fourth KPI in 2013–14 was a median of 46 days from the time of lodging an unfair dismissal application to finalising conciliation. In the first quarter of that year, the lodgment of applications increased significantly (20 per cent). Between August 2013 and March 2014, five of the Commission's 25 conciliators left the Commission and it took longer than anticipated to replace them. The combination of these factors led to the creation of a small backlog which has since been cleared and the Commission will meet its KPI in 2014–15.

The fifth KPI, a new measure for the Commission, was also not met due to extraordinary circumstances. Failure to meet this KPI was a consequence of a one-off, but very large additional workload for the Commission arising from the requirement in the *Fair Work*

⁶ Staff figures are Full Time Equivalent (FTE).

(Registered Organisations) Amendment Act 2012 (Cth) that each organisation amend its Rules by 1 January 2014. To maximise compliance by registered organisations with the Act, resources had to be diverted to this work. The result for 2013–14 was just under 38% of financial reports being assessed for compliance within 40 working days and as at the end of January 2015, 95.2% of reports had been assessed within 40 days.

Caseload (2009–2014)

In the last five financial years, the number of applications lodged with the Commission and its predecessor more than doubled, and the number of telephone inquiries more than quadrupled:

- In 2008–2009, 17 658 applications were lodged with the Australian Industrial Relations Commission (AIRC) and its information line responded to 50 000 inquiries;
- In 2013–2014, the Commission received 37 066 applications and 208 102 telephone inquiries.

The Commission's overall caseload has remained relatively steady since 2011, with the number of overall lodgments decreasing by 1% between July 2011 and June 2014⁷, however its profile reflects the trend of increasing numbers of individual rights-based disputes and decreasing numbers of collective disputes.

Unfair dismissal applications continue to comprise a significant proportion of the Commission's work, totaling 40 per cent of applications received in 2013–14. Whilst in 2013–14 there was a slight decline (0.14 per cent) in the number of unfair dismissal applications as compared with the previous financial year, there was also an 18.5 per cent increase in the number of general protections applications.

Collective disputes remained relatively stable in 2013–14. While there was a 13.6 per cent increase in dispute resolution applications from the previous year, the number of applications for orders relating to industrial action continued to decline (decreasing by over 22 per cent in 12 months).

In 2013–14, the number of hearings and conferences conducted by the Commission increased by 3.3 per cent, from 18 991 in 2012–13 to 19 620 in 2013–14. During the same period the number of decisions and orders published by the Commission increased by 14 per cent, from 11 673 to 13 302.

⁷ Annual Report 2013–14, p 26.

SECTION THREE: ADAPTING TO CHANGE

Changing workplace relations landscape

The Commission operates in an economic, social and industrial environment that is subject to frequent change. As the Productivity Commission has noted, there have been a series of reforms to workplace relations legislation in the past 20 years.

External factors and legislative changes have required the Commission and its predecessors to implement significant changes to its statutory functions, and to adapt to changes to the volume and nature of the matters it deals with and to meet the needs of the parties appearing before it.⁸

For example, following amendments to the Fair Work Act in 2013, the Commission was required to create processes to implement the new anti-bullying jurisdiction, which commenced operation on 1 January 2014.

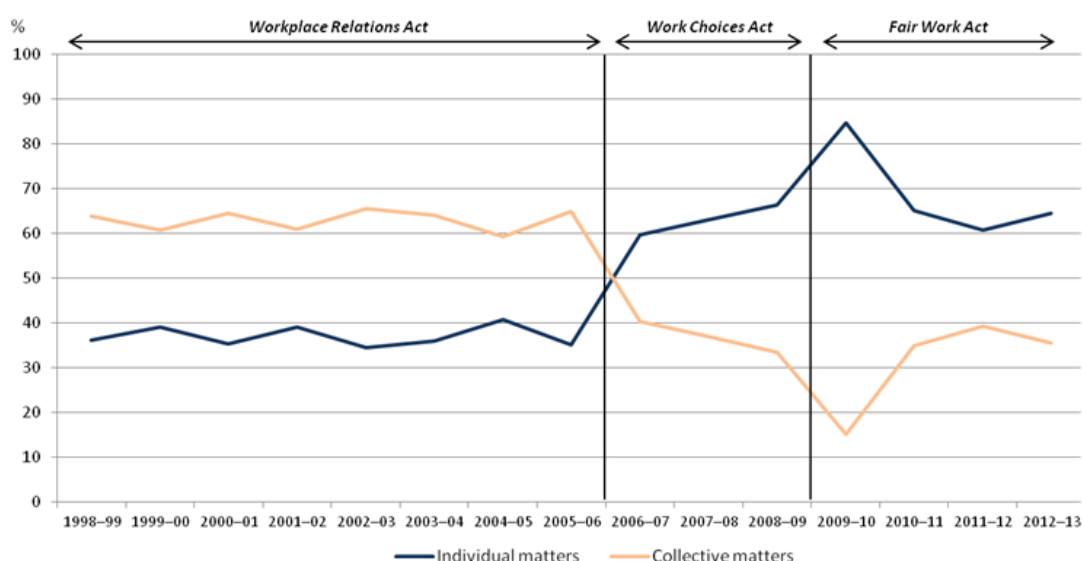
The Fair Work Act's unfair dismissal, general protections (anti-discrimination) and anti-bullying jurisdictions have continued a shift in the Commission's work from collective dispute resolution to dealing with individual rights-based disputes. **Chart 1** illustrates the significant change in the nature of applications filed with the Commission and hence proceedings conducted by it:

⁸ Historically, workplace relations laws were based on s.51(xxxv) of the Constitution, under which the Commonwealth Parliament may enact legislation with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state'. This meant that most matters dealt with by the national workplace relations tribunal were collective in nature, with minimum employment terms and conditions set in awards made in settlement of interstate industrial disputes.

In 1993, the *Industrial Relations Act 1988* (Cth) was amended to introduce an unfair dismissal jurisdiction. This was the first time that the tribunal had a significant jurisdiction dedicated to individual rather than collective matters.

Since the Work Choices amendments to the *Workplace Relations Act 1996* (Cth), the Commonwealth Parliament has more directly regulated the workplace rights and obligations of constitutional corporations and their employees through reliance on the corporations head of power (s.51(xx)) to underpin workplace relations law. In addition, in reliance on the referral power (s.51(xxxvii)) and referrals from Victoria, New South Wales, Queensland, South Australia and Tasmania, those laws have been extended to the private sector generally in the referring States.

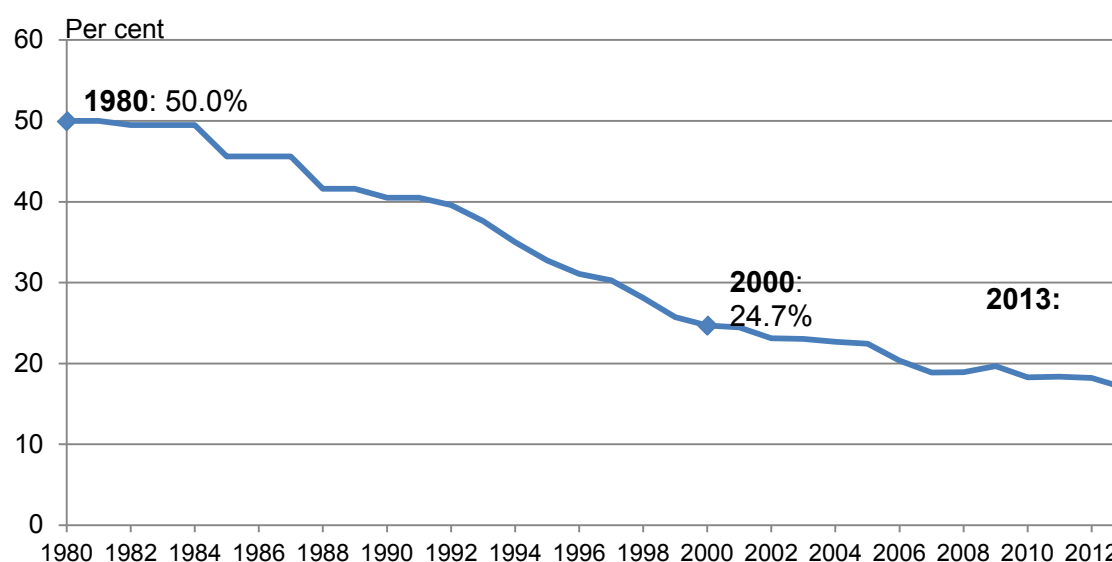
Chart 1: Collective to Individual: Changing nature of Fair Work Commission activities



The legislative changes have been accompanied by significant changes in the composition of the Australian workforce, increased diversity in working arrangements and patterns of work, and falling rates of trade union membership.

Chart 2 shows the decline in trade union membership since 1980, when 50 per cent of employees in Australia were members of a trade union. By 2013, this had fallen to 17 per cent of employees.

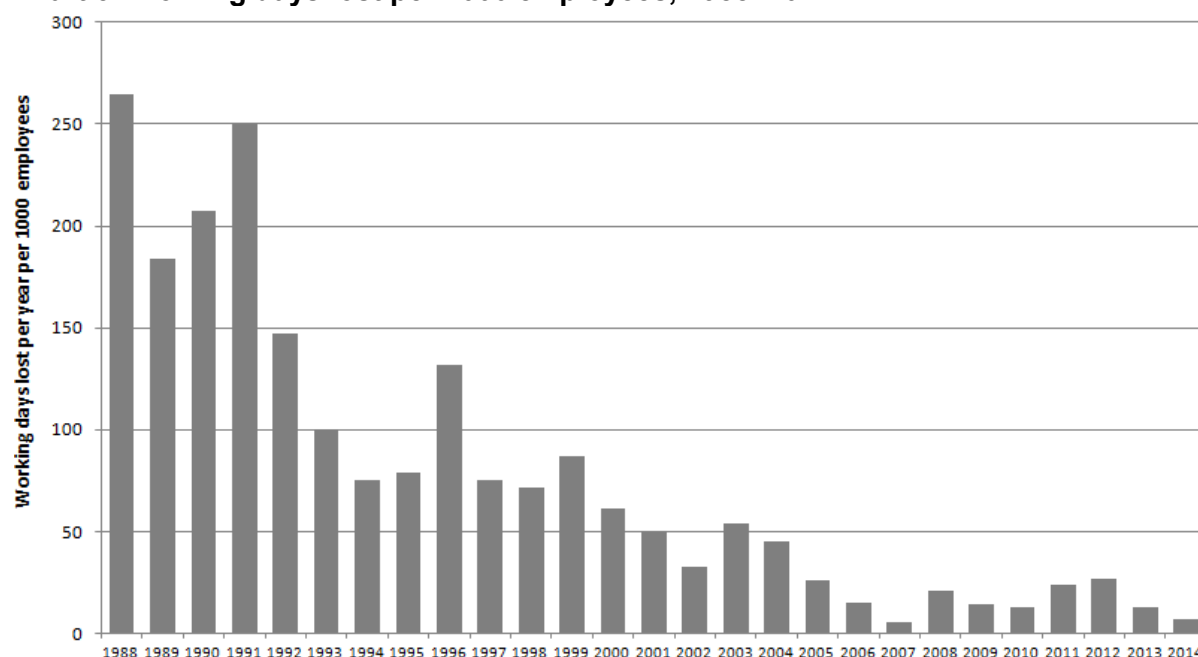
Chart 2: Trade union density, 1988–2013



Source: ABS, Employee Earnings, Benefits and Trade Union Membership, Australia, August 2013, Catalogue No. 6310.0.

There has also been a significant decline in industrial disputation, as measured by the number of working days lost per 1000 employees. As **Chart 3** shows, this has fallen from over 260 days in 1988 to around 7 days in 2014.

Chart 3: Working days lost per 1000 employees, 1988–2014



Source: ABS, *Industrial Disputes, Australia, Dec 2014*, Catalogue No. 6321.0.55.001.

Implications for the Commission

Historically the Commission has primarily dealt with collective disputes between parties generally represented by legal practitioners, trade unions or employer organisations. It now deals with an increasing number of self-represented parties pursuing individual rights-based disputes. This shift in the types of matters dealt with poses two particular challenges for the Commission.

The first challenge concerns the nature of the parties coming before the Commission. Parties to individual disputes are often infrequent or 'one-time' users of the Commission who are self-represented and have limited knowledge of the Commission's processes and the provisions of the Fair Work Act. The Commission has an obligation to explain these matters to these self-represented parties. In contrast, those involved in dealing with collective disputes such as larger employers, employer organisations, unions and workplace relations practitioners are often 'repeat players' who are familiar with the Commission's procedures and the legislative environment.

Parties appearing before the Commission are not required to be represented by a legal practitioner, and indeed, the Fair Work Act requires parties to seek the Commission's permission for such representation. However, self-represented litigants can make case management more complex. Access to justice can be impaired if a self-represented litigant does not understand his or her rights and obligations. Conversely, the other parties to the litigation can be exposed to lengthier proceedings and greater costs if misconceived applications are made or if procedures and timelines are not complied with.

The second challenge is that the shift to individual disputes has led to the expansion and disaggregation of the Commission's stakeholder base. Whereas the Commission could once communicate with the majority of parties that might appear before it through peak employer and employee associations, this is no longer the case.

As a consequence, the Commission increasingly engages with the wider community to tailor its operational activities, interventions and communications to an audience with variable understanding of its functions and objectives.

The ongoing *Future Directions* change program, discussed in detail in Section 4 of this submission, is the primary means by which the Commission is responding to these challenges. Commission initiatives to improve provision and delivery of services are also addressed in Section 5 of this submission.

SECTION FOUR: THE *FUTURE DIRECTIONS* CHANGE PROGRAM AND OTHER REFORMS

The Commission is committed to an ongoing change program, *Future Directions*, to improve and monitor its performance and the quality of services it delivers to the Australian community. The Program, which commenced in October 2012, focuses on four key objectives:

- promoting fairness and improving access;
- efficiency and innovation;
- increasing accountability; and
- productivity and engaging with industry.

What has been achieved?

In the first stage of the *Future Directions* change program, 25 initiatives were delivered over a 12 month period to December 2013. These initiatives included:

- publication of new plain English resources explaining the law and Commission procedures in relation to unfair dismissals, general protections disputes and the anti-bullying jurisdiction;
- publication of a series of videos providing a virtual tour of the Commission and explaining the Commission's unfair dismissal processes;
- establishment of timeliness benchmarks;
- introduction of website capability to search the content of enterprise agreements;
- a pilot program providing self-represented parties with pro bono legal services for unfair dismissal jurisdictional hearings;
- updating the Commission's most commonly used application forms to include more guidance on completion, lodgment and service of the forms and related documents;
- trialing SMS alerts to parties about upcoming hearing and conference dates; and
- upgrading the Commission's video conferencing facilities to improve access to the tribunal and reduce costs for parties and the Commission.

Several of the key initiatives are discussed in more detail below, as well as some additional initiatives that emerged during the first 12 months of the change program. A description of all 25 initiatives is at **Appendix 1**.

The recommendations of the Productivity Commission Inquiry Report: *Access to Justice Arrangements* (No. 72, 5 September 2014) are relevant to the operations of the Commission and the steps that it has taken to promote fairness and improve access.

Timeliness benchmarks

On 1 July 2012, the Commission introduced timeliness benchmarks for enterprise agreement approvals and the delivery of reserved decisions and on 1 July 2013 it introduced

further benchmarks for appeal processing times. Performance against the benchmarks is published on the Commission's website and regularly updated.⁹

The timeliness benchmarks were intended to set tight performance standards, and to that extent they are aspirational. There will be individual instances where the Commission does not meet its own high standards, for a variety of reasons, however, the setting of such standards and publicly reporting on performance are important accountability measures.

Table 1 shows the improvement in the Commission's performance for delivery of reserved decisions from before the implementation of the benchmark to the most recent calendar year. The table shows that performance improved at the same time as the number of reserved decisions issued increased.

Table 1: Commission performance against timeliness benchmarks: reserved decisions

Benchmarks	90% finalised within 8 weeks	100% finalised within 12 weeks	Number			
	Percentage finalised within 8 weeks	Percentage finalised within 12 weeks	Total reserved decisions finalised	Total finalised within 8 weeks	Total finalised between 8-12 weeks	Total finalised in more than 12 weeks
Jan–Dec 2014	84%	94.5%	1573	1321	165	87
2011–12	81.8%	90.2%	998	816	84	98

Table 2 shows a limited improvement for one of the indicators in finalising the approval of enterprise agreements since the introduction of the benchmark. Initiatives to further improve these times, particular for approval times under 3 weeks, are discussed in Section four under the heading 'Agreements Pilot'.

Table 2: Commission performance against timeliness benchmarks: agreement approvals

Benchmarks	50% finalised in 3 weeks	90% finalised in 8 weeks	100% finalised in 12 weeks	Number			
	Percentage finalised within 3 weeks	Percentage finalised within 8 weeks	Percentage finalised within 12 weeks	Total finalised in less than 3 weeks	Total finalised in 3-8 weeks	Total finalised in 8-12 weeks	Total finalised in more than 12 weeks
Jan - Dec 2014	49.6%	91.3%	97.9%	2816	2365	374	117
2011-12	59.2%	91.4%	96.1%	4839	2635	382	321

⁹ <https://www.fwc.gov.au/about-us/timeliness-benchmarks>

During 2015 the Commission will introduce further timeliness benchmarks relating to unfair dismissal matters.

Benchbooks

The Commission continues to develop and publish plain language guides to the law and Commission procedures to assist self-represented parties, including small businesses. This accords with recommendation 5.4 of the *Access to Justice Arrangements* report,¹⁰ as well as addressing the Commission's objective of promoting fairness and improving access.

One of the key plain language guides published to date is the Unfair Dismissals benchbook. This was published in July 2013 and received positive feedback from users. Subsequently, the Commission has published three further benchbooks, dealing with General Protections Disputes, Anti-bullying (in early 2014) and Enterprise Agreement Making (in 2015).

Commission Members have contributed their expert knowledge to the preparation of the benchbooks, and each of the benchbooks has gone through a public consultation process before finalisation.

The benchbooks are supported by guides to assist those unfamiliar with legal information and are updated on an on-going basis in response to legislative and case law developments.

Searching content of collective agreements

The 2012 Fair Work Act Review report *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* recommended that the Fair Work institutions extend their roles to include actively encouraging more productive workplaces, including through identifying best-practice productivity enhancing provisions in agreements and making them more widely known to employers and unions.¹¹

In 2012 the Commission introduced website search functionality to enable searching of the Commission's enterprise agreement database for specific clauses contained within agreements.

Since December 2014 this search functionality has been expanded to encompass many of the agreements that were approved by the former AIRC or Workplace Authority, so that more than 95 000 agreements can now be searched by interested parties.

Australian Workplace Relations Study

The recently conducted Australian Workplace Relations Survey is the largest survey providing employer-employee linked data since 1995. The study includes data from over 3000 employers and nearly 8000 employees and provides information about a range of key workplace relations issues. The study will assist key stakeholders when informing the Commission about matters relating to the annual wage reviews, the 4 yearly modern award reviews and equal remuneration cases. It also meets the obligation on the General Manager to conduct research under s.653 of the Fair Work Act. In designing the study, the Commission was guided by a steering group including the AiG, ACCI, ACTU, and a range of

¹⁰ Recommendation 5.4 was that government agencies should publish plain language guides that summarise legislation in relevant areas of the law.

¹¹ *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* pp 19 & 85.

Government agencies such as the ABS, the Department of Employment, FWO and the WGEA. To maximize the public value of the study, the data will be made readily available for use by the community.

Virtual tours

To further the objective of promoting fairness and improving access to the Tribunal, at the end of 2013 the Commission published an unfair dismissal video virtual tour on its website. The short video tours give self-represented and infrequent users of the Commission's services a step-by-step guide to the unfair dismissal process and enable parties to familiarise themselves with the hearing environment and processes before they attend the Commission.

