President Justice Hatcher speech

ALERA Conference - 27 October 2023

So the brief today is to speak to you about what the former US President George Bush Snr disparagingly called 'the vision thing'. I'm obviously not going to jump into any debate about the 'Closing Loopholes' legislative package that is currently before the Parliament, nor will I be going into any proposals for legislative reform. My 'vision thing' will be concerned with the future role of the Fair Work Commission within the current legislative framework. I want to focus on three topics:

First The Commission as an institution.

Second Enterprise bargaining.

Third Gender equality.

The Commission as an institution

For the first topic, I want to start with two quotes.

Eric Schliesser, a contemporary philosopher, has said 'Institutions and procedures are run by imperfect human beings and without ongoing maintenance, care and investment they decay.'

More bluntly, the former British Prime Minister Harold Wilson said (with regrettable gender bias), 'He who rejects change is the architect of decay. The only human institution which rejects progress is the cemetery.'

My vision for the Commission is for it to be an accessible, responsive and transparent organisation that is continually reforming and innovating to meet changing societal circumstances. To put some meat on the bones, let me describe some of the ways in which we are trying to reach this objective.

We measure our performance generally by reference to a series of benchmarks which we established in 2022, and we use data analytics to assess whether we have reached those benchmarks. In 2022-23, the Commission received over 31,000 applications in total, and we can assess our performance against the benchmarks by matter type, by location, by member etc.

We are continually trying to improve our timeliness in respect of how long we take to deal with all matters from beginning to end and how long we take to issue reserved decisions.

Timeliness is an essential element in the administration of justice generally, and is particularly important in the employment space, whether we're trying to resolve an industrial dispute, repair a fractured employment relationship or determine the wages and conditions to apply in a workplace or an industry.

Finalisation of matters

Benchmark:

- finalise at least 50% of cases within 8 weeks of lodgment, and 90% within 16 weeks.

Actual:

- 50% within 4.5 weeks, 90% within 11 weeks.

Reserved decisions

Benchmark:

- 50% of reserved decision issued within 5 weeks, 90% within 12 weeks.

Actual

- 66% within 5 weeks (50% within 3 weeks), 90 % within 12 weeks.

Two particular categories where we've tried to improve our performance is approval of enterprise agreements and dealing with applications for protected action ballot orders.

Enterprise agreements:

- 50% were approved in 17 days or less, and 90% were approved in 36 days or less.

There is a continuing mythology that we reject enterprise agreements for all sorts of technical reasons. Actually:

- 96% of all enterprise agreements were approved by the Commission. Only 0.5% were actually rejected, with the remaining applications having been withdrawn prior to determination.

PABOs

Statutory benchmark: s 441 of FW Act – Commission must, as far as practicable, determine PABO application within 2 working days.

- In FY 2022-23, 74% of applications were determined within 2 working days.

- In Q1 FY 2023-24, 93% of applications were determined within 2 working days.

I would venture to say that, in terms of volume and timeliness, these results put us ahead of any other court or tribunal in the country. But we can do even better. Sometimes overall figures tend to hide outlier instances of performance which do not meet the general performance standard. People often tend to judge performance by reference to the worst-case examples.

So we are putting in place systems to deal with the outliers. We have 'dashboards' to allow all members to see how they are tracking against out KPIs, which of itself assists to drive timeliness. The dashboards provide an at-a-glance view of matters that are 'orange' for close to the KPI, and then 'red' when they've exceeded it.

Our Regional Coordinators and National Practice Leaders oversee the work of groups of Members and matters in particular categories, and the dashboards allow them to monitor performance against a number of key metrics and be proactive to address spikes in workload and track older matters.

In relation to accessibility, the key challenges for us are:

- to deal with the needs of self-represented parties, which numerically constitute the majority of litigants before us, and

- respond to the ever-growing expectation in the community that they can transact with government agencies online.

A number of initiatives in this area including:

- a revamped online lodgment service (OLS), with improved functionality and security.

- development of online and smart forms for making applications.

- Online Learning Portal – modules on key topics including interest-based bargaining, unfair dismissal and sexual harassment.

