Improving public value

Future Directions 2014–15 pilot program update

The Fair Work Commission serves the community through the provision of an accessible, fair and efficient dispute resolution service for employment relations matters. Over time the tribunal has undergone changes to its name, functions and structure and endures by successfully adapting to these changes.

*Future Directions* is the Commission’s ongoing change program of initiatives designed to adapt and improve services in a contemporary environment and to meet the shift in the nature of the Commission’s work from primarily dealing with disputes of a collective nature to more individual rights-based matters. This program will assist the Commission to improve its performance, efficiency and the quality of its services, making it easier for both the ‘one time’ and regular users to effectively engage with the Commission.

A further challenge the Commission faces, along with most public organisations, is to continue to deliver quality services to the Australian community efficiently and effectively within the resources allocated to it. In short, how do we deliver improved services at a lower cost? The Commission is committed to meeting this challenge by directing its resources to where they will deliver the best outcomes and by operating in a manner consistent with best practice in Australian tribunals and courts. A series of pilot programs have been conducted in 2014–15 to trial and test new ways of delivering services to meet this challenge.

The purpose of this document is to provide an update on the progress and results of our pilot programs. The effectiveness of these programs has been made possible by the ongoing support of our stakeholders. The Commission invites all of its stakeholders and the broader community to provide feedback on the work we have done and make suggestions for new programs we should consider.

In recent weeks a number of internal and external events have been held across the country to provide information to stakeholders and to seek feedback on the developments outlined in this document. These events form part of broader ongoing consultation and engagement with stakeholders to ensure that the Commission continues to meet the evolving needs of the community it serves.

**Improving our performance—pilot programs**

In 2014–15 the Commission began three pilot programs to test different ways of delivering its services in dispute resolution (general protections claims involving dismissal), enterprise agreement approval and determining permission to appeal applications.

The aim of the pilots has been to better utilise the Commission’s resources by trialling the efficacy of administrative staff performing non-determinant work and freeing up Members for more complex matters. The permission to appeal pilot will be reviewed in October this year. The general protections and agreement approval pilots have recently been reviewed by Inca Consulting, led by its Director Murray Benton, in association
with Dr George Argyrous, Senior Lecturer in Evidence-Based Decision-Making, University of NSW.

The key findings are presented here and the full reports are available on the Commission’s website.

**General protections pilot**

The general protections provisions of the *Fair Work Act 2009* (the Act) require the Commission to conduct conferences to assist parties to resolve their dispute in a conciliation process. If the Commission is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful, then it must issue a certificate to that effect and an application can then be made to a Federal Court (or if the parties agree, the Commission) for the determination of the dispute.

The general protections pilot commenced on 1 September 2014 and involved a small team of specially-trained staff conciliators conducting conferences for general protections applications lodged in Western Australia, Queensland and the Australian Capital Territory. The program was overseen by Deputy President Kovacic. Nominated staff acted under my delegated authority. Where a matter could not be resolved in conciliation it was referred to Deputy President Kovacic to finalise, including by issuing a certificate stating that all reasonable attempts to resolve the dispute had been, or are likely to be, unsuccessful.

In the period from 1 September 2014 to 31 March 2015, staff conciliators conducted 444 conferences. These conferences were conducted by telephone, following the successful model for administrative conciliation in unfair dismissal matters. A survey was undertaken during the pilot period to measure parties’ satisfaction with their interactions with the Commission in conferences conducted by both Members and staff conciliators.

The review of the pilot focused on the following performance indicators:

- timeliness of the process
- outcomes of conferences and the consistency in approach
- distribution of administrative workload and cost effectiveness, and
- ability to meet the needs of, and minimise risks for, parties and tribunal Members.

A centralised case management team was established to coordinate the Commission’s resources in managing and scheduling matters up to the time of the conference. The results of the pilot showed a clear improvement in the timeliness of scheduling conferences.

In 2013–14, the median time between the lodgment of an application and a conference was 29 days, with 90% of conferences conducted within 59 days of lodgment. In the pilot program, conferences were conducted within 21 days (median) and 90% were conducted within 43 days.
The proportion of matters resolved through conciliation was greater in the pilot than experienced using the traditional method. The average settlement rate for staff-conducted conciliation conferences during the pilot (from 1 September 2014-31 March 2015) was 73% of matters, compared to 60% for Member-conducted conferences from July–December 2014.