The virtual tour is made up of a series of short instructional videos structured around key questions that parties in unfair dismissal proceedings are likely to have. The virtual tour includes video tours of all Commission premises and information about where to park, nearby public transport and key locations within the Commission buildings.

The Commission is planning the production of further virtual tours dealing with other major matter types, such as anti-bullying and appeals matters, during 2015.

What is underway and ahead?

Following the first stage of the *Future Directions* Program, a second Program was launched in May 2014 that commits the Commission to implement a further 30 initiatives throughout 2014 and 2015. Some initiatives in the program include:

- exploring ways to provide better services to small businesses;
- piloting a program to provide clients with selected application benchmark information as a guide to how long their application may take to be dealt with;
- providing access to audio files of most Commission hearings; and
- implementing a new, fully electronic case management system including the phased introduction of smart forms

A list of the further 30 initiatives underway in 2014-15 is included at **Appendix 1**, some of which are discussed further below together with some further initiatives.

Agreements pilot

The Commission has recently undertaken a review of the processes for determining applications for the approval of enterprise agreements with three goals in mind:

- improved service delivery and faster turnaround times for the users of the Commission's services;
- most efficient use of Commission resources; and
- ability to identify systemic issues across a large number of agreements that could be resolved through earlier involvement of the Commission via the provision of information to practitioners.

In this context, the Commission has commenced a pilot program in relation to the processing of enterprise agreements which is being supervised by Members of the Commission.

Applications for approval of enterprise agreements have historically been allocated to individual Members of the Commission, based on the industry panel to which the agreement relates.

The pilot program is designed to improve timeliness, efficiency and consistency in decision making. An estimated 60-70 per cent of applications are relatively straightforward in that, subject to compliance with statutory pre-approval and approval steps and timelines, no issues arise relating to the Better Off Overall Test (BOOT).

Under the pilot program, which is supervised by a Deputy President, enterprise agreement applications are directly allocated to Commission staff for initial analysis and a report is prepared for review by a Member. The report includes analysis of statutory tests for approval (including pre-approval requirements, mandatory terms, the National Employment Standards, approval requirements and the Better Off Overall Test). After a review of the report by a Member, agreements are then either approved, not approved or further information is sought from the applicant. The triage process also identifies applications that are not straightforward, and these are referred to a Member to deal with.

Once the pilot program processes were established (including training for participating Commission staff), the preliminary results from the trial have been promising. Fifty three agreement applications were dealt with by the pilot trial program in January–February 2015, resulting in 50 per cent of these applications being dealt with within 11 days of lodgment and 90 per cent being dealt with within 29 days. This compares favourably to the 2013–14 timeliness of 50 per cent of agreements applications being dealt with within 17 days and 90 per cent within 50 days.¹²

The pilot will be externally reviewed in April 2015.

General protections pilot

The Commission's role in general protections applications is limited to assisting parties to resolve their dispute through conciliation or mediation—arbitration can only take place with the parties' consent. In September 2014, the Commission commenced a pilot program whereby staff conciliators conduct conferences under a delegation of the President of some applications made under s.365 of the Fair Work Act. Prior to the commencement of the pilot, only Members of the Commission conducted conferences to assist the parties to resolve these disputes.

The pilot is intended to reduce the time required to schedule the conference and the time and financial cost impact on the parties. The President delegated authority to trained staff conciliators, who conduct telephone conferences in a similar fashion to conferences for unfair dismissal applications. Conciliators conduct conferences for applications lodged in Western Australia, the ACT and a number from Queensland.

The initial indicators are that the model can improve timeliness, outcomes and satisfaction by the parties. In the first five months of the trial, the median time from lodgement to conference was 21 days and 90 per cent were conducted within 43 days. This compares to the Commission's 2013–14 performance where the median time between lodgement and conference was 29 days, with 90 per cent of conferences conducted in 59 days.¹³ The average settlement rate for applications in the first five months of the trial was 75 per cent, compared to the Commission's 2013–14 average settlement rate of 57 percent and 60 per cent in the period 1 July–31 December 2014. Parties' satisfaction is also being measured

¹² Single enterprise agreement timeliness, *2013–14 Annual Report*, p 59.

¹³ General protections applications involving dismissal, *2013–14 Annual Report*, page 36.

through surveys, with more than two-thirds of participants being satisfied or very satisfied with the process.

This pilot will be externally reviewed in April 2015 to assess whether this approach should be expanded in the future and to consider its resourcing implications for the Commission. If the pilot is successful and can be extended to all general protections applications involving dismissal, the Commission can deliver better public value by providing a high standard service more efficiently.

Permission to appeal pilot

On 15 December 2014, the Commission launched a pilot program for dealing with certain applications for permission to appeal, as a further initiative to improve the efficiency of its appeals process and reduce transactional costs for parties.

In dealing with an appeal of a decision the Commission must consider two questions: whether permission to appeal should be granted; and if so, the substantive merits of the appeal. Historically, a Full Bench deals with both questions at the same hearing. This requires both the appellant and the respondent to be prepared to deal with both issues, notwithstanding that in a significant number of appeals, permission to appeal is ultimately refused.

The pilot is designed to reduce the transaction costs for parties (by eliminating the need to prepare submissions on the merits of the appeal) as well as improve internal efficiency through a reduction in the number of days required to hear appeals by determining the issue of permission to appeal at an earlier, separate, proceeding.

The pilot program works as follows:

- all appeals are assessed for their appropriateness for inclusion in the pilot. Those appeals which Commission data suggests have a higher likelihood of being refused permission to appeal (e.g. unfair dismissal appeals, because of the higher statutory threshold for permission to appeal) are included in the pilot;
- for appeals allocated to the pilot, the issue of permission to appeal will be determined as a threshold matter; and
- all appeals included in the pilot in a particular month will be heard on one or two days, by one Full Bench in either Sydney or Melbourne.

The pilot will be evaluated after 12 months' operation.

Early results from this trial are promising. Twenty four appeal applications were referred to the pilot for hearing in January and February this year and of these, 17 were refused permission to appeal on the day. Of the remainder, four were granted permission to appeal, two were discontinued and one was listed to be heard at a later date.

Video and teleconferencing

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). This is of particular value to self-represented parties, especially small business and those who are located outside metropolitan areas, as they minimise the time and costs involved in being away from the business.

In 2013–2014, Commission Members conducted 755 hearings by video conference, and held 3198 telephone hearings. Staff conciliators conducted over 10 000 telephone conferences. Ninety-eight per cent of all unfair dismissal conciliations conducted by staff were by telephone.

The Commission conducted a broad ranging survey of parties to unfair dismissal matters in 2010 following the introduction of the telephone conciliation model.¹⁴ The survey found:

- 78 per cent of applicants, 81 per cent of respondents and 58 per cent of representatives agreed or strongly agreed that conference by telephone worked well;
- 86 per cent of applicants and 88 per cent of respondents found the model was convenient and cost effective; and
- 72 per cent of applicants and 59 per cent of respondents were more comfortable on the telephone.

Telephone and video conferencing facilities contribute to the efficient conduct of matters for parties by minimising the time and cost involved in being away from their businesses. The Commission has video conferencing facilities in each state and territory, which are used for a range of matters and are used for multi-site hearings. The video conference platform has recently been upgraded to increase the capacity for simultaneous video conferences and to increase reliability.

Other technological advances

The Commission's website is a major point of contact between the Commission and the community. In March 2014, the Commission launched the first stage of a new website, with the aim of making it easier for users without a workplace relations or legal background to navigate and locate useful information. Work is continuing on improvements to the website, including through extensive usability testing and refining of the website's search functions.

In 2013–14 there were over 3 million visits to the website. Visits on mobile phone and tablet devices are up by 14.5 per cent and 19.3 per cent respectively from 2012–13 to 2013–14. This change reflects broad technological shifts towards these devices. In keeping with these developments, the new website uses responsive technology to ensure it is accessible on all devices.

Other recent technological enhancements include:

- free guest Wi-Fi is now available in all Commission offices. This will help parties to access relevant materials online, including during hearings;
- hearings are generally recorded and since late January 2015 recording is conducted by a central monitor in Melbourne, Sydney and Brisbane. Free access to audio files of proceedings is currently being introduced, which will improve accessibility and deliver cost savings to the Commission through reduced need for transcript;
- SMS alerts remind parties about upcoming conciliation conferences for unfair dismissal applications in order to improve attendance and avoid the inconvenience to parties of having to reschedule conferences. SMS alerts will be expanded to other areas of the Commission's work over the next 12 months;
- applicants are able to register and use an electronic filing system on the Commission website. The on-line lodgment capability is being upgraded in a staged process and will introduce smart forms for high volume applications (unfair dismissal, agreement approval

¹⁴ <https://www.fwc.gov.au/creating-fair-workplaces/research/unfair-dismissal-research>

applications) commencing in June 2015. These forms will connect to the Commission's case management system, decreasing the need for staff to manually enter data;

- provision of fifteen free subscription services including a weekly bulletin of decision summaries of selected Commission decisions and a tailored award service; and
- the Commission is reviewing its electronic case management system with the aim of upgrading its technology platform in 2015–16.

Small business engagement

The shift to individual disputes has resulted in an increasing number of small businesses having direct contact with the Commission. Small businesses primarily interact with the Commission as respondents to unfair dismissal, general protections and anti-bullying claims. However, they are also more likely than larger employers to be directly affected by modern awards, with more employees of small businesses having their employment terms and conditions set by awards.

Many small businesses have limited knowledge of workplace laws and of the Commission's role. Feedback from small businesses highlights the need for the Commission to ensure that it provides simple, plain English materials to help them engage with the Commission.

Many of the Commission's initiatives discussed earlier assist small business, including the conduct of telephone conciliations in unfair dismissal, general protections and some anti-bullying matters. To provide more targeted information for small business, the Commission's website has a dedicated entry point for small business employers and links to virtual tours explaining how to respond to unfair dismissal claims.

The Commission has also simplified its forms and developed tools and checklists to make it easier for small business employers to represent themselves at the Commission.¹⁵

Administrative procedures are also in place to identify unfair dismissal applications that are clearly outside the Commission's jurisdiction, for example where the minimum employment period has not been met. Where possible, these are dealt with by encouraging the applicant to withdraw their application, including by advising them of the risk of a costs order if they proceed, without the employer's involvement in any proceeding.

The Commission is continuing to work with the small business community on improvements to its service delivery, and has established a small business working group to consider how it can better meet the unique needs of these stakeholders. An overview of some of the group's initiatives which are underway or under consideration is included in **Appendix 2**.

Pro bono service

The provision of appropriate and timely legal advice can assist a party in the presentation of their case to the Commission and can also promote efficiency by focusing the proceedings on the real issues in dispute. In some instances the provision of timely legal advice may lead a party to discontinue an application because there is another, more appropriate, avenue to redress their grievance.

In May 2013, the Commission commenced an unfair dismissal pro bono pilot program in Melbourne. The pilot was designed to provide free legal services to eligible self-represented

¹⁵ <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/preparing-hearings>

employers (particularly small businesses) and employees involved in unfair dismissal jurisdictional hearings.

The pilot ran until December 2013 and was then reviewed by the RMIT Centre for Innovative Justice (CIJ). In response to participant feedback and the CIJ's recommendations, a number of changes were made to improve the program's efficiency and effectiveness.

Since 1 July 2014, the scheme has continued in Melbourne and Sydney, with opportunities to expand the scheme to Queensland and regional Victoria currently being examined.

Reviews and International Framework for Tribunal Excellence

The Commission is committed to ensuring that its resources are allocated as efficiently and effectively as possible. To this end, it continues to examine best practice management and structures in courts and tribunals, both in Australia and internationally.

In 2015–16, the Commission will measure its performance against the Council of Australasian Tribunal's (COAT) International Framework for Tribunal Excellence (IFTE) and report on its performance against these measures. An assessment against the IFTE will assist in determining areas where the Commission can improve its services to the community, consistent with its overall strategic goal of ensuring 'all Australians can access the Commission through efficient and innovative services and processes which meet the community's diverse needs and expectations.'

The subject areas covered by the IFTE are:

- independence;
- leadership and effective management;
- fair treatment;
- accessibility;
- professionalism and integrity;
- accountability;
- efficiency; and
- client needs and satisfaction.

The Commission has also engaged KPMG to review the Commission's efficiency through a comparative analysis of other tribunals and courts. It is anticipated that this review will identify further opportunities for the Commission to improve its performance.

Promoting co-operative and productive workplaces

In performing its legislative function of promoting cooperative and productive workplace relations and preventing disputes¹⁶ the Commission is examining alternative ways of supporting parties in enterprise bargaining and delivering dispute resolution services to parties.

In line with its legislative function, the Commission has recently instituted a 'New Approaches Strategy', which involves a shift in the historical relationship between industrial parties from adversarial and combative to increasingly cooperative. The essence of the 'New Approach' is that the Commission will work to assist parties at the enterprise level to

¹⁶ Fair Work Act s.576(2)(aa) commenced on 1 July 2013.

resolve issues before they become formal disputes, so that workplace change is achieved without industrial disputation. The Commission works in an informal manner with the parties, to facilitate constructive discussions, collaborative problem-solving, and the finding of 'common ground'.

The New Approaches Strategy builds on the success of the Commission's involvement at Sydney Water and Orora Fibre Packaging which improved both the bargaining process for the parties and their ongoing relationship. A description of these pilots is available in the Commission's *2013-14 Annual Report*¹⁷ and the Commission's online annual report includes short videos highlighting this work.¹⁸

The Commission is supportive of research by Professor Mark Bray and Dr Johanna Macneil of the University of Newcastle examining the role of Commission Members in facilitating workplace cooperation. The Commission has also engaged Joel Cutcher-Gershenfeld, visiting professor at the University of Sydney, to develop a range of educative materials on cooperative and productive approaches to negotiations and dispute resolution.

The Commission has developed a suite of materials both for building capability amongst Members, and also for parties who wish to utilise the Commission's assistance in introducing a more cooperative and productive approach to negotiation and dispute resolution at the workplace level.

Commission Members are planning to conduct two pilot workshops in conjunction with the New South Wales Industrial Relations Society. The first workshop will address the conduct of enterprise bargaining and outline an approach known as 'interest-based negotiation'. This approach contrasts with the traditional adversarial methods used by many parties negotiating enterprise agreements and is known to lead to better outcomes for all parties in terms of the content of the resultant agreement as well as their ongoing relationship.

The second workshop concerns the prevention and resolution of workplace disputes. The workshop is intended to provide the participants with the knowledge and skills needed to prevent or resolve disputes quickly and effectively at the workplace level, in most cases without the need to refer a dispute to the Commission.

Efficient and fair allocation of work

With the increasing shift from collective to individual disputes the Commission is constantly reviewing its allocation of resources. Efficiencies and improved services can be gained by moving from a work allocation model that is tied to the location of the parties to one where work can be performed elsewhere, using technology, where appropriate.

Staff implemented a national workload model for administrative work in 2013, moving work around the country to meet peaks in demand and maximise utilisation of the skills and experience of staff nationwide.

The Commission is also considering different ways to allocate, measure and monitor its case workload to ensure the best use of its people and resources. The agreements approval and general protections pilots, which are discussed in Section three, are examples of these initiatives, where more administrative and non-determinative steps are undertaken by Commission staff, with Member involvement reserved for determinations and complex matters.

¹⁷ *2013–14 Annual Report*, pp 52-53 and 62.

¹⁸ <https://www.fwc.gov.au/annual-report-2013-14/videos>

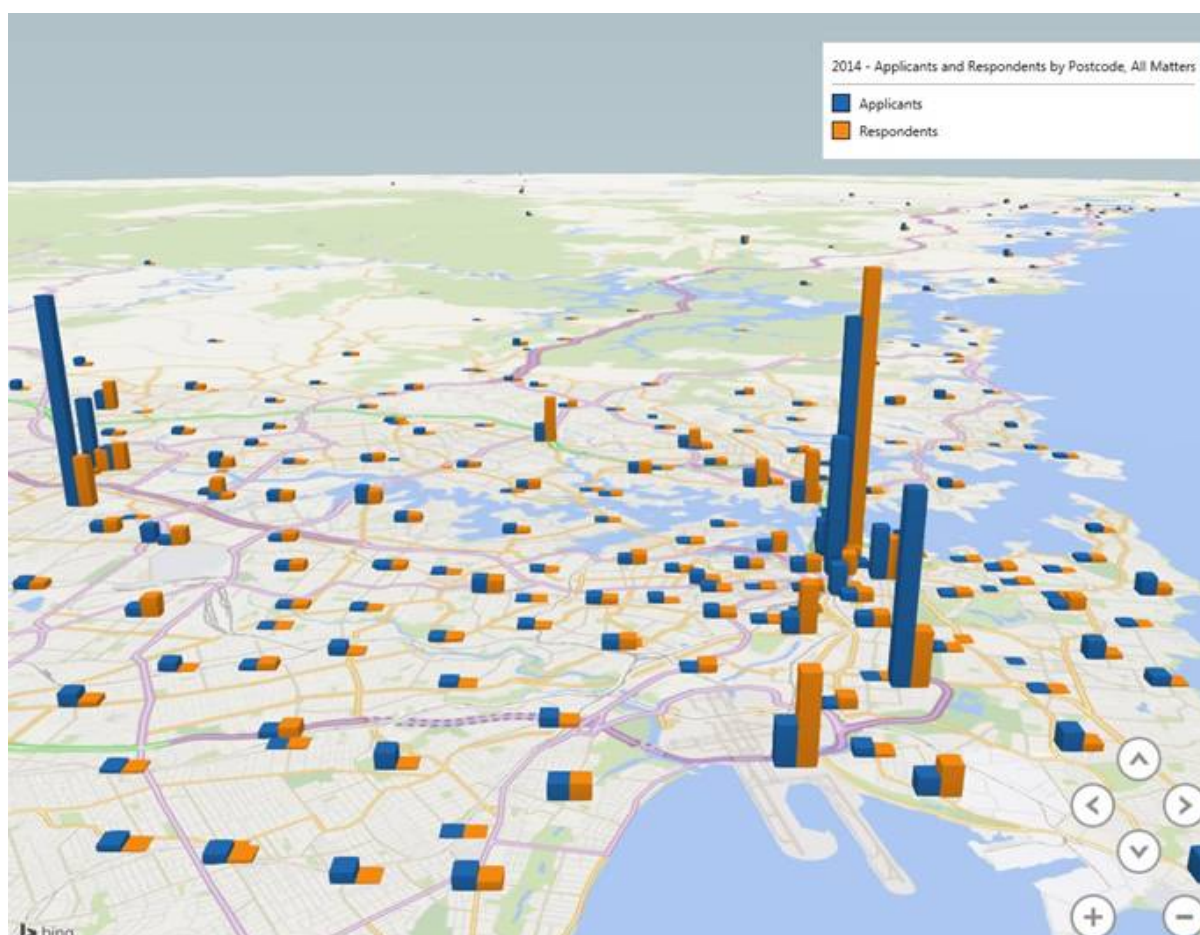
Meeting regional needs

Under the Fair Work Act, the President is responsible for ensuring that the Commission performs its functions and exercises its powers in a manner that adequately serves the needs of employers and employees throughout Australia, including rural and regional Australia.¹⁹

In 2014–15, the Commission is undertaking an extensive mapping exercise of the location of parties. This mapping uses geo-coding methodology to analyse parties by their home and/or business location, matter types and industry types. The Commission will cross-reference the Australian Bureau of Statistics geographical framework ASGS (Australian Statistical Geography Standard) to enable a consideration of the best use of resources according to where parties work and reside and the extent to which services can be provided in these areas, either with a physical presence or via technological means.

