Address to the Australian Industry Group Conference

31 July 2023

REVIEW OF THE FAIR WORK COMMISSION'S IMPLEMENTATION OF THE SECURE JOBS, BETTER PAY LEGISLATION

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Introduction

Thank you for inviting me to address your conference for the second year in a row. Much has changed since I was here in August last year. At that time, there was a public debate underway about reforms in industrial relations, especially in enterprise bargaining, in the context of the Government's then-upcoming Jobs and Skills Summit and the anticipated legislative package of amendments to the *Fair Work Act* that was to follow.

Now here we are only a year later, and the *Secure Jobs, Better Pay* legislation is already old news, and we are waiting with bated breath for a further major tranche of legislative reforms.

What I thought I would do this morning is to give you a report on the Commission's implementation of the *Secure Jobs, Better Pay* legislation, and to give you some feedback about the experience so far, especially in relation to enterprise bargaining.

However, before I launch into this, I want to give you some general information about the Commission's performance.

The Commission's performance

Last year, we adopted new internal performance targets, commencing 1 July 2022, so that we could more accurately measure our performance. We considered that this was an essential measure because of the level of adaptation we predicted would be necessary following the anticipated legislative reform's effects on our operations and workload.

For the financial year ending on 30 June 2023, I can report that the Commission:

- met or exceeded our Key Performance Indicators;
- delivered timely finalisation of cases and disputes brought to the Commission; and
- met or exceeded the expectations of 82.2% of surveyed users.

I don't want to bore you with too many statistics, but there are a few matters worth highlighting:

(1) Over the financial year, there were 31,520 matters lodged in the Commission, and we finalised 32,180 matters. This clearance rate of 102 per cent has meant that we have no backlogs in any matter type.

(2) Of the matters we finalised, 50 per cent were finalised within five weeks and 90 per cent within 13 weeks. In respect of matters where a formal decision by a Commission member was required, in 50 per cent of cases the decision was issued within three weeks and, in 90 per cent of cases, within 12 weeks.

(3) About 90 per cent of dispute matters and unfair dismissal cases were settled by an agreement facilitated by the Commission (either by members or our specialist staff conciliators).

(4) In respect of applications for approval of enterprise agreements, 50 per cent were approved in 17 days or less, and 90 per cent were approved in 36 days or less. Approximately 96 per cent of all enterprise agreements were approved by the Commission. Only 0.5 per cent were actually rejected, with the remaining applications having been withdrawn prior to determination.

These outcomes are the result of our unwavering focus on timeliness in the delivery of outcomes, which I consider to be an essential element of the proper administration of justice.

Importantly, we were able to deliver this level of operational performance while at the same time being heavily engaged in implementing the changes arising from the *Secure Jobs, Better Pay* legislation and driving further innovation in the way we deliver our services. This demonstrates, I think, that we are well placed to deliver any further legislative reforms that may emerge later this year.

The main reforms

The *Secure Jobs, Better Pay* legislation involves the introduction of changes to the *Fair Work Act* in four tranches.

In respect of the major reforms affecting the Commission's functions, the key dates so far are:

7 December 2022:

- sunsetting of 'zombie' agreements on 6 December 2023 subject to applications for extension
- new statutory objects, and new objectives for awards and minimum wages, in relation to gender equality and job security

6 March 2023:

- extended jurisdiction to address sexual harassment
- absorption of the functions of the former Registered Organisations Commission
- establishment of Expert Panels for pay equity and the Care and Community Sector

6 June 2023:

- changes to enterprise bargaining, including expanded multi-enterprise bargaining, and changes concerning taking protected industrial action
- changes to the requirements for approval of enterprise agreements in relation to genuine agreement and the better off overall test
- resolution of disputes about flexible work requests and requests for the extension of unpaid parental leave

The fourth key date, 6 December 2023, is when the amendments concerning fixed term contracts will commence operation.

I will endeavour to describe briefly what we have done in each of these areas. But, overall, the guiding principle the Commission has adopted in the implementation process is to act in an open and transparent way with the needs of our users constantly in mind. To that end, we have made public statements about implementation plans at every step along the way and we have established a range of consultation mechanisms to ensure that we listen to our users and understand their thinking. The Australian Industry Group, as one of the peak bodies, has participated very actively in these processes and I want to thank your organisation for its valuable input.

