‘Shift in FWC Work’

In recent years the composition of the Fair Work Commission’s work has fundamentally changed - from collective to individual dispute resolution. Part of this shift is a result of legislative change (such as unfair dismissals and general protections) and it is partially explained by declining union membership.

Historically, a substantial part of the Commission’s work has related to the resolution of collective industrial disputes. The parties to these disputes - unions, employers and employer organisations - are ‘repeat players’, familiar with the legislative framework and the Commission’s procedures.

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

Measured working days lost, the level of industrial disputation today is around one fifth of the level of industrial disputation experienced during the 1980s.

Collective dispute resolution will always be a core Commission function, because of the impact that such disputes may have on the parties and the community generally. As such they will continue to receive priority attention.

But we also recognise that individual dispute resolution is now a substantial part of our work and collective dispute resolution is declining in relative terms.
In the 1998-99 financial year, around 64 per cent of the applications lodged with the Commission were collective in nature, with the remaining 36 per cent comprised of applications lodged by individuals. In 2011-12, the Commission’s work largely consisted of individual matters, with 61 per cent of applications lodged by individuals and 39 per cent lodged in relation to collective matters.

The parties to individual disputes are often unfamiliar with the Commission’s procedures and the relevant legislative provisions. We have an obligation to explain these matters to self-represented parties.

Commission Members are responsible for ensuring that all of our proceedings are fair and that parties are treated with courtesy and respect. An important element of the obligation to provide a fair hearing is the duty to give appropriate assistance to parties, and in particular self-represented parties.

However, the assistance to be provided to a self-represented party is limited. It is plainly necessary to balance the interests of parties who represent themselves with the need to afford procedural fairness to other parties, and to ensure that hearings are conducted efficiently and costs are kept to a minimum. All parties have the right to a fair and efficient hearing.

In October last year we launched our Future Directions strategy which sets out the 25 initiatives we intend to implement by the end of October 2013 to improve our performance and the quality of the service we provide.

The information and assistance provided by the Commission to parties, particularly self-represented parties, is an important part of improving access to justice. The need to address this has become more urgent given the fundamental shift in the Commission’s workload.

Many of these initiatives are directed at promoting fairness, and improving access to justice and delivering a more efficient dispute resolution service.

This update report sets out some of the initiatives we have taken to assist self-represented parties.

“For those unfamiliar with the Commission’s processes and how a hearing is conducted, the experience can be daunting. The information and assistance we provide can be a significant benefit to such parties.”

JUSTICE ROSS
We have implemented the following initiatives:

Eligibility checklist
A checklist is available on the Commission’s website to assist potential applicants in unfair dismissal cases to work out whether they meet the eligibility requirements to make an application.

Outcome information
The outcomes of unfair dismissal conciliations and arbitrations are published on our website to give parties to applications an understanding about how matters have previously been finalised.

Other information for unfair dismissal matters

• Guides
An extensive range of information guides are available to assist all parties to unfair dismissal applications at each stage of the process.
They also include sample forms to show parties what should be included when making and responding to applications.

• Three day cooling off period
A three-day cooling off period for unrepresented parties in unfair dismissal matters has been established, to give an opportunity to parties in unfair dismissal conciliations to seek advice about a proposed settlement.

• Checklist for preparing for conference
The Commission has recently made available an interactive form that assists parties when preparing materials for unfair dismissal proceedings before the Commission. This checklist assists parties to address all of the issues that may be relevant to an unfair dismissal proceeding, ensuring that matters can proceed efficiently and fairly at a conference or hearing.

• SMS alerts to reduce transaction costs
SMS alerts are being trialled in unfair dismissal matters. These alerts remind parties 24 hours before telephone conciliations in order to reduce the costs incurred unnecessarily where parties do not participate.
Today, we are announcing the implementation of three new initiatives.

1 Pro bono program in Melbourne

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

A pilot pro bono program will begin in Melbourne on 17 May 2013 for unfair dismissal jurisdiction matters. The pilot program is supported by 14 national law firms. We greatly appreciate their commitment to this important initiative. This program is aimed at achieving a key objective of our Future Directions strategy to promote fairness and improve access to justice. Increasingly the Commission is dealing with applications that are made, or objected to, by unrepresented parties. Some issues, such as objecting to unfair dismissal applications on the grounds that the Commission does not have jurisdiction to deal with them, can be particularly complex. For respondents in these matters who are self represented, this can result in obstacles to accessing justice.

