Review of the permission to appeal pilot

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Executive summary

[1] Australia’s national workplace relations tribunal, the Fair Work Commission (the Commission) has a range of functions and responsibilities under the Fair Work Act 2009 (the Fair Work Act), one of which is determining appeals of first instance decisions of single Members of the Commission or the General Manager (including the delegate of the General Manager). The statutory provisions relating to appeals aim to provide an avenue for redress by allowing aggrieved parties to appeal alleged errors of law or fact identified in the reasoning of the original decision maker. Parties who invoke these provisions by applying to the Commission within the 21 day statutory time limit will have their matter heard and determined by a Full Bench.

[2] The Commission has experienced an increase in appeal lodgments over the last 12-18 months. Unfair dismissal matters made up 57.3% of all appeal matters dealt with by the Commission in 2014-15. The total number of unfair dismissal matters being appealed in 2014-15 increased by 83.6% from the previous financial year.

[3] During the period 1 January to 31 December 2014 permission to appeal was refused in a total of 60% of matters. Of the unfair dismissal appeals dealt with during that period, 73% were refused permission to appeal.

[4] As these figures show, unfair dismissal matters represent the majority of appeal matters, a substantial proportion of which are refused permission to appeal. In this context it is important to appreciate that unfair dismissal applications represent the largest number of first instance applications made to the Commission and that the statutory test for being granted permission to appeal in an unfair dismissal matter has a higher threshold than other appeal matters.

[5] To address these issues a permission to appeal pilot was established in December 2014 with a new approach being adopted in the case of appeals in unfair dismissal matters and a small number of other appeal matters. The aim of the pilot was to ensure that these matters were dealt with more efficiently and effectively.

[6] When an appeal was allocated to the pilot all parties were informed that the issue of permission to appeal was to be determined as a threshold matter. The appellant was required to file a short written submission in support of the application for permission to appeal. They did not need to file witness statements, evidentiary material or lengthy submissions addressing the merits of their case. The respondent was not required to file any written submissions in response.

[7] All appeals dealt with by the pilot were heard over two consecutive days in the month following lodgment, with the objective of bringing these matters to a more timely resolution. The same Full Bench dealt with all permission to appeal applications listed for hearing over the two days. The Full Bench sat in either Melbourne or Sydney, with video links to other states as required.

[8] Analysis of statistics relating to the permission to appeal pilot and the normal appeal process shows that there has been a significant improvement in time between the permission to appeal hearing and the decision being handed down, with decisions being handed down within a median time of 1.7 weeks compared to a median time of 3.6 weeks for the normal appeal process.
In addition to the improvement in timeliness, the pilot has reduced costs for parties and provided efficiencies for the Commission while maintaining access to procedural fairness for the parties involved in these proceedings.

As a result of the success of the permission to appeal pilot, the review team recommends that the pilot becomes the standard practice for dealing with unfair dismissal and general protections consent arbitration dismissal appeals, unless the President determines that any such appeal is more appropriately dealt with outside the permission to appeal roster.

Legislative framework for appeals

The provisions of the Fair Work Act that relate to appeal matters are set out as follows:

Part 5-1—Fair Work Commission
Division 3—Conduct of matters before the FWC
Subdivision E—Appeals, reviews and referring questions of law

604 Appeal of decisions

(1) A person who is aggrieved by a decision:
   (a) made by the FWC (other than a decision of a Full Bench or the Minimum Wage Panel); or
   (b) made by the General Manager (including a delegate of the General Manager) under the Fair Work (Registered Organisations) Act 2009;

   may appeal the decision, with the permission of the FWC.

(2) Without limiting when the FWC may grant permission, the FWC must grant permission if the FWC is satisfied that it is in the public interest to do so.

Note: Subsection (2) does not apply in relation to an application for an unfair dismissal (see section 400).

(3) A person may appeal the decision by applying to the FWC.

