The Fair Work Commission in 2029 – speech to the Newcastle Industrial Relations Society

Fair Work Commission President, The Hon. Iain Ross AO

15 August 2019

Thank you for the invitation to join you this evening.

I would also like to acknowledge that we are meeting on the traditional country of the Awabakal and Worimi peoples and pay my respects to their Elders both past and present.

Newcastle and the Hunter region occupy a special place in the history of industrial relations in this country, and in the history of the Commission.

Employers and unions in this region pioneered the development of co-operative approaches to industrial relations and were early participants in our New Approaches program. Professors Mark Bray and Johanna Macneil from Newcastle University made an important research contribution with their book Cooperation at Work – How tribunals can help transform workplaces. I am pleased to see both of them here tonight.

I’ve been asked to speak about what the Fair Work Commission will look like in 10 years’ time.

The Future of Work

Predicting the future is not for the faint hearted. Before turning to what the Commission might look like I want to touch on changes to the world of work.

The very nature of work is changing.

Work provides a means of meeting basic human needs— shelter, food, a sense of purpose, identity and belonging.

The demographic and structural changes in our economy will affect the types of jobs that people do. The way we measure our national well-being may need to evolve to adapt to these changes.

It is often said that the future is already here, just unevenly distributed. For example:

- there are developments in the Retail industry such as online shopping and the way customers interact with stores.
- And we have co-production – where the consumer is now doing more of the work (e.g. self-checkouts) reducing the need for employees.

Predicting the workforce of the future is notoriously difficult. Research from the Productivity Commission (2017) found that there was only a very limited relationship between an

occupation’s automation risk and its subsequent growth, which highlighted ‘the relative importance of factors other than automation to the growth of employment of particular occupations’.  

But what sort of skills will be needed by the workforce in the future? It seems it will be jobs which undertake ‘knowledge’ work with fewer jobs requiring physically based tasks.

But if the future lies in ‘knowledge’ work, how much work will there be? And what will the displaced workers do? Are they likely to easily transit between jobs or careers?

A CSIRO report on the future impacts of technology on the workforce concluded that the “current period in history is characterised by a combination of forces likely to be associated with greater, faster and different transitions than previously experienced”.  

The CSIRO also noted that lifelong education and training is needed to prepare people for different jobs and employment models with computerisation.

It is likely that the future of work will require adaptability, lifelong education and transitions between careers.

These matters raise some important questions.

- How will our policies and institutions provide assistance to workers displaced due to the new technological revolution?
- How do we give people more/better skills and education to make them (re-)employable?
- If workers are displaced and spend time out of work, is it permanent or short-term?
- How will they support themselves? What will be the role of the social safety net?
- Who pays for the transition? What is the balance? Individuals, government, employers.

The challenges to lifelong learning include the high costs of training (both the course fees as well as the opportunity costs borne from reduced working hours).

What does all of this change mean for inequality? Are we going to see those attached to the technology industry do really well, while those who are displaced have much poorer outcomes, leading to higher inequality?

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The Shift

In ‘The Shift’ Lynda Gratton constructs storylines of possible futures which she uses as a basis for making choices and understanding consequences. One storyline is of a neurosurgeon based in Delhi performing remote robotic surgery on a child in China in the morning and consulting with colleagues in South America in the afternoon in a hologram virtual conference room.

In some ways this reflects present reality. The Da Vinci surgical system – featuring a 3D high definition camera and special instruments that bend and rotate far more than the human wrist – is used to perform complex surgeries around the world. A surgeon in San Diego has used the system to perform a prostrate operation on a patient in New York.

[Would rather have the surgeon in the room]

Those who write about the future of work often refer to the use of technology and artificial intelligence to enhance human performance. They speak of a portfolio of different, and interesting, jobs. Of transitioning seamlessly from one career to another, embracing change and engaging in lifelong education. That may be the future for some – but not all of us are going to be neurosurgeons.

The future prospects of those with limited education and skills may be bleak. Gratton recognises that the future of work may drive inequality and social exclusion; and speaks of the ‘dark side’ of the future of work.

My point is that there is no preordained future. While global trends will have an impact on us we have a choice about the sort of future we want. But we need to have a conversation about what sort of society we want. What sort of Australia do we want to live in? In 10, 20 and 30 years. What sort of Australia do we want our children to grow up in?

How do we address the myriad of challenges facing all of us? An ageing population, the need to improve productivity; persistent low wage growth and changes in the world of work. I think we need to start by building a reform consensus. A common understanding about the challenges facing us; evidenced based options for policy initiatives. A collaborative, consensus approach that focuses on our shared interests – on what united us, rather than on what divides us.

