

President's statement

Fair Work Commission's 2023 work and 2023-24 performance

Justice Hatcher, President

Sydney, 22 December 2023

Introduction

[1] This statement contains information about:

- the Commission's operational performance for the 2023-24 reporting cycle so far
- some of the Commission's major cases
- the Secure Jobs Better Pay Act reforms, as they relate to the Commission, and
- recent innovations to improve service delivery.

[2] One year ago, the introduction of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Secure Jobs Better Pay Act) gave rise to some of the most significant changes in the Commission's recent history. We have successfully implemented these changes by working closely with our stakeholders, subject matter experts and users to design and deliver our new services.

[3] In my [statement of 20 December 2023](#) about the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, I indicated that the Commission remains in a strong position to continue to deliver our core services in a timely manner, whilst also implementing legislative changes and innovating to ensure we continue to meet the expectations of the Australian community that we serve.

The Commission's performance in 2023-24

[4] The Commission continues to perform well against our internal benchmarks.

[5] From 1 July 2023 to 30 November 2023, we received 16,522 lodgments and finalised 16,141 cases. This clearance rate of 98% exceeds our target of 95%.

[6] We continue to achieve timely finalisation of cases:

- 50% of cases finalised within about 4 weeks (target of 8 weeks, or 56 days)
- 90% of cases finalised within about 11 weeks (target of 16 weeks, or 112 days).

[7] Members and staff conciliators have informally resolved over 89% of disputes about awards or agreements and 92% of unfair dismissal disputes.

[8] Over 90% of applications have been substantially processed within 3 days of lodgment, with applicants receiving timely information upon lodgment of their application.

[9] Approval of complete and compliant agreement applications is well within our target timeframe, with 50% of agreements approved without undertakings or amendments within 12 days or less from the date of lodgment.

[10] The Commission is required, as far as practicable, to determine Protected Action Ballot Order (PABO) applications within 2 working days. As of 30 November 2023, 94% of PABO applications were determined within 2 working days.

[11] We are meeting all targets for reserved decisions:

- 75% of reserved decisions are issued within 5 weeks (target of 50% issued in 5 weeks)
- 93% are issued within 12 weeks (benchmark of 90% issued within 12 weeks).

[12] For permission to appeal decisions, 94% were issued within 2 weeks and 100% were issued within 4 weeks. Only 0.23% of decisions have been successfully appealed to date for the 2023–24 year.

Workload

[13] Our workload for 2023-24 so far has been 13% higher than the 5-year average. Lodgments in November 2023 were the third highest for an individual month within the past 4 calendar years. Lodgments were above average in 11 of the 18 case categories in November, including our highest-volume case types - Unfair Dismissal (+8%), General Protections Dismissal (+14%) and Agreement Approvals (+28%).

Major cases

Aged care industry work value case

[14] The Aged Care Industry Work Value case deals with 3 applications to vary 3 modern awards to increase the minimum wages of aged care sector workers: the *Aged Care Award 2010*, the *Nurses Award 2020* and the *Social, Community, Home Care and the Disability Services Award 2010*.

[15] The case is being conducted in 3 stages, of which stages 1 and 2 are complete. In its stage 1 decision, the Full Bench concluded that an interim increase of 15 per cent to modern award minimum wages applying to direct aged care workers was ‘plainly justified by work value reasons’. The decision in stage 2 confirmed the provisional views expressed in stage 1 and dealt with the timing of the interim increase.

[16] In stage 3, the Commission is considering wage adjustment issues and classification and allowance issues in the 3 awards. The hearing for stage 3 has now concluded and the decision is reserved. We continue to publish [extensive information on our website](#). I encourage interested parties to [subscribe to updates](#).

Annual Wage Review – Gender equality

[17] In the [Annual Wage Review 2022–23 decision](#) ([2023] FWCFB 3500), the Expert Panel confirmed that the Commission is undertaking a research project to identify occupations and industries in which there is gender pay inequity and potential undervaluation of work and qualifications and noted that this research will inform future Annual Wage Reviews. This project is intended to address the imperative in the Secure Jobs Better Pay Act amendments concerning gender equality. The Expert Panel has made it clear that award gender undervaluation issues must be resolved in future Reviews or other Commission proceedings.

