



President's statement

Implementing the *Secure Jobs, Better Pay* changes and the Fair Work Commission's performance in 2022-23

Justice Hatcher, President

Sydney, 2 August 2023

Introduction

[1] This statement provides an update on the implementation of significant changes to the Fair Work Commission's functions resulting from the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Secure Jobs Better Pay Act)*.

[2] The 2022-23 financial year saw a significant expansion of the Commission's functions in several areas, including bargaining, enterprise agreements, workplace sexual harassment, disputes about flexible work arrangements and extensions of unpaid parental leave and changes to the Commission's role in relation to registered organisations.

[3] This statement also gives a summary of the Commission's performance in 2022-23.

Implementing changes to the Commission's functions

[4] On 6 December 2022, the *Secure Jobs Better Pay Act* received royal assent. It introduced several new jurisdictions to the Commission and amended the operation of some existing jurisdictions. The following paragraphs highlight some of the work that was undertaken during the 2022-23 reporting period in preparation for the commencement of this legislative change.

[5] As indicated in my [statement issued on 8 December 2022](#), the Commission is committed to implementing the amendments in an open and transparent way and with the needs of our users in mind. We continue to listen closely to our users and other experts to ensure that their needs are at the heart of the design of our services.

Sunsetting of pre-2010 agreements

[6] We have published extensive information about the sunsetting of pre-2010 agreements ('zombie agreements') on our website. This includes information about how an application may be made to the Commission for an extension to the default period using the approved *Form F81*. The Commission has begun receiving applications to extend the default period. Initial applications have been allocated to a Full Bench for determination to ensure the establishment of guiding principles in this area and consistency in their application. The first of these decisions was *Suncoast Scaffold Pty Ltd* [2023] FWCFB 105, which identified general principles applicable to these types of applications.

[7] All decisions issued to date in this area have been published on the [Extending the default period for a pre-2010 agreement](#) page of our website and can also be found in our [Document Search](#).

[8] In May, we published a [written notice guide for employers](#) and [template written notice](#) to help employers meet their 6 June 2023 compliance obligations. Following on from positive feedback from stakeholders on these materials, we will continue to provide information to help both employers and employees prepare for the sunsetting of their instruments.

Gender equality, job security and expert panels

[9] The object of the *Fair Work Act 2009* in section 3 and the modern awards objective in subsection 134(1) have been amended to include considerations of gender equality and job security. The minimum wages objective in subsection 284(1) has also been amended to include consideration of gender equality. Accompanying these changes has been the introduction of Expert Panels for pay equity and the Care and Community Sector.

[10] These changes were discussed extensively in the *Annual Wage Review 2022-23* decision [2023] FWCFB 3500.

[11] The Annual Wage Review decision also indicated that the Commission has commenced a major research project to identify occupations and industries in which there is gender pay inequity and potential undervaluation of work and qualifications. Stage 1 of the research project will be undertaken by the Social Policy Research Centre at the University of New South Wales and a final report will be published in late October 2023. Stage 2 of the research project will then build on the findings of stage 1. The Annual Wage Review decision also confirmed that:

Once this research project has been completed and the research reports have been published, Commission proceedings will be initiated to consider and, if necessary, address the outcomes of the research project. Depending upon the timing, this may occur as part of or in association with the 2023-24 Review.¹

[12] Further updates about the research project and the next steps in the research program will be published on the Commission's website when they are available.

[13] From 6 March 2023, the *Fair Work Act* was also amended to establish new Expert Panels within the Commission. An Expert Panel is required when the Commission is considering changes to modern awards which relate to gender pay equity or the Care and Community Sector and when deciding whether to make an equal remuneration order.

[14] On 17 July 2023, an Expert Panel for pay equity issued the first decision under the amended equal remuneration provisions (see [\[2023\] FWCFB 127](#)). An Expert Panel for

¹ [2023] FWCFB 3500 at [139].

pay equity in the Care and Community Sector has also been constituted to hear stage 3 of the Work value case – Aged care industry.

Changes to workplace sexual harassment disputes

[15] On 23 February 2023, I issued a statement and implementation report that discussed our expanded sexual harassment jurisdiction and how we planned to implement it. Our National Practice Lead, Commissioner McKinnon, has led the implementation and is supported by specialist staff who take a trauma-informed approach to the case management process. We have published a draft sexual harassment disputes benchbook for consultation and we are finalising publication of a final version. We also updated our Workplace Sexual Harassment Online Learning Module to incorporate information about the expanded sexual harassment jurisdiction. The module is available on through our Online learning portal.

[16] Earlier in the year, we established a Sexual Harassment Working Group consisting of relevant stakeholders working in the field aimed at supporting implementation of the amended jurisdiction. We continue to seek their guidance and views to improve our understanding of the problems that people experiencing sexual harassment encounter when accessing legal services.

