



Submission: Response to Productivity Commission Draft Report on Workplace Relations

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SECTION ONE: Introduction

The overarching purpose of the Fair Work Commission (Commission) is to exercise powers and perform functions in accordance with the *Fair Work Act 2009* (Cth) (Fair Work Act) and the *Fair Work (Registered Organisations) Act 2009* (Cth) (RO Act).

In order to meet the demands of a modern workplace relations system and to strengthen the design and content of our systems and resources, the Commission regularly consults with its users, stakeholder groups and the broader community. The Commission is committed to addressing change internally through its Future Directions strategy, to ensure the delivery of services to a high standard whilst also ensuring the most efficient allocation of resources. The Commission welcomes the Productivity Commission's recognition of a number of current Commission initiatives under this strategy.

The purpose of this submission is to assist the Productivity Commission in its consideration of the issues raised by the Draft Report of the Productivity Commission Inquiry into the Workplace Relations Framework of 4 August 2015 (the Draft Report). This submission does not seek to repeat matters previously discussed in my earlier submission to the Inquiry, except to the extent that this will assist in better understanding the response to certain issues raised by the Draft Report. Nor does the submission respond to the Draft Report's preliminary recommendations or questions posed in the Draft Report.

Instead, this submission addresses Commission practices and initiatives relevant to matters discussed in the Draft Report in the following areas:

- the Commission's role in the national workplace relations framework, including a discussion of its various functions and matters conditioning the exercise of powers under the Fair Work Act;
- current and pending Commission projects and initiatives that relate to matters examined in the Draft Report, including in relation to modern awards, the improved use of technology, streamlined Commission processes, and user satisfaction survey results;
- the Commission's data collection practices and use of experts;
- the Modern Awards Review; and
- the Annual Wage Review and the Commission's research program.

In addition, a table has been included at Appendix I which identifies inaccuracies or incomplete information in the Draft Report, including clarifying the findings and methodologies of some of the Commission's research or the Commission's role and functions.

SECTION TWO: Commission role and exercise of functions

In discussing its functions and powers, the Draft Report commonly describes the Commission as a regulator,¹ and this flows through to the preliminary recommendations made in the Draft Report.

As noted in my earlier submission, following the commencement of the Fair Work Act, the Commission “took over the functions of the Australian Industrial Relations Commission, the Australian Industrial Registry and the Australian Fair Pay Commission.”² In addition, the Commission has functions under the RO Act. The Commission’s functions within the national workplace relations framework can be broadly grouped into three categories:

- **Tribunal functions**, exercised by the President and Members of the Commission under the Fair Work Act and the RO Act;³
- **Regulatory functions**, exercised by the General Manager of the Commission (or her delegate) under the RO Act;⁴ and
- **Administrative functions**, exercised by the General Manager and staff of the Commission under the Fair Work Act (including where delegated by the President of the Commission)⁵ and under the RO Act. The General Manager’s function is to assist the President of the Commission in ensuring the Commission performs its functions and exercises its powers under the Fair Work Act. The General Manager is supported by Commission staff in the administration of the Fair Work Act and the RO Act.

The Draft Report examines the varied functions performed by the Commission, including in relation to tribunal, inspectorate and other matters.⁶

In its discussion of the Commission’s tribunal functions, the Draft Report distinguishes between the Commission’s quasi-judicial functions (for example, in relation to unfair dismissal, general protections, enterprise agreements and industrial disputes) and what is described as broader matters with economy-wide impacts such as award and minimum wage determinations.⁷

In the Draft Report, the Productivity Commission suggests that the Commission may sometimes take an overly legalistic approach to matters or give too much weight to procedure or precedent over substance.⁸ However, some of the discussions in the Draft Report appear to proceed on a misunderstanding of Commission’s statutory role and functions, or to confuse obligations or tests imposed by the legislative framework or Federal Court or High Court authority with the Commission’s practices and processes.

The Fair Work Act in some instances requires the Commission to be satisfied of the existence of certain jurisdictional facts before its powers are enlivened, to take certain matters into account, to balance competing considerations or to follow prescribed processes in determining matters. For example, the modern awards objective and the minimum wages objective in the Fair Work Act set out the matters the Commission must take into account in setting minimum wages and the modern awards objective, in making or varying modern awards.⁹ The Fair Work Act also sets out the matters the Commission must take into account in assessing the better off overall test,¹⁰ or in determining whether a person has been unfairly dismissed.¹¹

The Draft Report refers to or assumes in several places the unpredictability of or inconsistencies in Commission decision-making.¹²

The Commission's approach to the exercise of its tribunal functions and powers is conditioned by legislation and case law, including judgments of the High Court of Australia and the Federal Court of Australia, as well as Commission Full Bench decisions. As this is not reflected in the Draft Report, I repeat the observations in my earlier submission¹³ that apparently inconsistent first instance decisions are not unusual in any tribunal or court. Tribunal decisions often involve the exercise of discretion and on the same facts different tribunal members may legitimately reach different conclusions, depending upon a consideration of the range of factors before the Member. The key point is that discretions must be exercised judicially and within acceptable parameters.

It is well established that Commission Members are required to act 'judicially' and accord all parties procedural fairness in the exercise of tribunal functions, including the setting of minimum wages and the making or varying of modern awards. This duty must be applied in the context of the particular circumstances, including the nature of the matter before the Commission.¹⁴ Affording procedural fairness and determining the merits of a matter often requires a full hearing of the evidence, which includes providing parties with the opportunity to test the other party's evidence through cross-examination. This is particularly relevant to cases involving individual rights-based matters. Consistent with the principle of open justice, (subject to limited exceptions) the Commission must also put its decisions in writing and publish its decisions.¹⁵

Decisions of the Commission at first instance are subject to appellate review before a Full Bench of the Commission and to judicial review in the Federal Court and the High Court. An Appeal Bench may intervene where, for example, a Member has made an error in the exercise of a discretion; acted upon a wrong principle of law; allowed extraneous or irrelevant matters to guide or affect him or her; mistaken the facts or not taken into account a material consideration. While virtually all matters within the Commission's jurisdiction are subject to an appeal, only a small proportion of Commission decisions are appealed.

As noted in my initial submission, 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 1.5 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.)

Table 1 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 1: Outcomes of Appeals determined from 1 July 2013 to 30 June 2014

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

Source: Fair Work Commission, Annual Report 2013-14, p.28.

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 is available on the Commission's website.¹⁶ Of the 10 matters finalised in 2013–14, only three 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 2015.¹⁷

In the context of unfair dismissal arbitrations, the Draft Report draws extensively on the decisions of the Commission in concluding that the Commission's approach may be overly legalistic rather than focusing on the economic costs of such cases or on the quality of outcomes for all parties.¹⁸

Section 397 of the Fair Work Act requires the Commission to conduct a conference or a hearing in relation to an unfair dismissal matter if, and to the extent that, the matter involves facts the existence of which is in dispute. Most unfair dismissal matters which proceed to arbitration will involve contested facts. **Table 2** sets out the number of unfair dismissal matters proceeding to an arbitrated outcome, in the financial years 2012-13, 2013-14 and 2014-15:

Table 2: Unfair Dismissal Arbitration Outcomes

Tribunal decision	Number of decisions		
	2012-13	2013-14	2014-15
Total arbitration results Australia-wide	660	1200	1527
Total Applications Dismissed	514	1008	1339
Objection upheld—application dismissed	258	374	890
Application dismissed (s.587)	N/A	96	77
Application dismissed — (s.587) dismissal by Panel Head	N/A	265	107
Application to dismiss (s.399A) — granted	N/A	98	104
Application dismissed — dismissal was fair	256	175	161
Total Applications Granted	146	192	188
Application granted — compensation	112	150	141
Application granted — no remedy granted	14	8	10
Application granted — reinstatement	8	9	12
Application granted —reinstatement and lost remuneration	12	25	15
Application granted: remedy to be determined	N/A	N/A	10

Source: Fair Work Commission, Annual Report 2013-14, p.42 and Case Management System, unpublished data

This data shows that in the period 1 July 2012 to 30 June 2013:

- **78 per cent** of all applications determined by the Commission were dismissed because the dismissal was found to be fair, for want of jurisdiction or for other reasons, including that the application had no reasonable prospect of success (ss. 399A and 587 of the Fair Work Act). Therefore, only **22 per cent** of applications were granted on the merits.
- Of the **61 per cent** of applications which proceeded to a merit hearing,¹⁹ **64 per cent** of claims were dismissed and the dismissal was found to be fair.

