I acknowledge the traditional owners of the land upon which this presentation takes place today, their Elders past and present. I acknowledge the continuing cultural importance and spiritual significance of the Melbourne region to the Wurundjeri people of the Kulin Nation.

It is a pleasure to have an opportunity to speak to you this morning about the possible next set of changes to the Fair Work Act 2009 (Act). I do so offering, first, an apology on behalf of Vice President Watson who was scheduled to speak in this spot, but has asked me to fill the breach. I will do my best to compensate for the disappointment you must feel; having had one of the most eminent and senior members of the tribunal advertised on the program only to arrive today and find, in his place, one of the most junior members of the tribunal (having been sworn in only 10 weeks ago).

As an independent statutory appointee the views I express here today are entirely mine. They should not be construed as representing any official position of the Fair Work Commission (Commission), any of its other members or necessarily a statement of Government policy.

Change to the legislative scheme that governs workplace laws in this country inevitably has an impact upon the work of the nation’s workplace law tribunal.

Alongside the Commonwealth Parliament, Commonwealth Government and High Court, the Commission (which can trace its history back to 1904) is one of our nation’s oldest institutions. And over the course of its history the legislative scheme has changed considerably and so the Commission has become accustomed to responding to change.

In its various statutory iterations the Commission has played a significant role in our social, economic and political history having established the minimum wage system, annual leave, sick leave, parental leave, ordinary working hours, equal pay for women and Aboriginal workers and, with some initial reluctance, enterprise bargaining.

For 109 years the Commission has provided a means for employers, employer associations, trade unions and employees to settle disputes. It has been an ever changing role in response to legislated, economic and social developments, which continue today.
Most recently the Commission’s President, the Hon. Justice Iain Ross AO, noted that there has been a significant shift over the past 15 years away from collective disputes in favour of individual applications. Less than 40% of applications now concern collective disputes.

This presents a challenge to the Commission and it is why, in October last year, the President launched the Commission’s *Future Directions Strategy*. That document sets out 25 initiatives the Tribunal is undertaking during the course of this year.

These initiatives are directed at improving our performance and the quality of the service we provide. They can be grouped under four broad headings:

- Promoting fairness and improving access
- Efficiency and innovation
- Accountability
- Productivity and Engagement

I encourage you all to engage with the *Future Directions Strategy* and to read the President’s March 2013 progress report on its implementation. We are making great progress.

**The Fair Work Act Review**

In December 2011 the government initiated a review of the operation of the *Fair Work Act 2009* to be completed by a panel consisting of Reserve Bank Board Member Dr John Edwards, former Federal Court Judge, the Honourable Michael Moore and noted legal and workplace relations academic Professor Emeritus Ron McCallum AO.

The purpose of the review was to assess whether the legislation has given effect to its objects and whether the legislation operates effectively. The Review Panel reported in June 2012. The Review Panel found that the Act was broadly meeting its objectives, but did recommend some amendment, mainly technical in nature. The recommendations have been dealt with in two tranches of amendments. The first tranche was passed in 2012 and included amendments to unfair dismissal provisions, functions of the Commission and other clarifying amendments. The most recent amendment legislation, the *Fair Work Amendment Bill 2013* (*Bill*), seeks to implement further recommendations made under this review process.

**Passage of the Fair Work Amendment Bill 2013**

The Bill was introduced to the House of Representatives on 21 March 2013 and was subject to Parliamentary debate on 4 and 6 June 2013. It passed by the House on 6 June 2013. Although the Bill was subject to a certain level of debate, the Bill was passed by the house largely intact.

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5 *Fair Work Amendment Act 2012* [Act no. 174 of 2012].
The Bill was introduced into the Senate on 17 June 2013, but is yet to be debated.

**The Proposed Amendments**

As it currently stands, the Bill seeks to amend several aspects of the Act, ranging from the introduction of various family oriented initiatives, including the introduction of certain family friendly measures, the possible expansion of the Commission’s ability to deal with termination of employment applications arising under the General Protections and Unlawful Termination provisions, to the amending the recent amendment to the *Fair Work (Registered Organisations) Act 2012*. This presentation does not address the amendments concerning registered organisations.