Flexible work and unpaid parental leave extensions

[17] On 9 May 2023, I issued a statement about the Commission's new powers to resolve disputes concerning requests for flexible working arrangements and extensions of unpaid parental leave. That statement set out our case management process and the work we would do to support these changes, including the publication of two new forms and information on our website. Additionally, we have recently completed a review of all modern awards to ensure consistency with the new provisions, with all modern awards being varied effective from 1 August 2023.

Changes to enterprise bargaining and agreement making and approval

[18] From 6 June 2023, the *Secure Jobs Better Pay Act* introduced significant changes concerning enterprise bargaining and agreement making. This included the introduction of three types of multi-enterprise agreements, changes associated with protected action ballot orders and eligible protected action ballot agents, genuine agreement and the better off overall test (the BOOT) amongst others.

[19] A summary of the changes to making agreements can be found on our website, along with extensive materials to support parties bargaining from 6 June. We have established an Enterprise Agreements and Bargaining Advisory Group consisting of representatives from peak organisations and other groups that represent users impacted by these changes. The advisory group will provide advice to support the implementation of the amendments and provide ongoing feedback to the Commission about the practical operation of the amendments.

Statement of principles on genuine agreement

[20] After an extensive consultation process with peak councils and other interested parties, we finalised the Statement of Principles on Genuine Agreement. When the notification time for an enterprise agreement occurred on or after 6 June 2023, Members are required to take into account these principles when determining whether an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

Understanding the tests that apply

[21] The enterprise agreement changes flowing from the *Secure Jobs Better Pay Act* impact the various types of agreements differently. Recognising the challenges the community may face when determining what rules may apply to them, we have created a new tool to help people understand which tests apply to single enterprise and multi-enterprise agreements.

[22] We have also updated our date calculator for single enterprise agreements, our notice of representational rights template generator and our section 185 pre-approval checklist.

Changes to bargaining

[23] In the lead-up to the 6 June 2023 changes, the Commission published extensive information on the changes to bargaining, including as to:

- new multi-enterprise agreements: cooperative workplace agreements, single interest employer agreements and supported bargaining agreements;
- changes to protected action ballot order applications, including the introduction of compulsory conciliation conferences;
- intractable bargaining declarations; and
- how the Commission can assist parties to make multi-enterprise agreements.

[24] In my 4 April 2023 statement, I outlined the strategic approach the Commission intended to take in relation to enterprise bargaining, including allocating additional Member resources to support the enterprise bargaining reforms. I reiterate the Commission's commitment to assisting parties during bargaining to help them make an agreement that meets their needs. We will continue to undertake work in this space in the months ahead. Parties are encouraged to subscribe to our newly-created and dedicated Bargaining updates service to stay informed.

Protected action ballots

[25] The Commission has now approved six eligible protected action ballot (PAB) agents in addition to the Australian Electoral Commission (AEC). A list of eligible PAB agents is published on our website. We are also publishing details of applications in progress for

approval of PAB agents about which interested parties may make submissions, in order to ensure that applications are dealt with in a fair and transparent way.

[26] In accordance with the new requirement in the *Secure Jobs Better Pay Act*, the Commission has begun ordering compulsory conciliation conferences upon making protected action ballot orders. From 6 June to 14 July 2023, Members conducted 29 compulsory conciliation conferences involving 102 parties (noting that the number of parties does not indicate the number of attendees at a conference).

[27] As previously indicated, the Commission intends for these conferences to be a meaningful process. The requirement to conduct compulsory conciliation conferences and to provide appropriate notice to those attending, are factors that the Commission has taken into account when determining the protected action ballot periods in some instances. Parties seeking a protected action ballot order can generally expect, subject to proper consideration of the particular circumstances of each case, the following ballot periods:

- If the ballot agent is the AEC — A ballot period of 30 working days from the date of the order (due to AEC requirements).
- If the ballot agent is not the AEC — A ballot period of 10-15 working days from the date the order.

[28] Protected action ballot order decisions can be found in our [Document Search](#).

Major bargaining cases

[29] The Commission has received 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](#). We have begun publishing information about the progress of these cases. 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

[30] From 6 March 2023, the General Manager of the Commission has taken over the functions of the former Registered Organisations Commission (ROC) as well as additional powers conferred by the *Secure Jobs Better Pay Act*. The Commission has now:

- established a Registered Organisations Commission Transition Advisory Committee consisting of the Australian Industry Group, the Australian Council of Trade Unions and the Australian Chamber of Commerce and Industry, to provide advice concerning cooperative measures to support regulatory compliance by registered organisations;
- seamlessly absorbed former ROC staff members as part of a machinery of government transfer and completed an internal restructure by consolidating all

functions relating to registered organisations into a single branch named the Registered Organisations Services Branch;

- released an interim Compliance and Enforcement Policy;
- developed and delivered education materials and prepared an interim Education and Engagement Strategy;
- progressed investigations and inquiries; and
- redesigned and rebuilt the registered organisations section of our website and subscription service to better share information with registered organisations.