Part 3-1—General protections

Division 8—Compliance

375A Appeal rights

(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under subsection 369(2) (which is about arbitration of a dismissal dispute) unless the FWC considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under subsection 369(2) can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.
Part 3-2—Unfair dismissal

Division 5—Procedural matters

400 Appeal rights

(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

[12] As can be seen, a higher threshold is required to meet the permission to appeal test for unfair dismissal and general protections consent arbitration dismissal appeal matters compared with the general provisions under section 604: the Commission must not grant permission to appeal unless it considers that the public interest requirement has been satisfied.

Background

Normal appeal process

[13] The Commission’s appeals process has been developed within the context of the appeals provisions of the Fair Work Act, its predecessor legislation as well as past jurisprudence in relation to appeals stemming from the Courts.

[14] A decision or order made by either:

- a single Member of the Commission, or
- the General Manager of the Commission (including a delegate of the General Manager)¹

can be appealed by a person aggrieved by that decision or order. Appeal matters are heard by a Full Bench of the Commission composed of two presidential Members and one Commissioner. Appeal matters are allocated to Full Benches based on a roster system which is prepared and distributed by the President’s chambers each year.

[15] Generally, an appeal is not a rehearing of a matter, but instead requires the person making the application (the appellant) to first point to an error of law or fact in the original decision maker’s reasoning.

[16] The Full Bench may also intervene on the basis that the decision subject to appeal is unreasonable or plainly unjust.

[17] In each appeal the Full Bench needs to determine two issues:

- whether permission to appeal should be granted, and, if granted
- whether there has been an error in the original decision.

[18] Special requirements exist for appeals against unfair dismissal and general protections consent arbitration dismissal decisions. If the appellant claims that an error has been

¹ In matters concerning the Fair Work (Registered Organisations) Act 2009.
made, they must prove that it is a ‘significant error of fact’.\(^2\) Permission to appeal from an unfair dismissal or general protections consent arbitration dismissal decision must not be made unless the Commission considers that it is in the public interest to do so.\(^3\)

[19] The appellant has 21 days to file an application to appeal a decision or order.\(^4\) After the matter is allocated to a rostered Full Bench, the chambers of the presiding Member (the most senior Full Bench Member) is responsible for the administration of the appeal file, including liaising with parties. Directions are provided to parties outlining the appeal process and requiring certain documents be filed with the Commission and served on other parties within a specified time frame. The matter will then be listed for a hearing before the Full Bench. In a limited number of cases, and with the consent of all parties, the matter may be determined on the papers.

[20] In preparation for an appeal hearing, the appellant must lodge three copies of an ‘appeal book’ with the Commission, which contains:

- any order made by the Commission
- the statement of the reasons for the decision
- the transcript of the evidence and argument in the proceedings from which the appeal is brought, or the relevant extract from the transcript (it is the appellant’s responsibility to obtain a copy of the transcript for inclusion in the appeal book)
- each document that was an exhibit or written submission in the proceedings and relates to the grounds of appeal set out in the notice.

[21] There are strict time limits for compliance, including that the appeal book must be lodged within seven days of the Notice of Appeal. The Commission may waive in whole or in part the requirement for the appellant to provide appeal books if the appellant makes a written request before the time at which the appellant is required to lodge the appeal books.

[22] Once the matter is listed for hearing, both the appellant and the respondent will be directed to file and serve an outline of their submissions by specified dates. Submissions may also be required regarding permission to have legal representatives to appear on behalf of parties.