[18] On 15 November 2023, I issued [a statement](#) announcing the publication of the [Stage 1 Report](#).¹ On 5 December 2023, I issued [a further statement](#) announcing the scope of Stage 2 of the research project. Stage 2 will examine each of the awards identified in Stage 1 (except the *Aged Care Award 2010*, which, as outlined above, is currently the subject of separate work value proceedings).

[19] The Stage 2 report, to be published in April 2024, will explore the history of wage fixing and work value assessments in each of the 12 awards in order to aid the identification of any indicia of gender undervaluation. The Commission will invite parties to make submissions about both the Stage 2 report and the Stage 1 Report as part of the Annual Wage Review 2023-24 submission process. A [draft timetable](#) for the Annual Wage Review 2023-24 was published on 15 December 2023. I encourage interested parties to [subscribe to updates](#) about the Annual Wage Review to be informed about the progress of the research project.

Modern awards review 2023-24

[20] On 12 September 2023, I received a [letter from the Minister for Employment and Workplace Relations](#). The Minister expressed the Government’s interest in the Commission initiating a targeted review of modern awards. I determined to initiate an award review on the Commission’s own motion under sections 157(3)(a) and 576(2)(aa) of the *Fair Work Act 2009* (Fair Work Act). Extensive information about this [Modern Awards Review 2023–24](#) is available on our website.

[21] I have constituted a five Member Full Bench to manage the review. The Full Bench issued a [timetable for the review](#) on 4 October 2023. Discussion papers relating to the [Arts and culture sector](#) and [job security](#) have been published. A further discussion paper and research relating to the work and care stream of the review will be published in accordance with the timetable. Interested parties have also been invited to lodge proposals to make the 7 most commonly used awards easier to use without reducing employee entitlements by 22 December 2023.

¹ Cortis, N., Naidoo, Y., Wong, M. and Bradbury, B. (2023). [Gender-based Occupational Segregation: A National Data Profile](#). Sydney: UNSW Social Policy Research Centre

Secure Jobs Better Pay Act Changes

[22] I have spoken at length about the Commission's implementation of the Secure Jobs Better Pay Act reforms in a number of statements throughout 2023, from my initial Secure Jobs Better Pay [statement on 8 December 2022](#) to my most recent [statement on 2 August 2023](#). Since that latest statement, there have been a number of significant decisions issued and insights gained with respect to the Commission's new functions, some of which I set out below. The last of the Secure Jobs, Better Pay legislative changes commenced on 6 December 2023.

[23] I would like to take this opportunity to thank, in particular, the members of the many advisory groups established to assist with the information of these legislative reforms: the Sexual Harassment Working Group, Enterprise Agreements and Bargaining Advisory Group, the Registered Organisations Advisory Committee and our Small Business Reference Group. Your experience, knowledge and generosity of time have provided invaluable assistance to the Commission as we have implemented these changes.

Sunsetting of pre-2010 agreements

[24] Certain agreements made before 2010 that were still in operation sunsetted at the end of 6 December 2023 unless an application was made to the Commission to extend their operation. Since my [2 August 2023 statement](#), the Commission has developed an interactive checklist and plain language fact sheet to help employers and employees determine if their instrument may have been affected. Recognising the impact that sunsetting may have on employees and employers, we issued multiple reminders about the upcoming sunsetting via our communications channels.

[25] As of 10 December 2023, the Commission received extension applications for 478 agreements, some of which were individual instruments and others collective instruments. The Commission has extended 141 of these agreements, with the longest extension granted being approximately 2 years and 8 months. Extensions have been refused for 27 agreements. Applications relating to 29 agreements have been withdrawn. A number of applications made before 7 December 2023 are currently being determined. We continue to publish a [list of all extension application decisions](#) on our website and in our Document search.