'Zombie' agreements

I want to start by saying that, before 6 December 2022, I never in my wildest dreams thought that a statute of the Parliament of the Commonwealth of Australia would ever contain the word 'zombie'. But here we are, about eight months later, and it is an accepted term in industrial law.

What is a zombie? Without getting too technical, it is a collective agreement, or an individual Australian Workplace Agreement, that was made under the legislative regimes which applied prior to 1 January 2010. It also includes State employment agreements that transferred to the federal system when States referred their industrial relations powers to the Commonwealth. Under the transitional provisions which applied when the *Fair Work Act* commenced operation, these zombie agreements continued in effect unless terminated by the Commission on application. In my assessment, the proportion of the workforce which is covered by zombie agreements is, at the least, not insignificant, and is larger than is commonly realised.

The *Secure Jobs, Better Pay* legislation provides that zombie agreements will 'sunset' — that is, cease to operate — on 6 December 2023, unless extended in operation by the Commission upon application. The maximum period of an extension is four years. Grounds for an extension include that employees would be better off overall under the zombie than the relevant award, or that bargaining is underway for a replacement agreement. Employers were, by 6 June 2023, required to notify employees if they were covered by a zombie agreement and advise them that the agreement would sunset on 6 December 2023 unless an application for extension were made.

The Commission has published on its website a list of pre-1 January 2010 collective agreements which have not been terminated. This is intended to give some guidance as to the existence of zombie agreements which may be affected by the new legislation. However, some

of the agreements in the published list may have been superseded by new agreements and may therefore not be legally operative. In addition, we do not have any records of AWAs, since the Commission was not the approving authority for this type of agreement, and for the same reason our records of collective agreements made in the 2006 to 2009 WorkChoices period are incomplete.

To date, the Commission has received extension applications in respect of 41 zombie agreements, of which five were AWAs and the rest collective agreements. In the seven decisions issued to date, an extension has been refused for six agreements (noting some decisions address more than one agreement) and an extension granted in three. The longest extension granted to date has been 12 months. We are publishing all the decisions made on a specific page on our website, so if you want guidance about the prospects of an extension application, you should look there.

Gender equality and job security

The object of the *Fair Work Act*, and the modern awards objective in s 134(1) and the minimum wages objective in s 284(1) have been amended to include the achievement of gender equality and job security. The Government's stated intention for these amendments is to 'place these considerations at the heart of the FWC's decision-making, and support the Government's priorities of delivering secure, well-paid jobs and ensuring women have equal opportunities and equal pay.'[1]

These amendments have first arisen for detailed consideration in this year's *Annual Wage Review* decision. The decision discusses in detail the effect that these amendments will have on the Commission's minimum and award wage fixing processes. We don't have time to go into detail about the analysis in that decision, but there are three key propositions to be aware of:

(1) We have previously approached the Annual Wage Review on the basis that the task is to determine what adjustment should be made to existing award rates, and the National Minimum Wage, to maintain a safety net of fair minimum wages. However, the requirement to now take into account the elimination of gender-based undervaluation of work in the conduct of the Review itself requires the consideration of whether the existing minimum rates of pay constitute a properly valued and non-gender-biased foundation upon which to make any wages adjustment.

(2) The Annual Wage Review decision identifies, and analyses, two potential gender-related undervaluation issues in modern award rates, and the resolution of these issues is firmly on the Commission's agenda.

(3) The Commission is in the process of developing a body of research to underpin the future resolution of these and any other gender-related undervaluation issues which may be identified. As the first stage of this, we have commissioned a major research project concerning occupational segregation and gender undervaluation.

[1] Revised Explanatory Memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*.

Extended jurisdiction to address sexual harassment

The *Secure Jobs, Better Pay* legislation has implemented Recommendation 28 of the landmark *Respect@Work Report* published in March 2020, so that the Commission now has power to deal with disputes about sexual harassment in connection with work before they go to the courts, in addition to the Commission's existing power to make stop sexual harassment orders.