Successfully addressing these challenges will require constructive engagement and building a consensus for change.

Lifting the quality of debate about workplace relations

While I’m generally optimistic about the future, the quality of current policy discourse does not inspire optimism. As Ken Hayne, the Financial Services Royal Commissioner and former High Court Judge, recently put it:
‘Reasoned debates about issues of policy are now rare. (Three or four word slogans have taken their place.)

Political, and other commentary focuses on what divides us rather than what unites us. (Conflict sells stories; harmony does not.) And political rhetoric now resorts to the language of war, seeking to portray opposing views as presenting existential threats to society as we now know it.

Trust in all sorts of institutions, governmental and private, has been damaged or destroyed. Our future is often framed as some return to an imaginary glorious past when the issues that now beset us had not arisen.’

Mr Haynes’ comments apply with equal force to the quality of both sides of the debate in our area – workplace relations.

Some recent public statements made in the Australian by the CEO of the Business Council of Australia, Jennifer Westacott and the reaction to those statements are a case in point.

In a recent opinion piece for the Australian, Ms Westacott put the case for lifting our productivity performance.

I agree with many of the propositions put in the article. There can be little doubt that improving our standard of living is dependent upon improving productivity. One of the few things economists agree on. As Ms Westacott puts it: ‘Productivity matters because it determines whether we can all get ahead’.

I also agree with her observation that ‘increasing productivity is about doing everything better. It is not about people working harder for less; it is about people working smarter and more effectively by making the most of every ingredient that goes into producing our goods and services’.

However, describing the BOOT as “a productivity killer” invites more scrutiny.

I can readily see how changing the BOOT may reduce employment costs and increase profitability. It is less clear how such a change would increase productivity.

The conventional economic meaning of productivity is the number of units of output per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. Financial gains achieved by having the same labour input – the number of hours worked – produce the same output at less cost because of a reduced wage per hour is not productivity in the conventional sense.

Of course we have a natural experiment with which to test the hypothesis that amending the BOOT would increase productivity. There was a period of about 13 months where agreements did not have to meet a no disadvantage test or the BOOT.
So one could look at the agreements lodged during this period to inform the debate as to whether changing the BOOT would boost productivity. Or, for that matter, improve outcomes for employees.

Ms Westacott went on to say:

‘The test was originally intended to mean that your workforce was better off overall than under the award. In 2016 the Fair Work Commission found the test effectively meant that every individual worker and prospective worker had to be better off than the award.’

One is left with the impression that the ‘original intention’ was that the ‘BOOT’ be applied as a global test – whether the workforce was better off overall. The suggestion seems to be that the Commission somehow departed from the ‘original intention’ in 2016 by finding that the test ‘effectively meant that every individual worker and prospective worker had to be better off than the award.’

Two things can be said about this.

First, the basis for the asserted ‘original intention’ of the BOOT is not clear. Neither the terms of s.193 nor the extrinsic material provide support for the assertion.

Section 193(1) states, relevantly:

(1) An enterprise agreement … passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

In the Second Reading Speech to the Fair Work Bill the Minister said:

‘Approval of agreements

The bill provides that Fair Work Australia must not approve an agreement that includes terms that are inconsistent with unfair dismissal, right of entry, National Employment Standards and the general protection provisions of the act. Fair Work Australia must also be satisfied that:

• the employer and a valid majority of the employees to whom the agreement will apply genuinely agree to the agreement; and

• each employee would be better off overall under the agreement in comparison to the relevant modern award.’
Section 193(7) allows the Commission to apply the BOOT to classes of employees, but nowhere is it suggested that the BOOT is applied to the workforce as a whole.

Second, the suggestion is that this all changed in 2016. Well, it didn't. The reference to 2016 is presumably a reference to Coles Supermarkets Decision ([2016] FWCFB 2887, Watson VP, Kovacic DP and Roe C). The Full Bench in Coles simply said at [6]:

‘The determination of this appeal requires us to consider, on all of the evidence before the Commission, whether the Agreement passes the BOOT. Section 193(1) of the Act provides that an enterprise agreement passes the BOOT if the Commission is satisfied, at the test time, that each award covered employee, and each prospective award covered employee would be better off if the agreement covered the employee than if the relevant modern award covered the employee ... It is well established that the test requires the identification of terms which are more beneficial for an employee, terms which are less beneficial for an employee, and an overall assessment of whether an employee would be better off under the agreement’ (emphasis added)

As the Full Bench notes, the proposition put was well established and plainly follows from the text of s.193(1).