In the period 1 July 2013 to 30 June 2014:

- **84 per cent** of all applications determined by the Commission were dismissed because the dismissal was found to be fair, for want of jurisdiction or for other reasons, including that the application had no reasonable prospect of success. Therefore, only **16 per cent** of applications were granted on the merits.
- Of the **36 per cent** of applications which proceeded to a merit hearing, **47 per cent** of claims were dismissed and the dismissal was found to be fair.

In the period 1 July 2014 to 30 June 2015:

- **88 per cent** of all applications determined by the Commission were dismissed because the dismissal was found to be fair, for want of jurisdiction or for other reasons, including that the application had no reasonable prospect of success. Therefore, only **12 per cent** of applications were granted on the merits.

- Of the **23 per cent** of applications which proceeded to a merit hearing, **46 per cent** of claims were dismissed and the dismissal was found to be fair.

The Commission does not propose to comment on the interpretation of decisions mentioned in the Draft Report, other than to note that any decisions should be read in their entirety, against the relevant legislative framework and body of jurisprudence applicable to the relevant subject-matter. Likewise, the Commission does not propose to comment generally on the Draft Report's recommended changes to the unfair dismissals jurisdiction, other than to note that:

- any modification to existing obligations to accord procedural fairness would require legislative amendment;
- the implementation of any merit-focused conciliation processes would need to be carefully considered given this would inevitably involve the assessment of conflicting evidence and would be expected to involve longer timeframes; and
- whilst some of the Commission's tribunal powers involve the exercise of quasi-judicial functions, the Commission does not have power to ascertain and declare the legal rights and obligations of parties. The determination of rights and obligations that should exist between parties is an arbitral function.²⁰ The Draft Report suggests that purely procedural errors by an employer in a dismissal should not result in reinstatement or compensation for a former employee, but at the discretion of the Commission, should lead to either counselling and education of the employer or financial penalties.²¹ It is noted that the power to impose penalties for contraventions of the law is reserved to the Courts under Chapter III of the *Australian Constitution*.

SECTION THREE: Commission projects and initiatives

The Draft Report discusses compliance costs for employees and employers and a number of measures that may be appropriate for the Commission to adopt to assist parties with these costs.²² As recognised in the Draft Report, regulators have the capacity to significantly influence compliance costs, subject to their legislative framework, and must be sensitive to the needs of particular stakeholders including small business.

The Commission welcomes the comments in the Draft Report on the initiatives of the Commission as part of its Future Directions strategy. The Commission is well advanced in driving transformational change across the organisation to remove inefficient practices. While further work needs to be done, significant advances have been made in relation to improving:

- fairness and access to justice;
- accountability;
- innovation and timeliness; and
- support for workplace productivity through engagement with industry.

As noted in my earlier submission, the shift to individual disputes and changing nature of the parties coming before the Commission has led to the expansion and disaggregation of the Commission's stakeholder base. As a consequence, the Commission increasingly engages with users, key stakeholder groups (including the research community and small business) and the broader community to tailor its operational activities, interventions and communications to audiences with a variable understanding of its functions and objectives. As part of its annual planning process, the Commission also assesses the operational environment by studying the trends and changes that affect its ability to offer quality services, meet the needs of users and remain relevant to key stakeholders.

A number of Future Directions projects are directed to addressing concerns with the legal complexity of the Commission's jurisdictions, to assist parties to better understand Commission processes and proceedings and to make informed decisions about their rights and obligations under the Fair Work Act. These include:²³

- publishing benchbooks on enterprise agreement-making, unfair dismissals, anti-bullying and general protections which provide plain language guides to the law and Commission procedures to assist self-represented parties, including small businesses;
- providing pro-bono legal assistance programs to assist unrepresented parties (employees or employers) with jurisdictional hearings in unfair dismissal applications;
- developing plain language awards;
- implementing a triage pilot program for enterprise agreement approval applications; and
- conducting surveys of users of the Commission's services.

Some of these matters have been the subject of new initiatives or developments since my earlier submission or the release of the Draft Report, and these are discussed further below:

Plain language modern award instruments

The Draft Report proposes that the Commission approach the task of improving modern awards by dealing with small issues as they arise (such as correcting typographical errors), identifying and addressing issues that are relatively straightforward (such as ambiguous language and the lack of pay tables), and initiating research to identify and subsequently address more complex but critical issues in modern awards.²⁴

In September 2015, in addition to its existing initiatives seeking to reduce complexity in modern awards²⁵, the Commission commenced a pilot which will seek to make a plain language version of the *Pharmacy Industry Award 2010*.²⁶ The pilot will involve a plain language expert providing a draft modern award instrument, the involvement of parties to the case, and external user testing with employers and employees of the instrument. A final report with an instrument will be published in April 2016.

Multiple modern award coverage

The Draft Report discusses the thematic approach taken by the Commission in the four yearly review of modern awards and the Commission's signal that model terms developed in the decisions on common issues may be applied consistently across awards.²⁷

In addition to the approach the Commission has taken to improving the understanding of the parties of the modern awards review process, the Commission will shortly be releasing a background paper seeking party views on addressing consistency issues relating to multiple modern award coverage for businesses. To support this process, the Commission will be undertaking research with small to medium sized employers exploring the effect of multiple modern award coverage on their businesses.

Client survey

Since the release of the Draft Report, the results of the Commission's *Day in the Life* client survey have been released. Hardcopy questionnaires were distributed to persons attending Commission premises over a two week period. During this time a total of 292 surveys were completed, primarily in Melbourne and Sydney. As noted in the survey report prepared by EY Sweeney, the "survey sample largely comprised of applicants and respondents – 62.3 per cent; and legal counsel/other representatives – 27.8 per cent. The sample included clients that were visiting the Commission for the first time (37.5 per cent) as well as those who had prior experience of visiting the Commission. A notable proportion (36.7 per cent) had visited the Commission more than five times."²⁸

The survey was initiated to gauge client satisfaction with the Commission's services and to determine any areas for improvement in five main areas:

- access, navigation and personal safety at the Commission building;
- staff, clarity of information and efficiency;
- Commission digital services;
- experience of appearing in front of a Commission Member; and
- Court room/conference room facilities.

The Key Findings of the survey report were:

Overall the results of the survey were positive, with survey respondents providing favourable feedback on their experience at the Commission on the day of the survey.

More than 90 per cent strongly agreed or agreed that each of a large series of positive statements apply to their experience at the Commission across the five main feedback areas. The average result across all aspects evaluated was 4.2 out of 5.0.

The results for each of the five areas evaluated were:

- Access, navigation and personal safety at the Commission building – 4.4 out of 5.0 (average across six statements)
- Staff, clarity of information and efficiency – 4.3 out of 5.0 (average across nine statements)
- Commission digital services – 3.6 out of 5.0 (average across six statements)
- Experience of appearing in front of a Commission Member – 4.5 out of 5.0 (average across seven statements)
- Court room/conference room facilities – 4.3 out of 5.0 (average across three statements).²⁹

It is noted that these findings are reflected in the positive (draft) finding of the Productivity Commission, based on CCIQ survey data, that businesses appeared overall to be satisfied with the Commission.³⁰

Website update

The Commission's *Corporate Plan 2015-16* expresses the Commission's commitment to continuing to improve access and service standards through improved use of technology.

The survey report discussed above recorded lower satisfaction levels with the Commission's digital services. In May 2015, the Commission completed a website usability review to understand what areas of the website need to be improved to support the broad range of internal and external users of Commission services. Following the usability review, improvements to the current website's search and navigation functions are being delivered, in tandem with the development of a new website. The first stage of improvements to the current website has been implemented.

The new website is anticipated to be completed by March 2016 and will deliver improvements to search, navigation and design. It will also include auditing, reviewing and (where necessary) re-writing content to reduce repetition and to ensure that it is targeted to the Commission's audiences. This is expected to reduce compliance costs for stakeholders.³¹

eCase

The Draft Report notes that the information systems and supporting technology of the Commission may benefit from “increased sophistication”, although it notes the relative sophistication of the Commission’s systems when compared with many other courts and tribunals examined in the Productivity Commission’s *Access to Justice* inquiry.³²

One of the Commission’s Future Directions initiatives involves the introduction of a new electronic case management (eCase) system to communicate with parties as their matters progress. This is intended to significantly reduce transactional costs for the parties and for the Commission, which will assist in improving processing times for applications and will enhance parties’ access to information.

The eCase project has involved a comprehensive review of the Commission’s administrative systems relating to case management, and the Commission has undertaken wide-ranging stakeholder and market consultations to develop a set of specification requirements for a new system. In developing these requirements, the Commission has reviewed international and domestic judicial and tribunal systems for examples of best practice and efficiency. The Commission will make a formal approach to market in the first quarter of 2016 to tender for its replacement system.