Chart 4 below shows an example of where parties were located in Sydney on 2014. There is a concentration of parties in inner Sydney reflecting the location of representatives, but also a high concentration in outer Sydney areas. Analysis of this type will assist the Commission to consider alternate ways to provide better services to the parties.

Chart 4: map of parties in unfair dismissal applications, Sydney



¹⁹ Fair Work Act s.581.

Working collaboratively

Following the release of the Fair Work Act Review report, the Commission entered into a Memorandum of Understanding (MOU) with the Fair Work Ombudsman (FWO) and Fair Work Building Construction (FWBC), which recognises the complementary and overlapping roles and objectives of each organisation in respect of promoting harmonious, productive and cooperative workplace relations. Consistent with the *Access to Justice Arrangements* report, the MOU confirms the intention of the Fair Work institutions to work collaboratively to share information on proposed activities and initiatives, to make the best use of resources and to minimise duplication of effort.

The institutions actively share information about a range of issues including web design, support for small businesses, referrals, application and complaint handling processes, management practices, knowledge management, training and call handling.

Research on productivity clauses

As part of stage 2 of the *Future Directions* Program, the Commission published research in late 2014 into enterprise agreement clauses which had been nominated by employers, employees or their representatives as enhancing productivity or innovation. The research report includes an overview of literature on the drivers of productivity and an analysis of data on productivity and enterprise agreements drawn from the Australian Bureau of Statistics (ABS) and the Department of Employment's Workplace Agreements Database (WAD).

The report contains the results of qualitative research on eight case studies of enterprise clauses which had been nominated by employers, employees or their representatives as enhancing productivity or innovation. The identified clauses fell into three categories:

- clauses directed at flexibility at work;
- clauses directed at development and deployment of employee skills, and
- clauses directed at incentives and engagement with employees to improve work practices.

Although the case studies are not intended to be representative of productivity clauses generally, they do provide examples of approaches to introducing productivity improvements through enterprise agreements. In this context, the report is intended as a starting point for those with an interest in developing enterprise agreements which may positively contribute to workplace productivity.

The Commission intends to continue conducting research in this area to further its statutory function of promoting cooperative and productive workplace relations.

Summary

The structural changes in the nature of the work of the Commission have presented challenges, as the parties have increasingly diverse and greater information needs.

The Commission has sought to respond to these changes in several ways. The *Future Directions* change program includes measures designed to make it easier for all users to engage with the Commission through reducing transaction costs and making it easier to access the information required so can parties can effectively represent themselves. Benchmarking the Commission's performance against the International Framework of Tribunal Excellence, together with the KPMG comparative review, will identify further

opportunities to improve the Commission's public value. Initiatives, such as providing greater information on the work of the Commission and timeliness and other performance benchmarks, increase the Commission's transparency and accountability to the community. As part of the ongoing commitment to review and refine the Commission's processes and find efficiencies, the Commission is committed to allocating the appropriate resources at the appropriate level. Many of the initiatives that have been implemented or are being piloted indicate that the Commission can deliver better quality services more efficiently, including the conduct of unfair dismissal conciliations by staff by telephone and case management by staff of anti-bullying matters (discussed in section 5).

The promising early results from the general protections pilot, the agreements pilot and the permission to appeal pilot all indicate that further improvements can be realised. Full implementation of these measures in 2015 will enable the Commission to deal with the same volume of work, at lower cost, and with high levels of satisfaction and consistency, by having skilled staff perform work that has historically been exclusively dealt with by Members. In turn, this enables Members to focus on higher level, determinative work and the capacity to work with enterprises to facilitate more co-operative and productive workplace relations through the New Approaches Strategy. In these ways, the Commission is well placed to deliver enhanced public value to the community. This is particularly timely as two Members have retired in the last year and at least six (and possibly more) will retire within the next 12 months.

SECTION FIVE: MAJOR MATTER TYPES

The following sections discuss some key areas of the Commission's work, and provide an overview of recent caseload trends and outcomes, and actions to improve the provision and delivery of its services:

Unfair dismissal applications

Caseload

A federal termination of employment jurisdiction has been in place since 1994.

The number of unfair dismissal applications has increased significantly since the enactment of the Fair Work Act—from 6 067 in 2007-8,²⁰ to 14 797 in 2013-14. Unfair dismissal applications now represent almost 40 per cent of applications made to the Commission and comprise a substantial part of its annual workload. In recent years, the Commission's unfair dismissals caseload has remained steady.²¹

Prior to 2009, conferences were conducted primarily by Members of the Commission with the support of a small team of staff conciliators. From 1 July 2009, all applications are referred to conciliation (conducted by staff) in the first instance and where the parties agree to participate in the process.

Conciliations

Unfair dismissal claims follow a standard process:

- an employee lodges an application, to which the employer must respond;

²⁰ AIRC Annual Report 2007-8, p 7.

²¹ For example, 14 027 applications were lodged in 2011-12 and 14 818 were lodged in 2012-13.

- staff manage the application up to the point of conciliation, answering queries and providing information to prepare for conferences. Where staff identify any jurisdictional issues (such as an application being made out of time), applications are referred to a Member for decision of the threshold issue before any conciliation takes place;
- the parties are invited to participate in a voluntary conciliation conducted by expert senior staff, usually by telephone;²² and
- if the matter is unresolved at conciliation or if there is an objection to staff conciliation, the matter is listed for a conference or hearing before a Commission Member.

Approximately 15 per cent of applications are discontinued during the case management stage and prior to any actions being taken by Members or staff to resolve the matter. Where applications are not discontinued, almost all proceed to conciliation.

In 2013–14, the conciliation settlement rate was 79 per cent.²³ The equivalent figure for the first two quarters of 2014–15 is 80 per cent.²⁴

In 2010, the Commission engaged external researchers, TNS Social Research, to review the unfair dismissals process. The research showed that overall, satisfaction with the administration of unfair dismissal applications is high, with 86 per cent of applicants, 82 per cent of respondents and 87 per cent of representatives reporting that they were satisfied or extremely satisfied with the service provided under the model.

The Commission's case management practices continue to be reviewed from time to time and new processes introduced to improve services. To inform service design, the Commission monitors trends in conciliations in terms of timeliness, settlement rates and settlement outcomes. It also surveys conciliation parties to gather information from a participant perspective. Survey results regarding satisfaction with the unfair dismissal conciliation process from the second quarter of 2013-14 show that 80 per cent of parties either agree or strongly agree that they were satisfied by the services received from the Fair Work Commission.

Other case management practices

The Commission recognises the need to avoid putting employers to the time and expense of responding to unmeritorious claims. To this end it has published detailed information on eligibility and procedural requirements for the making of unfair dismissal applications and has introduced a pro bono program to provide legal advice to self-represented parties for the hearing of jurisdictional objections (refer to Section 4).

Unless there are contested facts, jurisdictional issues (such as extension of time, minimum employment period and high income threshold issues) can be considered 'on the papers'. In 2013, the Commission gained new powers to administratively dismiss unfair dismissal applications, where a party has unreasonably failed to attend a conference or hearing, comply with a direction or discontinue an application after the conclusion of a settlement agreement.²⁵

²² More than 98% of conciliations are conducted by telephone.

²³ 8659 matters were settled at conciliation and 2313 were not resolved.

²⁴ 4761 matters were settled at conciliation and 1184 were not resolved.

²⁵ Fair Work Act s.399A with effect from 1 January 2013.

Overall, in the 2013–14 year, 459 matters were administratively dismissed, and a further 374 applications were dismissed at jurisdictional hearings. Seventy per cent of jurisdictional objections were upheld.²⁶

In late 2014, the Commission published materials to assist self-represented parties in unfair dismissal matters to prepare for a hearing. The materials, which set out how to prepare evidence, witnesses and submissions, enable parties to prepare without the need for representation and in a timely manner.²⁷

Timeliness benchmarks

The Commission has a key performance indicator (KPI) of a median time of 34 days from lodgement of unfair dismissal applications to finalising conciliations.

For the 2013–14 year, the median time from the lodgment of an application to the finalisation of conciliation was 46 days.²⁸ The failure to meet the stated KPI was attributable to a spike in applications in the July–September 2013 quarter (representing a 20 per cent increase in lodgments) and staffing shortages in the conciliator area over the year. This created a backlog of cases which meant the Commission was unable to meet its timeliness benchmark. The KPI is on track to be met in 2014–15.

Further timeliness benchmarks measuring time from lodgment to hearing for both jurisdictional objections and merits hearings will be implemented and published in 2015.

Resources

As discussed in previous Sections, the Commission has implemented a number of measures to assist infrequent and self-represented users of the unfair dismissals jurisdiction, and to ensure the fair and efficient case management of files, including:

- a video virtual tour of the processes and procedures of an unfair dismissal;
- a comprehensive online unfair dismissal guide and benchbook to assist parties and their representatives;
- providing an online unfair dismissal eligibility checklist for potential applicants;
- holding unfair dismissal mock hearings;
- additional information materials for self-represented parties;
- a pro bono program for jurisdictional matters to assist self-represented parties;
- a dedicated small business portal on the Commission's website, with a specific page on unfair dismissal and small business; and
- introducing smart forms for lodging applications.

In late 2012, the Commission successfully trialled a three-day cooling off period for unfair dismissal conciliation conferences to enable self-represented parties to seek advice and to further consider any proposed settlement. The RMIT Centre for Innovative Justice (CIJ) evaluated the trial, taking into account feedback from the parties and from conciliators, and a decline in the number of complaints received during the trial period. Since March 2013 a cooling off period of three business days has been offered to all parties participating in an

²⁶ 2013–14 Annual report, Table 15, p 42.

²⁷ <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/preparing-hearings>

²⁸ 2013–14 Annual report, Table 16, p 43.

unfair dismissal conciliation conference where at least one party is self-represented and the conciliation is conducted by a conciliator.

Outcomes

The Commission publishes data on its website on the outcomes achieved at conferences and hearings, in part because such information helps parties to understand how other matters have been resolved.

In 2013–14, the Commission received 14, 797 applications for an unfair dismissal remedy. Of the 367 matters finalised by a merits arbitration decision, in 48 per cent (175) of cases the dismissal was found to be fair.²⁹

Of the remaining 192 matters, the remedies granted were: compensation (150 matters), reinstatement (9 matters), reinstatement and lost remuneration (25 matters), and no remedy granted (8 matters).

There were 73 appeals against unfair dismissal decisions in 2013–14. The appeal was dismissed in 62 per cent of matters.

Settlement agreements at conciliation can include a range of monetary and non-monetary terms (such as the issuing of statements of service). In 2013–14, 49 per cent of monetary payments in settlement were below \$4 000, and 79 per cent were below \$8 000. It should be noted, however, that Commission records do not distinguish between monies paid as compensation and as payment of employee entitlements. It should also be noted that settlement agreements are made on a no-liability basis.

Anti-bullying applications

The Commission's new anti-bullying jurisdiction commenced on 1 January 2014.

Workers who reasonably believe that they have been bullied at work can apply to the Commission for an order to stop the bullying.³⁰ The Commission is empowered to make any order it considers appropriate to prevent the worker (or group of workers to which the worker belongs) from being bullied at work, other than ordering payment of a pecuniary amount.

A worker is bullied at work if, while the worker is at work in a “constitutionally-covered business”, an individual or group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member, and that behaviour creates a risk to health and safety.³¹

The nature of the jurisdiction is that workers must be involved with the workplace at the time of making the application and when any orders are being considered. That is, the objective of the legislation is for early intervention in cases of alleged bullying conduct so as to preserve and maintain ongoing and productive working relationships.

This jurisdiction is in addition to, and does not replace, other mechanisms that can deal with bullying, such as work health and safety, anti-discrimination or potentially the general protections or general dispute resolution provisions of the Fair Work Act.

²⁹ 2013-14 Annual report, Table 15, p 42.

³⁰ Fair Work Act s.789FC. New Part 6-4B sets out the jurisdictional requirements for making an application, the definition of 'bullied at work', and the considerations the Commission must take into account when deciding whether or not to make an order.

³¹ Fair Work Act s.789FD.

Not all workers and workplaces are covered by the anti-bullying laws.³²

Caseload

As there was no comparable jurisdiction in Australia or internationally, it was not possible for the Commission to accurately predict the number of applications that it might receive once the jurisdiction commenced. This required the Commission to put contingency arrangements in place to deal with a potentially fluctuating workload including: flexibility to increase or decrease staffing levels, flexibility around case management and flexibility in the work required of the Panel Head.

Whilst the first twelve months' experience suggests that numbers are lower than estimated, it is far too early to draw any conclusions on future activity. Commission data shows, for example, that general protections claims where the applicant has been dismissed increased by 60 per cent in 2010-11 from the commencement of this jurisdiction in 2009-10. Further, it is likely that awareness of the jurisdiction will increase over time in the community and amongst practitioners.

In the first twelve months of the jurisdiction the Commission received:

- more than 185 000 unique website hits;
- 6 995 telephone inquiries; and
- 701 applications

Many of the anti-bullying matters involve difficult interpersonal issues and sometimes complex and multiple employment/contractual relationships. As such they tend to be more resource intensive than many other applications dealt with by the Commission.

The great majority of applications were lodged by employees as opposed to other eligible categories of applicant worker such as a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer. Sixty five per cent of the applications allege unreasonable conduct by the applicant's manager or supervisor. About twenty five per cent of applications were made involving alleged behaviour by other workers with a small number citing visitors to the workplace (union official, clients or families of clients).³³

The most common industries for anti-bullying applications have been the clerical, health and welfare, retail, educational services, manufacturing, hospitality and social community home care and disability services sectors. Nearly 60 per cent of applications related to large businesses (with more than 100 employees), with only 11 per cent related to small businesses (with fewer than 15 employees).

³² Section 789FD of the Fair Work Act requires that the worker be at work in a constitutionally-covered workplace (as defined). In general terms, this includes the Commonwealth Government and agencies, most private sector corporations, and businesses operating in any of the Territories.

³³ Some applications cite multiple individuals who may fall into more than one category.

The Commission began to deal with all applications which it received in 2014 within the 14 day period required by the Act.³⁴ In fact, well over half of the applications commenced within 2 days of the application being made, with all being under review within 7 days.

Of the total applications made in 2014:³⁵

- 156 were resolved during the course of proceedings;
- 148 were withdrawn by the applicant early on in the case management process;
- 93 were withdrawn prior to the Commission conducting substantive proceedings, including where the applicant was satisfied with the response to the application provided by the employer;
- 77 were closed after a conference or hearing, but before a decision was issued;
- 51 were finalised by a decision, two of which were granted and the remaining were dismissed.

Forty eight applications were dealt with by way of mediations conducted by Commission staff, with 67 per cent of these matters being resolved.

In terms of those applications that were subject to proceedings before a Member of the Commission:

- 15 per cent were dismissed on preliminary, jurisdictional or merit grounds;
- 40 per cent were resolved;
- 44 per cent were closed without formal result (including withdrawals and where the applicant was satisfied with the response or outcome of the process without entering into a formal agreement
- Orders have been made in 2 matters.

Case management

Following extensive consultation with stakeholder groups and experts working in the field, the Commission developed and implemented a Case Management Model in late 2013. The model has not altered significantly since commencement of the jurisdiction on 1 January 2014. The model is published on the Commission's website.³⁶

In developing the approach to these matters, the Commission took into account a range of considerations including:

- the broad coverage of workers and the capacity to lodge claims in relation to conduct of individuals will mean that the Commission is dealing with multiple and sometimes complex legal and practical relationships;
- there are some jurisdictional limitations, including the need for the conduct to have taken place within a constitutionally-covered business;
- the concept of bullying conduct is defined broadly but must involve repeated unreasonable behaviour; while the worker is at work; and create a risk to health and

³⁴ Fair Work Act s.789FE.

³⁵ Note, in considering information regarding resolution of applications, that not all applications lodged in 2014 were finalised in 2014.

³⁶ <https://www.fwc.gov.au/documents/documents/resources/Anti-bullying-case-mgmt-model.pdf>

safety. It does not include reasonable management action taken in a reasonable manner;

- there are no express limitations in terms of applicants making multiple applications under the Act or under other statutory processes. The Act expressly permits applications to be made both within this jurisdiction and under the WHS Act and corresponding State and Territory WHS laws;
- there must be a finding of a risk that bullying conduct will continue by the same individual or group as a prerequisite to making an order. This means in effect that applicants will need to be within the relevant employment/contractual relationship when applying to the Commission;
- we expected a large number of enquiries from potential applicants and many of them may not find the jurisdiction appropriate for their circumstances given the restrictions on the nature of the remedy that can be provided and the role of the Commission as a Tribunal rather than an investigator;
- the range of behaviours and circumstances leading to the applications is likely to be varied - ranging from conduct that is unlikely to meet the definition of bullying to conduct that borders on criminal abuse;
- many of the parties in this jurisdiction are likely to be unrepresented. Some of the parties may also exhibit challenging behaviours, both to other parties and potentially to the Commission;
- there is no express obligation to attempt to mediate or conciliate anti-bullying applications. There is however power to do so, at least in the context of a conference convened by the Commission and this will be appropriate in many cases. When mediating (or conciliating), the emphasis will be on the resolution of issues to enable constructive and cooperative relationships to be resumed. Monetary settlements will not be promoted or recommended by the Commission; and
- the Commission must commence to deal with the applications within 14 days of being lodged. The Commission might start to 'deal with' an application by informing itself through inquiries or by requiring the provision of information from other parties.

The key steps in the anti-bullying application case management process are as follows:

- the worker lodges the application with the Commission – electronically or via a paper based application;
- the application is checked to ensure it is complete and valid. The details of the application and the applicant's intention to proceed will be confirmed by contact with the applicant prior to service on other parties;
- the application (without supporting materials) is served by the Commission on the employer(s)/principal(s) and responses are sought;
- where feasible, contact will be made with each of the employer(s)/principal(s) by the anti-bullying team of the Commission prior to the service of the application and to provide advance notice to manage the consequences of the application being provided to others in the workplace;
- in most cases, the individuals whose alleged conduct has prompted the application will be served with the application by the Commission and advised that the employer/principal of the applicant (and/or their employer/principal if different) has been provided with a copy. This will not take place until shortly after the employer/principal(s) have been served. The individual(s) will be given an opportunity to provide a response to the Commission;

- a report is made to the Panel Head by the anti-bullying team outlining whether the matter involves any potential jurisdictional issues, the nature of the alleged conduct, whether it may be suitable for mediation, factors that might indicate the degree of urgency and other relevant factors that would inform a decision about the assignment of the application;
- the Panel Head makes a decision as to whether the matter will be assigned to a Member, including to be dealt with directly by the Panel Head. Where appropriate, immediate jurisdictional issues and other preliminary issues may be heard and determined. In other cases, the applications may be assigned to Panel Members having regard to the location of the parties, the urgency of the circumstances and the availability of the Members to deal with the application. The matter may also be assigned by the Panel Head to a staff mediator at this point to conduct a mediation or to make further contact with the parties to more fully explore the circumstances before it is assigned to a Panel Member;
- it is expected that if a matter is referred to a Member by the Panel Head the Member will generally convene a preliminary conference of relevant parties with a view to understanding the issues involved, the position of the parties and the best approach to the matter. The Member may decide to:
 - Attempt to resolve the matter by conciliation or mediation at the preliminary conference or at a resumed conference;
 - Determine that other parties should be notified or required to attend;
 - Make interim orders - if the jurisdiction to do so is evident and the circumstances warrant that course of action; or
 - Make directions for the application to be heard;
- where the application is not otherwise settled or discontinued, the application will be determined by the assigned Member. However, where the assigned Member mediates or conciliates the matter and it is not appropriate to continue with the file, the Panel Head will assign the matter to another Member;
- the initial intervention by a Member of the Commission will generally be conducted within a few weeks of the original application and is likely to consider what steps should be undertaken to ensure the safety of the applicant and the other parties whilst at work and to attempt to stabilise working relationships to the extent that this is feasible;
- the nature of the hearing to determine the facts and consider the making of orders will generally depend upon the nature of the parties and the allegations made. The hearing may involve informal conference proceedings (in conference rooms) to more formal hearings conducted in hearing rooms (Court rooms).