### Information available to assist parties in the appeal process

[23] To assist parties, including self-represented appellants and respondents, the Commission has developed a range of materials to help parties navigate their way through the appeals process:

- [Fair Hearing](#) and [Appeals Proceedings](#) practice notes
- [Virtual tour](#)
- [Unfair Dismissal Benchbook](#)
- [Decisions database on the Commission website](#)
- Permission to appeal information sheet

\(^2\) Sections 400 and 375A of the Fair Work Act.
\(^3\) Sections 400(1) and 375A(1) of the Fair Work Act.
\(^4\) As specified by the Fair Work Commission Rules, r. 56(2), though an appellant may seek an extension of time in certain circumstances.
Increasing number of appeals

[24] The following table shows the difference in appeals determined between 2013-14 and 2014-15 financial years broken down by matter type:

Table 1 – Appeals determined between 2013-14 and 2014-15

<table>
<thead>
<tr>
<th>Matter Type</th>
<th>Appeals upheld</th>
<th>Appeals dismissed</th>
<th>Total appeals determined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unfair dismissals</td>
<td>23</td>
<td>32</td>
<td>50</td>
</tr>
<tr>
<td>Agreement approvals</td>
<td>6</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>s.739 disputes</td>
<td>6</td>
<td>11</td>
<td>8</td>
</tr>
<tr>
<td>Industrial action</td>
<td>5</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Modern Awards</td>
<td>6</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Bargaining disputes</td>
<td>3</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Right of entry</td>
<td>2</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>5</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>Total</td>
<td>56 (40.3%)</td>
<td>66 (28.2%)</td>
<td>83 (59.7%)</td>
</tr>
</tbody>
</table>

[25] As can be seen from the above table, the total number of appeals determined has risen from 139 in 2013-14 to 234 in 2014-15, an increase of 68.3%. In the same period the number of unfair dismissal matters rose from 73 to 134, an increase of 83.6%. Unfair dismissal matters made up 57.3% of all appeal matters dealt with by the Commission in 2014-15.

Establishment of the permission to appeal pilot

[26] In a Statement published on 15 December 2014 the President stated that a permission to appeal pilot would run for 12 months from January 2015 and would be reviewed at the conclusion of this period. In an update issued in June 2015 the President stated that the review of the pilot would be brought forward to October 2015.

[27] The permission to appeal pilot was conceived as a method of improving the efficiency of the Commission’s appeals process. As noted earlier, the Fair Work Act provides that two requirements be satisfied in order for an appeal to be successful:

- that permission to appeal should be granted, and, if granted
- that there has been an error in the original decision.
Review of the permission to appeal pilot

[28] Full Benches dealing with matters which were part of the pilot initially dealt only with the threshold test of whether permission to appeal should be granted. If the test could not be satisfied, then the matter was dismissed. If permission was granted, the matter proceeded to a substantive hearing to determine whether an error had occurred. The process was modelled closely on the ‘application for special leave’ system used by the High Court to determine whether an appeal can meet preliminary legal requirements before proceeding to substantive hearing.

Outline of permission to appeal pilot

[29] The framework for the permission to appeal pilot is set out below:

- All appeals were assessed for inclusion in the pilot. Those appeals which the Commission’s data suggests have a higher likelihood of being refused permission to appeal (e.g. unfair dismissal and general protections consent arbitration appeals, because of the higher statutory threshold for permission to appeal) were likely to be included in the pilot.

- When an appeal was allocated to the pilot all parties were informed that the issue of permission to appeal was to be determined as a threshold matter. The appellant was required to file a short written submission in support of the application for permission to appeal. This submission had to be filed seven days before the permission to appeal hearing. They did not need to file witness statements, evidentiary material or lengthy submissions addressing the merits of their case. The respondent was not required to file any written submissions in response.

- All appeals included in the pilot in a particular month were heard across two days, at a specified time, in the month following lodgment (usually the 3rd week of the following month). So appeals lodged in December 2014 which were allocated to the pilot program were heard on Tuesday, 20 January 2015 and Wednesday, 21 January 2015. The same Full Bench dealt with all permission to appeal applications listed for hearing on a particular day. The Full Bench sat in either Melbourne or Sydney, with video links to other states as required.

[30] Full Benches established to deal with permission to appeal proceedings were included on a separate roster to normal appeal matters. This roster was determined at the start of the year and distributed to the relevant Members by the President. The roster set down the approximate hearing dates at that time, which were usually over two days during the third week of each month. The decision on permission to appeal was issued either at the conclusion of oral submissions or in writing soon after. In most cases where permission to appeal was granted the same Full Bench was also responsible for hearing the substantive appeal.