To the beginning of October, we have had approximately 3000 people view our module on preparing for an unfair dismissal conciliation. And, since we launched it in March, we have had 16,000 people view the workplace sexual harassment module.

We also have new resources that have recently been released to support our users from culturally and linguistically diverse (CALD) backgrounds. These resources have been translated by NAATI-accredited translators into 29 community languages to help those from CALD backgrounds better understand the role of the Commission. These languages were chosen based on 2021 Census data and our own internal data regarding interpreter requests.

Finally, we have engaged in a process to transform our conference and hearing facilities to meet the needs of the post-pandemic era. This process includes the following elements.

- Fundamental review of our physical facilities and online hearing capabilities

- Replacement of audio-visual technology in hybrid courtrooms

- Implementing new optimised online hearing rooms

- Development of a long-term property strategy

- Updating protocol for in-person v online hearings

- Feedback from the legal profession

What I've described will leave the Commission well-placed to accommodate and deliver on any changes to the legislative framework which may emerge from the Parliament in the near future.

In particular, I consider that we have the personnel, the resources and the systems in place to handle any expansions to our jurisdiction and new powers which may be conferred on us by the Parliament.

Enterprise bargaining

The Secure Jobs, Better Pay legislation has made some important reforms to the enterprise bargaining regime. The multi-employer bargaining provisions have received the most attention but, in my view, the most significant amendments in practical terms are:

(1) The new s448A requirement for the Commission to conduct conferences involving the bargaining parties once it makes a protected action ballot order. This provides an opportunity for the Commission to attempt to resolve, or at least confine, bargaining disputes before the occurrence of protected industrial action.

The experience to date is that, at least in some cases, this has led to terms for a new enterprise agreement being reached. In other cases, it has led to the disputed issues being narrowed or a process being agreed to resolve the outstanding issues. We are expending time and member resources to maximise this opportunity to facilitate enterprise bargaining.

(2) The Commission's new power in s 235 to make intractable bargaining declarations after a minimum of 9 months of bargaining, leading to arbitration by the Commission, provides a mechanism to end long running bargaining disputes.

Indirectly, it is becoming a signpost as to how bargaining may conclude if it does not result in an enterprise agreement within a reasonable period of time. Although only one IDB has been granted to date, there are early indicators that this is beginning to influence bargaining behaviour.

In particular, because prior participation in s 240 proceedings is one of the preconditions for the grant of an IDB, we have seen earlier and greater usage of s 240 in bargaining. To remind you, s 240 is an existing provision which allows the Commission to conciliate and, by agreement, arbitrate disputes which arise in the course of bargaining.

Essentially, anyone who runs into trouble in bargaining can make an application under s 240 for assistance by the Commission. If such an application is made, my commitment is that the Commission will put significant resources into assisting the parties to reach an agreement.

These matters both point to a future whereby the Commission has a significantly greater role in facilitating enterprise bargaining. Can I give two recent examples of this.

First, the recent Woodside and Chevron bargaining disputes. This dispute had huge potential ramifications, since it affected approximately 5% of the world's gas supplies. It's the only case I can remember where we had energy traders and stock market speculators from Hong Kong and New York ringing my chambers asking for an explanation as to how intractable bargaining declarations and protected industrial action work.

In very short summary, the bargaining in both cases became the subject of s 240 proceedings. This assisted a fairly early settlement in the Woodside dispute.

In the Chevron dispute, things got more serious. I sent Commissioner Bernie Riordan to go out to WA and sort it out. Chevron applied for an intractable bargaining declaration, which was set down for hearing.

Mediation continued, and the day before the intractable bargaining declaration hearing was due to start, Commissioner Riordan made a last-resort recommendation proposing final outcomes for all the issues remaining in dispute. Both parties accepted the recommendation. The dispute almost went off the rails again when the parties were trying to nail down the detail but, again, Commissioner Riordan was able to get it back on track. So things look good for the finalisation of an enterprise agreement very shortly.