Resources for parties

A number of resources have been made available on the Commission's website to assist parties lodging or responding to applications for orders to stop bullying.

The Commission developed and published an Anti-Bullying benchbook which contains information to assist parties in preparing for matters before the Commission. The benchbook also includes examples of workplace behaviours that could constitute bullying in this jurisdiction and the effects that bullying can have. After extensive public consultation the benchbook was published in its final form on 6 January 2014.

As with unfair dismissal applications, the Commission has developed an on-line eligibility checklist for people to determine whether they are eligible to make an application.³⁷ Additional resources include a flowchart of the process for dealing with anti-bullying complaints, and a detailed Guide, which sets out key information such as what constitutes bullying, who is eligible to make an application, how to make or respond to an application, and the role and powers of the Commission in addressing bullying at work.

Case study

As discussed above, the majority of matters received to date have been finalised prior to proceedings or resolved by agreement of the parties prior to a substantive decision being made by the Commission. The specific outcome of conferences and mediations are confidential to the parties.

The Commission's Annual Report 2013–2014³⁸ contained the following case study of a matter resolved in conference before the Commission:

The applicant worked at a business in the hospitality industry for over a year. The applicant alleged that a co-worker was engaging in behaviour characterised by raising her voice and making offensive statements. It wasn't clear from the application whether or not this was the sole incident as the applicant suggested it had occurred over the period of a year.

The applicant applied to the Commission for an order to stop bullying in March 2014. The application did not appear to have any threshold jurisdiction issues and so proceeded through the usual case management process. The case manager spoke with the applicant the day after their application was lodged. The case manager discussed with the applicant what the role of the Commission was in dealing with anti-bullying matters and confirmed that the applicant understood that their employer and the person named in the application would receive a copy of their application. The applicant confirmed that they wished to continue with their application.

That same day, the case manager also contacted the employer of the applicant. The case manager explained the role of the Commission in dealing with anti-bullying matters and asked whether the employer would be able to handle any issues that may arise as a result of the person named receiving the application. The employer confirmed that they knew there were issues between the two individuals and had tried to address them. The employer had concerns about the person named being served but understood that they were also a party to the application and needed to be involved. The employer was advised that the person named would be contacted the following day so that they had the opportunity to take any action they thought might be necessary to manage the matter.

Both the employer and the person named were given an opportunity to respond. The employer provided a detailed response indicating that they believed the matter to be an isolated incident and set out the steps they had taken to resolve the issue, including interviewing the staff who were involved. The person named also responded to the application, indicating that the behaviour was out of character.

The matter was subject to a conference with a Member of the Commission and the parties were able to resolve the matter. It transpired through the conference that there

³⁷ <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/workplace-issues-disputes/anti-bullying/anti-bullying-am-i>

³⁸ 2013–14 Annual report, p 75.

was a pattern of behaviour that the employer had not initially been aware of that necessitated more intervention. The matter was also the more challenging as they worked in a remote location and were living in the same small community.

The parties agreed that:

- a formal warning would be issued to the person named;
- mediation between the co-workers would take place; and
- until that time, the co-workers would not be rostered on together where possible.

Issues of management training and the development of appropriate workplace policies and procedures were also canvassed with the parties by the Commission Member.

Continuous Improvement

In March 2015, the Commission convened two forums to discuss with relevant stakeholders the first twelve month's experience with the jurisdiction. One of the purposes of the forums is to obtain feedback to identify any areas of the case management processes that could be improved.

General Protections

Case load

The general protections provisions of the Fair Work Act expand on the freedom of association and unlawful termination provisions of the *Workplace Relations Act 1996*. They are intended to protect employees and potential employees from adverse action which is taken for a proscribed reason. Protections include the right to:

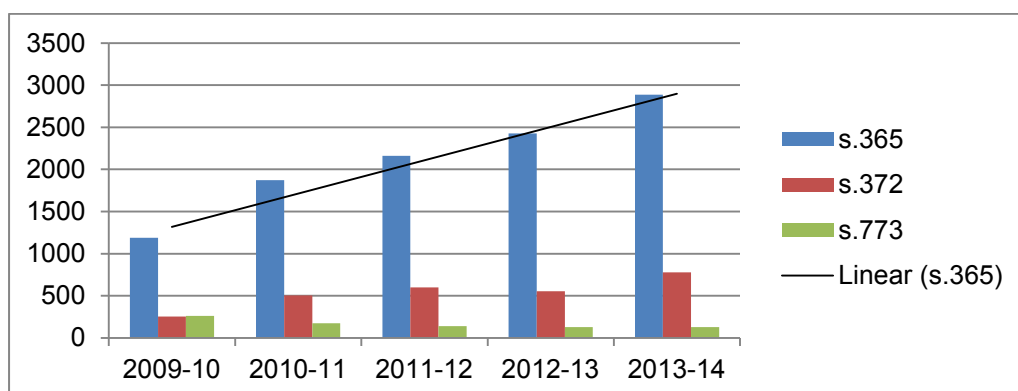
- have or exercise a workplace right;
- freedom of association;
- engage in industrial activity; and
- freedom from workplace discrimination.

General protections claims are sometimes referred to as adverse action claims. Adverse actions taken against an employee or potential employee might include:

- dismissing the person;
- not giving the person their legal entitlements;
- changing the person's job to their disadvantage;
- treating the person differently than others;
- not hiring the person; or
- offering the person different (and unfair) terms and conditions, compared to other employees.

Chart 5 shows there is a trending increase in general protections claims—in 2013–14, the Commission received 2879 applications for general protections claims involving dismissal, an 18.5 per cent increase from 2012–13 (2429 applications) and a 33 per cent increase from 2011–12 (2162 applications). Fifty applications were made in 2013–14 that did not involve the dismissal of the employee.

Chart 5: General protections applications 2009-14



Process and timeliness

If a dispute involves a dismissal, the Commission must convene a conference.³⁹ Conferences for general protections matters are usually private, and can be held face-to-face or by telephone. Many parties choose to represent themselves in Commission conferences.

Where the dispute is not resolved during the conference and the Commission is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, the Commission must issue the parties a certificate to that effect.⁴⁰

From 1 January 2014, the Commission's role has been expanded to allow it to arbitrate a dispute involving dismissal, where both parties agree and notify the Commission of their consent.⁴¹ There were eight applications for consent arbitrations in the six months to 30 June 2014.

If the parties do not consent to the Commission arbitrating the dispute, an applicant can choose to progress their matter by making a separate application to the Federal Circuit Court or the Federal Court of Australia. If the Commission considers that an application to either court would not have a reasonable prospect of success, it must advise the parties accordingly.⁴²

The timeframes for dealing with general protections applications has increased slightly in line with the increase in applications. In 2013–14, a first conference was held within 59 days for 90 per cent of applications—up from 56 days in 2012–13 and 48 days in 2011–12.

Continuous Improvement

As discussed in Section four, in September 2014, the Commission launched a general protections conciliation pilot, where trained staff conciliators conduct telephone conferences to assist parties to resolve a general protections dispute by agreement. This pilot will be externally reviewed in April 2015 to assess whether this approach should be expanded in the future and to consider its resourcing implications. The early results for this trial show

³⁹ Fair Work Act s.368(1)

⁴⁰ Fair Work Act s.368(3)(a)

⁴¹ Fair Work Act s.369

⁴² Fair Work Act s.368(3)(b)

improvements in both timeliness and in the settlement rates. These results are outlined in Section four.

The Commission has developed a detailed benchbook and guides on general protections claims, and an eligibility checklist for people to determine whether or not they are eligible to make a an application. This material is particularly directed to assisting self-represented parties (both applicants and respondents) understand this complex area of law.

In 2012–13, the Commission ran a pilot program in Western Australia to assist self-represented parties in general protections applications involving dismissal. Eligible applicants were referred to the Employment Law Centre of Western Australia for legal advice on the merits of their application. The pilot saw 76 per cent of those referred to the service take a different course of action after receiving advice, either discontinuing the application (27 per cent) or amending it (49 per cent).

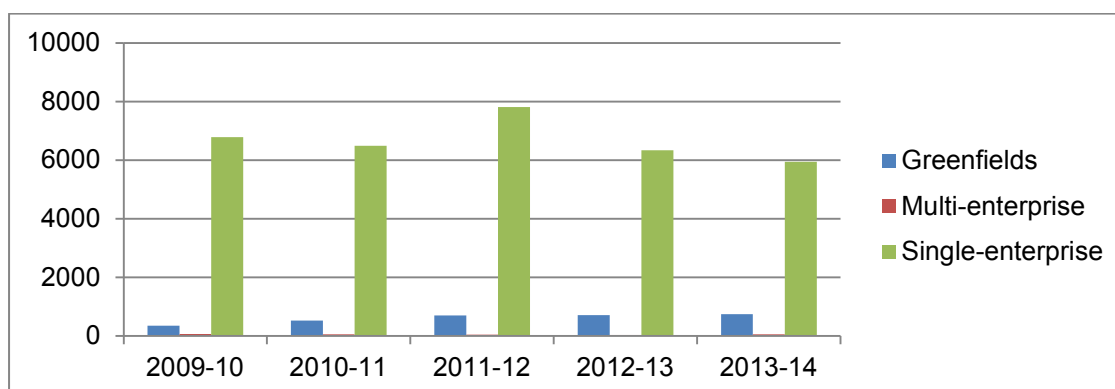
The program was reviewed by RMIT's Centre for Innovative Justice (CIJ) which found there were significant benefits for both parties and the wider legal process in assisting self-represented applicants early in the process.

The Commission is currently considering ways to establish ongoing programs to assist self-represented parties through Commission staff providing information and web-based tools designed for applicants and respondents. By way of example, the Commission intends to produce a virtual tour covering general protections. It has also started gathering more detailed data on general protections conference outcomes in 2014, with a view to publishing this data in the Commission's 2014–15 Annual Report. As with unfair dismissal claims, this may help parties to gain an appreciation of how others have resolved similar disputes.

Agreement approvals

Enterprise agreement related applications⁴³ (which constituted approximately 20% of applications in 2013-14) are the second largest number of applications lodged with the Commission each year after unfair dismissal applications. Of the 5 945 applications lodged for approval of single enterprise agreements in 2013-14, 749 were for approval of greenfields agreements and 60 were for multi-employer agreements.⁴⁴ **Chart 6** shows the lodgment of agreement (by type) applications in the period 2009-14.

Chart 6: Enterprise agreement applications (s185) 2009-14



⁴³ Application can be made for approval, variation and termination of enterprise agreements.

⁴⁴ 2013–14 Annual report, Appendix K.

Agreements approved under the Fair Work Act must include terms such as those required under s.202; must meet the Better Off Overall Test (BOOT) and meet the pre-approval steps in relation to the making of the agreement (for example, a notice of employee representational rights must be provided under s.173). The BOOT requires that the employee would be better off overall under the relevant agreement than if the modern award applied to the employee.⁴⁵ An application for approval of an agreement that does not meet either procedural or substantive tests may be refused.

Information and preliminary results have been provided in Section Four about the Agreements Pilot in which Commission staff are processing some applications for approval of agreements under supervision of Commission Members.

Dispute Resolution

The Commission deals with a wide variety of workplace disputes which can vary significantly in scale and potential economic impact. Disputes range from those between an individual employee and employer to those that affect entire industries and thousands of employees. This arises because the Commission can or must assist parties to resolve disputes arising under a range of industrial instruments—agreements, modern awards, instruments under repealed legislation, determinations made under the *Public Service Act 1999* (Cth) and those involving requests for flexible working hours. In doing so, the Commission generally seeks to help parties reach a settlement.

Information is set out in Section Four regarding the Commission's 'New Approaches' program aimed at resolving issues before they develop into formal disputes.

The Commission received 2516 dispute applications⁴⁶ in 2013–14 and the majority (94 per cent) were applications for the Commission to resolve disputes arising from awards, agreements and contracts. The number of applications increased by 7 per cent in 2013–14 compared to the previous reporting year and by 24 per cent compared to 2011–12.

The median time between the lodgment of the applications and the first conference taking place was 17 days and 90 per cent were conducted within 46 days.⁴⁷ These times are slightly higher than previous years; in 2012–13 the median time was 15 days and 90 per cent were conducted within 38 days. The Commission is enabled by the Fair Work Act to deal with disputes that arise during bargaining upon referral by the parties.

Orders relating to industrial action

Industrial action can be taken by employees and employers, and can be protected or unprotected actions under the Fair Work Act. Parties can make applications to the Commission for orders to stop industrial action⁴⁸ or to suspend or terminate industrial action where the action is or would cause significant economic harm or endanger the life or the personal safety of the community.⁴⁹

⁴⁵ Enterprise agreements exclude the operation of modern awards in relation to employees to which the agreement applies—Fair Work Act s.57.

⁴⁶ Applications made under s.739 of the Fair Work Act

⁴⁷ 2013–14 *Annual report*, Table 5, p 8.

⁴⁸ Fair Work Act ss.418 and 419.

⁴⁹ Fair Work Act ss. 423 and 424.

The Commission received a total of 989 applications in relation to industrial action in 2013–14. This represents a decrease of 22 per cent from the 2012–13 year, and a decrease of 30 per cent from the 2011–12 year.⁵⁰

The Fair Work Act requires the Commission to, as far as is practicable, determine an application for an order to stop industrial action within 2 days after the application is made. The median time frame for dealing with such applications was 1 day in 2013–14 and the two previous reporting periods and 90 per cent were determined within 2 days (and within 3 days in 2011–12).⁵¹

To achieve this timeliness, Members will convene hearings and conferences out of business hours, at weekends and by using video and telephone conferencing.

Appeals

The current appeal mechanism

Section 604 of the Fair Work Act sets out when an aggrieved person may appeal a decision of the Commission (other than a Full Bench decision). The Commission's powers on appeal are exercisable only if there is error on the part of the primary decision maker.⁵² There is no right to appeal—an appeal may be made only with the permission of the Commission. The Commission must grant permission to appeal if satisfied that it is in the public interest to do so.

The Explanatory Memorandum to what is now s.604 makes the following observations about the concept of permission to appeal:

2328. Subject to the appellant demonstrating an arguable case of appealable error, it is intended that FWA [FWC] should have a broad discretion as to the circumstances in which it can grant permission to appeal. Some examples of considerations which have traditionally been adopted in granting leave and which would therefore usually be treated as justifying the grant of permission to appeal include:

- that the decision is attended with sufficient doubt to warrant its reconsideration; and
- that substantial injustice may result if leave is refused.

It should be noted that an additional requirement is prescribed by s.400 of the Fair Work Act in relation to appeals concerning unfair dismissal applications. The Commission *must not* grant permission to appeal an unfair dismissal decision *unless* it considers that it is 'in the public interest to do so'. In *Coal & Allied Mining Services Pty Ltd v Lawler and others*, Buchanan J (with whom Marshall and Cowdroy JJ agreed) characterised the test under s.400 as 'a stringent one'.⁵³

The public interest test in s.400(1) is not satisfied simply by the identification of error or a preference for a different result. In *GlaxoSmithKline Australia Pty Ltd v Makin* the Full Bench identified some of the considerations that may attract the public interest:

⁵⁰ 2013–14 Annual report, p 48.

⁵¹ 2013–14 Annual report, Table 20, p 50.

⁵² Note that the Commission has power to receive further evidence on appeal, pursuant to s.607(2); see *Coal and Allied v AIRC* (2000) 203 CLR 194 at [17] per Gleeson CJ, Gaudron and Hayne JJ.

⁵³ (2011) 192 FCR 78 at 90, paragraph [43].

... the public interest might be attracted where a matter raises issues of importance and general application, or where there is a diversity of decisions at first instance so that guidance from an appellate court is required, or where the decision at first instance manifests an injustice, or the result is counter intuitive or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters...⁵⁴

Caseload

Only a small proportion of Commission decisions are appealed. The Commission's 2013–14 Annual Report shows that 37 066 applications were lodged in the financial year and 13 302 decisions, orders and determinations were published. There were 214 appeals lodged, representing only one and a half per cent of all Commission decisions. In 2012-13, 36 616 applications were lodged; 11 673 decisions, orders and determinations were published and 142 appeal applications were lodged (1.2 per cent of all decisions, orders and determinations.)

Virtually all matters within the Commission's jurisdiction are subject to an appeal. In practice appeals are heavily skewed towards unfair dismissal matters. In part, this is because unfair dismissal applications represent a large proportion of the matters lodged in the Commission, though most applications are resolved at first instance by staff conciliators. **Table 3** below shows the number of appeals determined and the outcome of the appeal, by matter type for 2013–2014. About 70 per cent of appeals determined in this 12 month period were dismissed.

Table 3: Matters the subject of Appeal in the Fair Work Commission 2013-14

Matter Type	Appeals upheld	Appeals dismissed	Total appeals determined
Unfair dismissals	23	50	73
Agreement approvals	6	5	11
s.739 disputes	6	8	14
Industrial action	5	3	8
Modern awards	6	2	8
Bargaining disputes	3	3	6
Miscellaneous	5	12	17
s.598 Permission to appear	2	0	2
Total	56	83	139

Very few Commission Full Bench decisions are the subject of applications to the Federal Court on the basis of jurisdictional error. A list of such Federal Court matters in 2014 is available on the Commission's website.⁵⁵ Of the 10 matters finalised in 2013–14 only 3 resulted in the orders and decision of the Full Bench being quashed. One further matter was initially upheld by a Federal Court Judge, but this decision was overturned on appeal to the Full Court on 5 March 2015.⁵⁶

⁵⁴ (2010) 197 IR 266 at [27].

⁵⁵ <https://www.fwc.gov.au/cases-decisions-and-orders/appeal-decision-or-order/court-reviews>

⁵⁶ [Australian Nursing and Midwifery Federation v Kaizen Hospitals \(Essendon\) Pty Ltd \[2015\] FCAFC 23](#)

The Commission has introduced a number of initiatives to improve the efficiency of the appeal process, in particular:

- the establishment of benchmarks for the hearing and determination of appeals;
- the introduction of an appeals practice note and more consistent case management of appeals;
- utilising, where appropriate, locally based Members to constitute Appeal Benches; and
- introducing a permission to appeal pilot (discussed in Section 4).

These initiatives have been directed at improving timeliness, providing greater consistency in the case management of appeals and in reducing the cost to the Commission associated with the hearing and determination of appeals.

Appeal timeliness benchmarks

On 1 July 2013, the Commission introduced two timeliness benchmarks relating to appeals:

- time to deliver reserved decisions - 90 per cent of all reserved appeal decisions delivered with 8 weeks and 100 per cent delivered within 12 weeks; and
- time from lodgement to hearing - 90 per cent of all appeals listed within 12 weeks and 100 per cent listed within 16 weeks.

By comparison, the Federal Court of Australia has a benchmark of 85 per cent of cases (excluding native title) being completed within 18 months of commencement.⁵⁷

Table 3 shows the performance of the Commission relating to appeal reserved decisions, with a significant improvement made in the time taken to deliver decisions since the implementation of the benchmarks.

Table 3: Commission performance against timeliness benchmarks: appeal reserved decisions

Benchmarks	90 % reserved decisions finalised within 8 weeks	100% reserved decisions finalised within 12 weeks
	Percentage finalised within 8 weeks	Percentage finalised 12 weeks
Jan– Dec 2014	90.7%	94.7%
2012–13	77.8%	90.9%

⁵⁷ See Annual Report of the Federal Court of Australia 2013-14.

Table 4 shows the Commission's performance against the benchmarks on timeliness for listing appeals for a first substantive hearing.