Indeed similar observations were made in much earlier Full Bench decisions: Armacell ([2010] FWAFB 9985 per Giudice J, Acton SDP and Lewin C) and NTEU v UNSW ([2011] FWAFB 5163 per Harrison SDP, Sams DP and Deegan C). These decisions were cited with approval in Coles.

The Federal Court has made the same point – as is clear from the terms of s.193, it is applied to each employee and each prospective employee: see SDA v Aldi ([2016] FCAFC 161 at [33] per Jessup J and at [153] per White J).

Ms Westacott ends the article with the exhortation that ‘we can’t allow the EBA system to die the deaths of a thousand cuts.’ The implicit suggestion being that changing the BOOT will reinvigorate enterprise bargaining.

The main source of data on enterprise agreements, the Employee Earnings and Hours survey compiled by the Australian Bureau of Statistics, shows that the proportion of employees covered by an enterprise agreement has fallen from 43.4 per cent in 2010 to 37.9 per cent in 2018, the latest data.

Another source of data on employees covered by enterprise agreements, the Workplace Agreement Database, collected now by the Attorney-General’s Department, shows that the number of employees covered by a federal enterprise agreement that has not passed its expiry date has fallen from over 2.5 million in 2011 to below 2 million across 2017 and 2018. (It has since picked up in early 2019 to just over 2 million employees).
It seems likely that the significant decline in employees covered by enterprise agreements is for reasons that go beyond issues with the BOOT.

There are a range of factors contributing to the decline – two in particular spring to mind. The first is the decline in union density, with a consequent decline in ‘union agreements’, shown on this slide.

The second relates to changes in the award system. Prior to the commencement of modern awards on 1 January 2010 there were 3323 instruments (including State and federal awards) setting pay and conditions across the country. There are now 122 modern awards with common application. As well as simplifying coverage and reducing the number of awards that may apply in one workplace, modern awards are less prescriptive and provide greater flexibility than awards made under previous legislative frameworks. All awards contain flexibility terms that permit employers and individual employees to change the effect of certain clauses in the award. Additionally awards contain facilitative provisions for arrangements such as TOIL and the cashing out annual leave.

These changes remove one of the incentives for bargaining – to have a single instrument covering an enterprise in order to avoid the complexity associated with multiple awards.

Another recent opinion piece on this issue claimed that ‘the rapid decline in the number of employers and employees using enterprise agreements’ was due to the complexity of the bargaining framework and: ‘the overly technical and highly inefficient approach of the Fair Work Commission to approving agreements.’ In short the complaint was that the Commission:

- required employers to explain the effect of the terms of an agreement to their employees;
- applied the BOOT in ‘overly strict, impractical ways.’ Giving the example of an undertaking being required in respect of casual employees in circumstances where the employer did not employ any casuals.

Well, as to the first matter we are obliged to apply the Federal Court judgments in One Key (see [2017] FCA 1266 and [2018] FCAFC 77). The obligation under s.180(5) to take all reasonable steps to explain to relevant employees the terms of an enterprise agreement and the effect of those terms. As the Federal Court made clear, this obligation is an important element of the agreement-making scheme established by Part 2-4 of the Act.

As to the second, the terms of the BOOT are clear – it applies to each prospective employee. It is also instructive to look at what the BOOT does, and does not, require.

In a recent decision (BOC Limited, [2019] FWCA 5544), Colman DP noted that the assessment of the BOOT is undertaken objectively, rather than by reference to subjective considerations such as employee preferences about working arrangements. The decision
also emphasised that the BOOT inquires whether employees would be better off overall under the Agreement than under the relevant award, not better off on a line by line basis, and that trading off award conditions (in that case, accrual of RDOs and time off in lieu of overtime), was plainly permissible under the Act.

Of course, if any party is concerned that the Commission has not properly applied the statutory tests they can appeal or seek judicial review.

**Correcting the record on agreement timeliness**

The same opinion piece notes that the Commission had an average 76 day approval time ‘at the last reporting period.’

That number is substantially out of date. If you lodge an agreement today, the timeframes you can expect for approval are very different to 12 or 18 months ago.

Two charts tell the story. The first shows our timeliness for complex agreements lodged and finalised this year. These are applications which cannot be approved at lodgment. They often requiring undertakings or a hearing – and for that reason are the most time consuming to deal with.