**Family-friendly Measures**

Special maternity leave

- The amendment seeks to preserve an employee’s entitlement to unpaid parental leave under section 70 of the Act where an employee has taken a period of unpaid special maternity leave.
- Under the current operation of the Act, if an employee takes unpaid special maternity leave, for example because she has a pregnancy-related illness, the employee’s entitlement to unpaid parental leave is reduced by an equivalent amount.
- The Bill seeks to address this and ensure that the employee’s unpaid parental leave entitlement is not affected by any period of special maternity leave she is required to use prior to the birth of the child. It is intended that this amendment “will further advance the rights of mothers by providing for a reasonable period of maternity leave before and after childbirth by ensuring mothers who take unpaid special maternity leave are not required to return to work earlier than would otherwise be necessary.”

Parental Leave

- The parental leave amendments seek to increase the period of leave the parents in an “employee couple” arrangement can utilise concurrently. Currently the entitlement is to 3 weeks and each member of the couple must take it consecutively and in a single broken period (with some exceptions). The amendment seeks to increase the period to eight weeks.
- The amendment also allows the parents to choose when the leave is taken in the first 12 months after birth and to take the leave in separate periods (of at least 2 weeks, or a shorter time agreed to by both the employee and employer).
- It is intended that the “amendment supports the right to maternity leave and promotes the understanding that both parents have an important role to play in raising a child and supports

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Postscript Note: The Senate debated and agreed to the Bill on 27 June 2013. It received Royal Assent on 28 June 2013 [Act no. 73 of 2013]. For final text of the Bill as passed by both Houses of Parliament: http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr5028%22

Part 1, Schedule 1 *Fair Work Amendment Bill 2013*.

*Fair Work Amendment Bill 2013 Revised Explanatory Memorandum (EM), 6.*

Part 2, Schedule 1 *Fair Work Amendment Bill 2013*. 
working parents to fulfil those roles, in line with Australia’s obligations under the *Convention of the Rights of the Child*\(^\text{10}\)

**Right to Request Flexible Working Arrangements\(^\text{11}\)**

- This amendment seeks to expand the circumstances in which an employee is able to request flexible working arrangements.

- As the legislation stands, an employee may make a request to their employer for Flexible Working Arrangements, where they have caring responsibilities of a child that is under school age or under the age of 18 and has a disability.

- Flexible Working Arrangements may include undertaking work on a part-time basis or altering the ordinary hours that an employee performs their duties, in order to better accommodate an employee’s particular circumstances.

- The amended legislation would also allow an employee to make a request where the employee:
  - is a carer as defined in the *Carers Recognition Act 2010*. This definition includes people who provide personal care to individuals who need support due to disability, medical condition, mental illness and fragility due to age;
  - has a disability;
  - is 55 or older;
  - is experiencing violence from a member of the employee’s family; and
  - provides care or support to a member of the employee’s immediate family or household, who requires support because the member is experiencing violence from the member’s family.

- The amendment also expressly allows an employee returning to work from maternity leave to request to work on a part-time basis.

- The legislation preserves the employer’s ability to refuse such a request “only on reasonable business grounds” but includes a non-exhaustive list of examples of those grounds i.e. that:
  - there would be excessive cost of accommodating the request;
  - there is no capacity to reorganise work arrangements of other employees to accommodate the request
  - the impracticality of any arrangements that would need to be put in place to accommodate the request, including the need to recruit replacement staff
  - there would be a significant loss of efficiency or productivity

\(^{10}\) EM, p 6.

\(^{11}\) Part 3, Schedule 1 *Fair Work Amendment Bill 2013.*
there would be a significant negative impact on customer service.

Consultation about changes to rosters/working hours

- The amendments will require the Modern Awards to contain a term requiring employers to consult with employee regarding roster changes. Such an amendment is due to apply to all Modern Awards operating from 1 January 2014.
- Similarly, the amendment will require an Enterprise Agreements’ consultation term to extend to ‘change to a regular roster or ordinary hours of work’. This particular amendment is due to apply to all Enterprise Agreements made on or after the commencement of the amendments.
- The amendment is intended to promote genuine consultation (that is to say, the party being consulted must have an actual and genuine ability to influence the ultimate decision). “The dispute resolution mechanisms of the relevant workplace instrument will apply to the operation of the consultation term”13 Most dispute resolution mechanisms invest jurisdiction for dispute resolution in the Commission.