Process for reviewing the pilot

[31] As part of the review, the review team analysed the Full Bench decisions and the Commission’s case management system data for the period 1 January to 30 September 2015 to identify:
Review of the permission to appeal pilot

- the number of matters which were heard as part of the pilot
- the types of matters being appealed
- whether matters were granted permission to appeal or permission was refused
- the time taken between lodgment of the appeal application and the first listing date for permission to appeal
- the time taken between the permission to appeal hearing and the matter being determined
- the number of matters which were withdrawn before hearing
- the number of matters in which respondents filed written submissions.

[32] The review team also attended a meeting on 16 October 2015 with Members of the Commission who were involved in the pilot. The purpose of the meeting was to provide feedback on the operation of the pilot to the President and to review the statistics relating to the pilot and modify the standard directions that were put in place at the beginning of the pilot.

[33] The success of the pilot was assessed against the following measures:
- time taken to resolve matters
- parties access to procedural fairness
- reduced costs for parties
- cost effectiveness to the tribunal.

Assessment of data

[34] There were 108 appeals that were heard in the permission to appeal pilot from 1 January to 30 September 2015. A further 24 appeals allocated to the pilot were subsequently withdrawn. Of the 108 matters heard, 107 have had the permission to appeal issue determined, with one matter still pending at the time of preparing this report.

[35] The data in the following tables has been extracted from the Commission’s case management system.

Table 2 – Total matters dealt with in the permission to appeal pilot

<table>
<thead>
<tr>
<th>Total matters</th>
<th>Matters heard</th>
<th>Percentage heard</th>
<th>Withdrawn</th>
<th>Percentage withdrawn</th>
</tr>
</thead>
<tbody>
<tr>
<td>132</td>
<td>108*</td>
<td>81.8%</td>
<td>24</td>
<td>18.2%</td>
</tr>
</tbody>
</table>

*The outcome of one appeal is pending.

[36] The following table shows a breakdown of the types of unfair dismissal issues dealt with in the pilot between 1 January and 30 September 2015:
Table 3 – Types of matters dealt with in the permission to appeal pilot

<table>
<thead>
<tr>
<th>Matter type</th>
<th>Number of matters</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unfair dismissal matters</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extension of time</td>
<td>33</td>
<td>30.6%</td>
</tr>
<tr>
<td>Remedy</td>
<td>7</td>
<td>6.5%</td>
</tr>
<tr>
<td>Merits</td>
<td>29</td>
<td>26.9%</td>
</tr>
<tr>
<td>Genuine redundancy</td>
<td>9</td>
<td>8.3%</td>
</tr>
<tr>
<td>Minimum employment period</td>
<td>3</td>
<td>2.8%</td>
</tr>
<tr>
<td>Employee not dismissed</td>
<td>3</td>
<td>2.8%</td>
</tr>
<tr>
<td>Representation</td>
<td>2</td>
<td>1.9%</td>
</tr>
<tr>
<td>Miscellaneous*</td>
<td>16</td>
<td>14.8%</td>
</tr>
<tr>
<td>General protections dismissal disputes</td>
<td>5</td>
<td>4.6%</td>
</tr>
<tr>
<td>Section 739 dispute</td>
<td>1</td>
<td>0.9%</td>
</tr>
<tr>
<td>Total</td>
<td>108</td>
<td></td>
</tr>
</tbody>
</table>

*Includes costs, extension of time to appeal, amending application, etc.

[37] The above table shows that decisions dealing with jurisdictional extension of time issues were the most frequently appealed. Of the 108 matters that were heard in the permission to appeal pilot, 30.6% of those matters were appeals where jurisdictional extension of time was a central issue.