As you can see, timeliness has improved significantly. The trend for simple agreements, which naturally can be dealt with more quickly, is similarly positive.

The number cited in the opinion piece was the 2017-18 median time from lodgment to approval. Over the past 6 months, that has more than halved, to a median of 35 days. And keep in mind that includes the range of matters, from simple agreements that can be quickly approved, to complex agreements requiring multiple undertakings.

Or, to put it another way, a majority of parties who lodge an agreement today will receive an outcome in not much more than a month.

The second chart shows the number of applications to approve agreements that we have on hand.

The number of applications on hand has fallen significantly, from a peak of 2063 in January this year to 660 in early August. This number continues to reduce.

In effect, this is the queue to have an agreement assessed for approval. This chart shows that, as a result of the improvements we have made, the queue is now significantly shorter.

All of this has also meant that in 2018-19 we successfully met our portfolio budget statement KPI of a median approval time of 32 days for agreements without an undertaking, achieving a median of 30 days.
There is always more to do, and we are continuing to look for ways to improve our services and support parties to lodge compliant applications. But I am confident that we are heading in the right direction.

The suggestion that the BOOT be examined received the somewhat predictable response from Unions and the opposition that it was Work Choices Mark II – or would leave thousands of workers worse off.

So where does this leave us.

Well, we are left with a largely binary policy exchange characterised by slogans, factually inaccurate statements and an absence of an evidence-based policy proposals. Much like two people shouting at each other across a crowded room in a different language.

At a time when productivity and wage growth across most developed economies, including ours, is at historical lows and the very nature of work is experiencing significant changes – the Australian community deserves more from all of us.

They are entitled to expect that we work collaboratively together to lead a positive and constructive debate.

We can and must do better.

I am encouraged by Minister Porter’s recent comments about relying on evidence to drive practical improvements to the workplace relations system.

It is up to the people in this room, along with all trade unions, employer associations, peak bodies and IR societies to lift the debate – from what divides us to what unites us. Looking, at our shared ‘interests’ rather than positional negotiation. The opinion pieces I mentioned earlier also speak to our shared interests. Ms Westacott’s article concludes with this observation:

‘We all want a nation where all Australians can get ahead, sharing in the dividends of prosperity. A more productive society is inherently a fairer society.’

We all have an interest in a productive and fair society. Just as we all have an interest in making our workplace relations system simpler and easier to understand.

The alternative to a more constructive engagement is failing the Australian community that relies on our collective leadership.

I do not want my remarks to be taken as expressing any view about the BOOT, or any proposal to change it. Nor do I want to be taken to be suggesting that the current legislative framework has nothing to do with the decline in bargaining. It is likely that the existing complexity has had some impact. Indeed the effects of the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (the Amending Act) support this view.
As this slide shows, the proportion of applications withdrawn from the process – in some instances over concerns about non-compliance – fell quite sharply after the Amending Act commenced; the number of agreements approved without undertakings has increased.

This graph shows the outcome of agreement applications

- **The red line shows the percentage of applications approved with undertakings (s.190)**
  - The primary reason for a reduction in timeliness in recent years is due to the requirement to seek undertakings or further information after an application is lodged
  - There was an increase in the number of applications requiring undertakings earlier this year, but that was probably caused by the reduction in the number of applications being withdrawn following the commencement of the Amending Act

- **The blue line shows the percentage of applications approved (s.186)**
  - The proportion of agreements that were approved without an undertaking rose above 30% for the first time in 2 years in the past six months, which is a good sign
  - The proportion of agreements that could be approved without an undertaking has reduced significantly from 2016, but that is slowly turning around
  - The education material that is available on the website and other initiatives such as user experience may have contributed to the increase in s.186 approvals

- **The green line shows the percentage of applications withdrawn by the applicant**
  - Matters withdrawn are usually associated with a failure to comply (or to provide evidence of compliance) with one or more of the pre-approval requirements.

- **The purple line shows the percentage of applications not approved/ dismissed**

**Future Directions**

As all this shows, the Commission operates in an ever-changing, dynamic environment. Directly or indirectly, legislative, workplace and social change all influence how we perform our functions. For the Commission, that has meant a constant focus on change and improvement to ensure we continue to meet the needs of the community we serve.

Our focus on improving the services we provide employers and employees began in 2012, when we initiated a change program called Future Directions.

**What’s Next**

In 2018, we reset and launched a new set of initiatives to improve access and reduce complexity for our users.
In developing these initiatives, we drew on evidence about the needs of employers and employees who use our services. It was clear that many of those who use our services wanted more assistance to guide them through the process and the information we provided needed to be easier to find and understand.