Second, there was a dispute at Apple in relation to bargaining for the first new agreement in 9 years which got very complicated because, in addition to the SDA and the ASU, there were over 100 individual bargaining representatives. Again, the parties utilised the assistance of the Commission via s 240 and, after very intensive engagement by Commissioner Alana Matheson, an innovative new agreement was reached which has now been approved by the Commission. This is one of a number of indicators that the major retailers are returning to enterprise bargaining.

Gender equality

One of the major amendments made by the Secure Jobs, Better Pay legislation was the inclusion of gender equality as part of the object of the Fair Work Act and also as part of the modern awards objective in s 134(1) and the minimum wages objective in s 284(1).

In the minimum wages objective, the new element is expressed as 'the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps'.

The stated intention for these amendments in the Explanatory Memorandum is to 'place these considerations at the heart of the FWC's decision-making, and support the Government's priorities of … ensuring women have equal opportunities and equal pay.'

This objective will take some time to work itself out in practice, but it is clearly going to be a fundamental feature of the industrial relations system going forward. The Parliament, by making this amendment, is clearly telling us that we need to give a greater focus and priority to gender equality.

We discussed these amendments in some detail in this year's Annual Wage Review decision. I just want to highlight three propositions.

(1) We have previously approached the Annual Wage Review on the basis that the task is to determine what adjustment should be made to existing award rates, and the National Minimum Wage, to maintain a safety net of fair minimum wages. However, the requirement now to take into account the elimination of gender-based undervaluation of work in the conduct of the Review itself necessarily requires the consideration of whether the existing minimum rates of pay constitute a properly-valued and non-gender-biased foundation upon which to make any wages adjustment.

(2) The Annual Wage Review decision identifies, and analyses, two potential gender-related undervaluation issues in modern award rates, and the resolution of these issues are firmly on the Commission's agenda. They will receive further consideration in future decisions of the Commission.

In particular, last year's Aged Care decision raised the issue of whether the system established in the late 1980s / early 1990s of creating cross-award alignment of award rates based on the C10 tradesperson's classification was affected by a gender bias towards valuing a certain type of skill associated with male-dominated work. That issue is likely to be explored further in the third stage of the Aged Care proceedings in December, and perhaps in next year's annual wage review.

(3) As we stated in the Annual Wage Review decision, the Commission is in the process of developing a body of research to underpin the future resolution of these and any other gender-related undervaluation issues which may be identified.

We have now received the first stage report from the University of New South Wales, which provides a national data profile of gender-based occupational segregation. The report identifies 29 occupations which involve large numbers of employees, are very highly feminised (over 80% female) and are located within feminised industry classes (over 60% female). In total, they employ over 1.1 million workers constituting over 9% of the workforce. The 13 modern awards which are used to set pay in these 29 occupations will therefore likely to be the focus of attention in the implementation of the new gender equality objective in the Fair Work Act. We intend to publish this report in the near future.

It needs to be emphasised that the gender pay gap across the workforce cannot be closed through the award system by itself, because only approximately 20% of workers, making up about 11% of the national wages bill, have their pay set by modern awards. A range of other mechanisms — legal, economic and social — will need to contribute.

One of the legal mechanisms is the equal remuneration provisions in s 302 of the FW Act. In this connection, I just want to mention one recent decision made by the first pay equity expert panel constituted under the Secure Jobs, Better Pay amendments. The very small number of equal remuneration cases launched before the amendments assumed a large-scale, collective approach to the use of the provisions. But in *Sabbatini v Peter Rowland Group Pty Ltd* [2023] FWCFB 127, the expert panel confirmed what should have long been obvious but was not, namely that the provisions can be used by individuals who do not enjoy equal remuneration for work of equal or comparable value in their own workplace.

In this case, a female chef complained that she was paid less than a number of male chefs who did the same work in the same kitchen. The case ultimately failed because the panel said that the provisions operate prospectively to rectify unequal remuneration going forward, and in this case the applicant had resigned before bringing her case.

However, in my view, the legal profession and the human resources community should look at this because it signposts a way to remedy gender undervaluation at the granular workplace level.