Table 4: Commission performance against timeliness benchmarks: appeal listings

Benchmarks	90% listed within 12 weeks	100% listed within 16 weeks
	Percentage listed within 12 weeks	Percentage listed within 16 weeks
Jan–Dec 2014	86.5%	99%
2012–13	90.8%	97%

Measurement of 'lodgment to first hearing' excludes appeals where a stay order is sought. Matters heard together are counted as one for the purpose of measuring the benchmarks.

The time taken to hear and determine appeals is expected to improve substantially in 2015 with the introduction of the permission to appeal pilot. This pilot is discussed in more detail below.

Appeals administration

The composition of Appeal Benches is based on an Appeal Roster. The Appeal Roster is set annually by the President, after consultation with Members, to determine their availability to sit on appeals in each roster period.

The Appeal Roster is set having regard to the number of appeals expected to be filed throughout the year. Members are assigned to the roster taking into account a number of factors including their availability, location and their capacity to meet the Commission's timeliness benchmarks.

Most appeals are filed in Melbourne or Sydney. Two 3-day periods in each month are allocated for hearing appeals in each of these locations, and, since January 2015, a day or two are rostered per month to consider permission to appeal as a part of a pilot program (see discussion in Section 4). Four days per month (two periods of 2 days) are allocated for hearing appeals in capital cities other than Melbourne or Sydney.

The composition of Appeal Benches is generally determined by the following factors:

- the Members assigned (by the Appeal Roster) to hear appeals in the relevant roster period;
- the location in which the appeal is lodged; and
- the nature and complexity of the appeal.

If an appeal raises a jurisdictional issue or a legal question involving the interpretation of the Fair Work Act, then a legally qualified Member, or an experienced senior Member, will usually be assigned to the Appeal Bench. If an appeal raises a matter of special significance then the President or one of the Vice Presidents will usually preside.

In the interest of transparency, information about the number of appeals allocated to each Member is posted on the Commission's website.⁵⁸

The Appeal Roster is designed to ensure that a sufficient mix of Members is available to hear and determine appeals in a timely manner.

To minimise the expenditure of public money, Appeal Benches usually comprise resident Members. So, if an appeal is lodged in Sydney then Members resident in Sydney will usually make up all or most of the Members on the Appeal Bench. This saves travelling time and reduces cost.

Fewer appeals are lodged in Brisbane and Perth (and even fewer in Adelaide, Canberra and Hobart), so Members resident in those cities hear fewer appeals—because of the small number of appeals and the fact that a Member cannot sit on an appeal from their own decision.

The number of times that a Member is assigned to an Appeal Bench will also be influenced by the number of appeals which are to be heard during their roster period.

Appeal matters are generally listed for hearing within 12 weeks of the Commission receiving the application. If the application included a request to stay (stop) all or part of a decision or order, a stay order hearing will be listed within 7 days of the lodgment.

Appeals Practice Note

In May 2013, the Commission published an Appeals Practice Note to provide guidance in relation to appeal proceedings. The practice note provides a general explanation of appeal rights and procedures followed by the Commission in listing, hearing and determining appeals. The practice note also standardises the directions applicable to appeals. Once a date has been fixed for the hearing of an appeal, parties will be directed to file and serve outlines of submissions.

Use of local Members for appeals

Travel costs associated with Members (and associates) flying interstate constitute a significant part of the cost to the Commission of conducting hearings, including appeals. The Commission has significantly reduced its expenditure on travel by Members, with a reduction of 45 per cent on fares between the 2010-11 and 2013-14 financial years.⁵⁹ The Commission has also sought to increase the cost-effectiveness of the existing appeal system by increasing the use of resident Members in the composition of appeal panels. For example, if an appeal is to be heard in Sydney the Appeal Bench will usually consist of Members resident in Sydney. Further, when Members are required to travel fewer associates are accompanying Members, thereby reducing overall travel costs.

Consistency of decision-making

Apparently inconsistent first instance decisions are not unusual in any tribunal or court. Different Members may reach different outcomes on similar facts because in many aspects of the Commission's jurisdiction the decision of the Member involves the exercise of discretion and minds can reasonably differ. This observation may be made of decision-making in any court or tribunal. In the exercise of a discretion there is no absolute 'right' or

⁵⁸ <https://www.fwc.gov.au/cases-decisions-and-orders/appeal-decision-or-order>

⁵⁹ Expenditure on fares by Members fell from \$1 305 683 in 2010–11 to \$708 329 in 2013–14.

‘wrong’ answer, rather the answer depends upon a consideration of a range of factors before the Member. Where the original decision has involved the exercise of a significant level of discretion it is not enough that the Appeal Bench would have reached a different conclusion. The Appeal Bench may intervene only on the limited ground that an error has been made in the exercise of discretion. As the High Court observed in *House v The King*:⁶⁰

The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

A degree of inconsistency in first instance decisions is not a new phenomenon. Australian Chamber of Commerce and Industry Workplace Relations Manager Mr Daniel Mammone is quoted in Workforce Daily as saying that while inconsistent decisions were ‘a concern’ on a general level but that was ‘not new under [Justice] Ross and not new under [former President Justice Geoffrey] Giudice’.⁶¹

In addition to the appeal mechanism in s.604, the existing legislation provides two other means to address inconsistent decision making:

- the Minister can apply for a review to be conducted by a Full Bench of any decision by a single Member if the Minister believes that the decision is contrary to the public interest.⁶² Review applications are determined by a Full Bench⁶³ and the powers that can be exercised by a Full Bench on a review are the same as those that can be exercised in an appeal under s.604 of the Act.⁶⁴ No such applications have been made since the commencement of the Fair Work Act; and
- parties interested in a proceeding, or the Minister, can apply to the President to have a matter before a single Member referred to a Full Bench for determination.⁶⁵ The President must direct a Full Bench to perform a function or exercise a power in relation to a matter if he or she is satisfied that it is in the public interest to do so.

These processes may be used in circumstances where there are inconsistent first instance decisions dealing with a particular issue. In the rare circumstance where there are inconsistent Full Bench decisions, the Commission has historically addressed the issue through a Full Bench with more than three Members or a senior Full Bench. Such an

⁶⁰ (1936) 55 CLR 499.

⁶¹ Workforce Daily, November 4 2013.

⁶² Fair Work Act s.605(1).

⁶³ Fair Work Act s.614.

⁶⁴ Fair Work Act s.607(3).

⁶⁵ Fair Work Act s.615A.

approach was adopted by the *Commission in CFMEU v Queensland Bulk Handling Pty Ltd*.⁶⁶

In a speech delivered to the Industrial Relations Society of NSW on 24 May 2014, I adverted to the assertion in various articles and media commentary that there have been ‘contradictory findings’ by the Commission in a range of areas. For the reasons set out in that speech these assertions are either wrong or are being dealt with by the existing mechanism. A copy of the speech is at **Appendix 3**.

Safety Net

One of the Commission’s functions is the establishment and maintenance of a safety net of minimum terms and conditions of employment.

Modern awards

Awards continue to be a key part of the safety net framework of minimum terms and conditions of employment.

With the introduction of enterprise bargaining in 1993 through the Industrial Relations Reform Act 1993, and the award simplification process undertaken in the late 1990s under the Workplace Relations and Other Legislation Amendment Act 1996, awards have become a safety net for those who are covered by enterprise agreements.

The most recent process of award modernisation began in March 2008 following a formal request from the Australian Government to the (then) Australian Industrial Relations Commission (AIRC).⁶⁷

By the end of 2009, the Commission had created 122 industry and occupational modern awards, replacing approximately 1560 federal and state instruments. Modern awards commenced operation on 1 January 2010 and contained transitional provisions to phase in changes in wages, loadings and penalties over a five year period. A further 1625 federal and State awards covering single enterprises were also considered in a separate enterprise instrument modernisation process.

Following the passage of the Fair Work Act, the Commission’s role in varying awards is governed by the Modern Awards Objective.⁶⁸ This Objective requires that the Commission ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions and taking into account those matters from ss. 134(1)(a) through to (h).

Apart from variations to modern awards as a result of the Annual Wage Reviews, the ability of parties to seek a variation of a modern award is outside the scope of the 4 yearly reviews of modern awards, and variations are limited to matters set out in the Fair Work Act⁶⁹

The Fair Work Commission must conduct a 4 yearly review of modern awards starting as soon as practicable after each 4th anniversary of 1 January 2010.⁷⁰ Accordingly, the first 4 yearly review commenced in early 2014 and is anticipated to run until mid-2016. All material in relation to the 4 yearly review is published on a dedicated section of the Commission’s

⁶⁶ [2012] FWAFB 7551.

⁶⁷ The modernisation process was undertaken in accordance with Part 10A of the *Workplace Relations Act 1996* (Cth).

⁶⁸ See Fair Work Act s.134.

⁶⁹ Fair Work Act ss.157-161.

⁷⁰ Fair Work Act s.156.

website. This approach ensures transparency for all parties when the Commission deals with the issues.

Employer and employee organisations, individual businesses, and the Australian Government have all made submissions to the 4 yearly review, including assisting with establishing the timetable.

In addition to the consideration of claims made by parties in relation to individual or multiple modern awards as part of the 4 yearly review, the Commission is also proposing a number of technical and drafting changes to improve the accessibility of award documents. Technical amendments include the removal of provisions from a number of awards that were inconsistent with the National Employment Standards.

A guide⁷¹ to the award stage of the 4 yearly review was published on the Commission's website, together with an exemplar award⁷² prepared by Commission staff which seeks to address some of the structural issues identified in modern awards. A comparison document⁷³ highlighting the changes between the original modern award and proposed modern award is also available on the website.

Special efforts were then made to capture the views of users of awards from the small business sector who are not, traditionally, active participants in the workplace relations system.

The Commission engaged in a process of co-design to elicit the views of small business participants who were covered by modern awards on the usability of current awards and the exemplar award. This research is assisting the Commission to develop modern awards that are easier to understand, which may lower red tape and assist with compliance.⁷⁴

The conduct of the 4 yearly review is a very large body of work, both for external stakeholders as well as requiring extensive internal resources to support it. For example, more than 2,500 documents have been posted to the Commission's website, six decisions and 27 statements have been issued to date, and the process is expected to be completed in 2016. All documents relating to the review can be found on the Commission's website.⁷⁵

Minimum wage determinations

The Commission (and its predecessor institutions) have been responsible for minimum wage determination within the Commonwealth workplace relations system since the original *Harvester*⁷⁶ decision in 1907.

The *Harvester* decision set wages on the basis of what a fair minimum wage would be for an average man with dependents working within Australia. This wage broadly became the basic wage for Australia and, for much of the period until the 1990s, the basic wage operated with additional components – 'margins' – to reflect the skills of different classes of worker. The fixation of a basic wage and margins for skill continued until the adoption of a total wage in

⁷¹ <http://www.fwc.gov.au/documents/sites/awardsmodernfouryr/4-yearly-review-Guide-to-Award-Stage.pdf>

⁷² <http://www.fwc.gov.au/documents/sites/awardsmodernfouryr/Exemplar-award.pdf>

⁷³ <http://www.fwc.gov.au/documents/sites/awardsmodernfouryr/Exemplar-award-comparison.pdf>

⁷⁴ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/citizen-codesign-report.pdf>

⁷⁵ <https://www.fwc.gov.au/awards-and-agreements/modern-award-reviews/4-yearly-review>

⁷⁶ (1907-08) 2 CAR 1.

1967⁷⁷, with the fixation of classification rates reflecting economic and work value considerations.

Until the *Industrial Relations Reform Act 1993* (Cth), the award system operated as the primary basis for wage determination in Australia. Although there existed substantial over award bargaining in many sectors, it was not until 1993 that enterprise bargaining was given formal precedence in the legal system.

The award system in 1993 consisted of a number of awards which covered most employees in the Commonwealth's workplace relations jurisdiction. Furthermore, a series of relativities operated in relation to set minimum wages for skill-based classifications.⁷⁸ The relativities operated both internally within an award based on different skill levels, and externally across the award system such that key classifications in major industry awards were measured against each other.

Since the passage of the Fair Work Act, annual wage reviews have been conducted in accordance with Part 2-6 of the Act. The overarching legislative provisions which determine the Commission's approach to minimum wages are set out in the modern awards objective (discussed above) and the minimum wages objective (s.284 of the Fair Work Act).

The provisions require that the Commission must establish and maintain a safety net of fair minimum wages, taking into account those matters in sub-sections (1)(a) through to (e):

- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
- (b) promoting social inclusion through increased workforce participation; and
- (c) relative living standards and the needs of the low paid; and
- (d) the principle of equal remuneration for work of equal or comparable value; and
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

These provisions establish the legal basis for the decision of the Commission when dealing with minimum wages and the annual wage review. The Commission has observed that there is often a degree of tension between the economic, social and other considerations which the Commission is required to take into account, leading it to reject a mechanistic or decision rule approach to wage fixation.⁷⁹

The annual wage review is conducted by the Expert Panel, rather than exclusively by primary Members of the Commission.⁸⁰ The qualifications for appointment of Expert Panel Members are set out at section 627(4). The legislation also establishes the time frame for the annual wage review to be conducted and when orders must come into operation.⁸¹

⁷⁷ (1967)118 CAR 219, at 655.

⁷⁸ Relativities between different categories of workers within and across awards were substantially reviewed under the structural efficiency principle. See National Wage Case August 1988 Print H4000; February 1989 Review, Print H8200 and National Wage Case August 1989, Print H9100.

⁷⁹ *Annual Wage Review 2013–14* [2014] FWCFB 3500, at [72].

⁸⁰ The FWC must be constituted by an Expert Panel to conduct Annual Wage Reviews, and to make determinations and orders in those reviews (Fair Work Act s.617).

⁸¹ Fair Work Act s.286.

Process

In accordance with legislative requirements, all interested persons and bodies are provided with a reasonable opportunity to make written submissions for consideration in the Annual Wage Review and all parties are given the opportunity to make comments on the submissions of others. Parties can also make oral submissions.

Further, ss.290 and 291 enable a forward research program to be planned and published. These provisions have enabled the Commission to develop a forward research program to provide the Expert Panel with the most up-to-date research on the matters which it must consider pursuant to the minimum wages objective.

Particular issues about minimum wages

Issues Paper Number 2 details a range of questions that the Productivity Commission is seeking to be answered in relation to minimum wages.

As with our comments in this submission relating to the other elements of the Commission's jurisdiction, this submission does not address the Productivity Commission's questions as such. Rather the Commission will refer to its published decisions as demonstrating the Commission's approach.

Minimum wages and employment

The Commission is required to consider employment growth, amongst other matters, in discharging its responsibilities in the annual wage review and considers the impact of minimum wages on employment. The Commission has regard to labour market information, both at an aggregate level and at the level of particular labour market segments, including award reliant industries. The Panel also has regard to research in relation to the minimum wage and employment.

The Commission has noted the limited number of empirical studies put to it canvassing the effects of increases in minimum wages in the Australian context and expressed reservations about international studies undertaken in the context of industrial relations systems of a different character to the Australian system, including the range of minimum rates at various levels throughout the award system.

The Commission in its Annual Wage Review 2013–14 decision⁸² noted that

[425] ...the Australian industrial relations system encompasses a range of rates at various classifications levels throughout the modern awards and these all apply as minimum rates. The scope and higher relative coverage of the minimum wages in the Australian system and the context set by these wages in the unique system of collective bargaining are factors that must be considered when seeking to rely upon international studies for present purposes.

[426] However, the quality of this new research and the refined theoretical understandings are consistent with the view taken by the Panel that a modest increase in minimum wages leads to a very small, or even zero, effect on employment. We also note that the value of minimum wages relative to median earnings in Australia has been growing steadily closer to that of other countries, and

⁸² [2014] FWCFB 3500.

as a result, this particular aspect of distinctiveness of the Australian system is less significant than it has been.

Minimum wage relativity

It has been frequently argued that the minimum wage in Australia is higher in either absolute terms, or relative to median earnings, than that of comparable nations. It is suggested in this context that the impact of minimum wage increases may be more significant. The Commission in its Annual Wage Review 2013–14 decision noted (at paragraph 36) that:

Although Organisation for Economic Co-operation and Development (OECD) data shows that the NMW in Australia remains relatively high as a proportion of average earnings, it also discloses a significant reduction over the past two decades, both in an Australian context and in an international context.

In the Annual Wage Review 2012–13⁸³ decision the Commission's Expert Panel stated:

[382] In our view, data about the Australian minimum wage bite relative to the other OECD countries is of limited significance in evaluating the relative living standards supported by award wages. However, the minimum wage bite is relevant in relation to the competitiveness of businesses that pay award rates and compete in global markets. ...

[387] Over the past decade, all award rates of pay have fallen relative to measures of median and average earnings, with much of that decline occurring in 2006 and 2008, and the ratio being volatile from year to year. The annual movements in the C14 rate relative to median weekly earnings of full-time employees is shown in Table 6.3, which shows a fall in the minimum wage bite from 57.5 per cent in 2002 to 52.7 per cent in 2012.

Award reliance

The Commission has conducted research using ABS data, and its own research, to identify those industries which are the most award reliant. In the Annual Wage Review 2013–14 decision the Expert Panel noted that:

The most recent award reliance data remain those for 2012, which show on aggregate 16.1 per cent of employees were award reliant. The 2012 data identify the Accommodation and food services (44.8 per cent); Administrative and support services (29.0 per cent); Retail trade (25.6 per cent); Other services (24.6 per cent); and Rental, hiring and real estate services (20.9 per cent) industries as the most award reliant, in that they are the industries in which the highest proportion of employees are award reliant.

⁸³ [2013] FWCFB 4000.

Incentives to bargain

One of the issues which the Commission is asked to examine is whether award increases are of such a magnitude that they discourage employers and employees from engaging in enterprise bargaining.

Research⁸⁴ was commissioned as a part of the Annual Wage Review forward research program to shed light on the impact that minimum wage setting may have on incentives to bargain. In the Annual Wage Review 2013–14 decision the Commission noted that:

[471] Though we acknowledge the limitations raised by parties on the research methods applied in both research reports, those limitations have not persuaded us to disregard the research or its conclusions. We note that no other empirical evidence was presented by the parties.

[472] The research does not reveal any particular relationship between minimum award increases and the incentive to bargain. Instead it points to a complex mix of factors that may contribute to employee and employer decision-making about whether or not to bargain.

[473] The available evidence indicates that the level of increases in minimum award wages over the past decade or so have been compatible with the encouragement of collective bargaining. We are satisfied that the increase awarded in this Review is also compatible with the need to encourage collective bargaining.

Tax Transfer system

Submissions are frequently made to the Commission, from both employers and employees, that the Commission should take into account the interaction between the tax transfer system and the minimum wage system. In the *Annual Wage Review 2013–14* decision the Commission made the following comments

[357] The tax-transfer system has a significant role to play in alleviating the impact of earnings inequality and supporting the living standards of low-paid workers. Wages do not entirely determine the living standards of the majority of individual wage earners who live in households with others. We agree with the view expressed in the past three review decisions that:

“minimum wages and the tax transfer system are both relevant to the maintenance of an effective safety net for the low paid: each has its part to play. Wages play a particularly important role in the maintenance of disposable incomes for households not receiving income support payments.”

[358] The effect of taxes and transfers on disposable incomes of the low paid is relevant to the needs of the low paid and their relative living standards. This is so in relation to both specific changes in the tax-transfer system at the time of a particular Annual Wage Review and assessing broader information in relation to measures of the income of the low-paid expressed as a proportion of overall median or average incomes. Consideration of the effect of changes in the tax-transfer system on the absolute or relative circumstances of the low paid must be made in the particular circumstances that apply.