Timeliness data

[38] The tables below compare the timeliness of appeals dealt with during the first nine months of the permission to appeal pilot against the appeal benchmarks and the results achieved for the 12 months prior to the pilot commencing:
Table 4 – Timeliness of lodgments to hearings

<table>
<thead>
<tr>
<th></th>
<th>90th percentile</th>
<th>100th percentile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current benchmark</td>
<td>12 weeks</td>
<td>16 weeks</td>
</tr>
<tr>
<td>Normal appeal process 1 Jan - 31 Dec 2014</td>
<td>93.1%</td>
<td>100%</td>
</tr>
<tr>
<td>Permission to appeal pilot 1 Jan- 30 Sep 2015</td>
<td>97.2%</td>
<td>99.07%*</td>
</tr>
</tbody>
</table>

* One appeal was heard outside 16 weeks. This appeal was lodged on 31 March 2015 and initially listed for 20 May 2015. Two adjournments due to poor health were sought by the applicant. The matter was heard on 25 August 2015 and a decision was issued on 15 September 2015.

Table 5 – Timeliness of hearings to decision

<table>
<thead>
<tr>
<th></th>
<th>Total matters determined</th>
<th>Median (weeks)</th>
<th>90th percentile</th>
<th>100th percentile</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current benchmark</td>
<td></td>
<td>8 weeks</td>
<td>12 weeks</td>
<td></td>
</tr>
<tr>
<td>Normal appeal process 1 Jan - 31 Dec 2014</td>
<td>162</td>
<td>3.6 weeks</td>
<td>9.1 weeks</td>
<td>22.1 weeks*</td>
</tr>
<tr>
<td>Permission to appeal pilot 1 Jan- 30 Sep 2015</td>
<td>107</td>
<td>1.7 weeks</td>
<td>4.3 weeks</td>
<td>12 weeks</td>
</tr>
</tbody>
</table>

* One matter was lodged 11 November 2013. The matter was listed for 15 January 2014. Correspondence on 3 January 2014 shows that the parties sought to have the matter determined on the papers. The appeal decision was handed down on 17 June 2014.

[39] As can be seen in Table 5, in the majority of appeals dealt with under the pilot have been determined in less than half the time taken compared to the normal appeals process.

[40] The following table sets out the time taken between permission to appeal decisions being issued to further hearings by a Full Bench (or by a single Member where matters were remitted) in instances where permission to appeal was granted.

Table 6 – Timeliness of further hearing of substantive merits following decision granting permission to appeal

<table>
<thead>
<tr>
<th>Total matters</th>
<th>Median weeks permission to appeal decision to further hearing</th>
<th>90th percentile</th>
<th>100th percentile</th>
</tr>
</thead>
<tbody>
<tr>
<td>24*</td>
<td>4.9 weeks</td>
<td>7.7 weeks</td>
<td>11.9 weeks</td>
</tr>
</tbody>
</table>

*Of the 24 matters where permission to appeal was granted, three matters have not been counted – in two cases the substantive appeals were dealt with at the same time as granting permission, and one matter was discontinued after permission was granted but before any further hearing was held.
Comparison with normal appeals process

Time taken to resolve matters

[41] Analysis of the above permission to appeal pilot statistics shows that matters were being resolved more efficiently under the pilot when compared to the normal appeals process. In the normal appeals process requests for extensions to file and serve submissions can slow down the process and may result in matters being relisted where such extensions impact the hearing date. For example, if an appellant is granted an extension of time for filing submissions, the respondent must be provided with corresponding additional time to respond to those submissions. A new hearing date that suits the availability of all three Members on the bench and the parties must be found. This can extend the appeal process out by weeks to months.

[42] Requiring the appellant to file a simple outline of submissions, not exceeding three pages in length, and addressing only the permission to appeal requirement rather than the merits of the claim speeds up this process. Not requiring the respondent to file detailed submissions reduces the timeframe required between lodgment and hearing. Given that the hearing is usually only dealing with the threshold question of permission to appeal, more appeals can be dealt with in a shorter amount of time, with between five and eight matters being dealt with in one day rather than one appeal matter taking half to a full day to hear.