Work allocation – staff conciliations

The Commission’s Future Directions change program involves reviewing, and benchmarking against, best practice management and structures in other, similar tribunals and courts. In so doing, the Commission regularly reviews workflows to identify and pilot work allocation models to ensure that it delivers services to a high standard whilst also ensuring the most efficient allocation of resources.

As part of this, Commission staff conduct conciliations in unfair dismissal, general protections³³ and anti-bullying matters, and administratively process enterprise agreement applications (discussed further below). Graduating levels of Commission intervention, from low to high depending on the complexity of a matter and the stage that it is at, is consistent with current understanding of best practice regulation.

Enterprise agreements – triage and support

The Commission will shortly be publishing an agreement making guide and checklist (which has been user tested with employers), which has a particular focus on assisting small business with the bargaining and agreement-making process. These materials will be made available on the Commission’s website.

The Draft Report considers there may be issues of inconsistency in how enterprise agreements are handled by the Commission.³⁴ In October 2014, the Commission instituted an enterprise agreements triage pilot to facilitate a faster review and greater consistency of enterprise agreement approvals. The pilot included all West Australian, Australian Capital Territory (ACT) and Tasmanian agreements and some agreements in the building and construction industry in Victoria.

Enterprise agreements must meet a number of technical requirements under the Fair Work Act in order to be approved by the Commission, including meeting the ‘better off overall test’ and

satisfying certain procedural steps. Prior to the pilot these matters were individually checked and assessed by Commission Members.

Commission Members developed a formal review process for the pilot, including checklists, to help ensure consistency across agreements. In the pilot, the preliminary review of agreements was conducted by a team of lawyers specifically trained in reviewing enterprise agreements. After the preliminary review was conducted, a report was prepared for the Member identifying any technical problems or issues in the agreement. Using the team's report, the Member was then able to make a decision more quickly as to whether or not an agreement should be approved, more information should be sought or a hearing be held. This allowed agreements without technical issues to be approved more quickly, while those with problems were listed for hearing much sooner than in the past.

Employing Commission staff to conduct initial reviews is more cost effective than using Members' Chambers for the same task. Members' time is freed from these more administrative tasks to focus on the more complex aspects of their work. The process is supervised by a small number of Members, and it is the Member who makes relevant decisions and exercises the powers and functions under the Fair Work Act. By centralising the initial review and standardising the process, the team has been able to detect trends in errors which might delay, or prevent, approval of agreements. The Commission is now developing a range of educational materials to assist parties to address these problem areas.

An independent evaluation of the pilot was published on the Commission's website in June 2015. The evaluation report made a number of findings, including that there was improved timeliness in processing agreements the subject of the pilot, and that the pilot had facilitated a more consistent treatment of agreement approval applications.³⁵

Following the pilot and the evaluation report, the new triage process is being progressively implemented this financial year, and by early 2016 approximately 80 per cent of agreements will be dealt with under this process (subject to review by senior Commission Members).

Since 1 July 2015, the Member Support Team (MST) has triaged over 50 per cent of all agreement approval applications. Currently (early September 2015) the MST triages an average of 55-60 agreements per week in the following industries:

- all single and greenfields agreements in Western Australia, Tasmania and the ACT; and
- all single and greenfields agreements nationally in the:
 - building, metal and civil construction industries
 - electrical contracting industry
 - plumbing industry
 - manufacturing and associated industries
 - food, beverages and tobacco manufacturing industry
 - pharmaceutical industry
 - storage services industry.

Table 3 shows the total number of agreement approval applications lodged with the Commission compared to the number of applications being dealt with by the MST:

Table 3: Agreement approval applications allocated to the MST

Week 2015	Total single and greenfields applications	Allocations to Member Support Team	% of applications allocated to triage process	BOOT requests outside triage	Total % of triage allocations and BOOT requests
1-3 July	70	28	40%	5	47%
6-10 July	115	52	45%	4	49%
13-17 July	102	32	31%	9	40%
20-24 July	116	53	46%	3	48%
27-31 July	103	50	49%	2	50%
3-7 Aug	95	58	61%	0	61%
10-14 Aug	104	63	61%	5	65%
17-21 Aug	89	50	56%	2	58%
24-28 Aug	99	67	68%	2	70%
31 Aug – 4 Sep	125	82	66%	2	67%
7-11 Sep	119	86	72%	1	73%
Total	1149	619	53%	32	55%

Source: Fair Work Commission, Case Management System, unpublished data

As shown in **Table 4** and **Chart 1** below, agreement approval applications dealt with by the centralised triage process are currently being finalised in the following timeframes:

- 50 per cent of matters finalised in 8 days; and
- 90 per cent of matters finalised in 17 days.

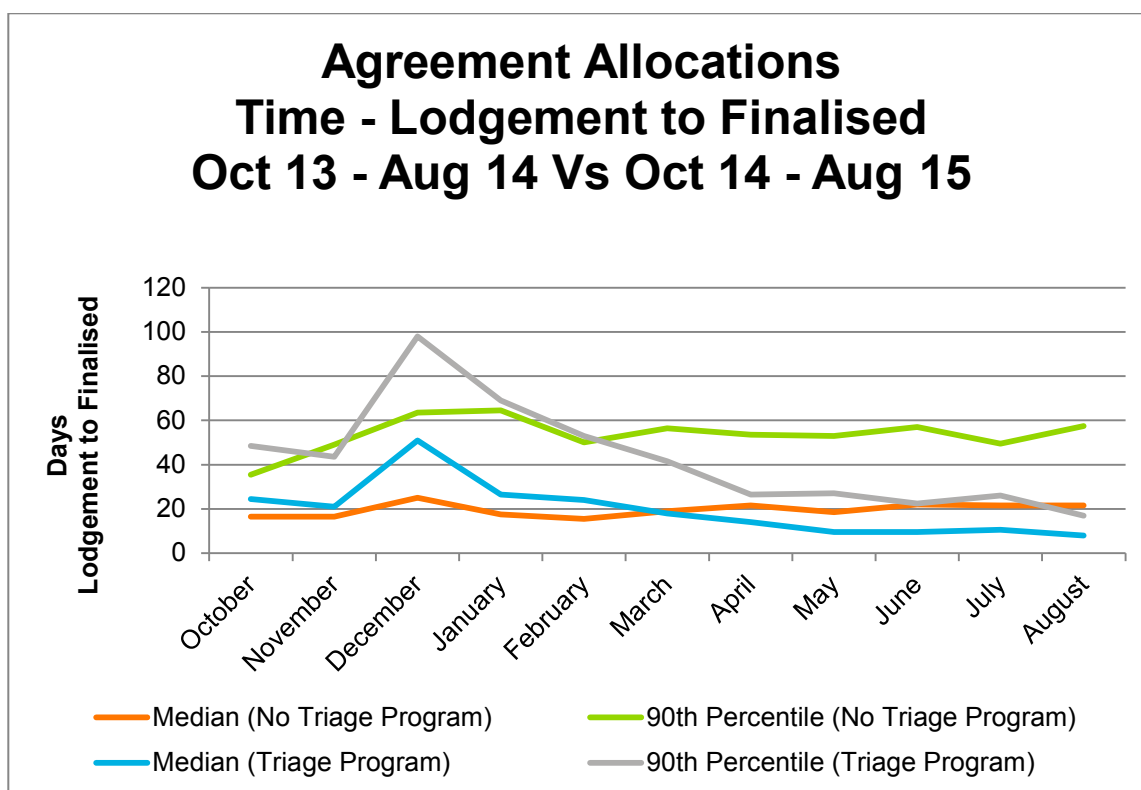
This compares favourably with the timeframes achieved in 2013/14 prior to the implementation of the triage process.

Table 4: Timeframes for finalisation of agreement approvals

Month	2013/14 Median (days)	2013/14 90th percentile (days)	2014/15 Median (days)	2014/15 90th percentile (days)
October	16.5	35.5	24.5	48.5
November	16.5	49	21	43.5
December	25	63.5	51	98
January	17.5	64.5	26.5	69
February	15.5	50	24	53
March	19	56.5	18	41.5
April	21.5	53.5	14	26.5
May	18.5	53	9.5	27
June	22	57	9.5	22.5
July	21.5	49.5	10.5	26
August	21.5	57.5	8	17

Source: Fair Work Commission, Case Management System, unpublished data

Chart 1: Median timeframes for finalising agreement approvals



Source: Fair Work Commission, Case Management System, unpublished data

Anti-bullying

The Draft Report makes a preliminary recommendation that the Commission should encourage the resolution of anti-bullying disputes at the workplace level before an application is made to the

Commission for an order to stop bullying.³⁶ The Commission has adopted a number of processes to encourage parties to resolve their disputes through the employer's internal processes.³⁷ These measures include:

- providing information on the Commission's website on how parties may be able to resolve the issue at the workplace level;³⁸
- providing information in its published anti-bullying guide on what to do if there is bullying, or reports of bullying, at work;³⁹
- instituting a case management model which emphasises that the "prevention and resolution of alleged bullying matters within the workplace should be encouraged where appropriate";⁴⁰ and
- where appropriate, referring matters to confidential mediation before a staff mediator rather than proceeding to determination before a Commission Member.⁴¹

While no data is as yet available for the whole 2014–15 period on the number of applications that proceeded to voluntary mediation with Commission staff, the data for 1 July 2014 to 31 March 2015 shows that of the 531 anti-bullying applications lodged, 51 matters proceeded to staff-assisted mediation.⁴² Commission data also shows that of those 531 anti-bullying applications, 137 were withdrawn early in the case management process, before the involvement of Commission Members.⁴³

It is also noted that the Commonwealth Office of Best Practice Regulation has listed the anti-bullying amendments to the Fair Work Act to be subject to a post-implementation review by January 2016.