We have set up a National Practice Group, led by Commissioner Sarah McKinnon, to manage the new jurisdiction. The National Practice Group is supported by specialist staff who take a trauma-informed case management process, and we have set up a working group of industry and employee representatives to oversee the implementation of the new jurisdiction.

The experience to date is that we have received only 11 applications under the post-6 March provisions, most of which have sought to access our dispute resolution function. The settlement rate of these matters to this point has been positive.

However, despite the low number of applications, I suspect the existence of the extended jurisdiction will have a prophylactic effect in practice. We have released on our website a eLearning module to educate employment participants about workplace sexual harassment and, since late March, about 11,000 people have viewed the module. We have also had constant contact from employers, employees, organisations, and lawyers and HR professionals about this module, who have provided feedback but have also requested access to the module for the purpose of embedding it in their own training systems for staff. This indicates a widespread demand for educational resources in this area, and we are responding by promoting use of the module and access to it across the country.

Dispute about flexible work requests and requests for the extension of unpaid parental leave

The *Secure Jobs, Better Pay* legislation has strengthened the right of employees to request flexible work arrangements under the National Employment Standards, including employer obligations to consider and respond to such requests. The legislation has also made parallel amendments to the right to request an extension of unpaid parental leave.

The key change affecting the Commission is that, as a last resort, the Commission is, from 6 June 2023, empowered to arbitrate disputes about requests which have been refused or not responded to. We have put in place the necessary administrative machinery to deal with such applications, but no decisions in this area have yet been made.

Registered organisations functions

From 6 March this year, the General Manager of the Commission took over the functions of the abolished Registered Organisations Commission. It is sufficient to say that there has been a seamless transition, with the Commission taking over all current inquiries, investigations and proceedings, and with the former ROC staff now working in the Commission's new Registered Organisations Services Branch. The transition has been supported by an Advisory Committee comprised of representatives of all the peak bodies including the Australian Industry Group.

One of the features of the *Secure Jobs, Better Pay* legislation is that the General Manager has been armed with new enforcement powers in the event of any breach of the regulatory regime, including infringement notices, enforceable undertakings and additional civil penalty provisions. This is part of an approach under the legislation whereby the General Manager is required to seek to embed a culture of good governance and voluntary compliance with the law within registered organisations. In order to inform how this approach might be put into practice, the General Manager has commissioned a review of the Commission's regulatory approach, to be conducted by two highly respected former Deputy Presidents of the Commission, Jonathan Hamberger and Anna Booth. Their review will, among other things, looking at the design and development of a contemporary and 'best practice' enforcement policy and ways to boost service delivery to organisations.

Enterprise bargaining

The most publicised feature of the legislative change to the enterprise bargaining system concerns the three new or modified streams for multi-enterprise agreements, namely:

- supported bargaining agreements;
- single interest bargaining agreements; and
- cooperative workplace agreements.

I think the law and practice in these areas will develop fairly slowly because undertaking sectoral bargaining for unions and other bargaining representatives will necessarily be a major and resource-intensive exercise. I suspect that the use of these provisions, at least initially, will be highly selective rather than economy-wide. The major development so far is that, on 6 June 2023 (the day the amendments took effect), the United Workers' Union applied for a supported bargaining authorisation in the early childhood education and care sector. The application is supported by the employers who are subject to it. It will be heard by a Full Bench of the Commission on 16 and 17 August. There has also, more recently, been an application by the Independent Education Union for a single interest employer authorisation for the Catholic school sector in Western Australia, and that will also be determined by a Full Bench in due course. These decisions, when issued, should give parties some guidance as to the operation of these multi-employer bargaining streams.

There are a range of other less-publicised changes that the legislation has made to the bargaining provisions of the *Fair Work Act* which have had more immediate effect. I want to focus on two of these.

The first is the introduction of the intractable bargaining declaration process. The Commission can make this declaration if four requirements are met:

(1) The Commission has dealt with the matter under section 240 and the applicant for the declaration has participated. Section 240 is an existing provision of the *Fair Work Act* which allows the Commission, on application, to conciliate, and by agreement arbitrate, any dispute about enterprise bargaining. I'll say something more about section 240 in a minute.