⁸⁴ Reports 7/2010; 6/2013 and 7/2013. Reports are available on the Commission's website: <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/previous-wage-reviews/annual-wa-8>

Technical Issues

In past annual wage reviews, some employer associations have proposed a supplementary exemption process, in which particular employers or industry sectors could seek exemption from or deferral of, an increase in modern award minimum wages determined in the annual wage review.

However, there are practical impediments created by the present legislative framework to such a process, impacting on the ability of some parties to effectively raise exceptional circumstances, as explained in the *Annual Wage Review 2012–13*:

[91] The practical impediments to the adoption of a supplementary determination process are evident from the chronology below:

- 14 May 2013—Commonwealth Budget
- 17 May 2013—Post-Budget submissions filed
- 21–22 May 2013—Panel public consultations
- 3 June 2013—Decision
- 1 July 2013—Operative date of variations

[92] Two points may be made about this chronology. The first is that it is not feasible for the Panel to publish its decision (either in final or draft form) prior to early June. The time between the Budget and early June is the minimum period required in order to provide the parties with an opportunity to file supplementary submissions in relation to the Budget; hold consultations; and finalise the Panel's decision.

[93] The second point is that there is a statutory requirement that variation determinations arising from annual wage reviews come into operation on 1 July in the next financial year, absent exceptional circumstances (s.286). In order to meet the 1 July requirement, the Panel must, as a matter of practicality, issue its decision in early June in order to provide sufficient time for draft variation determinations to be prepared and commented upon, prior to final variation determinations being issued.

[96] The current legislative framework ensures that annual wage reviews are conducted in a timely way and provides certainty for businesses and employees, by nominating the operative date of any wage increases flowing from such reviews. But the interaction of ss.157(2), 285(1) and 286 does give rise to a practical difficulty in that there is no mechanism in the Act for revisiting a determination varying modern award minimum wages *after* an annual wage review has been completed.

[97] Apart from the context of an annual wage review, or the system of 4 yearly reviews of modern awards, the Commission may only vary modern award minimum wages if it is satisfied, among other things, that the variation is justified on work value grounds (s.157(2)). As a result of this legislative inflexibility, a small or large business; a sector; or a region facing circumstances warranting the deferral of, or exemption from, an annual wage review increase; can only make such an application in the context of an annual wage review. So if the adverse circumstances arose in, for example, July, the businesses affected would have to wait until the following year (i.e. the next annual wage review) before they could seek relief."

APPENDIX 1

FAIR WORK COMMISSION FUTURE DIRECTIONS INITIATIVES

Future Directions 2012-13

Promoting Fairness and improving access

Fair Hearings Practice Note

The Fair Hearings Practice Note sets out the obligations of Members, parties and their representatives in relation to the provision of a fair hearing. It gives those appearing before the Commission an understanding of, and some certainty around, how their matter will proceed. The Practice Note was published on the Commission's website in July 2013.

Unfair dismissal information for self-represented parties

Information was made available in a variety of forms such as booklets and multi-media, including improved information guides about unfair dismissal and an eligibility checklist. A series of videos have also been developed about the process for unfair dismissal matters as part of the virtual tour project.

Virtual tour of the Commission

The virtual tour explains the practicalities of accessing the Commission's offices and details the processes and procedures followed in unfair dismissal proceedings. It is a significant resource for self-represented parties and first-time users.

General protections information to assist self-represented parties

Improved information materials have been developed to assist self-represented parties (both applicants and employers) in general protections matters, an area of law that is often found to be complicated.

Unfair dismissal benchbook

The unfair dismissal benchbook was published in July 2013. The benchbook contains plain English summaries of the key principles of unfair dismissal case law and how these have been applied in Commission decisions. Since publication it has been updated to include any legislative amendments. It can be accessed on the Commission's website:

Other benchbooks

Benchbooks were developed for both general protections and the new anti-bullying jurisdiction and were made available on the Commission's website for public consultation. After extensive feedback the benchbooks were published in their final form in January 2014. These benchbooks are updated to include any legislative amendments and new relevant decisions, and will assist the high number of self-represented parties in these types of applications. They can be accessed on the Commission's website:

Review of application forms

The Commission has completed a review of its application forms to improve accessibility and reduce the number of forms. Twenty six forms were revised and a new format developed. Further forms are being considered as a part of the next phase of *Future Directions*.

General protections pilot program

In conjunction with the Employment Law Centre of Western Australia, the Commission ran a pilot program for the provision of independent legal advice to self-represented parties which continued until 30 June 2013. Following the pilot program the RMIT Centre for Innovative Justice conducted an assessment of the first 10 months of its operation, in particular examining participants' responses to the pilot and the impact the pilot program had on their applications. The report was published in July 2013. The Commission is considering these recommendations with a view to establishing an ongoing program to assist self-represented applicants.

Pro bono service

In December 2013 the Commission concluded a pilot program based in Melbourne which assisted self-represented parties in unfair dismissal jurisdiction proceedings by providing access to free legal assistance. A review of the program was conducted by the RMIT Centre for Innovative Justice. Following the review, some changes were made to the process to ensure the service continued to meet the Commission's aim of providing fairness and access to justice. The review also recommended that the program should be implemented on an ongoing basis. Accordingly, a new program was launched as part of the second phase of *Future Directions*. The Commission now has a pro bono lawyer program to support parties in unfair dismissal matters in both Melbourne and Sydney.

Website upgrade

The Commission's website has been completely redesigned and upgraded, with the aim to make it easier for users to select the sections relevant to them and to search for the specific information they require. Further work is being undertaken to support this aim.

Efficiency and Innovation

Benchmarks for reserved decisions and agreement approval timeliness were introduced on 1 July 2012 and the Commission reports on performance against the benchmarks on its website.

Timeliness benchmarks for reserved decisions

The benchmarks for reserved decisions are:

90 per cent of all reserved decisions are to be delivered within eight weeks, and

100 per cent of all reserved decisions are to be delivered within 12 weeks.

Timeliness benchmarks for finalising applications to approve agreements

The benchmarks for agreement approval timeliness are:

50 per cent of all applications to be finalised within three weeks

90 per cent of all applications to be finalised within eight weeks, and

100 per cent of all applications to be finalised within 12 weeks.

Online applications

The Commission developed a tool to enable all applications to be made online, via the Commission's website. This has resulted in greater convenience for applicants.

Daily hearings lists for smartphones and tablets

The Commission developed a searchable hearings list application which was suitable for all smart phones and tablets, and users to view and search hearing lists up to seven days in advance of a hearing. The technology used has been incorporated in the Commission's new website, which is device responsive.

SMS alerts for hearings and conferences

The Commission completed a trial of sending SMS alerts to participants in unfair dismissal conciliations in order to determine whether they increase the attendance rate of parties involved in the proceedings. Due to the success of the trial, further uses of SMS alerts has been included as an initiative in the second phase of *Future Directions*.

Matter allocation trial

The Commission piloted the regional allocation of some types of applications to improve service delivery.

Upgrade of video conferencing facilities

Video conferencing systems have been upgraded in all Commission offices, improving the quality and frequency with which these resources can be used.

Appeals Practice Note

In May 2013 the Commission introduced an Appeals Practice Note which incorporates standard directions for appeals, promoting a consistent approach to appeal proceedings.

Increasing Accountability

Member Code of Conduct

The Commission introduced a Member Conduct Guide and made it publicly available on its website in July 2012. An updated Member Code of Conduct was released on 1 March 2013.

Unfair dismissal outcomes

Statistical information on unfair dismissal outcomes at conciliation and arbitration is now published on the Commission's website.

***Future Directions* updates**

The Commission published regular updates detailing the progress made in implementing the initiatives set out in *Future Directions*. A final progress report in relation to the successful implementation of all 25 *Future Directions* initiatives was released in December 2013.

User groups

The Commission established user groups to facilitate an exchange of views. The groups have provided valuable feedback on a number of the Commission's initiatives.

Productivity and engaging with industry

Searching enterprise agreements

The Commission launched a search tool in December 2012 to enable clients to search the content of collective agreements approved by the Tribunal through our website.

Working cooperatively with other organisations

The Commission worked cooperatively with other organisations to minimise the potential for duplication of effort in implementing the Commission's engagement strategy.

Engagement strategy

The Commission developed a broad engagement strategy, in consultation with the major peak employer and union bodies. The Commission's engagement strategy comprises a number of elements, including:

Invited Paper Series

Australian Workplace Relations Study

Workplace Relations Lecture Series, and

Fair Work Commission Public Value research.

Invited Paper Series

Invited papers are written by external workplace relations academics, researchers and practitioners and cover a range of relevant workplace relations issues.

Australian Workplace Relations Study

Part of the Commission's engagement strategy includes the Australian Workplace Relations Study (AWRS). It has been included as an initiative as part of phase two of *Future Directions*.

Workplace Relations Lecture Series

In 2013 the Fair Work Commission co-sponsored with the University of Melbourne a series of lectures by prominent researchers to facilitate the discussion about workplace relations issues. Attendance ranged from 140 to 160 people per lecture. Speakers included Associate Professors John Howe and Anthony Forsyth and Mr Dean Parham.

Fair Work Commission public value research

As part of the engagement strategy the Commission commenced an investigation of options for research to improve its public value. This work is continuing as part of phase two of *Future Directions*.

Future Directions 2014-15

Promoting Fairness and improving access

Development of further benchbooks and making them available online

Following on from the creation of the unfair dismissal, anti-bullying and general protections benchbooks delivered as part of the first phase of *Future Directions*, a further benchbook will be developed about agreement making.

Access to audio files of Commission hearings

By the end of 2015 the Commission aims to provide access to audio files of most hearings from the Commission's website. This will provide greater accessibility to parties and the public while also ensuring appropriate security is in place for sensitive matters.

Broadening the scope of the current pro bono lawyer program

Following the success of last year's pilot program, planning commenced in the first half of 2014 to recommence the service as a permanent initiative in Melbourne. The pro bono service provides unrepresented parties with free legal assistance in unfair dismissal jurisdictional hearings before the Commission in Melbourne. The recommendations from the RMIT report of the pilot scheme were used as a basis for changing this service to better meet the needs of the parties. The service recommenced on 1 July 2014. A pro bono lawyer program is also running in Sydney.

Pilot information kiosk in Sydney

By the end of 2014 we aim to pilot an information kiosk in the Sydney Registry in order to assess how it is used by clients attending at the Registry and whether it should be rolled out to other offices. An information kiosk will enable applicants to complete and lodge forms electronically and access information about both the Commission and other relevant agencies.

Produce virtual tours covering general protections and anti-bullying

In the first phase of *Future Directions*, the Commission prepared a set of videos which were intended for first-time unrepresented users of the Commission, largely focused on location assistance, jurisdictional objections and unfair dismissal. The second phase will focus on providing information to enhance unrepresented parties' knowledge and ability to utilise the Commission in the areas of general protections, anti-bullying and agreement making.

Processes for Commission staff to identify issues where self-represented applicants may wish to seek legal advice

By the end of 2014 the Commission aims to introduce a system where upon lodgment staff assess applications and identify particular issues which may require the applicant to seek legal advice prior to the matter progressing to a Commission Member, for instance, unfair dismissal matters that have been made outside of the legislative timeframe. This will enable clients an opportunity to address obvious problems with applications early in the process.

Review and update all forms

The forms review project will continue the work delivered as part of the first phase of *Future Directions* to simplify access to the Commission by improving accessibility and readability of forms, particularly for self-represented parties, and increasing the level of guidance we currently provide on how to make and respond to applications. The project will also deliver a simplified fee waiver form to reduce the administrative burden on applicants experiencing financial hardship.

Improve access to information and advice

During 2014 and 2015 we will improve access to, and presentation of, information and advice through:

- continued improvement of the materials provided on our website
- enhancing the Commission website's capacity to search and collate content of collective agreements, and
- conducting education webinars that enable clients to obtain detailed, targeted information.

Examine effective use of technology

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

Efficiency and Innovation

First paperless annual wage review

In 2014 we will begin preparation for conducting the Commission's first paperless annual wage review in 2015.

WiFi access

All visitors to Commission premises now have WiFi access, including in hearing rooms. Accessing information via WiFi reduces the need to bring printed material into Commission offices and enables on the spot research as required. The Commission is working to develop information materials to assist the general public in relation to WiFi use.

SMS alerts

Following the successful pilot program for unfair dismissal conciliation conferences, in 2014 and 2015 the Commission will explore further uses of SMS alerts for Commission matters.

Efficiency

The Commission will examine ways in which Commission staff can work more efficiently, such as introducing a facility enabling lodgment of multiple related applications as a single bulk lodgment and by examining the cost-effectiveness of 'smart forms' for our most popular forms.

Electronic case management system

In 2014 and 2015 the Commission will improve its electronic case management system which will significantly reduce costs for parties and for the Commission, assist in improving processing times and enhance access to information.

Review processes for approval of enterprise agreements

The Commission is reviewing the processes for determining applications for the approval of enterprise agreements to ensure the most timely and efficient resolution of these matters.

Increasing Accountability

The Commission's performance against the International Framework for Tribunal Excellence

During the next two years the Commission will evaluate our performance against the International Framework for Tribunal Excellence to identify further measures to improve our performance against this Framework.

'Day in the life' of the Commission

The Commission will capture a snapshot of a 'day in the life' of the Commission. This will involve conducting a survey of all clients who have contact with the Commission during a particular period. This will enable the Commission to gain a better understanding of how clients use information and services available and whether we are providing services that meet their needs. This feedback may be used to better tailor information and service provision to suit the needs of clients and to improve client satisfaction.

Application benchmark information

In mid 2015 the Commission will run a pilot program to provide clients with selected application benchmark information as a guide to how long their application may take to be dealt with through to finalisation. Clients will benefit by being better informed of how long an average matter takes to be dealt with.

Performance indicator framework

The Commission will develop a performance indicator framework to provide greater reporting across a broader range of matters.

Research

We will take steps to enhance transparency and accountability through investigating options for research to improve our public value and facilitating an external review of our performance indicator framework.

Additional timeliness benchmarks

By late 2014 the Commission will develop additional timeliness benchmarks for unfair dismissal matters.

Productivity and engaging with industry

Mock hearings

Following the success of its mock hearings in Melbourne, the Commission committed to expanding its mock hearings program in 2014. The Commission held mock hearings in Sydney, Melbourne, Brisbane and Canberra during the first half of 2014, and in Perth on 12 August 2014. These were modelled on the 2013 mock hearings in Melbourne, with a new unfair dismissal scenario developed to provide an opportunity for ongoing learning for 2013 participants.

Communications strategy

The Commission will consult with a broad range of clients in developing a communications strategy which improves the public's understanding of our services and role. This will enable us to establish programs to better meet community needs and expectations.

Establishment of new user groups

The Commission will further facilitate the exchange of views with our key stakeholders by establishing new user groups, including a pilot program with community legal centres. The Commission commenced working with the Footscray Legal Centre to explore ways the Commission can provide assistance to the Centre with its Employment Law pilot program. To this end the Commission gave the Centre's volunteer lawyers the opportunity to participate in the recent pro bono training sessions which gave them access to free advocacy training and information about the unfair dismissal jurisdiction. Work on the initiative will progress through the 2014–15 period.

Better services to small business

The Commission will work to better promote the materials and resources we have for the small business sector. We will also review our materials and engagement with small business to ensure that we meet the needs and expectations of this important sector in the Australian economy.

Australian Workplace Relations Study

In 2014 the Commission will continue the Australian Workplace Relations Study (AWRS) which will capture the views of both employers and employees, resulting in the production of the first Australia-wide statistical dataset linking employer data and employee data. Data

collection through the AWRS has been one of the main activities of the Commission's Pay Equity Unit.

Promoting cooperative and productive workplace relations

In consultation with key stakeholders, in 2014 and 2015 the Commission will develop and implement a strategy for the promotion of cooperative and productive workplace relations that facilitate change and foster innovation.

Research community

In 2014 the Commission will continue to engage with the research community by co-sponsoring a series of papers and lectures delivered in Sydney, Melbourne, Brisbane, Perth and Hobart.

Qualitative research

In support of the recommendation contained in *Towards more productive and equitable workplaces, an evaluation of the Fair Work legislation*, the Commission will conduct and publish qualitative research to identify clauses in enterprise agreements that enhance productivity or innovation. The purpose of the project is to help enterprises to become more productive by informing them about productivity-enhancing measures that other enterprises have introduced through their enterprise agreements.

Research

By mid 2015 the Commission will conduct research to map the location and business needs of parties to determine how the Commission can provide services that more effectively and efficiently meet their needs.

APPENDIX 2

FAIR WORK COMMISSION - IMPROVING SERVICES FOR SMALL BUSINESS

The Commission has been consulting with small business to explore ways the Commission can improve services to meet their needs.

Small business representatives have provided feedback that they require simple, plain English materials to assist them to engage with the Commission. The Commission is progressing a range of initiatives to better meet the needs of these key stakeholders.

Some of the initiatives already being undertaken or considered include:

Agreement making guide and checklist—the Commission is developing an agreement making guide and checklist with a particular focus on assisting small business with the bargaining and agreement making process. The checklist will be written in plain English and include a summary of important dates in the agreement making process. This material will be published by the end of March 2015.

Citizen co-design with small business owners research—focus groups and in depth interviews were undertaken with 47 small business owners across Victoria and New South Wales in the context of the 4 yearly review of modern awards. The purpose of this exercise was to elicit practical insights from small businesses and to gain a greater understanding of the attitudes of the small business community in relation to their use and perceptions of modern award documents.

Consultation with other government agencies—the Commission is consulting with other government agencies to help develop a cohesive approach to providing information services to small business, to reduce duplication and provide clearer information.

Permission to appeal pilot—the appeals pilot allows for the permission to appeal issue to be dealt with more quickly and efficiently. The aim is to reduce the time and financial cost burdens on all parties.

Unfair Dismissal Practice Note and plain English information materials—in late 2014 the Commission released an Unfair Dismissal Practice Note and a series of documents to assist unrepresented parties when preparing for unfair dismissal hearings or conferences. Each of the documents prompts a response to questions relating to the statutory criteria which must be considered by a Member when determining an unfair dismissal application.

Usability review of the Commission's website—the Commission is currently undertaking an extensive usability review of the Commission's website. Part of this process is ensuring that small businesses are able to quickly and easily access the Commission's online resources and the information they require.

Small business workshop—the Commission is currently considering conducting a series of small business workshops. These events are likely to focus on the practicalities of

agreement making and the unfair dismissal jurisdiction. Further information materials are likely to be released in conjunction with these events.

Online video mock hearing for unrepresented parties—later this year the Commission will develop an online video-based unfair dismissal mock hearing for unrepresented parties to assist them to prepare for hearings or conferences at the Commission.

The Commission will continue to consult broadly with small business to improve service delivery.

APPENDIX 3



Future Directions -

Improving Institutional Performance and the concept of 'Public Value'

IRSNSW

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President

Fair Work Commission

24 May 2014

IMPROVING INSTITUTIONAL PERFORMANCE AND THE CONCEPT OF 'PUBLIC VALUE'

Thank you. This morning I want to discuss the future direction of our National Workplace Relations Tribunal, the Fair Work Commission. I particularly want to discuss the steps we are taking to improve the Commission's performance and the related concept of 'public value'. In this context I am referring to both the adjudicative and the administrative arms of the commission.

Australia has had a national workplace relations tribunal for over a century. It is one of our key national institutions. It has endured by successfully adapting to changes in its legislative environment and because it provides an independent, competent and professional dispute resolution service.

But past performance does not guarantee future survival. Even successful institutions have a tendency to decline unless they continue to innovate and adapt to changes in their environment.

When I was appointed in March 2012 the organisation was facing a number of challenges.