Promoting cooperative and productive workplaces

As noted in the Draft Report, a new function of the Commission is to "promote cooperative and productive workplace relations and prevent disputes".⁴⁴ To give effect to this, the Commission has been working on significant workplace engagement projects to proactively assist parties at the enterprise level to resolve issues before they become formal disputes. One of the projects, *New Approaches*, relies on a different model of intervention by Members that is aimed at permanently improving relationships between employers, employees and their representatives at the workplace level to reduce disputation and improve productivity. Relying on the principles of interest-based negotiation, two of the larger interventions involving workplaces with protracted histories of disputation have been the subject of case studies prepared by the University of Newcastle. In both case studies, the employee and employer representatives reported significant and lasting improvements to their workplace relations.⁴⁵

In August 2015, approximately 50 per cent of the Commission's Members participated in workshops on interest-based bargaining and, also of recent times, employers and employee representatives who have heard about *New Approaches* have been proactive in approaching the Commission for assistance. The Commission will pilot the *New Approaches* model of implementation throughout 2015 and 2016 to assess its impact on cooperation and productivity, and will evaluate the success of the project before deciding whether to roll it out as an ongoing initiative.

As part of the Future Directions program, the Commission continues to engage with the workplace relations community by consulting with peak employer, small business and employee organisations about how it can best meet their members' needs, and the needs of the broader community. The Commission, through its national engagement strategy, also provides briefing and information sessions to school groups, unions, employer organisations, businesses, law firms, community legal centres and other community groups. The Commission actively fosters dialogue with its stakeholders through public lectures, panel discussions and the participation in conferences and workshops. It also publishes educative materials to support practitioners and the public in preparing to come to the Commission, and, where available, provides self-represented employers and employees with access to pro bono legal advice to assist their preparation for jurisdictional matters.

SECTION FOUR: Data collection and use of experts

The Draft Report proposes that the Commission publish more detailed information regarding conciliation outcomes and settlements and about general protections claims. The Draft Report states: “There is a need for greater transparency in, and internal and external analysis of, the FWC’s conciliation processes.” This statement is, however, footnoted: “Recent publications, such as the Fair Work Commission (2015), provide some much needed further detail.”⁴⁶

The Commission has two streams of conciliation procedures: unfair dismissal and general protections conciliations conducted by expert staff of the Commission, and conferences conducted by Commission Members.

The Commission publishes detailed information about unfair dismissal conciliations conducted by Commission Members and staff, including in its annual and quarterly reports.⁴⁷ In addition, information about outcomes in unfair dismissal matters resolved by conciliation and by arbitration is published on the Commission’s website and is updated annually.⁴⁸ This includes the ranges of monetary amounts paid to resolve matters, either voluntarily by the parties via conciliation or in decisions made by Members of the Commission. It should be noted that part of the staff conciliator training and the Commission’s conciliation process model is that conciliators will not encourage the making of a financial settlement where an application has no merits.

The Commission is also collecting administrative data on outcomes in general protections matters. This voluntarily collected administrative data has been collected on outcomes in general protections matters for 2014-15 onwards.

In July 2015, the Commission published an independent review of its general protections conciliation services and recent pilot.⁴⁹ This review provided detailed information, including from a survey of users, of its procedures and user satisfaction with services. The Commission will update the indicative data on its website after the first 6 months of the implementation of the general protections pilot program, in January 2016. Aggregated general information is also made available about the outcomes of unfair dismissal and general protections conferences conducted by Members of the Commission in the annual report and quarterly reports.⁵⁰

The Draft Report suggests that the Commission could record the underlying factors that inform conciliation outcomes, which could be linked to data from calls received by the Fair Work Ombudsman.⁵¹ Absent persons choosing to volunteer this information through the completion of a survey, it may not be possible to identify the underlying reasons for parties agreeing to settle a matter, as these will be subjective and may depend on a range of factors. Further, any settlement may encompass a number of potential legal claims, for example in relation to breach of contract or discrimination.

The Draft Report also states: “... the FWC should develop clearer analytical frameworks and proactively undertake its own data collection and systematic high-quality empirical research as the key basis for its award decisions and wage adjustments”,⁵² and recommends a recurring and expanded Australian Workplace Relations Study (AWRS).⁵³

Improved labour force data in a number of areas would assist the Commission in the performance of its functions. However, the Commission’s General Manager confirmed at the 2015 AWRS conference on 25 June 2015 that the Commission does not intend to again undertake the AWRS, due to the high costs associated with conducting the AWRS and the

Commission's lack of power to compel responses. For these reasons, it was proposed that it may be more appropriate for other agencies to conduct research of this kind in the future.

The Commission's *Corporate Plan 2015-16* expresses the Commission's commitment to improving business intelligence, data systems and analytical capabilities to improve service delivery and efficiency. However, it is critical that that this is adequately resourced to enable the collection and analysis of data, including by exploring whether any additional powers should be conferred on the Commission to support these functions. The Commission's current research activities are discussed below in the Section Six.

The Draft Report also suggests that the Commission should consider appointing more experts and advisors in relation to matters with economy-wide impacts, such as award and minimum wage decisions.⁵⁴

The Commission has engaged experts to provide research and information to assist it in the performance of its functions in a number of areas, including in relation to:

- the citizen co-design of modern awards (see *Citizen Co-Design with Small Business Owners*); and
- the pilot which will seek to create a plain language modern award.

The Commission has also engaged experts to provide services on non-modern award matters including:

- providing training to Commission Members and staff on interest-based bargaining;⁵⁵
- in the review of programs and pilots it undertakes to improve services⁵⁶; and
- to provide information to the public on significant matters such as equal remuneration.⁵⁷

SECTION FIVE: Modern Awards Review

As recognised in the Draft Report, the conduct of the four yearly review is a very large body of work, for both external stakeholders and the Commission. As at 4 September 2015, more than 3,500 documents have been posted to the Commission's website, and 15 decisions and 42 statements have been issued.

The Commission has sought to reduce the "adversarial" nature of the process and to provide relevant and easy to understand information to the parties on key issues and processes. The Commission has provided parties with materials, which go beyond the requests of interested parties, such as:

- a guide to the conduct of the four yearly review, which outlines the objectives and processes involved in the review;⁵⁸
- an exemplar award to address some of the structural issues identified in modern awards;⁵⁹
- forty-nine award comparison documents to assist parties in comparing the existing award with the proposed exposure drafts published in Groups 1 and 2; and
- background papers to assist parties in relation to certain common issues that have arisen in the four yearly review, such as in relation to annual leave and award flexibility.⁶⁰ These background papers summarise the parties' submissions under logical subject headings and provide context on the legislative history and previous Commission decisions which underpin award provisions.

The Commission has also:

- proposed a number of technical and drafting changes to improve the accessibility of award documents including the removal of provisions from a number of awards that were inconsistent with the National Employment Standards (NES); and
- commissioned independent research that captures the views and experiences of small businesses on the usability of current awards and on the exemplar award. This has ensured that the views of small businesses which are not active participants in the workplace relations system are heard, and is assisting the Commission to develop modern awards that are easier to understand, which may lower red tape and assist with compliance.

The Draft Report states that history and precedent play too big a role in some of the Commission's key economic and social functions, particularly award determinations.⁶¹ As the Full Bench noted in the *Preliminary Jurisdictional Issues* decision:

[60] On the basis of the foregoing we would make the following general observations about the Review:

...

3. The Review is broader in scope than the Transitional Review of modern awards completed in 2013. The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among

other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.⁶²

The Draft Report makes suggestions regarding the future conduct of award assessments, including that the Commission undertake empirical analysis to identify complex and critical problems with the operation of modern awards, develop policy options and use scientific methodologies to assess the merit of the case for change.