This current work program, *What’s Next*, seeks to directly address these areas of need.

**Workplace Advice Service**

A central part of What’s Next is the Workplace Advice Service. This month marks the one-year anniversary of the Service, a free legal assistance program coordinated by the Commission. It offers one hour of pro bono assistance to unrepresented individuals and small business employers who have an application or an inquiry relating to dismissal, bullying or general protections. This assistance is available prior to lodgement or once an application is made.

It is, in my view, one of the most developed pro bono programs operated by any Court or Tribunal in Australia.

Over the past 12 months, the service has expanded to operate in New South Wales, Queensland, South Australia, Victoria and Western Australia and has partnered with more than 65 law firms, community legal centres and legal aid bodies. So far, the program has facilitated over 1,100 pro bono consultations to eligible employees and small business employers. As the second year of operation commences, well over 200 requests for assistance are now received every month.

Further growth of the program is planned in the coming year where we are working towards expanding the program into Tasmania, the territories and some regional centres, such as Wollongong and Newcastle.

The success of the program would not be possible without the generous support and involvement of our partner organisations. If you would like to know more or join this important initiative please contact the Commission or Deputy President Tony Saunders.

Another element of What’s Next which I think has significant potential to improve service delivery is behavioural insights – I’ll come back to that in a moment.

**Looking forward**

So what of the next 10 years?

If we look back 10 years, to 2009 – the Fair Work Act was passed, and we became Fair Work Australia and then the Fair Work Commission. And took another step towards a true national workplace relations system. A lot can happen in 10 years. As I have mentioned, the number of instruments setting pay and conditions fell considerably. Now, the vast majority of employees are covered by modern awards and the NES.

So, what next?
For all courts and tribunals, the challenge is to harness technology in a way that makes our services easy to use, quick and inexpensive, while remaining accessible to all.

In recent times, courts and tribunals have worked to reduce the amount of paper they use and have introduced eFiling or online lodgement systems which allow parties to lodge applications and file submissions online. This also allows Registries and Chambers to manage cases digitally.

Access to justice has also been enhanced by making information easily available online. Previously legal information was in books and journals stored in musty law libraries. Now anyone with an internet connection can access case law, decisions and parliamentary documents from anywhere.

But, having information about a particular legal issue online doesn't necessarily mean it is easy to understand. Information needs to be refashioned into plain language. This can involve anything from videos and animations, to cartoons, quizzes and decision trees that help people understand often complicated legal concepts.

We have taken some important steps forward in the use of technology and the provision of information, some of which are shown on this slide.

Most digital legal help in recent years has been about providing access to information and making that information easier to understand. More recently, some courts around the world have actually started to conduct their dispute resolution activities digitally.

This includes using technology to conduct online dispute resolution, using Artificial Intelligence decision making for disputes or even conducting trials via the internet. There are a number of examples of each of these uses of technology.

**Online dispute resolution – Canadian Civil Resolution Tribunal**

The Civil Resolution Tribunal in British Columbia is an entirely online tribunal. They resolve disputes like car accident injury disputes of up to $50,000, small claims disputes under $5,000 and strata property disputes of any amount.

A key driver for online dispute resolution or ODR is the need for affordable access to justice. In many lower value disputes, what is at stake is worth less than starting legal proceedings or even than seeking legal advice.

The CRT allows parties to resolve their disputes when and where it’s convenient for them. This could be from work, home, on a smart phone or at the local library.

The CRT uses a traditional tiered approach to dispute resolution:

- Applicants use a solution explorer that has free legal information and tools and gives them the right CRT application form for their dispute
Once the application has been accepted the parties use the CRT’s confidential negotiation platform to talk through the dispute and try to reach an agreement. The parties message back and forth like in a private chat room.

If the parties can’t reach an agreement through negotiation a case manager will get involved and facilitate. They also do this from within the private chat room.

If parties still can’t reach an agreement a Tribunal Member will make an enforceable decision about the dispute, based on evidence and arguments that parties provide digitally.

The CRT says that only about 15% of claims need to be resolved by a decision of an CRT Member. Looking at the FWC for a moment, in the last financial year, just 6% of unfair dismissal applications lodged with the Commission were finalised by decision, with the remainder overwhelmingly resolved through our telephone conciliation service.

Artificial Intelligence, also known as machine learning, is another growing area of technology in the justice system. A lot of the focus has been on the potential to use AI in criminal cases to identify bias, give guidance to judges and ensure consistency.