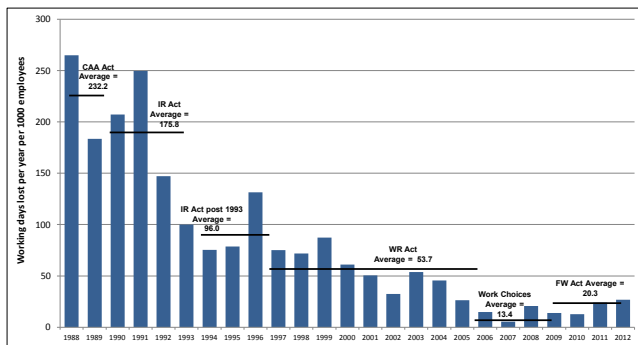
The composition of its work had fundamentally changed - from collective to individual dispute resolution.

The level of industrial disputation has fallen over time, and now, generally speaking, it is associated with bargaining following the expiry of the term of a collective agreement.

This chart shows the total number of working days lost per 1000 employees between 1988 and 2012. You can see that the average number of working days lost has steadily declined over successive industrial relations regimes. Measured as working days lost the level of industrial disputation under the Fair Work Act is one tenth of the level of disputation experienced in the late 1980's.

Dimensions of change

Chart 10: Working days lost per 1000 employees, 1988–2012

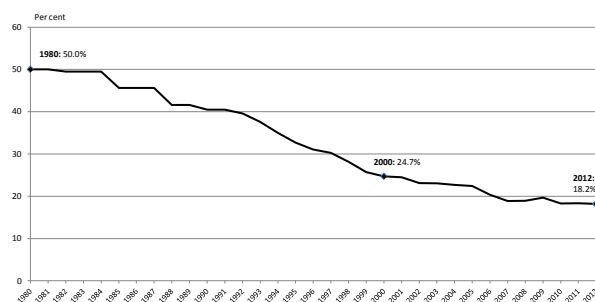


Source: Fair Work Commission calculations based on ABS, *Industrial Disputes, Australia*, Dec 2012, Catalogue No. 6321.0.55.001. Weighted averages are for the quarters covered by different employment relations arrangements. Based on, and extending, Chart 4.16 at p. 75 of *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, report prepared by the Fair Work Act Review Panel, DEEWR, 2012.

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No doubt one explanation for the decline in industrial disputation is the decline in union density. In the 20 years between 1980 and 2000 union density halved - from 50% to 24.7%.

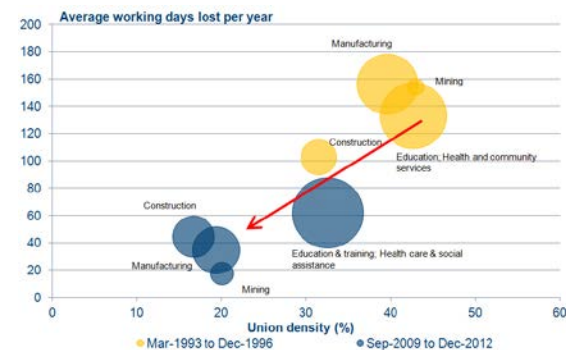
Decline in union density, 1980–2012



Source: ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2012, Catalogue No. 6310.0.

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Disputation, union density and size of industry by employment, 1993–2012



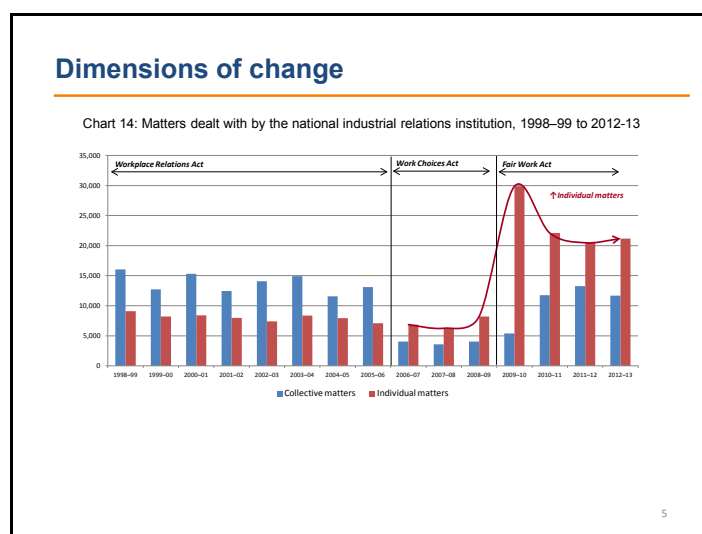
Source: ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2012, Catalogue No. 6310.0; ABS, *Labour Force, Australia*, Detailed, Quarterly May 2013, Catalogue No. 6291.0.55.003; ABS, *Industrial Disputes, Australia*, Dec 2012, Catalogue No. 6321.0.55.001.

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In this chart we can see a fall in both union density and industrial disputation in the four industries with the highest number of average working days lost per annum.

The size of the bubbles reflect the size of the industry by employment. The chart shows that employment in Manufacturing has declined over time, and union density and average working days lost per year within the industry has also decreased. In contrast, employment in Construction has increased (as noted by the larger bubble) although union density and average working days lost per year within this industry has decreased.

Collective dispute resolution will always be a core Commission function, because of the impact that such disputes may have on the parties and the community generally. But we also recognise that individual dispute resolution is now a substantial part of our work and collective dispute resolution work is declining in relative terms.



In the 1998-99 financial year, about two-thirds of the applications lodged with the Commission were collective in nature (represented by the blue bars). The remaining one-third comprised of applications lodged by individuals (the red bars). The Commission's work now largely consisted of individual matters, with over 60 per cent of applications lodged by individuals.

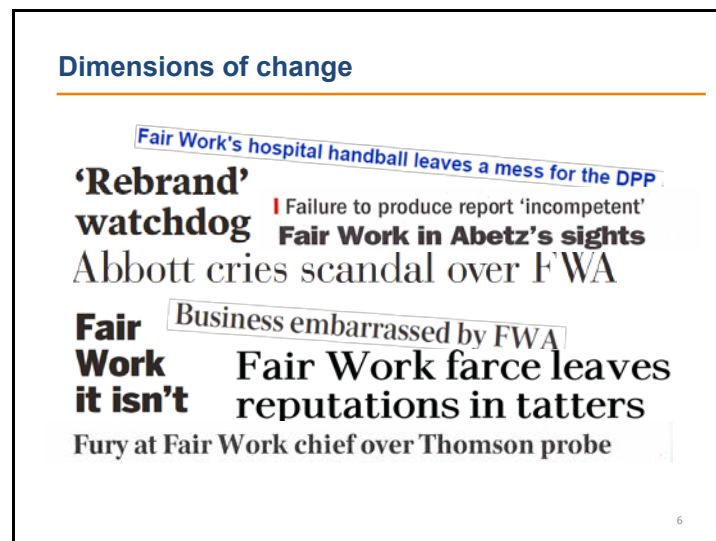
Two things flow from the shift in the nature of our work.

First, the parties to collective disputes - unions, employers and employer organisations - are 'repeat players'. They are familiar with the legislative environment and our procedures. The parties to individual disputes are quite different. They are usually 'one shotters'. They are often self-represented and unfamiliar with the provisions of the Fair Work Act and our procedures. We have an obligation to explain these matters to self represented parties.

The shift in the nature of our work also has implications for our stakeholder base. We need to engage with the community more broadly.

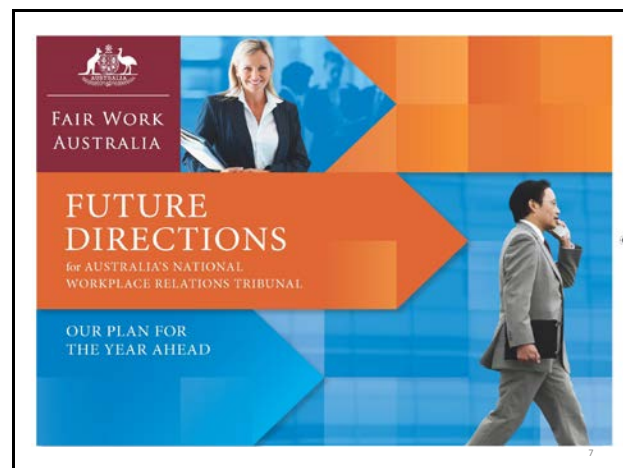
The second challenge the Commission faced in March 2012 was that over the previous 12 months or so the organisation, then known as Fair Work Australia, had been subjected to sustained criticism about the time taken to complete investigations into the HSU.

The HSU investigations were unprecedented in terms of size and complexity, but the inquiries and subsequent investigations took an unreasonably long time, raising legitimate questions.



Justice institutions rely ultimately on public confidence and the consent of the governed. There was an urgent need to repair the reputational damage to the Commission. We had to become more efficient and accountable.

We sought to address these challenges through a new change program - called *Future Directions*.



The 25 initiatives in the first phase of *Future Directions* were announced in October 2012. Those initiatives were aimed at improving the performance and quality of the services provided by the Commission and were grouped under four themes:

Future Directions

for Australia's National Workplace Relations Tribunal

- Promoting fairness and improving access
- Efficiency and innovation
- Accountability
- Productivity and Engagement

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Future Directions

for Australia's National Workplace Relations Tribunal

First phase completed



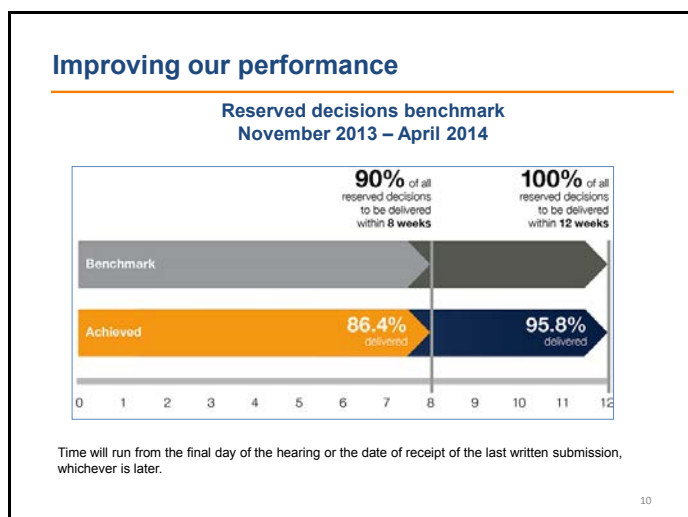
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The first phase of its Future Directions was completed in December 2013. Each of the 25 initiatives was implemented.

I want to briefly touch on some of the initiatives we have introduced.

In July 2012, the Commission introduced timeliness benchmarks for the delivery of reserved decisions and in relation to the time taken to determine applications for the approval of agreements.

These performance benchmarks set the Commission's expectations of its Members and its processes. They have already had a positive impact on performance.



In the 12 months before the reserved decisions benchmark was introduced only 72% of reserved decisions were handed down within 8 weeks. About 14% of all reserved decisions were handed down more than 12 weeks after the hearing or final submissions. Now over 86% of all reserved decisions are handed down within 8 weeks and almost 96% are handed down within 12 weeks.

The Tribunal's performance against these benchmarks is published on our website and updated. I am currently taking a number of steps to further improve our performance in these key areas.

Any party who is concerned about the delay in the delivery of a reserved decision can lodge a query through the Commission's website. I deal with each of these personally.

The timeliness benchmarks are intended to set tight performance standards, to that extent they are aspirational. I expect that there will be individual instances where the Tribunal does not meet its own high standards, for a variety of reasons. But the setting of performance benchmarks and publicly reporting the Tribunal's performance are important accountability measures. Such measures are a practical recognition of the fact that justice institutions rely ultimately on public confidence and the consent of the governed.

In the second half of last year we introduced a range of initiatives to improve our performance and reporting in the management of appeals. I will return to those matters shortly.

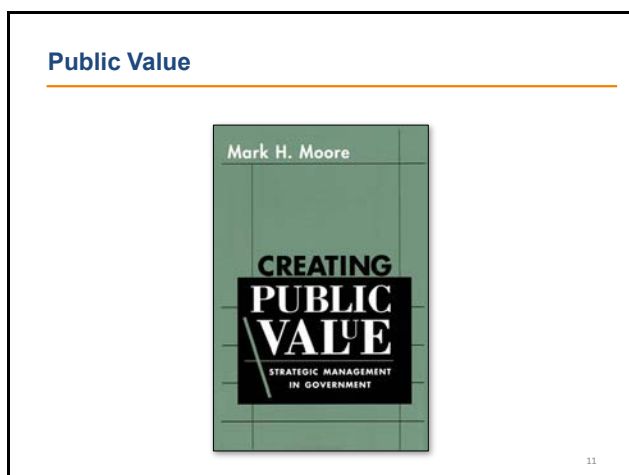
I now want to turn to the concept of public value.

ABOUT PUBLIC VALUE

In the private sector the aim of management is, broadly speaking, to make money for the shareholders. In simple terms it is about producing products or services that can be sold to generate revenue. Success can be measure in terms of profitability, market share and share price.

It is more difficult to define and measure success in the public sector.

Harvard Professor Mark Moore defines the aim of managers in the public sector in terms of creating 'public value'. Program evaluation and cost effectiveness analysis can help define public value in terms of collectively defined objectives.



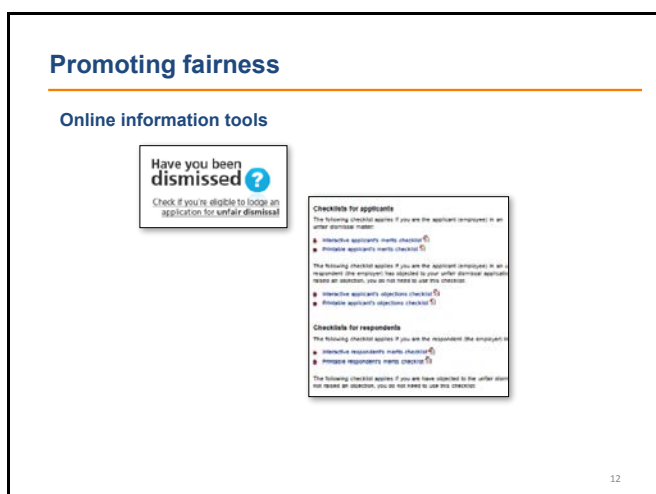
We are starting to apply this conceptual framework to the Commission's activities.

We can enhance the Commission's 'public value' by providing an efficient dispute resolution service - a service which resolves disputes in a timely and appropriate way, and minimises the costs incurred by the parties. We have already taken a number of steps to improve our service delivery and reduce transaction costs for parties.

The information and assistance provided by the Commission to parties, particularly self represented parties is an important part of providing affordable access to justice.

We now provide a range of online information tools to assist the parties who appear before us:

- *Eligibility checklist:* An online checklist to assist potential applicants in unfair dismissal cases to work out whether they meet the eligibility requirements to make an application



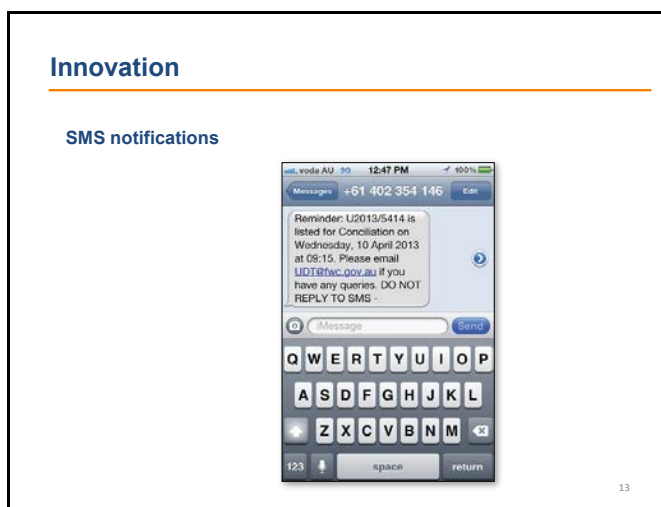
- *Outcome information:* we publish the outcomes of unfair dismissal conciliations and arbitrations on our website

- **Guides:** an extensive range of guides are available on our website to assist all parties to unfair dismissal applications at each stage of the process. We recently launched an interactive form to assist parties in preparing for unfair dismissal proceedings in the Commission. The checklist assists parties to address all relevant issues to ensure that their matter can proceed fairly and efficiently.
- **Online benchbooks:** a benchbook is a resource that brings together leading decisions that have been made on the key aspects of a particular jurisdiction. It is a resource that is widely used by judges and tribunal members. For many years Commission Members have had access to an unfair dismissal benchbook. Earlier this year the benchbook was extensively reviewed. In July this year we made the revised unfair dismissal benchbook publicly available, on our website. It contains plain English summaries of the key principles emerging from unfair dismissal cases. The benchbook will assist both applicants and respondents to prepare their case before the Commission.

We have also made greater use of technology to improve our work processes, service delivery and accountability.

We intend to move to 'smart' online application forms where the information entered can be automatically uploaded into our case management system.

Two other technology driven innovations are worth mentioning.



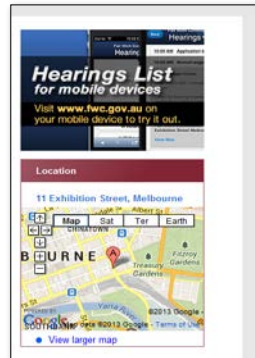
In May last year we started trialling SMS alerts in unfair dismissal conciliations.

The alerts are sent to parties 24 hours before their scheduled conciliation conference. The objective is to reduce the number of adjournments which occur because a party has forgotten that they are to participate in a conference.

If we can reduce the number of adjournments we can reduce the transaction costs and inconvenience for parties, and deliver a more efficient service.

Innovation

Hearings list app



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In July last year we introduced a smart phone app, providing users with quick and easy access to the Commission's daily hearing lists. The app can be downloaded from the Commission's website and you can use it to view and search hearing lists up to seven days in advance of a hearing. You can also get directions to where the hearing will be held.

The implementation of the 25 initiatives set out in the first phase of Future Directions has been a major achievement. It is a testament to the hard work and commitment of our staff, our Members and our stakeholders.

But the implementation of these initiatives marks a beginning rather than an end.

Continual improvement – the next phase



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This next phase of our ongoing change program features 30 initiatives which will be delivered over the next two years.

Some of the new initiatives include:

Continual improvement – the next phase

Some of the new initiatives include:

- The introduction of an electronic case management system to improve processing times, and reduce costs for parties
- A review of the process for determining enterprise agreement approval applications to ensure the most timely and efficient resolution of these matters
- A qualitative research project to identify clauses in enterprise agreements that enhance productivity or innovation
- In conjunction with key stakeholders, the development and implementation of a strategy for the promotion of cooperative and productive workplace relations that facilitate change and foster innovation.

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Continual improvement – the next phase

- Develop further benchbooks and make them available on-line
- By the end of 2015 we will provide access to the audio files of most Commission hearings.
- In 2014-15 we will review the scope of the current pro-bono lawyer program to provide these services on a broader geographical and jurisdictional basis.
- Evaluate our performance against the Tribunal Excellence Framework.

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- A review of the process for determining enterprise agreement approval applications to ensure the most timely and efficient resolution of these matters
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- Evaluate our performance against the Tribunal Excellence Framework.

The new list of Future Directions initiatives can be found on the Commission's website.

We are intent on improving our performance across the range of our statutory functions.



The [Tribunal Excellence Framework](#) is an assessment tool which can be used by tribunals to identify the areas where they need to improve. The Framework identifies ‘tribunal excellence’ as having three broad dimensions:

- predictable, just decisions;
- procedural justice; and
- the delivery of a fair and efficient dispute resolution service.

Predictable, just decisions

Predictability is about certainty. Different tribunal members faced with the same facts should, broadly speaking, reach the same outcome. Of course tribunal decisions often involve the exercise of a discretion and on the same facts different tribunal members may legitimately reach different conclusions. But such discretions must be exercised judicially and within acceptable parameters.