In its recent decisions on the common issues of annual leave and award flexibility, the Commission has relied on a range of evidence including research reports and data to support its findings and proposals.⁶³ The Commission’s decisions to issue provisional model clauses (and in the case of annual leave, final model clauses) in substantively different terms to that advocated by the parties to the proceedings has been based on its analysis of this evidence and is reflective of its recognition that these are not adversarial processes. In its annual leave decisions, the Commission has introduced a range of flexibilities into modern awards with respect to:

- dealing with excessive annual leave accruals;
- the cashing out of annual leave;
- granting annual leave in advance of accrual; and
- allowing employees who are paid by electronic funds transfer to be paid in accordance with their usual pay cycle while on paid annual leave.⁶⁴

There is force in the Productivity Commission’s proposition that consistency across awards should be promoted, but only to the extent that this does not ignore industry or occupation specific requirements or unique situations that warrant different entitlements or conditions.⁶⁵ Consistency may assist in ensuring that awards are simple and easy to understand: s.134(1)(g). However, as the Full Bench noted in *4 yearly review of modern awards—Annual leave* [2015] FWCFB 3406:

[374] ... while we generally agree with the proposition that it is desirable that provisions dealing with the taking of annual leave be uniform across modern awards, it seems to us that close-down provisions are an exception to this general proposition and warrant consideration on an award-by-award basis.

[375] Some 81 modern awards already contain close-down provisions and the nature of the provisions varies considerably ...

[376] ... We are not persuaded that it is appropriate to adopt a common provision across the modern awards which are the subject of the Employer Group's claim. The circumstances in the industries covered by modern awards and the need for such a provision vary considerably. Accordingly, claims to vary existing close-down provisions or to insert such a provision are more appropriately made and determined on an award-by-award basis.

The Productivity Commission's further consideration of these matters may be assisted by taking into account the issues of accuracy and of a technical nature discussed in Appendix I.

SECTION SIX: Annual Wage Review and research program

Annual Wage Review

The Draft Report states that it is still evident that the conceptual approach of the Expert Panel is to have a prior view based on past annual wage reviews that must be dislodged by fresh and compelling evidence.⁶⁶

In past annual wage reviews, the Expert Panel has examined whether there have been changes in the macroeconomic environment and research development since the previous annual wage review as part of its decision process. The overarching legislative provisions that determine the Commission's approach to minimum wages are set out in the minimum wages objective (s.284) and the modern awards objective (s.134), which includes consideration of the need to ensure a stable and sustainable modern award system (s.134(1)(g)). Many of these considerations require the Commission to have regard to what has happened over the period since the previous decision.

The Draft Report suggests that the Commission should draw upon further material in considering the matters it must take into account when setting minimum wages, including by encouraging broader participation by underrepresented groups such as consumers and the unemployed.⁶⁷

The Commission has established processes, which are open to the public, for interested persons and bodies to make written submissions to the Commission during the annual review of minimum wages, and all parties are given the opportunity to make comments on the submissions of others. Parties can also make oral submissions.

The Commission's submissions processes are generally undertaken from March to June of each year. The Commission calls for the making of submissions, submissions in reply and post-budget submissions, in addition to conducting public hearings where parties can attend and/or present further submissions. Following the issuing of its decision (generally in June), the Commission then undertakes further public submissions and sometimes hearing processes from July to October, to set a timetable and, when relevant, set forward research priorities for future reviews. Individuals as well as representative and welfare organisations and governments provide submissions as part of these processes.

Since the Commission, through its Expert Panel, began conducting annual wage reviews under the Fair Work Act, it has undertaken a number of additional public processes to those listed above. For example:

- in February 2011, the Commission held 'regional consultations' ahead of the Annual Wage Review 2010-11;⁶⁸ and
- in March 2014, the Commission undertook 'preliminary consultations' ahead of the Annual Wage Review 2013-14, with the primary purpose of facilitating individuals (witnesses) giving evidence.⁶⁹

These initiatives were advertised on the Commission's website and in the case of the regional consultations, advertised in national and regional newspapers. However, these initiatives were not repeated - in the case of the regional consultations, attendance was generally low,⁷⁰ and in the case of the preliminary consultations, witness evidence was not adduced by any party.⁷¹

Research program

The Draft Report notes the research the Commission undertakes for annual wage reviews, but concludes that "... the FWC does not appear to rely heavily on objective, robust research when making award review and annual wage review decisions, although the use of evidence is more apparent in the latter."⁷²

Since 2010, the Expert Panel has set successive research programs for the annual wage review which have resulted in over 20 pieces of published research. In 2014, the Expert Panel for annual wage reviews published a medium-term (3-5 year) research program, which outlines its research priorities to inform future annual wage reviews.⁷³ The broad purpose of the medium-term research program is to provide the Expert Panel with relevant qualitative and quantitative analysis and data that is focused on identified research gaps, to assist the Expert Panel in performing its statutory function of determining minimum wages by taking into account the modern awards objective and the minimum wages objective.⁷⁴ In setting the program the Panel observed:

In considering research projects for the draft medium-term program, the Panel has had particular regard to projects which will inform broader research questions that have been subject to discussions by the Panel and parties in prior reviews. In particular this includes issues concerning the employment effects of minimum wage increases in Australia as well as the characteristics of the youth labour market and the underemployed.⁷⁵

In developing and undertaking the research program, the Commission:

- publishes research for public comment;
- consults with a Minimum Wage Research Group⁷⁶ to discuss research scope and workshop research prior to publication; and
- engages expert academics to review research, where relevant, prior to publication.⁷⁷

In addition to the statistical reporting published and updated throughout the annual wage review, a number of research projects have been published under the medium-term research program using data generated by the Commission (namely through the AWRS and the Award Reliance Survey (ARS)) as well as existing data sources.⁷⁸ Three of these research projects were completed prior to the Annual Wage Review 2014–15.

As noted in the Draft Report, credible Australian research which quantitatively analyses the impact of changes in the national minimum wage and award rates of pay on employment and hours worked would be relevant to the conduct of annual wage reviews.⁷⁹

Accordingly, as part of its medium-term research program, in September 2014 the Commission commenced a competitive open tender process for this research. The tender sought to elicit research which could quantify the impact of changes in national minimum wage and award rates of pay on employment and hours worked in Australia through methods other than Computable General Equilibrium modelling. As noted in the tender:

... [r]esearch that empirically estimates the employment effects of minimum wages adjustments in an Australian context has been limited. This is due to the specific nature

of the research, which draws on an in-depth understanding of Australia's industrial relations system and the limitations posed by data collected in Australia.⁸⁰

To elicit as many quality tenders as possible, the Commission undertook a shortlisting process which included providing a nominal fee to successful shortlisted tenderers to further develop their proposals. The Commission also sought the services of expert academics to provide comments on de-identified tender proposals which were incorporated into the Commission's tender evaluation process. Unfortunately, despite this process the Commission was unable to award a contract.

It is noted from the Draft Report that the Productivity Commission has had the benefit of accessing the Department of Employment's Research and Evaluation Database (RED), which it used to try to assess the impact of annual minimum wage increases between 2008 to 2013.⁸¹ The Commission notes that the RED does not appear to be a published resource and that the Commonwealth Government did not present any data from the RED to the Annual Wage Review 2014–15 as part of its submissions.

The Commission notes the comments in the Draft Report that the Commission should "... broaden its analytical framework to systematically consider the risks of unexpected variations in economic circumstances on unemployment and the living standards of the low paid."⁸² As part of its forward research program, the Commission proposes to commission research into the characteristics of the underemployed and unemployed, to track the changes over time in the extent of underemployment for those who are employed part-time, and its relation with unemployment.⁸³

APPENDIX I

The purpose of this Appendix is to provide further information to assist the Productivity Commission in ensuring that its report is accurate and technically correct.

Importantly, the following table does not address all issues of accuracy or of a technical nature that may appear in the Draft Report, but instead covers general issues primarily associated with the use of the Commission's data in the Draft Report and specific responses to technical issues arising in chapters of the Draft Report.