Fixed term contract disputes

[26] From 6 December 2023, the Commission was empowered to deal with disputes between employees and employers about the operation of Division 5 of Part 2-9 of the Fair Work Act, which places limitations on the use of fixed term contracts. If an employee and employer are in dispute about the application of these provisions and discussions at the workplace level do not resolve the dispute, a party may refer the dispute to the Commission. The Commission may deal with the dispute by mediation or conciliation and, if the parties consent, can arbitrate the dispute.

[27] We have published information about the operation of the new provisions on the [Dispute about fixed term contracts](#) page of our website, along with an application form and a form to notify of consent to arbitration.

Flexible work and unpaid parental leave

[28] From 6 June 2023, the Secure Jobs Better Pay Act strengthened the right to request flexible working arrangements and extensions of unpaid parental leave. The amendments also provide for the Commission to deal with disputes about these rights to request. I issued a [statement about the Commission's new powers](#) to resolve these disputes on 9 May 2023.

[29] From 6 June 2023 to 30 November 2023, the Commission received 65 applications to deal with a dispute about requests for flexible work, and 4 applications to deal with requests for an extension of unpaid parental leave under the amended provisions.

[30] A Full Bench considered the operation of the new provisions relating to requests for flexible working arrangements in *Quirke v BSR Australia Ltd* [2023] FWCFB 209. That decision considered the jurisdictional prerequisites for arbitration of these matters and considered the meaning of 'disability' in the context of section 65(1A) of the Fair Work Act.

Workplace sexual harassment disputes

[31] From 6 March 2023, the Fair Work Act was amended to include new provisions prohibiting sexual harassment in connection with work and expanded the Commission's jurisdiction to deal with workplace sexual harassment disputes. My statements of 23 February 2023 and 2 August 2023 included information about our implementation of the expanded sexual harassment jurisdiction.

[32] From 6 March 2023 to 30 November 2023, the Commission received 47 applications under the new sexual harassment provisions in Part 3-5A. The Commission also continues to be able to receive applications in relation to sexual harassment that occurred or commenced prior to 6 March 2023 under Part 6-4B of the Fair Work Act (as preserved in relation to sexual harassment).

Changes to enterprise bargaining and agreement making

[33] The Secure Jobs Better Pay legislation has made some important reforms to enterprise bargaining.

[34] One significant amendment is that from 6 June 2023, the new section 448A of the Fair Work Act requires the Commission to conduct conferences involving bargaining parties once it makes a protected action ballot order. This conference must occur on or before the date of the close of voting in the protected action ballot and represents an opportunity for the Commission to facilitate the making of an enterprise agreement before any protected industrial action occurs. We are continuing to expend time and member resources to maximise this opportunity to facilitate enterprise bargaining. We have achieved a significant degree of success in assisting parties to make new enterprise agreements through this mechanism.

[35] Pursuant to amendments concerning the conduct of protected action ballots (PAB), the Commission has now approved seven eligible PAB agents in addition to the Australian

Electoral Commission (AEC). The Commission continues to publish details of applications in progress for the approval of PAB agents. A list of all eligible PAB agents is available on our website.

[36] From June 6 to November 30, over two thirds of applications for a protected action ballot order named an eligible PAB agent other than the AEC to conduct their protected action ballot.

[37] The Commission has continued to receive a number of bargaining-related applications that we consider have significant scope. This includes the current supported bargaining authorisation application for the early education and care industry (ECEC). On 27 September, the Commission made the first supported bargaining authorisation which includes 64 employers operating in ECEC, the United Workers Union (UWU), Australian Education Union (AEU) and Independent Education Union of Australia (IEU).

[38] The Commission also received an application for an intractable bargaining declaration by the United Firefighters' Union of Australia (UFUA) in relation to a proposed enterprise agreement for employees of Fire Rescue Victoria. As part of this case, a Full Bench made the first intractable bargaining declaration specifying a two-week post declaration negotiating period. The matter is now proceeding to arbitration.

[39] We continue to publish information about the progress of [this major case](#). Parties can find information about all our [current major cases](#) and [previous major cases](#) on our website.