The review concluded:

_The General Protections Pilot has demonstrated in emphatic terms that centralised case management and the use of staff conciliators is a more efficient and effective arrangement than the traditional one … The approach benefits parties to general protections disputes as well as the Fair Work Commission. There appears to be no reason to not adopt the approach nationally._
In many respects the review findings are unsurprising as staff conciliators provide a more focused service in which matters are rostered and allocated a sufficient period of time. In contrast, there are many demands on Members’ time as they perform a range of determinative functions and are not always able to allocate sufficient time to general protections matters.

Chart 3: Agreement with statements about interactions with FWC staff regarding applications (agrees or strongly agree)

- They provided or directed me to information that I needed: 88% (Staff conciliator conferences), 61% (Member conferences)
- They were easy to understand: 88% (Staff conciliator conferences), 76% (Member conferences)
- They were polite: 100% (Staff conciliator conferences), 84% (Member conferences)
- They were helpful: 88% (Staff conciliator conferences), 76% (Member conferences)

Further information on Chart 3 can be found at page 9 of the review of the general protections pilot.

These findings have been made publically available to invite comment on this pilot and to seek views about establishing this model as a national process from 1 July 2015. Comments can be made to feedback@fwc.gov.au by 26 June 2015.

Enterprise agreement approvals pilot

A second pilot program was established in late 2014 to trial a new process for dealing with enterprise agreement applications to determine if improvements could be made in relation to:

- timeliness
- cost effectiveness, and
- consistency.

Under the guidance of Deputy President Gostencnik, Deputy President Kovacic and Commissioner Lee, enterprise agreements lodged for approval are assigned to specially-trained staff for assessment to ensure compliance with each of the statutory obligations, including bargaining, voting and prescribed content. The staff also prepare an assessment as to whether each enterprise agreement meets the better off overall
Commission Members continue to make all decisions as to whether an agreement should be approved, assisted by the analysis of the administrative staff.

Commencing in October 2014, the pilot assessed most Victorian enterprise agreements in the building, metal and civil construction industry, some enterprise agreements from Western Australia and all enterprise agreements from Tasmania. Once operational processes had been established and internal training material developed, the pilot was expanded in December 2014 to incorporate all agreements from Western Australian and the Australian Capital Territory. From 1 January 2015, the pilot has been responsible for assessing approximately 32% of all agreement applications lodged with the Commission.

The independent review of the pilot concluded that administrative staff can effectively and efficiently assess the compliance of enterprise agreements with the Act, and to the satisfaction of the Commission Members overseeing the pilot.

*I have a high level of confidence...very consistent, high level of work.*

*They stick to the procedure, don’t free-wheel.*

*I’ve got confidence that the information flow is there to help make the right judgement.*

The pilot has shown that, particularly in recent months, there has been a consistent improvement in timeliness, with further potential to achieve additional improvements in the future. The review identified that the timeframes for approvals made under s.186 of the Act are significantly better under the pilot.

**Chart 4: Number of days from lodgment to result for enterprise agreements**

<table>
<thead>
<tr>
<th>50% of s.186</th>
<th>90% of s.186</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pilot</strong></td>
<td><strong>Non-pilot</strong></td>
</tr>
<tr>
<td>12.5</td>
<td>35.5</td>
</tr>
<tr>
<td>18</td>
<td>41</td>
</tr>
</tbody>
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Further information on Chart 4 can be found at page 6 of the [review of the enterprise agreements pilot](www.fwc.gov.au).

The review also indicates that the pilot is significantly more cost effective. The cost modeling assumes administrative staff can largely replace the higher costs associated with Members’ involvement under the current model. The reality is more complex and will depend on decisions made by Government about the replacement of Members as they retire. The pilot demonstrates that Members can be made available to focus on determinative and other complex work that makes better use of their specialised skills and statutory responsibilities.