[43] There has been some improvement in the time between lodgment and the permission to appeal hearing. The most significant difference in time was between the permission to appeal hearing and the decision being handed down, with 50 per cent of decisions being handed down within 1.7 weeks compared to 3.6 weeks in the normal appeals process. This can be attributed to the fact that decisions being handed down were confined to only dealing with the permission to appeal issue which reduced the amount of time spent writing decisions.

[44] Appeal proceedings can be quite complex, especially for parties unfamiliar with the Commission’s processes. The permission to appeal pilot established two steps in the appeal process which were aimed at making the process clearer and less complex for parties.

[45] Even though the permission to appeal process shortened the time it takes to hear these appeal matters, the matters were still dealt with the same level of consideration as those determined under the normal appeal process.

[46] The following table shows the outcome of appeal matters in the period prior to the pilot for the year 1 January to 31 December 2014:
Table 7 – Outcome of permission to appeal - normal appeal process: 1 January to 31 December 2014

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Permission granted</th>
<th>Percentage granted</th>
<th>Permission not granted</th>
<th>Percentage not granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unfair dismissal</td>
<td>83</td>
<td>22</td>
<td>27%</td>
<td>61</td>
<td>73%</td>
</tr>
<tr>
<td>Other appeals</td>
<td>79</td>
<td>44</td>
<td>56%</td>
<td>35</td>
<td>44%</td>
</tr>
<tr>
<td>Total matters</td>
<td>162*</td>
<td>66</td>
<td>40%</td>
<td>96</td>
<td>60%</td>
</tr>
</tbody>
</table>

*Represents the total matters determined during the period.

[47] This compares with the table below which shows the percentage of matters in the pilot where permission to appeal was granted compared with where it was refused:

Table 8 – Outcome of permission to appeal under the permission to appeal pilot

<table>
<thead>
<tr>
<th>Total matters heard</th>
<th>Permission granted</th>
<th>Percentage granted</th>
<th>Permission not granted</th>
<th>Percentage not granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>107*</td>
<td>24</td>
<td>22.4%</td>
<td>83</td>
<td>77.6%</td>
</tr>
</tbody>
</table>

*107 matters determined out of 108 matters heard in total. There is one matter pending determination at the time of this report.

[48] While the permission not granted figure increased in the pilot when compared with appeals overall, the percentage differences between unfair dismissal matters and the pilot is similar (77.6% in the pilot compared to 73% in the normal appeals process). Given that most of the matters dealt with in the pilot were unfair dismissal matters, this provides a more accurate comparison of the differences.

Potential reduced costs for parties

[49] The permission to appeal process has the potential to reduce costs for the parties involved when compared with the normal appeals process. By not requiring the appellant to file more than a brief outline of submissions, the appellant is saved from having to invest time into preparing complex submissions. It also means that the appellant is less likely to have to engage a lawyer or paid agent to act of their behalf throughout the matter. Similarly, the respondent can choose not to respond with written submissions and is also less likely to have to engage a lawyer or paid agent.

[50] The following table shows the number of respondents who provided written submissions in the lead up to permission to appeal hearings under the pilot:

Table 9 – Number of respondents who provided written submissions under the permission to appeal pilot

<table>
<thead>
<tr>
<th>Total matters</th>
<th>No written submissions provided</th>
<th>Percentage not provided</th>
<th>Written submissions provided</th>
<th>Percentage provided</th>
</tr>
</thead>
<tbody>
<tr>
<td>108</td>
<td>77</td>
<td>71.3%</td>
<td>31*</td>
<td>28.7%</td>
</tr>
</tbody>
</table>

*This does not include submissions regarding permission to be legally represented at the permission to appeal hearing.
This compares with the normal appeals process which requires the respondent to file written submissions in response to the appellant’s submissions.

The fact that the permission to appeal hearing runs for a shorter length of time also contributes to potential cost savings to parties involved. Appellants usually only take half an hour or so to make their oral submissions on the permission to appeal threshold question. This compares with hearings that take place under the normal appeals process which can take half to a full day to hear.