Using AI to make decisions in courts sounds particularly futuristic. But that is exactly what is happening in Estonia where they are using AI in 13 places where an algorithm has replaced government workers.

The Estonian Ministry of Justice recently asked a team of AI developers to design a ‘robot judge’ that can adjudicate small claims disputes of up to around $11,000.

It just goes to show; no job is exempt from the march of technology!

A pilot phase of the robot judge will start this year with a focus on contract disputes. The parties will upload documents and other relevant information and the AI will issue a decision that can be appealed to a human judge.

The idea is that robots solve simple disputes, leaving more time for human judges to focus on tougher problems.

While AI legal decision makers might not be coming to Australia any time soon, AI may assist in providing parties with an assessment of the likely outcome in their dispute.

**Internet courts**

The Supreme People’s Court of China established the Hangzhou internet court in 2017.

As Hangzhou is the headquarters of some of China’s largest ecommerce companies, most of the evidence heard by the internet court is electronic.

To verify the identity of litigants and lawyers, they have to register a real name account on the official website of the court and verify their identity using facial recognition.

After logging in to the court website, applicants file their case online and provide their email address and mobile number.
Parties upload evidence in a variety of formats, including video or audio.

Hearings are held via video. The judges sit in one room in front of a large screen. The applicant and respondent are on either side of the screen while the documents or evidence are displayed in the centre.

This kind of technology raises as many questions as it answers. But does hold out the prospect of location-free justice - as any participant can take part from anywhere in the world (as long as they have an internet connection).

I want to conclude by talking about some of the changes I believe will shape how the Commission does its work over the next decade.

**Behavioural insights - Innovative answers to complex questions**

As I mentioned earlier, I think the field of behavioural insights – also known as Nudge Theory – has significant potential for the Commission.

Nudge Theory draws on cognitive science, psychology and economics to understand the unconscious biases and motivations that influence how people think, decide and behave. The goal of Nudge Theory is to help people make better decisions, for themselves.

The attraction of Nudge Theory to institutions such as the Commission is the capacity to achieve significant benefits for the community through relatively small, low cost changes to service design.

Let me give you an example.

These are the stairs near the entrance to Southern Cross Station, just down the road from the Commission in Melbourne.

This image is from 2014. As part of a state-wide public health campaign to promote daily exercise, the Government wanted to get more people using the stairs.

Now marketing is not my area of expertise, but you can imagine the conventional response might have been to hand out flyers selling the health benefits of using the stairs, perhaps showing a fit-looking celebrity briskly leaping up the stairs two at a time.

Instead, informed by Nudge Theory, they painted the steps with this mural.

In the month that followed, they measured the use of the stairs to see if there were any changes in pedestrian behaviour.

The findings were striking.

There was a **25% increase** in pedestrian use of the stairs in off-peak hours, and a **140% increase** during peak hours. In fact, the mural was such a successful nudge that it was replaced with advertising the following month, which is how it remains today.
Why was this trial so successful? Well, if asked, most people who can use the stairs might say that it is the smart decision to do so, given the health benefits of regular exercise.

But, when this decision is realistically presented to us in practice, it is perhaps the hundredth decision at the end of a long day. In those circumstances, we often choose the easiest, not the best, option.

Our rational thinking about the course of action we should take is at odds with our immediate choices - we stumble, and choose the option that serves us in the moment.

The image appeals to our subconscious, cognitive processes. We are drawn to things that are visually attractive. By reframing the choice faced by pedestrians, between using the stairs or the escalators, the mural nudges them toward the better option.

**Origins of Nudge Theory**

The insights behind Nudge Theory are not particularly novel. From the middle of the twentieth century, psychologists have studied the impact of social pressure on behaviour. Academics have focused on understanding human biases and marketing firms have capitalised on these biases to sell products.

But it wasn’t until thinkers like Kahneman, Thaler and Sunstein drew these threads together and started explicitly articulating their social and policy implications, that Nudge Theory was born.

The publication of Sunstein and Thaler’s book, “Nudge”, in 2008, was a watershed for the discipline. Nudge Theory began to appear prominently in regulatory and policy discourse. President Obama appointed Sunstein as head of the White House’s Office of Information and Regulatory Affairs, and Thaler became an advisor to the British Government. I want to focus on the UK experience for the moment.

In 2010, the Blair Government established what was colloquially known as the ‘Nudge Unit’ in the PM’s office. The unit was set up with a sunset clause – if it did not achieve a ten-fold return on its five hundred thousand pound establishment cost, it would be shut down after two years. After a year of operation, it had achieved a twenty-fold return.