Chapter 3: Institutions

Page Reference	Section in Draft Report	Fair Work Commission response/comment
p. 151	The Draft Report states that certain findings are "... supported by earlier research finding that at 'pinch points' in decision making, the past professional history of decision makers can be a significant predictor of outcomes (Southey and Fry 2012)."	<p>The Southey and Fry 2012 research referred to does not find that member background "can be a 'significant predictor of outcomes'". The research found:</p> <p>"A mild association exists between work history and arbitration decisions, on this analysis alone it would be imprudent to suggest that judicial bias featured in these decisions. The influence of an arbitrator's work background on his or her decisions would be one among many potential variables influencing arbitration results." (p. 118)</p> <p>The Southey and Fry 2012 research analyses cases heard under a previous legislative framework (the <i>Workplace Relations Act 1996</i> (Cth) (pre-reform)). The analysis has little relevance to the way the system currently operates.</p> <p>See also the "Response to the Draft Report" by Prof. A Stewart et al of September 2015 (Submission DR271), discussing some of the limitations of the Southey and Fry and Booth and Freyens research (at pp. 5-6).</p>
p. 152	The Draft Report notes that "Data on existing members suggests that the average duration of current appointments is around 6 years, with some members having served for close to 15 years".	As at 1 August 2015, the average length of appointment for the Commission's 41 primary appointments was 9.62 years and the mode was 13.76 years.
p. 159	The Draft Report suggests that there should be an independent performance review of the Commission's unfair dismissal conciliation operations along the lines of recent FWO evaluation. Citation references O'Neill 2012a.	This citation appears to be incorrect (as it relates to the General Manager's 2012 report into Individual Flexibility Arrangements).

Chapter 5: Unfair dismissal

Page Reference	Section in Draft Report	Fair Work Commission response/comment
p. 203	The Draft Report includes a table which is recreated from Freyens and Oslington (2013) which suggests that coverage of the Fair Work Act unfair dismissal laws is 90 per cent of the workforce.	This estimate appears to be inconsistent with the estimate on p.5 of the Draft Report that 70 per cent of the workforce is covered by the Fair Work Act.
p. 214	The Draft Report states “In considering cost estimates regarding unfair dismissal, data provided by the FWC, while useful, does not provide detail on some important elements of cost ... It is possible to make high-level comparisons between the FWC data on unfair dismissal costs and the findings of earlier research by Freyens and Oslington (2007), which incorporate a broader set of costs.”	<p>It is not appropriate to compare the settlement and compensation data the Commission captures with that reported by Freyens and Oslington (2007) (F&O), given the data captured is different and in particular, the data used by F&O (2007) was captured during a prior legislative regime (the Workplace Relations Act).</p> <p>F&O (2007) report that to undertake their analysis of the costs associated with unfair dismissal claims, they used data from averaged amounts taken from costs derived from a 2004 survey, 2001-2002 ABS costs and earnings data, and data relating to unfair dismissal claims in the then AIRC. The costs included from the 2004 survey in their analysis were reported to be: administrative costs, legal costs, settlement payments (if any), and, if the matter progressed to arbitration, the costs of reinstatement or compensation. (p.2)</p> <p>The Commission data relates to Fair Work Act applications. Only agreed settlement amounts following conciliation or a conference with a Member and awarded compensation from an arbitration are published. This data is only captured and reported in monetary bands. The data on the actual settlement amounts or compensation are not recorded or disclosed. Other costs that may be incurred by parties are not captured. It is unclear how the Draft Report (at p.214) has determined the average settlement or compensation amounts attributed to the Commission's data.</p>

Page Reference	Section in Draft Report	Fair Work Commission response/comment
p. 214 (cont.)		<p>The F&O data is not comparable to Commission data as the purpose of the F&O data reported in 2007 appears to be to quantify costs associated with running an unfair dismissal application made under previous legislation. The Commission cannot verify the accuracy, or otherwise, of the F&O data or its relevance to the current Fair Work system.</p> <p>The one-off analysis undertaken by the Commission of arbitrated compensation amounts from 2009-2012 (as a proportion of total reported income by applicants) may be of use to the Productivity Commission (O'Neill 2012).</p>

Chapter 8: Minimum wages

Page Reference	Section in Draft Report	Fair Work Commission response/comment
p. 288	Box 8.2 and elsewhere in the Draft Report, states that "... the Panel makes a 'national minimum wage order' which sets the base minimum wage applicable for all national system employees."	<p>The National Minimum Wage (NMW) Order made under s.294(3) of the Fair Work Act applies to award/agreement free employees only. It does not set a base minimum wage applicable to all national system employees.</p> <p>The annual wage review decision explains the outcome of the review in relation to modern award minimum wages (see, for example the 2014-15 decision at para [579]), and determinations are made in respect of each award. While decisions have maintained a 'nexus' between the NMW and modern award minimum rates for adult employees (see for example the 2009-10 decision at para [339]), the Expert Panel is only required to take the rate of the NMW into account in its decision to adjust modern award minimum wages (s.135(2)).</p>
p. 311	Table 8.2 in the Draft Report cites a Fair Work Australia research report as showing that the "[e]stimated share of workers on minimum wages' in the Survey of Employment Arrangements, Retirement and Superannuation	The Fair Work Australia report's analysis of the SEARS data found that 9.2 per cent of employees were paid <i>below</i> the (then) Federal Minimum Wage (not that 9.2 per cent of employees were in receipt of

Page Reference	Section in Draft Report	Fair Work Commission response/comment
	(SEARS) data is 9.2 per cent.”	minimum wages): see p. 13, Table 4.1.
p. 312	The Draft Report notes that “for comparison” the AWRS estimation of people on the NMW was 0.2 per cent which was lower than the Department of Employment’s estimate of persons “earning the minimum wage”.	The AWRS’s finding of 0.2 per cent relates to persons covered by the National Minimum Wage (NMW) Order i.e. award/agreement free employees. It does not relate to employees in receipt of wages that are at the rate of the national minimum wage under awards. The AWRS is the only survey which has data outlining the number of persons covered by the NMW Order.
p. 333	Referring to the Expert Panel’s Annual Wage Review 2014-15 considerations, the Draft Report states: “It has indicated that it is ‘mindful of the possibility that higher rates of growth of minimum wages could diminish the number of entry level and low-skill jobs over the longer term’, and sets the minimum wage at a lower level as a result of that consideration.”	This is not an accurate summation of the Expert Panel’s reasoning. In the Annual Wage Review 2014-15 decision ([2015] FWCFB 3500) the Expert Panel also notes that the consequences of larger minimum wage rises on profitability and the viability of small businesses are factors that have been given due weight in its decisions. (at para [433])

Chapter 9: Variations from uniform minimum wages

Page Reference	Section in Draft Report	Fair Work Commission response/comment
pp. 335, 343–344	Chapter 9 discusses variations from uniform minimum wages, which includes a discussion of the possibility of state-based differences in wage rates.	Section 154 of the Fair Work Act generally provides that modern awards must not include terms and conditions of employment that contain state-based differences.
pp. 344, 442, 448	In a number of places, the report discusses the principle of “Equal Pay for Equal Work” in the context of the regulation of wages and the evaluation of work value across industries.	The principle of equal remuneration for work of equal or comparable value forms part of the modern awards objective (s.134) and the minimum wages objective (s.284). The phrase is defined in s.12 of the Fair Work Act by reference to s.302(2), as meaning “equal remuneration for men and women workers for work of equal or comparable value”. This is the basis for

Page Reference	Section in Draft Report	Fair Work Commission response/comment
		the exercise of the Commission's equal remuneration jurisdiction in Part 2-7 of the Fair Work Act.
p. 361	Footnote 82 of the Draft Report states that "The FWC does not separately set minimum wages for award free apprentices ..."	The Commission has set minimum wages for award free apprentices since 2011 – see clause 9 of the <i>National Minimum Wage Order 2015</i> .

Chapter 11: Role of awards

Page Reference	Section in Draft Report	Fair Work Commission response/comment
p. 394	The Draft Report notes that "Prior to the first four yearly review, there were few successful applications for variations, with the FWC requiring that the requested change be necessary to achieve the objective and not 'merely desirable' (Stewart 2013)."	<p>Section 157(1) of the Fair Work Act permits the Commission to make a modern award or a determination varying or revoking an award "... if the FWC is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective."</p> <p>See also the decision of Tracey J. in <i>Shop, Distributive and Allied Association v National Retail Association (No 2)</i> [2012] FCA 480 at paras [35] to [38] and at [46]:</p> <p>"In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary."</p>
pp. 395-6	<p>The Draft Report discusses award coverage, application and reliance coverage under the Fair Work Act.</p> <p>The Draft Report suggests that an award applies to an employee "... if they are covered by the award and their wages and conditions of employment are exactly those set out in the award."</p>	<p>The distinction drawn in the Draft Report between the coverage and application of awards is not consistent with the Fair Work Act.</p> <p>Under the Fair Work Act:</p> <p>- s.48 provides that a modern award covers an employee, employer, organisation or outworker entity if the award is expressed to cover the employee,</p>