In those cases where a party engages a lawyer or other representative to speak on their behalf during the hearing, that party may save money on preparation and appearance costs. Similarly, where a party has had to leave work to attend a hearing, the costs associated with their absence from work will also be minimised with the reduction in time.

Efficiencies for the Commission

The Commission experienced efficiencies resulting from the permission to appeal process. The permission to appeal process requires less overall input from Members and staff involved in the process compared with the normal process. Up to 18 appeals were dealt with by the same Full Bench within a two day period that would usually involve the time and effort of a number of different Full Benches across a number of weeks. Permission to appeal was not granted in 77.6% of the matters that were dealt with in the pilot, and many of these matters were heard in under an hour. Under the normal appeals process a Full Bench would be constituted to hear the substantive merits of an appeal, including permission to appeal, for half to a full day, only to determine that this threshold question had not been met and the matter dismissed. The process of dealing with these appeals in a much shorter time frame helps free up time for Members to deal with other matters.

The presiding Member’s chambers for each rostered month may, however, experience increased workload in the lead up to and during the allocated two day period, as the presiding Member is responsible for all of the administrative tasks associated with file management for all of the permission to appeal matters scheduled for that month. This compares with multiple Full Benches having to coordinate single appeals under the normal appeal process. Despite this, the overall workload across the Commission is still reduced as there are less documents to be filed and the administrative tasks can be streamlined (e.g. template Directions have been established and the simpler process means that there are less queries from parties to Members’ Chambers).

Conclusion

The permission to appeal pilot has been shown to be a more efficient and effective way of processing appeal matters, in particular unfair dismissal appeals. As discussed in paragraph [38], the median time taken to issue decisions was 1.7 weeks from the time of hearing to final decision compared with 3.6 weeks under the normal appeals process (1 January 2014 and 31 December 2014). This shows that under the pilot, the time between the permission to appeal hearing to decision was substantially quicker than under the normal appeals process. There have also been improvements between the time taken from lodgment of the appeal to the permission to appeal hearing taking
place, with 97.2% of matters heard within 12 weeks of lodgment in the pilot compared with 93.1% of appeal matters heard within 12 weeks or less in the normal appeals process between 1 January and 31 December 2014. These figures show that the permission to appeal pilot was successful in reducing the time taken to resolve appeal matters.

[57] Even though the time taken to resolve matters has been reduced all parties are still afforded procedural fairness. As discussed in paragraphs [46]–[48] there was only a slight increase in the overall matters where permission to appeal was refused, being 77.6% compared with 73% of unfair dismissal matters in the normal appeal process between 1 January and 31 December 2015. This demonstrates that these types of matters were still treated with the same level of consideration under the pilot as in the normal appeal process, which works to allay potential concerns regarding the speed with which these matters are dealt with.

[58] The pilot has also reduced the costs to parties involved in the process. As is set out in paragraphs [49]–[55] applicants whose matters are being dealt with as part of the permission to appeal process are not required to file more than two pages of submissions outlining the permission to appeal threshold question and an appeal book. Respondents to these matters are not required to file anything in response. The experience of the pilot has shown that only 28.7% of respondents took the time to provide written submissions.

[59] The reduced time spent holding permission to appeal hearings compared to hearings in the normal appeals process also potentially minimises the cost associated with appearances by representatives and taking time off work to attend. The outlined benefits afforded to parties demonstrate that the pilot has been a success in reducing costs incurred by parties.

[60] The pilot has also produced efficiency benefits for the Commission, as is described in paragraphs [54]–[55]. While the workload of the presiding Member’s chambers may increase in the lead up to and during the two day period in which matters are rostered, the permission to appeal process allows a substantial number of matters to be dealt with each day compared with one appeal matter in the normal process. As the requirements for filing documents are much less onerous on parties compared with appeal matters in the normal process, the Member’s chambers will also benefit from having less correspondence and file management to undertake for the amount of matters being processed.