Over the past decade the influence of Nudge Theory has grown rapidly. A recent study estimated there were 196 behavioural economics units operating across the world.

In Australia, there are now nudge units at both Commonwealth and state government level, as well as numerous university researchers and private sector practitioners working in the area.

In one sense, the key to the success of Nudge Theory is that it takes us as we are, imperfections and all, rather than from the unrealistic notion of humans as perfectly rational.
The starting point of Nudge Theory is that ‘stumbling’, or bad decision making, is inevitable. Environmental factors and cognitive biases will always, to some extent, compromise our decision-making.

But the way in which we stumble is predictable – and can often be mitigated or corrected with a gentle ‘nudge’ in the right direction.

By introducing subtle changes to the way our decisions are framed – sometimes called ‘choice architecture’ – and appealing to our existing cognitive processes, effective nudges help improve the quality of the decisions we make.

Direct, explicit interventions in behaviour are not nudges. Forbidding a particular course of action is not a nudge, nor is the provision of overt incentives or penalties.

To go back to the Southern Cross mural example, they could have simply roped off the escalator, or given out five dollar notes to people who climbed the stairs. That might have been effective – though inefficient – but it wouldn’t have been a nudge.

**Nudge Theory in the public sector**

The attraction of Nudge Theory to the public sector is its capacity to achieve significant policy outcomes through relatively small, low cost changes to service design.

That’s the theory – but it is best explained by some examples.

An example that illustrates the value of Nudge Theory for the public sector is the nudge designed to encourage people to pay their tax on time.

The trial involved adding a single line to letters sent by the UK Office of Revenue and Customs to late taxpayers, drawing on the social norm bias.

The addition simply states: nine out of ten people pay their tax on time.

They also tested a few different variations.

What the results on the slide indicate is that the more tailored the social norm is to the circumstances of the recipient, the more effective it was.

The ‘local norm’ letter referred to a ‘people in your local area’. The ‘debt norm’ referred to ‘other people with a debt like yours’.

Letters with a combination of these two elements were the most effective in prompting payment.

Within the first twelve months of the trial, an additional 200 million pounds in unpaid taxes were recovered. This trial has since been replicated in a number of countries.
**ADVO intervention**

Another intervention, this time in New South Wales, sought to improve court attendance in domestic violence matters.

It tested whether a timely text message reminder could increase court attendance by defendants in apprehended domestic violence order court proceedings.

The text message relied on two behavioural insights:

- the timeliness effect: people respond differently depending on **when** they are received; and
- the messenger effect: people are heavily influenced by **who** communicates information.

The slide shows an example of the text that was sent to defendants.

This simple solution increased court attendance by 4.1 per cent.

It also caused a significant reduction in the time taken to finalise each domestic violence court case (69 days compared with 74 days).

**Benefits of Nudge Theory for tribunals, parties and the community**

The sorts of initiatives I've talked about will be familiar to many in this room – text messages, plain language and other support measures courts and tribunals commonly use can all be seen as ‘nudges’ to encourage compliance.

But there is more we can do. There is a wealth of information available on BI methods and examples, and expertise available across the public and private sectors that we can draw on to help us develop, test and implement initiatives.

And the potential benefits are significant.

As the examples I’ve given demonstrate, wherever compliance is an objective, there is potential to improve outcomes through the application of behavioural interventions.

When rules are not effective, the problem they aim to address remains unresolved. Achieving a greater understanding of what drives compliance, can shift the focus to increasing compliance, rather than the focusing on sanctions after the fact.

Low levels of compliance are costly to rectify, consuming time and resources of both tribunals and the parties themselves.

The beauty of nudges is that they are generally relatively low cost and easy to implement. You do need some expertise to develop and deploy behavioural interventions, and to design and implement the randomised control trials or other evaluation methodologies. But, as the
examples I’ve shown demonstrate, well designed nudges can deliver significant gains for comparatively modest costs.

Nudge theory might also have something to offer us in addressing the stress and anxiety experienced by parties during the legal process.

The Commission’s research shows parties, particularly those without representation, often come to us with high levels of anxiety, stress, confusion and frustration.

Providing information to a party when they need it, and are able to absorb it, can help them make better decisions and give them greater sense of control over the process.

Clear, accessible information also results in a better understanding of a process, usually resulting in both higher levels of compliance, and a reduced emotional burden on the parties.

What the Commission is doing

The Fair Work Commission has begun work in this space, in partnership with experts from the Behavioural Insights Team (BIT), based in Sydney.