Page Reference	Section in Draft Report	Fair Work Commission response/comment
pp. 395-6 (cont.)	The Draft Report also states that “A looser definition of award application (also referred to as award-reliance) includes employees not covered by an enterprise agreement, whose wages and conditions are slightly superior to those set out in the award, but are mostly the same.”	<p>employer, organisation or outworker entity.</p> <p>- s.47 provides that a modern award applies to an employee, employer etc. if it covers the employee, employer etc., it is in operation, and no other provision provides or has the effect that the award does not so apply.</p> <p>- s.57 provides that a modern award <i>does not apply</i> to an employee (or to an employer etc.) in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.</p> <p>Therefore, a modern award can still apply to an employee where the employee is paid above award wages, such as under a common law contract, unless the employee is a high income employee (as defined).</p> <p>The term ‘award reliance’ used in the Draft Report is not a legal term, but its generally understood meaning is different to that conveyed in the Draft Report.</p> <p>The term ‘award reliance’ is usually used by the ABS and other research to refer to an arrangement where an employee earns the exact rate in an award. The EEH collects data on award reliance only.</p> <p>The AWRS and the ARS are able to provide award reliance data as well as data on employers who have ‘award based’ pay arrangements, which goes to contracting arrangements that have been ‘based’ on an award.</p> <p>A discussion of these concepts and their interaction with what is collected in ABS and other data can be found in Wright 2013 at pp.6-7 at: http://www.fwc.gov.au/documents/sites/wagereview2014/research/report6.pdf.</p>

Page Reference	Section in Draft Report	Fair Work Commission response/comment
p. 396	The Draft Report suggests that employees not covered by an award have their wages and employment set by the NES.	The National Minimum Wage Order sets minimum wages for award/agreement free national system employees (s.294(3)). The NES does not set wages.
p. 416	The Draft Report notes that the Commission has expressed reluctance to revisit issues during the four yearly review which were decided in the award modernisation process or under the (two yearly) transitional review.	The Commission's approach and its reasons are explained in the Full Bench decision: <i>4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues</i> [2014] FWCFB 1788 at paras [23]–[27] and [60].

Chapter 12: Repairing awards

Page Reference	Section in Draft Report	Fair Work Commission response/comment
p. 440	The Draft Report states: "The objective of these assessments would be to ensure that awards provide an adequate safety net for employees at least-cost to employers."	The current modern awards objective is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions of employment, not that the Commission must ensure that there is an adequate safety net at least-cost to employers.
p. 448	<p>The Draft Report states "... the Full Bench discussed the proposals put forward by a number of parties to justify different increases to wages in different awards. These proposals were rejected for two main reasons:</p> <ul style="list-style-type: none"> - there was insufficient evidence of an incapacity to pay - any differential changes would alter the existing relativities, which would undermine the concept of 'equal pay for work of equal value'... 	<p>The <i>Annual Wage Review 2013-14</i> [2014] FWCFB 3500 does not state that these were the two main reasons for which proposals for award-by-award adjustments were rejected. Relevantly, the Panel also states at para [517]:</p> <p>"The scheme of the Act is more consistent with establishing adjustments across the range of modern awards, and in the absence of exceptional circumstances, taking the sectoral variations into account when determining the level and nature of adjustments that will apply to the modern awards generally. Exceptional circumstances can and should be considered on their merits as required by the Act."</p> <p>The Panel also provides reasons in response to the claims of parties in relation to particular industries or awards: see in particular paras [557] – [558].</p>

Chapter 14: Regulated weekend penalty rates for selected consumer services

Page Reference	Section in Draft Report	Fair Work Commission response/comment
pp. 530-1	The Draft Report discusses the inclusion of preferred hours clauses in enterprise agreements.	A preferred hours clause may be included in an enterprise agreement where the instrument overall would satisfy the BOOT (not only where there are exceptional circumstances).

Chapter 16: Individual flexibility arrangements

Page Reference	Section in Draft Report	Fair Work Commission response/comment
p. 600	The Draft Report states that the 2012 General Manager's report into individual flexibility arrangements (IFAs) found employees were more likely to initiate an IFA "(56 per cent compared to 44 per cent that were employer initiated)."	<p>The data presented in the Draft Report does not reflect the results for all IFAs made, it only reflects the results of those employers who had made a single IFA (p.43, Table 4.3).</p> <p>Where employers had entered into IFAs with more than one employee (multiple-IFA employers), a greater proportion were at the initiation of the employer: 74 per cent of these employers reported that all IFAs they had made were employer initiated; 11 per cent reported that some IFAs were employer initiated; and 15 per cent reported no IFAs were employer initiated (i.e. 15 per cent reported all IFAs were employee initiated) (p. 48, Table 4.6).</p>
p. 600	The Draft Report also states that the 2012 IFA report found: "Employers with multiple IFAs identify the main benefits as clarity about conditions, the capacity for staff to work hours as needed by the employer, and increased rostering flexibility (O'Neill 2012b). Employers with multiple IFAs also nominated formalisation of an existing arrangement as a benefit."	The formalisation of an existing arrangement was the most commonly reported benefit by multiple-IFA employees – 43 per cent (p.68, Table 5.10).
p. 601	The Draft Report states: "The conditions most likely to be varied in an IFA are arrangements about when work is performed, increases in penalty rates and overtime rates (O'Neill 2012b)."	Of the five matters contained in the IFA model flexibility term, arrangements for when work is performed was the most commonly varied matter among employers that reported having one IFA (45 per cent) and overtime was the most common among employers that reported having more than one IFA (36 per cent) during the reference period. The incidence of employer-reported variations to penalty

Page Reference	Section in Draft Report	Fair Work Commission response/comment
		rates via IFAs was lower than the most common matters to be varied, with 16 per cent of employers with one IFA and 21 per cent of employers with multiple IFAs reporting variations to penalty rates via an IFA during the reference period. (see p.61, Table 5.1).
p. 606	The Draft Report states: “The 2012 FWC survey suggested that fewer than 1 per cent of employers were averse to IFAs because of the risk of penalties (O’Neill 2012b).”	The survey sample is not all employers, but is “employers who were aware of IFAs but had not made an IFA”. The 2012 report noted that 0.7 per cent of employers who were aware of IFAs but had not made an IFA stated that concern about possible penalties or risks associated with IFAs was the reason for having not made an IFA (p. 41, Table 4.2).

Chapter 19: Industrial disputes and right of entry

Page Reference	Section in Draft Report	Fair Work Commission response/comment
p. 680	The Draft Report requests further information on how protected action ballot procedures may be simplified, including by: “amending or removing the requirement that industrial action be taken within 30 days of ballot results being declared”.	Under s.459(3) of the Fair Work Act, the Commission may extend the 30-day period by up to 30 days if an applicant for the protected action ballot order (PABO) applies to the Commission for the period to be extended and the period has not previously been extended.

Appendix D: Employment arrangements

Page Reference	Section in Draft Report	Fair Work Commission response/comment
p. 894	The Draft Report notes in a footnote to Figure D.4 that data in the analysis has been multiplied by 70.8 per cent (being the estimated share of employees covered by the Fair Work Act) to approximate the share of total employed persons.	<p>The AWRS was designed to sample national system employers and employees so any treatment of the sample to approximate the national system coverage may not be required. See the AWRS technical notes for information about the AWRS sample design.</p> <p>The ARS also sampled national system non-public sector enterprises. See Wright (2013) for more detail.</p>

Page Reference	Section in Draft Report	Fair Work Commission response/comment
p. 894	The Draft Report notes that “the exclusion of small business in AWRS is likely to result in underestimation of award reliance.”	AWRS excluded micro businesses with 1 to 4 employees. Businesses with 5 or more employees were included. See the AWRS technical notes for information about the AWRS sample design.

Endnotes

1 Draft Report, pp. 8, 41, 68, 659, 700, 785.

2 Submission by the President of the Fair Work Commission to the Productivity Commission Inquiry into the Australian Workplace Relations Framework, March 2015, p.7.

3 The Commission's tribunal functions under the Fair Work Act include: dealing with unfair dismissal claims; applications for orders to prevent bullying at work; general protections and unlawful termination disputes; determining national minimum wages; making and varying modern awards; approving, varying and terminating enterprise agreements; making orders to stop or suspend industrial action; dealing with disputes; and issuing, suspending and revoking right of entry permits (s.576). Under the RO Act, the Commission is also responsible for determining applications for registration and cancellation of registration of employee and employer organisations; approving amalgamation of organisations; approving membership agreements and assets and liabilities agreements between employee organisations and state registered unions; and determining applications for alterations of the eligibility rules of organisations or a change to an organisation's name.

4 Regulatory functions vested in the General Manager under the RO Act include: assessing reporting units' financial reports; assessing registered organisations' annual returns; arranging for the conduct of organisational, divisional and branch elections; assessing and certifying rules alterations (other than eligibility rules); and making orders in relation to a dispute about the entitlement of an organisation to represent the industrial interests of employees. The General Manager may also conduct inquiries and investigations and may commence litigation against registered organisations, their officers, employees and auditors to ensure compliance with obligations in the RO Act.