The Commission’s pilot pro bono program matches eligible self-represented parties with pro bono legal services, to assist them to address these more complex jurisdiction issues on the day of a jurisdiction hearing. Deputy President Gostencnik and Commissioner Lee are coordinating the implementation of the Melbourne pro bono program. We intend to extend the pro bono pilot scheme to Sydney by the end of June 2013. Senior Deputy President Drake will be coordinating the implementation of the Sydney pro bono scheme.

2 Unfair Dismissal Benchbook

A Benchbook is a resource that is generally used by Judges and Tribunal members as a central collection of decisions that have been made around key areas within their jurisdiction. The Unfair Dismissal Benchbook has been designed to provide accessible information to self-represented parties to unfair dismissal matters.

The Unfair Dismissal Benchbook contains plain English summaries of the key principles of unfair dismissal case law. It also contains case summaries that illustrate how the principles have been applied in decisions of the Commission. The Unfair Dismissal Benchbook is intended to be a guide for both applicants and respondents to unfair dismissal claims. It is intended to assist with making and responding to applications and with preparing materials in accordance with the directions of the Commission. It is intended to be used in conjunction with other interactive tools on the Commission’s website that are currently under development.

It is envisaged that the availability of this Benchbook will improve access to justice at the Commission by increasing the accessibility of relevant case law.

Sections of the Unfair Dismissal Benchbook will be available on the Commission’s website from 6 May 2013. These sections will provide a snapshot of the Unfair Dismissal Benchbook, demonstrating the structure and the style. Feedback about the structure and style of the resource is welcome and can be provided by a link on the website.

The final copy of the Unfair Dismissal Benchbook will be published in June 2013 today we are releasing a portion of the Benchbook as part of a community engagement process.

The content is still in draft and will be fully reviewed by the Commission’s Legal Profession Reference Group and our internal processes before a final version is put on the website.
Benchbooks will also be made available in relation to general protections disputes and agreement making later this year. It is envisaged that the availability of these benchbooks will result in greater access to justice, with an accessible resource that assists those who come before the Commission to have a better understanding of how it makes decisions about specific aspects of agreement making, and what it may consider during a conference or hearing.

A Benchbook Committee has been established, chaired by Vice President Hatcher, and it will be responsible for finalising the draft Unfair Dismissal Benchbook and maintaining it over time. The Benchbook Committee will also be commencing work on the development of other benchbooks dealing with other aspects of the Commission’s work. We intend to make all of these publications generally available online.

3 Appeals Practice Note

Practice notes provide parties with information about the processes and procedures adopted by the Commission. A new practice note has been developed through extensive internal and external consultation. The Appeals Practice Note provides a general explanation of appeal rights and sets out the procedures followed by the Commission in the listing, hearing and determination of appeals. The new practice note will facilitate consistent administrative processes when dealing with appeals, including the option of determining an appeal ‘on the papers’ without the need for a hearing.

Thank you

The implementation of these initiatives has been a collective effort. It has required the commitment and support of Members, staff and our key stakeholders.

I would like to thank all of those involved, for their hard work, dedication and commitment in implementing these initiatives.

Justice Iain Ross AO
President

Links to the Future Directions strategy

Website:

Future Directions Strategy

Future Directions Progress Report and Engagement Strategy
(1.) Source: Fair Work Commission calculations based on ABS, *Industrial Disputes, Australia, Dec 2012*, Catalogue No. 6321.0.55.001. Weighted averages are for the quarters covered by different employment relations arrangements.


(2.) Note: Figure 1 does not include the following types of matters: dispute notifications, appeals (or, Full Bench matters including appeals), the Annual Wage Review, reviews of modern awards, and the termination of industrial instruments replaced by awards.

Source: *Annual Reports of the Australian Industrial Relations Commission*, various; *Fair Work Australia Annual Reports*, various.