(2) There is no reasonable prospect of agreement being reached if the Commission does not make the declaration.

(3) It is reasonable to make the declaration taking into account the views of the bargaining representatives.

(4) Nine months have passed since the nominal expiry date of the existing agreement or since bargaining commenced (whichever is the later).

If such a declaration is granted by the Commission, bargaining (including taking protected industrial action) comes to an end and the Commission arbitrates the outstanding issues. This gives the Commission the capacity to bring an end to protracted bargaining, such as in the recent NSW Trains dispute where bargaining proceeded fruitlessly for years and was accompanied by industrial action affecting commuters. It also provides an incentive for parties involved in difficult bargaining to seek the assistance of the Commission by the use of s 240 at an early stage.

We had our first application for an intractable bargaining declaration in the case of *Virgin Australia Regional Airlines v The Australian Licensed Aircraft Engineers Association*, and this was due to be heard by a Full Bench on 21 and 24 July 2023. However, it was discontinued by Virgin at the last minute on the basis that it appeared to have reached an understanding about a new agreement with the ALAEA. This may demonstrate that this new aspect of the legislation can act as a spur to the reaching of agreements, although I hope we do not see applications for these declarations being used simply as a bargaining tactic.

The second is the introduction of a requirement for the Commission to conduct a conciliation conference whenever it makes an order for the conduct of a ballot of employees to authorise the taking of protected industrial action (PABO). This conference has to be conducted prior to the closure of the ballot that has been ordered. This represents an opportunity for the Commission to facilitate reaching an enterprise agreement before any protected industrial action is taken. I'll come back to this.

As part of the process of our implementation of the *Secure Jobs, Better Pay* legislation, the Commission has made a strategic decision to apply more resources to the facilitation of enterprise bargaining. Part of the reason we are able to do this is because the Government has appointed a number of additional members to the Commission, increasing our member cohort by about a third.

We have set up a new practice group specifically for enterprise bargaining, headed up by one of our most experienced members, Deputy President Peter Hampton. He is leading the Commission's conduct of all matter types to do with bargaining and industrial action up to the point that an agreement is made, in order to ensure that we take an integrated approach and take advantage of any opportunities to help parties reach an enterprise agreement.

I issued a Statement on 4 April this year outlining the strategic approach the Commission intends to take to enterprise bargaining. There were two key propositions in that Statement:

(1) Any bargaining representative (including an employer) that encounters difficulty in reaching an enterprise agreement is encouraged to apply to the Commission to deal with the bargaining dispute under section 240 of the *Fair Work Act*. **If such**

an application is made, the Commission will make available the appropriate level of Member resources in order to facilitate the reaching of an agreement.

(2) In relation to the new requirement for post-PABO conferences, the Commission will ensure that the appropriate level of Member resources is provided for the conduct of such conferences in order to maximise the prospects of success in facilitating an agreement. **There will be a corresponding expectation that bargaining representatives will likewise apply the appropriate level of resources to the required conference process.**

I just want to expand on those two propositions.

In relation to our commitment to provide member resources to assist in bargaining in response to any section 240 application, I can refer to the bargaining dispute involving Svitzer Australia Pty Ltd and the three maritime unions as a case study.

Svitzer is the overwhelmingly dominant player in the tugboat industry in Australia, and in 2019 it began bargaining for a new enterprise agreement. The bargaining that followed involved 75 meetings stretching over three years without any agreement being reached, and all the while there were repeated instances of disruptive protected industrial action being taken by the unions and their members. Things came to a head when, on 14 November 2022, Svitzer gave notice that it intended to lockout all its tugboat employees at 17 ports in Australia for an indefinite period effective from the 18th. The effect of this would have been to wholly or substantially cease all shipping operations at those 17 ports.

The Commission acted quickly, on its own motion, to call a hearing as to whether the protected industrial action should be terminated or suspended under the provisions of the *Fair Work Act* as they then were on the basis that the action would cause significant damage to the Australian economy and endanger the public welfare. Before the lockout was due to commence, the Commission made an order suspending protected industrial action for a period of six months.