[31] The General Manager has also initiated an independent review of the Commission's registered organisations governance and compliance functions. The persons conducting the review are former senior Commission Members Anna Booth and Jonathan Hamberger, who were the consensus selection of the Registered Organisations Transition Advisory Committee. The terms of reference of the review are available on the Commission's website.

[32] Every registered organisation has been invited to assist with the review. The review is scheduled to be completed shortly and the final report will be provided to all registered organisations.

Future implementation work

[33] Using the engagement measures outlined above as a baseline, the Commission will continue to develop its work program to support further engagement in the areas identified. We are also working to prepare for changes that commence from 6 December 2023 (or an earlier date to be fixed by proclamation), including changes to fixed term contracts and any consequences which may flow from the sunseting of pre-2010 agreements.

The Commission's performance in 2022-23

[34] In 2022-2023, the Commission:

- met or exceeded its key performance indicators (KPIs);
- delivered timely finalisation of cases overall and delivery of decisions;
- assisted the informal settlement without arbitration of around 90% of 12,500 disputes under an award or agreement and unfair dismissal cases, helping parties to save time and cost in the resolution of their cases; and
- met or exceeded the expectations of 82.2% of surveyed users.

[35] At 30 June 2023, the Commission had received 31,520 lodgments and finalised 32,180 matters in 2022-23. This represents a clearance rate of 102%. Consequently, the Commission is not carrying any backlogs in any case type into the 2023-24 reporting period.

[36] The Commission has been able to deal with its caseload quickly, efficiently and effectively. In 2022-23:

- 50% of cases were finalised in 33 days or less (within 5 weeks); and
- 90% of cases were finalised in 90 days or less (within 13 weeks).

[37] In respect of applications for approval of enterprise agreements:

- 50% were approved in 17 days or less (within 3 weeks); and
- 90% were approved in 36 days or less (within 6 weeks).

[38] The Commission was able to approve complete and compliant applications in much shorter timeframes, with 50% of these approved within just 12 days, exceeding our target of 32 days. Approximately 96% of all enterprise agreements were approved by the Commission. Only 0.5% were actually rejected, with the remaining applications being withdrawn prior to determination.

[39] Decisions by Members in 2022-23 were generally issued expeditiously following the final hearing or submission date:

- 50% were issued within 15 days or less (within 3 weeks); and
- 90% were issued within 84 days or less (within 12 weeks).

[40] The Commission's staff conciliators conducted over 7,700 unfair dismissal conciliations in 2022-23. 50% were conducted within 33 days of lodgment, meeting our target of 34 days.

[41] The Commission has met its statutory obligations to deal with industrial action applications and applications for orders to stop workplace bullying and sexual harassment within the timeframes prescribed by the legislation:

- all applications for orders to stop workplace bullying or sexual harassment were commenced in 14 days or less, with over 50% commenced on the same day they were lodged;
- all applications to stop unprotected industrial action were dealt with in 2 days or less;
- all applications to stop protected industrial action were dealt with in 5 days or less; and

- applications for protected action ballot orders were, as far as practicable, dealt with in 2 working days or less.

[42] Fewer than 1% of first-instance decisions were the subject of a successful appeal, indicating the high quality of work by our Members in their decision-making. When appeals were lodged, the Commission dealt with them quickly and efficiently. Almost all appeals were heard within 12 weeks of lodgment.

[43] In 2022-23, the Commission introduced a new internal performance measure in response to user experience research highlighting the importance of providing parties with meaningful information about their case from the outset. As set out in our 2022-23 Corporate Plan, we aimed to ensure that 90% of applications are substantively processed within 3 days of lodgment, and that applicants receive timely information upon lodgment of their application. This information includes:

- providing parties with information on the case management process;
- timeframes for each step of that process; and
- how to obtain further assistance.

[44] We have exceeded this target of 90%.

[45] The strong operational performance of the Commission during this busy financial year provides confidence that we are in a sound position to continue delivering core services in a timely manner while also innovating across the institution to ensure we meet the expectations of the community we serve.

Conclusion

[46] In 2022-23, the Commission undertook extensive work to support business, employees and the community with the *Secure Jobs Better Pay Act* changes through proactive and targeted communication and education. From the outset of the implementation process in December 2022, we committed to placing our users' needs at the heart of the design of our services. We will continue meet this commitment.

[47] We have also integrated these new functions into our existing performance framework so as to ensure the continued delivery of efficient, timely, and quality dispute resolution service in all areas of the Commission's jurisdiction.

[48] My appreciation goes to the Commission's Members, the General Manager, and all our staff who have worked diligently to improve existing processes while also implementing the significant changes to Commission functions resulting from the *Secure Jobs Better Pay Act*.

[49] I also thank the members of our various advisory groups who have offered their knowledge and experience to the Commission. Their active involvement in consultation has assisted the Commission to innovate and adapt to the new legislative environment while maintaining a high level of operational performance.

PRESIDENT