The project is currently focused on developing behavioural interventions to increase the proportion of enterprise agreement applications that are complete and compliant on lodgement.

To give you some background, we currently deal with about 5000 applications a year seeking the approval of enterprise agreements which set out wages and conditions in thousands of workplaces across the country.

As I mentioned earlier, the statutory criteria for approval are complex.

The failure of an application to comply with a statutory requirement can often be addressed by the applicant making an undertaking. But, this process is resource intensive and usually means the agreement takes significantly longer to approve.

There is a clear public benefit in encouraging compliant applications. The work BIT is doing with us is directed at ensuring that applicants receive and understand the information they need, at the time they need it, to avoid errors.

This work has involved reviewing the information resources we currently provide, considering data such as website analytics, and interviewing parties who have been involved in the agreement application process.

It is too early to assess outcomes, but, interestingly the early recommendations focus on reducing the amount of information we provide, rather than increasing it.
We are also looking at options to bring the most relevant information resources to the position on our website where it is most likely to be found, and to design measures to nudge applicants to access those resources.

Similar to the other examples I’ve given, the options we are looking at are reasonably straightforward to implement and for the most part, unnoticed by the user.

The next phase of our Nudge project will focus on our unfair dismissal jurisdiction. BIT will help us develop interventions to:

- reduce the proportion of applications lodged outside of the 21 day time limit;
- ensure employees who have lodged late unfair dismissal applications receive relevant, targeted information, as early as possible, about the higher statutory thresholds that apply; and
- encourage applicants who have lodged out of time to make early, informed decisions about the best course of action for them.

The project will be completed in the second half of the year and we will publish the report on the Commission’s website.

**Made for me service delivery**

Another area we intend to look closely at is the use of predictive modelling and other kinds of data analysis that allow us to target services and allocate resources to where they are most needed.

The tribunals of the future will be data smart.

The report by Deloitte, Gov2020: A Journey into the Future of Government identifies seven major trends that have the potential to reshape government services in the future.

One of these trends is ‘made-for-me service delivery’. Public service interactions are becoming personalised and available from home and from mobile devices. Large centralised offices in the CBD don’t make sense when different groups of people have different needs. A CBD office isn’t helpful for someone who lives in a regional town or remote area or even in an outer suburb like Blacktown or Packenham.

We already hold around 30 per cent of hearings and conferences via video or phone. But for video hearings this often involves parties going to the Commission office in their state. In the future, we want to work with public libraries to provide a space in which parties can video call – making sure that they can take part in hearings from their local town or suburb.

But as I mentioned earlier, most individual matter types don’t ever go to a hearing. If we look at unfair dismissals, which are our most common matter, around 80 per cent are settled at conciliation without anyone ever setting foot in a Commission office. These are the cases that could start off using online dispute resolution, similar to the example in
Canada I mentioned earlier, and then progress to a video hearing if the matter doesn’t settle.

**Smarter forms**

Many courts in the US are starting to use form builders – programs that ask the applicant a series of questions and use the answers to help fill out court forms.

One prediction I can make with some confidence is that the Commission’s forms will look quite different in 10 years’ time – and hopefully well before then. We are already developing smartforms for agreement applications that alert the applicant if the dates they have entered raise compliance issues. I think there is a great deal of potential to use technology, along with human centred design, to make forms work better both for parties and decision makers.

**Human centred institution**

Tribunals are human centred institutions. While technology can make them more accessible, more efficient and cheaper, it can’t replace the fundamentally human character of a tribunal. Cases have a distinctly human element – human emotion, reason and interaction to deliver justice.

That’s why any technological changes we make to the way we operate need to be made with the people who use our services front and centre.

In the future we will use address data from the forms filed by applicants and respondents to map locations; to see where most of our parties are coming from. If a substantial number of applicants are coming from a specific town or region, we will reallocate resources to focus our service delivery in that area. We will look at economic trends around the country, to try and predict where demand for our services might rise.

As well as mapping location data, we will map more sophisticated data like work industry, age, gender and so on to better understand the characteristics of our users. This information will help us provide tailored services. This could include packages of information tailored to each particular case and the circumstances of the parties.

**Conclusion**

Thanks for your time tonight. I’m not sure how accurate my crystal ball is, but I hope I’ve given you some insight into what the future holds for courts and tribunals, and the Commission in particular. Perhaps you can invite me back in 10 years’ time and we’ll see how well my predictions have fared – or perhaps the robot judge will come instead.