Finally, the review found that the pilot had facilitated the more consistent treatment of agreement approval applications. Trends in bargaining are also more easily observable, which provides the Commission with an opportunity to more actively assist parties to prepare enterprise agreements and avoid common pitfalls. For example, the *Notice of Employee Representational Rights Guide* has been developed with the
objective of assisting parties to comply with the relevant statutory provisions and decrease the incidence of draft agreements having to be withdrawn because of a technical non-observance of a pre-lodgment requirement. An enterprise agreement making ‘step-by-step’ guide for small businesses is also under development.

In addition, Commission Members have started delivering industry briefings to assist employers and industry groups lodge compliant enterprise agreements, which will reduce the parties’ regulatory burden and the time associated with making an agreement. These briefings will continue to occur, especially in the early stages of industry bargaining rounds. It is expected that, over time, the initiatives in relation to the briefings and the development of educational materials will lead to a longer term improvement in the efficient assessment and timely approval of enterprise agreements.

The report of the independent review of the enterprise agreements pilot is available on the Commission’s website.

As with the general protections pilot, the Commission invites feedback on this initiative. Comments can be made to feedback@fwc.gov.au.

Permission to appeal pilot

The Commission is also piloting a new approach to determining permission to appeal applications which is already showing improvements in efficiency for both for the parties and the way in which the Commission’s resources are allocated. In dealing with an appeal the Commission must consider two questions: whether permission to appeal should be granted and, if so, the substantive merits of the appeal. Commission practice has been for a Full Bench to consider both questions at the same hearing. This requires parties to prepare for both issues, notwithstanding that in a significant number of cases, permission is ultimately refused. For example, in 2014 permission to appeal was refused in over 70% of unfair dismissal appeals.

The pilot is designed to reduce transactional costs for parties by minimising the need to prepare for the substantive appeal. The pilot is also designed to improve internal efficiency through a reduction in the number of days required to hear appeals by listing a number of permission to appeal applications for hearing on the same day.

All appeals are assessed for their appropriateness for inclusion in the pilot. Appeals for which historical data suggests a higher likelihood of being refused permission to appeal are included in the pilot (for example, unfair dismissals matters). Appeals in the pilot are heard by a Full Bench over one or two days every month.

In the first six months of the trial:

- 56 applications were included in the pilot
- 37 (66%) were refused permission to appeal
- 13 (23%) were granted approval to appeal, and
- 6 (11%) decisions are pending.

Although the early outcomes are promising across a number of indicators, including reducing the administration and regulatory burden on parties, the pilot will be reviewed in October this year and, depending on the outcome, consideration will be given to extending the pilot into 2016.

Your involvement in the upcoming review is welcome. Should you wish to provide feedback, your comments can be directed to feedback@fwc.gov.au.
Update on other Future Directions program initiatives

Access to audio recordings of proceedings

In the coming month, the Commission will start providing free access to audio recordings of proceedings for most matters. The audio recording will be accessible within a short timeframe after the conclusion of the proceedings. Parties will be able to choose between downloading and saving the audio recording in a standard format (e.g. MP3) to their local computer and streaming the audio recording using a media player that will be provided on the website. This initiative will save parties the expense of ordering a transcript of their proceedings. The Commission will continue to provide access to transcriptions of major cases and other matters where the presiding Member has requested that a transcript be prepared.

Benchbooks

The Commission’s webpage dedicated to benchbooks has been visited over 32,000 times by approximately 23,000 individual users since 1 January 2015. To ensure that each of the four benchbooks continues to provide the most up-to-date information available, they are currently undergoing a comprehensive review. In addition, work has commenced on developing a further benchbook on industrial action.

The Commission is also currently working with a major international publisher with a view to having each of the benchbooks available as part of their online repository of resources.

The anti-bullying benchbook has been reviewed and an updated benchbook uploaded to the Commission’s website.

Improving public value

The successful implementation of the pilots described above, together with other initiatives we are taking to improve our performance, will assist the Commission to deliver improved public value to the Australian community by meeting its statutory obligations at a lower cost.

In the period 1 July 2014 to 1 July 2016, a significant number of Commission Members reach the statutory retirement age of 65. Although some Members will need to be replaced, the initiatives we have developed will mean we can deliver improved services more cost effectively and with fewer Members.

Justice Iain Ross AO

President, Fair Work Commission

11 June 2015