Transfer to a Safe Job

- This clause in the Bill extends the entitlement to be transferred to a safe job to a pregnant employee, regardless of whether she has or will have an entitlement to unpaid parental leave (i.e. it will no longer be dependent on having completed at least 12 months of continuous service).
- Where there is no safe job available and the employee has complied with the notice and evidence requirements, the employee will be entitled to no safe job leave. If the employee is:
  - entitled to unpaid parental leave, the no safe job leave will be paid; however,
  - is not entitled to unpaid parental leave, the no safe job leave will be unpaid.

Modern Awards Objective

- The amendments seek to alter modern awards objective such that Commission is expressly required to consider compensation for hours of work that may impact upon an employee’s work/life balance and enjoyment of life outside work. Additional remuneration will need to be considered for employees working:
  - overtime;
  - unsocial, irregular or unpredictable hours;
  - on weekends or public holidays; and
  - working shifts.

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12 Part 4, Schedule 1 Fair Work Amendment Bill 2013.
13 EM, p. 25.
14 Part 5, Schedule 1 Fair Work Amendment Bill 2013.
15 Schedule 2 Fair Work Amendment Bill 2013.
Anti-Bullying Measure

- The amended legislation (if passed) will allow the Commission to deal with workplace bullying complaints. This measure is a direct response to the October 2012 House of Representatives Standing Committee on Education and Employment report on Workplace Bullying “We just want it to stop”. In that report the committee noted that:
  - “work provides a sense of dignity and is central to our individual and collective sense of identity”;\(^\text{17}\)
  - workplace bullying “can have a profound effect on all aspects of a person’s health as well as their work and family life, undermining self esteem, productivity and morale.”\(^\text{18}\)

- Vesting this jurisdiction in the Commission is aimed at allowing for early intervention that is also inexpensive.

- The proposed provisions would allow a worker (as defined in the Work Health and Safety Act 2011) who reasonably believes they are being “bullied at work” to apply to have the Commission deal with the matter. Although “worker” is broader than “employee”, the definition of “worker” excludes those engaged in the Defence Force and volunteer associations.

- “Bullied at work” is defined in section 789FD.

  A worker is “bullied at work” if:
  
  a) While the worker is at work in a constitutionally-covered business’

  i. an individual or

  ii. a group of individuals;

  repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member: AND

  b) that behaviour creates a risk to health and safety.

  (my emphasis)

- Note the three important elements of the definition. “Repeated”, “unreasonable” and “a risk to health and safety”. Reasonable management action when carried out in a reasonable manner will not result in a person being bullied at work.\(^\text{19}\)

- The Commission will be required to deal with an application within 14 days after the application is made. The legislation does not specify a process for Commission to deal with the matter, the Explanatory Memorandum (EM) provides that the Commission may deal with it

\(^{16}\) Schedule 3 Fair Work Amendment Bill 2013.
\(^{17}\) House of Representatives Standing Committee on Education and Employment report Workplace Bullying “We just want it to stop”, p 1.
\(^{18}\) Ibid, p 2.
\(^{19}\) EM, p 34 [111].
by way of conference or hearing and that the Commission retains the ability to inform itself under section 590 (for example, this section allows the Commission to issue orders requiring production of documents / and orders requiring a person to attend the Tribunal). The Commission is yet to settle upon the procedure under which it will deal with an application.

- Where the Commission is satisfied that a worker has been bullied at work and there is a risk that the worker will continue to be bullied at work, the Commission may make an order it considers appropriate (other than an order requiring reinstatement or the payment of a pecuniary amount) to prevent the worker being bullied at work. The contravention of one of these orders is subject to a civil penalty (60 penalty units (presently $10,200)).

- The EM outlines that these orders may include an order that the individual/group stop the specified behaviour, regular monitoring of the behaviours by the employer, compliance with an employer’s bullying policy, the provision of additional information/support/training to workers or a review of the employer’s workplace bullying policy.

Conferences

- The amendments propose to expressly confirm the Commission’s ability to mediate, conciliate or make a recommendation or express an opinion during a conference held under section 592 of the Act. This is not to be taken as limiting what the Commission may do at a conference, but merely clarifies “some of the common functions that [the Commission] can [and already does] perform”.

Right of Entry

- Presently, when a Permit Holder enters premises for the purposes of conducting interviews or holding discussions, the occupier of the premises is able to request that the interview/discussions takes place in a particular room, so long as the requirement was reasonable. Like beauty, reasonableness is often in the eyes of the beholder and, as such, there can be disputes about where discussions are to be held.