5 See Fair Work Act, ss. 625 and 657.

6 Draft Report, pp.132, 133, 147.

7 Draft Report, pp.148-9.

8 Draft Report, pp.3, 11, 152, 224, 229, 428.

9 Fair Work Act, ss.134, 284.

10 Fair Work Act, s.193.

11 Fair Work Act, Part 3–2.

12 Draft Report, pp.8, 12, 224.

13 Submission by the President of the Fair Work Commission to the Productivity Commission Inquiry into the Australian Workplace Relations Framework, March 2015, pp.44-46.

14 See, for example, *Coal & Allied Mining Services Pty Ltd v Lawler and others* (2011) 192 FCR 78, *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550, *R v Moore, Ex parte the State of Victoria* (1977) 140 CLR 92 at pp. 101-2.

15 Fair Work Act, s.601.

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

17 *Australian Nursing and Midwifery Federation v Kaizen Hospitals (Essendon) Pty Ltd* [2015] FCAFC 23

18 Draft Report, p.224.

19 The proportion of unfair dismissal matters proceeding to merit hearing fell significantly in subsequent years, due to the introduction of new powers for the Commission to administratively dismiss applications lodged after 1 January 2013 if a party failed to attend a conference or hearing, comply with a direction or discontinue an application after the conclusion of a settlement agreement.

20 *Re Ranger Uranium Mines Proprietary Limited And Others* (1987) 163 CLR 656, 666.

21 Draft Report, pp.28, 48 and 233 (recommendation 5.2). See also the discussion on pp.41 (and 700) that penalties for unlawful industrial action (by any party) should be increased, "... as this would allow the FWC and the Federal Court more scope to apply penalties commensurate with the harm associated with such action." [emphasis added]. However, it is noted that draft recommendation 19.6 only refers to 'federal law courts' in this regard (at pp.59 and 700).

22 Draft Report, pp.796-799.

23 Fair Work Commission, Strategy and Vision — Future Directions, <https://www.fwc.gov.au/about-us/operations/strategy-vision-future-directions>.

24 Draft Report, pp. 433–434.

25 Discussed in Section 5 of this submission.

26 Fair Work Commission, *Plain language modern award instruments pilot – Pharmacy Industry Award 2010* [2015] FWC 6555 (21 September 2015).

27 Draft Report, p.455.

28 EY Sweeney, Fair Work Commission: Client Survey, commissioned by the Fair Work Commission, 30 July 2015, available at: <http://www.fwc.gov.au/documents/documents/resources/ClientSurvey-30Jul2015.pdf>, p. 4.

29 EY Sweeney, Fair Work Commission: Client Survey at p.4.

30 Draft Report, p.796.

31 Refer Draft Report, p.796.

32 Draft Report, p.147.

33 See: INCA Consulting, General Protections Conferences: Centralised Case Management and Use of Staff Conciliators: A review of the pilot, research commissioned by the Fair Work Commission, April 2015 (<https://www.fwc.gov.au/documents/documents/resources/General-protections-pilot-review-April-2015.pdf>)

34 Draft Report, p.575.

35 See: <https://www.fwc.gov.au/documents/documents/resources/Improving-public-value-FD-GP-pilot-update-11June2015.pdf> at p.5 The June 2015 report noted that 90 per cent of s.186 applications the subject of the pilot were resolved within 35.5 days, compared to 41 days for those not subject to the pilot.

36 Draft Report, p.282.

37 The Commission notes that it currently has no legislative power to compel parties to resolve a bullying complaint through internal processes. The Commission's operational procedures were developed through a reference group made up of major stakeholders and a professor in regulation.

38 Fair Work Commission, Anti-Bullying – Before You Apply, <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/workplace-issues-disputes/anti-bullying/before-you-apply>

39 Fair Work Commission, Anti-Bullying Guide, https://www.fwc.gov.au/documents/documents/factsheets/Guide_antibullying.pdf

40 Fair Work Commission, Anti-Bullying Case Management Model, <https://www.fwc.gov.au/documents/documents/resources/Anti-bullying-case-mgmt-model.pdf> at p. 8.

41 Fair Work Commission, Anti-Bullying Case Management Model, <https://www.fwc.gov.au/documents/documents/resources/Anti-bullying-case-mgmt-model.pdf> at pp.10-11.

42 Fair Work Commission, Anti-Bullying Quarterly Reports, <https://www.fwc.gov.au/about-us/reports-publications/quarterly-reports>.

43 Fair Work Commission, Anti-Bullying Quarterly Reports, <https://www.fwc.gov.au/about-us/reports-publications/quarterly-reports>.

44 Draft Report, p.132. Fair Work Act, s.576(2)(aa).

45 Fair Work Commission, Annual Report 2013–14, pp.52, 53 and 62.

46 Draft Report, p.159, and pp. 49 (recommendation 6.5), 264, 819.

47 Fair Work Commission, Annual Report 2013–14, at pp. 39–43, 124–128; Fair Work Commission, Quarterly Reports, <https://www.fwc.gov.au/about-us/reports-publications/quarterly-reports>.

48 <https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/dismissal-termination-redundancy/results-outcomes>

49 INCA Consulting, General Protections Conferences: Centralised Case Management and Use of Staff Conciliators: A review of the pilot, research commissioned by the Fair Work Commission, April 2015 (<https://www.fwc.gov.au/documents/documents/resources/General-protections-pilot-review-April-2015.pdf>)

50 Fair Work Commission, Annual Report 2013–14, at pp. 41–42, 126–128; Fair Work Commission, Quarterly Reports, <https://www.fwc.gov.au/about-us/reports-publications/quarterly-reports>.

51 Draft Report, p.147.

52 Draft Report, p.11.

53 Draft Report, p. 822.

54 Draft Report, pp.149-150.

55 Fair Work Commission, Continuing the change program: Future Directions 2014–15 progress report, p. 4.

56 For example, the commissioned reviews of the General Protections Pilot, Unfair Dismissal Pro-bono Pilot and the Agreement Making Triage Pilot: see www.fwc.gov.au.

57 Layton et al., Equal Remuneration under the Fair Work Act 2009, Adelaide Research and Innovation Pty Ltd, research commissioned by the Fair Work Commission Pay Equity Unit, 2013.

58 Fair Work Commission, 4 yearly review of modern awards: Guide to Award Stage, 16 June 2014.

59 Fair Work Commission, 4 yearly review of modern awards: Exemplar Award, 16 June 2014.

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

61 Draft Report, p.11.

62 [2014] FWCFB 1788 at para [60].

63 See for example: *4 yearly review of modern awards—Annual leave* [2015] FWCFB 3406 at paras [101] to [145] and *4 yearly review of modern awards—Award flexibility* [2015] FWCFB 4466 at paras [209] to [227].

64 See the Summaries of Decision at: https://www.fwc.gov.au/documents/documents/summaries/2015FWCFB5771_summary.pdf
https://www.fwc.gov.au/documents/documents/summaries/2015fwcfb3406_summary.pdf

65 Draft Report, p.455-456.

66 Draft Report, p.144.

67 Draft Report, pp. 11, 431–432.

68 [2011] FWA FB 1102.

69 [2013] FWCFB 7722.

70 Transcript of these consultations is available on the Commission's website: <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/previous-wage-reviews/annual-w-26>

71 Transcript of these proceedings is available on the Commission's website.
https://www.fwc.gov.au/documents/sites/wagereview2014/transcript/040314C20141_amended.doc. The transcript notes the reasons given by some parties for this.

72 Draft Report, p.429.

73 [2014] FWCFB 6846.

74 [2014] FWCFB 5840 at [1].

75 [2014] FWCFB 5840 at [3].

76 The Minimum Wage Research Group is chaired by a staff member from the Commission's Workplace and Economic Research section and comprises representatives nominated by the Australian Chamber of Commerce and Industry (ACCI); Australian Industry Group (Ai Group); Australian Council of Social Service (ACOSS); Australian Council of Trade Unions (ACTU); Australian Government and state and territory governments.

77 For example see Rozenbes D, Kenny R, Nelms L and Farmakis-Gamboni S (2013), Labour supply responses to an increase in minimum wages: an overview of the literature, Research Report 2/2013, Fair Work Commission; Bolton T and Wheatley T (2010), Earnings of employees who are reliant on minimum rates of pay, Research Report 4/2010, Fair Work Australia.

78 See: <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/annual-wage-review-2014-15-1>.

79 Draft Report, p. 821-822 and Appendix C.

80 at p.23.

81 Draft Report, p.302.

82 Draft Report, p.285.

83 See <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/annual-wage-review-2014-15-1> for further information.