A ‘just decision’ is one based solely on the application of the relevant law to the facts of the case.

Procedural justice

Delivering justice is not just about the outcome. The parties who appear before tribunals and the community generally have a legitimate interest in procedural justice. Procedural justice includes the legal concept of procedural fairness. But it also embraces a judgment about whether a tribunal process is fair in a more abstract sense.

Satisfaction with the process of justice is an important metric for a tribunal, and more generally. Satisfaction with the judicial process has been found to have a measurable effect on society as a whole and contributes to the perceived legitimacy of the justice system.

A fair and efficient dispute resolution service

The service provided by a tribunal should be fair, in that it should provide access to a fair hearing. The service should also be efficient in the sense that the tribunal is affordable and resolves disputes in an appropriate and timely way. The costs incurred by the parties and the tribunal resources allocated to a proceeding must be reasonable and proportionate to the complexity and importance of the issues and the amount in dispute.

As I mentioned, I want to return to the issue of predictability - or consistent decision making.

There has been considerable media commentary in which a range of assertions have been made about inconsistent decision making within the Commission. These comments have primarily been made in support of a proposal for a new, and separate, appeal mechanism. There is no substance to this criticism. Two points can be made in this regard.

First, inconsistent first instance decisions are not unusual. Different Members may reach different outcomes on the same facts because in many aspects of the Commission's jurisdiction the decision of the Member involves the exercise of a discretion and reasonable minds can differ about how a discretion is exercised. This observation may be made of decision-making in any court or tribunal. In the exercise of a discretion there is no absolute 'right' or 'wrong' answer, rather the answer depends upon a consideration of a range of factors before the Member.

Of course a new appeal mechanism will not lead to fewer inconsistent first instance decisions. Where the original decision has involved the exercise of a significant level of discretion it is not enough that the Appeal Bench would have reached a different conclusion.

As the High Court observed in *House v The King*

¹ an Appeal Bench may intervene only on the limited ground that an error has been made in the exercise of discretion.

The second point to note is that the existing legislation provides a range of mechanisms to address inconsistent decision making:

- appeals
- reviews
- referrals

The appeal mechanism is well known and understood. We have taken a number of steps to improve the efficiency of the appeal process.

We have launched a new section on our website dealing with appeals and judicial reviews of Commission decisions. In this part of our website we report against two timeliness benchmarks.

The first benchmark provides that:

¹ (1936) 55 CLR 499

- 90% of all appeals will get to a hearing within 12 weeks and 100% of all appeals within 16 weeks

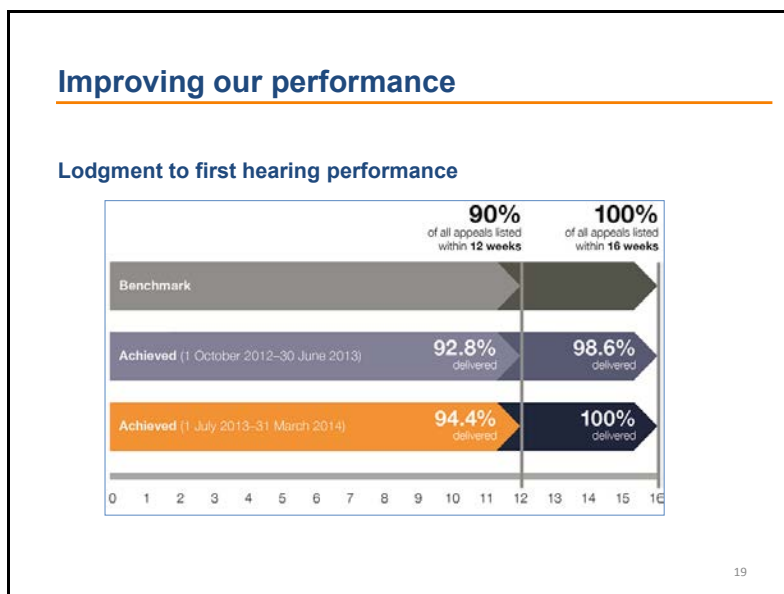
Our website also provides a link to all appeal decisions and a table setting out the outcomes of appeals and judicial reviews over time.

The timeline commences from the day the application is lodged and measures the time between lodgment and the first appeal hearing.

Stay hearings are not counted as a first hearing unless heard at the same time as the first substantive hearing.

Lodgment to first hearing performance

1 July 2013 - 31 March 2014 & 1 October 2012 - 30 June 2013



This slide shows the Commission's performance prior to and after the introduction of the listing benchmarks. Both time periods are compared against each other and against the lodgement to first listing benchmark.

The results *before* the first listing benchmarks were introduced (1 October 2012 - 30 June 2013):

- 92.8% of all appeals listed within 12 weeks
- 98.6% of all appeals listed within 16 weeks

The results achieved *after* the benchmark was introduced (1 July 2013 - 31 March 2014):

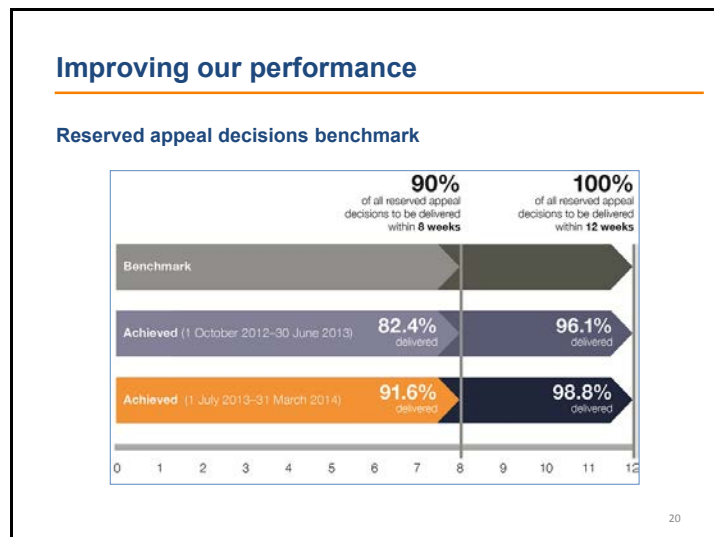
- 94.4% of all appeals listed within 12 weeks
- 100% of all appeals listed within 16 weeks

Stay hearings are not counted as a hearing when measuring timeliness performance (unless heard concurrent with a substantive hearing) so the chart does not reflect the total number of appeal hearings in a month.

The reserved appeal decisions benchmark provides that 90% of all reserved appeal decisions delivered within 8 weeks and 100% of all reserved appeal decisions delivered within 12 weeks

The timelines commences from the final day of the hearing or the date of receipt of the last written submission, whichever is later.

1 July 2013 - 31 March 2014 and 1 October 2012 - 30 June 2013



The slide shows the Commission's performance before and after the introduction of the benchmark.

Before the benchmark was introduced:

- 82.4% of all appeals listed within 8 weeks
- 96.1% of all appeals listed within 12 weeks

The results achieved after the appeals reserved decision benchmarks were introduced (1 July 2013 - 31 March 2014):

- 91.6% of all appeals listed within 8 weeks
- 98.8% of all appeals listed within 12 weeks

In addition to appeals the existing legislation provides other mechanisms to address inconsistent decision making. The Minister can apply for a review to be conducted by a Full Bench of any decision by a single Member, if the Minister believes that the decision is contrary to the public interest (s.605(1)). Review applications are determined by a Full Bench (s.614) and the powers that can be exercised on a review are the same as those that can be exercised in an appeal.

If the Minister is concerned about inconsistent decision making he can institute a review. No reviews have been instituted by either the current Minister or his predecessor.

The other alternate avenue to deal with inconsistent first instance decisions is by referral to a Full Bench. Section 615A provides a procedure for the parties interested in a proceeding, or the Minister, to make application to the President to have a matter before a single Member referred to a Full Bench for determination.

In various articles and media commentary it has been asserted that there have been 'contradictory findings' in a range of areas. These assertions are either wrong or any inconsistency is being addressed by the existing mechanisms. Let me deal briefly with assertions.

Drug and alcohol testing

It is suggested the Commission's decision-making has been inconsistent in relation to the use by employers of urine testing of employees for drug and alcohol at the workplace.

In *Briggs v AWH Pty Ltd*² the Commission observed that the issue of whether the most appropriate method of workplace drug testing is by the collection and analysis of a urine sample or a saliva sample has proved to be controversial. The controversy exists at two levels. Firstly, there has been a scientific debate as to which method best detects drug use of a nature that may affect workplace health and safety. At the core of this debate are the propositions that urine testing is the more accurate means of determining whether an employee has at some time consumed any one of a range of drugs, but that saliva testing is better at identifying likely present impairment from drug use (particularly cannabis use) because it only detects very recent use.

Secondly, there has been controversy over which of two competing workplace interests should be given priority in the selection of the appropriate testing method. On the one hand, there is the interest of employees in not having their private behaviour subject to scrutiny by their employers. On the other hand, there is the interest that employers and employees have in ensuring a safe working environment by the taking of all practicably available measures to detect and eliminate or manage risks to safety.

Properly analysed, there has been no inconsistency in the Commission's treatment of this issue. The approach taken by the Commission has simply evolved over time on the basis of the material presented in particular cases. The cases of purported inconsistency arose in a range of different statutory contexts eg in unfair dismissal proceedings and in private arbitration under an enterprise agreement. In any event, it would be open to the Minister or an interested party to seek to refer any case dealing with this issue to a Full Bench.

Earlier this year I set up a five Member appeal in *DP World Brisbane Pty Ltd*. The appeal is to be heard on 13 June 2014 and the grounds of appeal raise issues about the relative merits of saliva and urine testing and the reasonableness of the employer's policy. The appeal decision may provide greater clarity about these issues.

Pornography

The second issue referred to is whether an employee can be dismissed for distributing pornography on work computers. These comments appear to have been in response to the

² [2013] FWCFB 3316

decision of the Full Bench in *D'Rozario and others v Australian Postal Corporation T/As Australia Post (Australia Post)*³.

The approach of the Commission in cases involving employees using or dealing in pornography was first encapsulated by the Full Bench in *Queensland Rail v Wake*⁴ in 1996. The decision in that matter stated (at paragraph [21]):

“Obviously each case is to be decided on its merits, but in general it is in the public interest that, subject always to considerations of fairness, the Commission’s decisions should support employers who are striving to stop inappropriate email traffic.”

The majority of the Full Bench in *Australia Post* stated [at 121]:

“We endorse the right of employers to regard compliance with such policies as a serious matter. We acknowledge that, depending upon the circumstances, a breach of such a policy can ground misconduct that may justify a dismissal that would not be harsh, unjust or unreasonable. However, upon a full consideration of the particular circumstances of the present case, we are satisfied that each of the dismissals was harsh.”

The majority granted permission to appeal on the basis of a concern that the Full Bench decision in *Wake* was being misinterpreted.

The decision of the Appeal Bench is currently the subject of proceedings in the Federal Court and that application specifically challenges this aspect (among others) of the majority decision. In short, the applicant is challenging the asserted basis for the grant of permission to appeal. It is contended that there was no evidence before the Fair Work Commission that there are any decided cases of the kind referred.

The very issue of whether there have been inconsistent first instance decisions dealing with pornography is now the subject of proceedings in the Federal Court. It is not appropriate for me to make any comment about the majority’s observations on this issue.

The appeal was heard by the Full Federal Court on 18 March 2014 and judgment is reserved.

Fighting in the workplace

Fighting in the workplace is the third example of alleged inconsistent decision-making. This is a reference to the DP World litigation.

General principles relating to fighting in the workplace were set out in the decision of Moore J in *AWU-FIME v Queensland Alumina Limited*.⁵ In that case, Moore J said:

“... whether a dismissal or termination arising from a fight in the workplace is harsh, unjust or unreasonable will depend very much on the circumstances... generally the attitude of industrial tribunals tends to be that in the absence of extenuating circumstances, a dismissal for fighting will not be viewed as harsh, unjust or unreasonable. The extenuating circumstances may, and often do, concern the circumstances in which the fight occurred as well as other considerations such as the

³ [2013] FWCFB 6191

⁴ Print PR974391

⁵ (1995) 62 IR 385

length of service of the employee, including their work record, and whether he or she was in a supervisory position.”

Last year, both the Commission and the Federal Court have had occasion to consider the application of the unfair dismissal provisions of the Act to circumstances where an employer dismisses an employee for fighting in the workplace. This has arisen in the context of litigation between DP World and Lambley.

The first Full Bench⁶ quashed the decision of the Member at first instance to reinstate Mr Lambley.

The decision of the first Full Bench was the subject of proceedings for prerogative writ relief in the Federal Court. In determining that application Katzmann J held that the first Full Bench erred in the propositions it set out and in reaching its conclusion in reliance on them. At paragraphs [34] to [38] of her judgement, Katzmann J said:

“34 DP World accepted that it was an overstatement on the part of the Full Bench to say (as it did in [27]) that the authorities establish that the dismissal of an employee found guilty of fighting at the workplace “can only be found” to be harsh, unjust or unreasonable in extenuating circumstances. It is certainly not an accurate reflection of what Moore J said in *AWU–FIME Amalgamated Union v Queensland Alumina Limited* (1995) 62 IR 385, which is one of the two authorities to which the Full Bench referred. There, his Honour observed that generally the attitude of industrial tribunals tends to be that, absent extenuating circumstances, a dismissal for fighting will not be regarded as harsh, unjust or unreasonable. Even if this could be said to be the effect of the authorities, it was not a binding rule which could be applied to confine the discretion of FWA more narrowly than the Parliament intended (*Norbis v Norbis* (1985) 161 CLR 513 at 537 per Brennan J).

In the first Full Bench decision, the Bench concluded that the discretion of the Deputy President at first instance had miscarried and quashed his decision, but did not go on to exercise the discretion itself. It could have done so (see s.607(3)) but it did not. As the first Full Bench made no order disposing of Mr Lambley’s application, Katzmann J concluded that the application needed to be determined afresh.⁷

The second Full Bench⁸ reheard the matter and, by majority, dismissed Mr Lambley’s application for an unfair dismissal remedy. At paragraphs [43] to [46] the majority dealt with the principles pertaining to fighting in the workplace and applied what was said by the High Court in *Byrne* and by Moore J in *Queensland Alumina*.

The only inconsistency evident in these cases is in the overstatement of the relevant principle by the first Full Bench, as identified by Katzmann J. This was accepted by both parties and rectified by the second Full Bench which referred to and applied the long-standing authority of Moore J in *Queensland Alumina*.

Bankrupt applicants

Reference has also been made to the uncertainty surrounding the capacity for bankrupt employees to pursue remedies under the Fair Work Act’s unfair dismissal jurisdiction.

⁶ [2012] FWAFB 4810

⁷ [2013] FCA 4 at [51]

⁸ [2013] FWCFB 9230

The issue of the capacity for a bankrupt employee to pursue an unfair dismissal remedy comes up infrequently, perhaps once a year. It needs to be remembered that over 14,000 unfair dismissal applications are lodged each year.

The Full Bench in *Melanie Millington v Traders International* [2014] FWCFB 888 (23 April 2014) has resolved the conflicting first instance decisions on the capacity for a bankrupt to bring an unfair dismissal claim - at least where the unfair dismissal application is made after bankruptcy has occurred.

The Full Bench found that in these circumstances an application for an unfair dismissal remedy was not properly vested in the trustee and that both reinstatement and compensation were available. The Bench observed that the result would probably have been different if the bankruptcy had been declared *after* the unfair dismissal claim was lodged.

That matter has been determined and the issue has now been clarified. This provides an example of the existing mechanisms in the Act being used to clarify uncertainty, rather than providing a justification for changing the existing arrangements.

In summary, the purported rationale for altering the existing arrangements - the examples of allegedly inconsistent decisions cited by some commentators - provide no justification for changing the existing appeal mechanism.

Further, as a matter of logic it is difficult to see how some inconsistency in first instance decisions will be avoided through the creation of a new Appeals Panel. The rectification of inconsistent decisions at first instance is the reason for an appeal jurisdiction, but provides no justification for an 'alternative appeals process'.

Can I briefly provide some other examples of where recent Full Bench proceedings have clarified certain aspects of the Fair Work Act.

The first is the Full Bench decision in *Peabody Moorvale* [2014] FWCFB 2042. This decision concerns two issues relevant to the approval of enterprise agreements pursuant to s.185 of the *Fair Work Act* 2009 (the Act). The first was whether the notice of employee representational rights (the 'Notice'), provided by Peabody to each employee who would be covered by the Agreement, complied with s.174(1A) of the Act and, if the Notice did not comply, was it necessarily invalid and of no effect (the 'Notice' point). The second issue was whether Regulation 2.06A(b)(i) of the *Fair Work Regulations* (the Regulations) requires that an application for the approval of an enterprise agreement be accompanied by a signed copy of the agreement which includes the 'residential address' of each person who signs the agreement.

The consequence of failing to give a Notice which complies with the requirements of s.174(1A) is that the Commission cannot approve the enterprise agreement.

The Full Bench agreed with the Minister's submissions on the notice point and held that there is simply no capacity to depart from the form and content of the notice template provided in the Regulations. A failure to comply with these provisions goes to invalidity.

As to the second matter the particular issue was whether 'address' meant the persons' residential address or whether it was sufficient if a work address was supplied. The Full

Bench rejected the CFMEU's submission that 'address' in Regulation 2.06A(2)(b)(i) meant 'residential address'.

The second case concerns the use of loaded rates enterprise agreements which incorporate the pre-payment of annual leave.

In *Hull-Moody* a Full Bench, by majority, approved such an agreement. A subsequent Federal Court judgment (in *Jeld-Wen Glass Australia*), in a different context, was relied on in some first instance proceedings in the Commission to cast doubt on the correctness of *Hull-Moody*. There were instances of inconsistent first instance decisions, some following *Hull-Moody* and some applying *Jeld-Wen*. To resolve this issue a 5 member Full Bench was constituted to deal with an application to approve the Canavan Building Pty Ltd agreement. The Canavan agreement is essentially the same as the agreement in *Hull-Moody*. A hearing has been held and the decision is reserved.

I want to conclude by making some brush strokes on a broader canvass - by discussing how the Commission might contribute to improving Australia's productivity performance.

Productivity matters. Our productivity performance as a nation underpins our standard of living. National growth rates are determined by three factors - population, participation and productivity.

In the coming decades, as the population ages and the workforce participation rate falls productivity will have to do the heavy lifting if Australians are to enjoy rising living standards. In the past decade the terms of trade have been a significant contributor to income growth. If incomes are to grow in the next decade there will need to be a significant improvement in our productivity performance.

Public policy settings and institutional support can facilitate productivity growth - because they affect the environment within which business operates - but the key to improving productivity lies at the workplace level.

The Commission is committed to the development of a new workplace engagement strategy in consultation with the major peak employer and union bodies. The object of this initiative is to promote cooperative and productive workplace relations. The development of a more cooperative workplace culture that facilitates change and fosters innovation will be at the heart of the Commission's engagement strategy.

We have already taken a number of steps in this regard.

Towards the end of last year I set up a workplace engagement team - led by Vice President Catanzariti - to further develop our strategy for promoting cooperative and productive workplaces. The project team has reported back to me and we are currently sorting out the best way to implement this initiative. We have, as you would know, a number of demands on the Commission's resources at present. The development of our engagement strategy will be transparent and will be done in consultation with the key industry peak bodies, the Members of the Commission and the community we serve.

Later this year we will conduct and publish research identifying clauses in enterprise agreements that enhance productivity or innovation. This is one of the new initiatives announced as part of the second stage of Future Directions.

The Commission's engagement strategy is not a panacea for the productivity challenge facing us as a nation - but each public institution must play its part.

I look forward to your contribution to that process and to your support in making a great national institution better. Thank you.