- The amendment proposes that the permit holder and occupier must agree on which rooms or premises the interviews or discussions are held in. If they are unable to agree, the default position is that the permit holder may utilise any area “in which one or more of the persons who may be interviewed or participate in the discussion would ordinarily take meal or other breaks: and that is provided by the occupier for the purpose of taking meal or other breaks”.

- The amendments also seek to make provision for transport and accommodation arrangements in remote areas. The EM outlines that what is considered a “remote area” is

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20 Schedule 3A Fair Work Amendment Bill 2013.
21 EM, p 39 [141].
22 Schedule 4 Fair Work Amendment Bill 2013.
23 Section 492.
24 See for example, Australasian Meat Industry Employees’ Union v Dardanup Butchering Company Pty Ltd [2011] FWAFC 3847.
25 New proposed sections 492(2) and (3).
limited to circumstances where the only realistic means for a permit holder to access the
premises is where the occupier provides transport to or accommodation at the premises.
Where premises can be reasonably access through public transport or public roads, then it
will not be considered a “remote area”.

- The occupier will be required to enter into transport and accommodation arrangements where
the following pre-requisites are satisfied:
  o it would not cause the occupier undue inconvenience;
  o the permit holder, or their organisation, requests the occupier to provide
    accommodation/transport;
  o the request is made within a reasonable period before it is required; and
  o the permit holder/organisation have not been able to enter into an arrangement by
    consent.

- The occupier is not able to charge a fee for the transport/accommodation that is more than
necessary to cover the cost.

- Importantly, the Act (if amended) will enable Commission to deal with disputes about aspects
of accommodation and transport arrangements and also,

  “deal with disputes about the frequency of entry to premises for discussion purposes.
  This could lead to the Commission placing limitations on the frequency of entry.
  However, that could only occur if the Commission is satisfied that the frequency of
  entry would require an unreasonable diversion of the occupier’s critical resources.”

**Consent Arbitration for General Protections and Unlawful Termination**

- This amendment seeks to allow parties to consent to have the Commission arbitrate general
  protections and unlawful termination disputes. It is intended that this amendment will provide
  a faster, less expensive and less formal alternative to court proceedings, thus advancing “the
  right to just and favourable conditions at work”.

- Where a general protections or unlawful termination certificate has been issued and both the
  employee and the employer agree, the Commission will be able to exercise its general
  powers to arbitrate the matter.

- As with the time frame to bring an application to the Federal Court or the Federal Circuit
  Court, an applicant will have 14 days from the date the certificate is issued to proceed in this
  manner before the Commission.

- These provisions will also bring the time frame for making an unlawful termination application
  into line with the current unfair dismissal and general protections timeframes (i.e. 21 days

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26 EM, p 8.
27 Schedule 4A Fair Work Amendment Bill 2013.
28 EM, p 11.
from the dismissal taking effect, rather than the current 60 days).

- The Commission will be able to exercise its general powers, including the power to inform itself under section 590 of the Act.

- In these matters the Commission will have the ability to make an order:
  - for reinstatement of the person
  - for the payment of compensation of the person
  - for payment of an amount to the person for remuneration lost
  - to maintain the continuity of the person’s employment
  - to maintain the period of the person’s continuous service with the employer.

- The ability to appeal decisions of this kind is subject to a similar requirement to unfair dismissal matters (see section 400). In order to grant permission to appeal, Commission must be satisfied that it is in the public interest to allow the appeal AND that the decision involved a significant error of fact.

- The amendments also allow for parties to seek costs orders against the other party, as well as against a lawyer or paid agent.

- The amendment preserves the multiple application provisions that prevent an employee from pursing multiple remedies in relation to dismissal.

**Permission to be represented**

The potential for expansion of the Commission’s jurisdiction (into consent arbitration for general protections and unlawful termination matters and also to deal with bullying matters) which are contemplated by the Bill brings into sharp focus the recent increased attention on section 596 of the Act.

Whether those matters proceed by way of hearing, conference or mediation, parties seeking to be represented must be prepared to address the Commission on the issue of permission to be represented. While it will likely be the practice of the Commission to ask the opposing party whether they object to permission being given, the views of the opposing party will not be determinative of the matter (even if they raise no objection to the appearance by a lawyer or paid agent).

The April 2013 decision in *Warrell v Commission* is particularly relevant in this regard.