Absorbing the functions of the Registered Organisations Commissioner

[40] As of 6 March 2023, the regulatory powers and functions of the former Registered Organisations Commission (ROC) transferred to the General Manager of the Commission. With this transfer of functions, we welcomed 34 former staff of the ROC to the Commission's Registered Organisations Services Branch (ROSB), and the Commission assumed responsibility for all of the ROC's ongoing inquiries, investigations and proceedings.

[41] There has been a lot of work carried out throughout the year since the transition. While the responsibilities for registered organisations sit with the General Manager, I would like to acknowledge and thank everyone for the work that has been carried out to date to ensure a successful and seamless transition.

[42] Highlights of the transition include:

- the establishment of a Registered Organisations Transitional Advisory Committee, which has now become the permanent Registered Organisations Advisory Committee going forward, featuring representatives from the ACTU, ACCI and AiGroup to provide ongoing guidance to the General Manager about supporting registered organisations to maintain voluntary compliance with their obligations.

- the commissioning of an independent review of the Commission’s registered organisations governance and compliance functions. The General Manager released [the report and his response](#) to it in September 2023. More than half of the recommendations from this review are already being implemented and work is continuing on the balance, including:
 - The establishment of a Compliance Practitioners Reference Group including people who work in the compliance of registered organisations and subject matter experts from the ROSB consulting on technical matters.
 - Streamlining the application process for right of entry permits to make it less cumbersome for organisations. Further enhancements to the process are being planned.
 - The commencement of work to investigate the differences between Tier 1 and Tier 2 financial reporting, following the RO Review recommendation for financial reports of registered organisations to be prepared to the Tier 2 standard.
 - The ROSB has issued a public tender for suppliers to draft an annotated and practical set of model rules that will work for many organisations. The tender closes on 12 January 2024.
 - Improving the time taken to deal with applications for rule changes by introducing transparent internal reporting and tracking mechanisms, introducing a prioritisation process and recruiting additional resources to drive innovation, as well as delivering a targeted education and awareness focus relating to efficient and timely rule alteration processes.
- the ROSB is meeting all of its Key Performance Indicators and is already making timeliness improvements with right of entry permits, rules matters and elections while continuing to focus on continuous improvement.

Service initiatives – digital transformation

[43] Throughout 2023, we have continued to respond to the ever-increasing community expectations of interacting quickly and easily with government agencies online. This is an ongoing priority. The Commission is committed to supporting the needs of self-represented parties and users with diverse accessibility needs.

[44] To this end, the Commission has:

- released additional modules on unfair dismissal and sexual harassment within our [Online Learning Portal](#)
- developed online smart forms for key application types
- revamped our online lodgment system to improve functionality and security
- released the [Modern Awards Pay Database Application Programming Interface](#)

- produced animations to better support employers and employees in unfair dismissal cases to provide information about the [21-day time limit](#), [late applications](#) and [extension of time](#)
- released new and revised tools to assist parties seeking to understand the new agreement approval provisions from the Secure Jobs Better Pay Act
- expanded our digital library to include all Modern Awards, and
- implemented new conciliation and conference technology.

[45] In October this year, we released additional [resources for our users from culturally and linguistically diverse \(CALD\) backgrounds](#). These resources have been translated by NAATI-accredited translators into 28 community languages to help those from CALD backgrounds better understand the role of the Commission. The languages were chosen based on 2021 Census data and our own internal data regarding interpreter requests.

[46] We continue to transform our conference and hearing facilities to meet the needs of the post-pandemic era, including by updating physical equipment, replacing audio-visual technology, and updating protocols for in-person and/or online hearings. This is by no means an exhaustive list, with many other innovation projects being commenced in 2023.

Conclusion

[47] The successful implementation of the Secure Jobs Better Pay Act changes would not have been possible without the hard work of Commission staff and Members. I would like to thank them for their efforts and dedication. They have not only ensured the Commission's outstanding achievements throughout 2023, but have also put us in great stead for the year to come.

[48] I would also like to particularly acknowledge the participation and engagement of our community partners. Their involvement has been critical, as has the involvement of all those who participated in our stakeholder engagement activities.

[49] I wish everyone a happy, relaxing and safe Christmas and New Year break.

PRESIDENT