In that matter the Federal Court made it clear that:

- “the decision to grant or refuse “permission” for a party to be represented by “a lawyer” pursuant to section 596 cannot be properly characterised as a mere procedural decision”;

- “It is apparent from the very terms of s.596 that a party “in a matter before [the Commission]”

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30 Ibid [para 24].
must normally appear on [their] own behalf.”

- “That normal position may only be departed from where an application for permission has been made and resolved in accordance with law, namely where only one or other of the requirements imposed by s596(2) have been taken into account and considered.”

- “… permission may be granted “only if” one or other of the requirements of s596(2) is satisfied.”

- “Even if one or other of those requirements is satisfied, the satisfaction of any requirement is but the condition precedent to the subsequence exercise of the discretion conferred…”

- “The appearance of lawyers to represent the interests of parties to a hearing runs the very real risk that what was intended by the legislature to be an informal procedure will be burdened by unnecessary formality.”

Parties seeking to be represented must be prepared to address the Commission on which limb or limbs of subsection 596(2) you say are relevant.

It is not sufficient to say “if it pleases the Commission, my name is [surname], initial [x] and I seek leave to appear for the [Applicant/Respondent]”. Make no assumption permission will be granted.

It is not uncommon for the Commission to reject permission to appear. Accordingly, representatives seeking permission to appear should also always ensure that their client is in a position to represent itself in the event that permission to appear is not granted. It should not be assumed that an adjournment will be granted in that event.

**Unrepresented applicants**

The subject nature of these disputes (where it is contemplated that the Commission’s jurisdiction will expand) generally have higher levels of unrepresented parties. Consequently, permission for the other party to be represented in these matters may be affected (i.e. declined) when the Commission takes into account fairness between the parties under section 596(2)(c).

Therefore, evening up any imbalance and ensuring access to justice for all parties is properly a consideration for the Commission. This is why the Commission has launched new initiatives to assist self-represented parties who appear before the Commission including:

- a pro bono legal scheme to provide independent legal advice to self-represented parties involved in unfair dismissal jurisdictional hearings. The assistance will be provided to both applicants and respondents. The pilot is being undertaken in Victoria, with plans to extend to NSW next month.

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31 Ibid.
32 Ibid.
33 Ibid.
34 Ibid.
35 Ibid.
36 Azzopardi v Serco Sodexo Defence Services Pty Limited [2013] FWC 3405. Postscript note: see also the decision of the Full Bench in G & S Fortunato Group Pty Ltd v Stranieri [2013] FWCFL 4098.
• The introduction of an Unfair Dismissal Benchbook containing plain English summaries of the key principles of unfair dismissal case law and how these have been applied in Commission decisions. A portion of this benchbook was launched in May and a final copy will be available in June 2013.

• The introduction of an Appeals Practice Note to promote consistent administrative processes when dealing with appeals, including the option of determining an appeal ‘on the papers’ without the need for a hearing

Further, the Commission has been supporting a pilot program in Western Australia to assist self represented applicants who lodge a general protections application.

Under the WA pilot, general protections applications are referred to the Employment Law Centre of WA (the ELCWA) so that self represented applicants can receive advice on the merits of their proposed application and assistance with completing or amending the relevant application form. The ELCWA is funded to help clients who are vulnerable and who would otherwise not have access to legal assistance. Evaluations of similar pilots in other jurisdictions demonstrate that such programs can result in cost savings in terms of the Tribunal’s time and resources and by avoiding the costs associated with running an unmeritorious case. Respondent employers are also saved the cost and inconvenience of having to respond to an unmeritorious claim. Initial outcomes from the WA pilot are positive. Of the 14 self represented applicants who have received advice from the ELCWA, six have lodged amended applications and five have discontinued their application in the Tribunal.

The WA pilot will be evaluated after 12 months and if successful we will extend the model to other states. We also intend to engage with the providers of pro bono legal services to generally extend the availability of legal advice to self represented parties.37

Conclusion

What is apparent from the proposed changes that I have described this morning is that, should the Bill complete its legislative journey through the Parliament this week, we will once again see the need for the Commission to respond to these changes.

It will likely lead to an increase in the workload of the Commission and again cause it to reflect on how its tribunal work can best respond to the changes. It makes more important the Future Directions strategy of the Commission, which evidences our existing readiness to address these changes and challenges.

Thank you.

37 Future Directions, above note 2, pp 3-4.