An existing section 240 application was then activated to assist the parties to reach an enterprise agreement. Commissioner Bernie Riordan, who is one of the Commission's most capable dispute resolvers, was assigned to this task. It wasn't easy. The Commissioner engaged in 30 conferences with the parties as well as numerous one-on-one conversations with particular parties, and although it took about seven months, he was ultimately successful in facilitating an outcome. All this took place without there being any further industrial action. On 11 July 2023, the Commission approved the *Svitzer Australia Pty Limited National Towage Enterprise Agreement 2023*. That's as close as you get to a happy ending in industrial relations. This experience shows the level of facilitation and support for enterprise bargaining you can get from the Commission if you need it.

In relation to the post-PABO conciliation conferences, our standard approach is that, once a protected action ballot order has been made, an order will be issued forthwith requiring all bargaining representatives to attend the conference now required by the legislation at an identified time and place (or remotely).

Under the legislation, a bargaining representative who fails to comply with an order to attend a PABO conference will not subsequently be able to undertake protected industrial action.

There will also be a direction for parties to provide the Commission with a document outlining the progress in the bargaining to date and the outstanding issues together with a copy of the latest draft of the proposed agreement. The conference will be conducted by a member of the Commission and will typically take at least two to four hours, with additional conferences being conducted depending upon the state of progress and the wishes of the participants.

I can give you a report about how this is working in practice based on some very early numbers. In approximately the first six weeks of the operation of this part of the new legislation, we had 85 applications for protected action ballot orders, which is incidentally 54% more than the 5-year average for that period. In the same period, we conducted 29 post-PABO conferences in accordance with the requirements of the legislation, involving 102 parties (noting that the conferences for the remaining matters fell outside the six-week period). Half of the conferences were conducted within 12 days of the protected action ballot order being made, and 90% were conducted within 21 days.

Although it is early days, in most of these conferences there was progress made towards narrowing the differences between the parties and, in at least three cases, the conferences resulted in complete resolution as to the terms of a new enterprise agreement.

One example of this was in the case of bargaining for a new agreement between an aviation business and its three unions. In this case, bargaining had been ongoing, unsuccessfully, for about 12 months, agreements proposed by the company had been rejected in employee ballots on three occasions, and there had been extensive protected industrial action. On 14 June 2023, shortly after the commencement of the bargaining amendments on 6 June, two of the unions applied for protected action ballot orders in order to obtain authorisation for further protected industrial action. The Commission made the ballot orders that were sought by the parties on 16 June, and the parties were then directed to attend the required conference.

There was an initial conference conducted by Commissioner Paul Schneider on 20 June, which was sufficiently productive to lead to the Commissioner conducting further conferences on 27 and 29 June and 6 July. The Commissioner was successful in achieving agreement on the main issues in dispute, despite the fact that the parties were very far apart when they started. The parties are now drafting the terms of an agreement to be put to a ballot, on the basis that the unions have undertaken that there will be no further industrial action in the meantime.

So the experience to date has been encouraging, but I think we have more work to do to change expectations about the way enterprise bargaining proceeds under the new legislation. Some parties, I think, have a mindset about enterprise bargaining that is akin to an old-style rugby league grand final, where you have a 'softening up' period before the main game of bargaining begins. Hopefully, as we bed the new process down, that will change.

Enterprise agreement approval process

Finally, I want to deal quickly with the changes to the enterprise agreement approval process effected by the *Secure Jobs, Better Pay* legislation. There have been two main changes.

The first is an alteration to the requirement for genuine agreement on the part of the employees covered by the agreement. It involves a move away from the previous prescriptive, rules-based approach to a principles-based approach. The main development to report here is that the

legislation required the Commission to develop and publish a Statement of Principles concerning genuine agreement which the Commission must, in future, take into account in deciding whether an enterprise agreement has been genuinely agreed to. After consulting with the peak bodies, including the Australian Industry Group, and a wide range of other bodies, we published the Statement of Principles on 12 May 2023. However, because the changes only apply to agreements for which the bargaining commenced on or after 6 June 2023, we have not yet reached the stage where we are applying the new approach.

The second change has been to the better off overall test, and involves three main aspects:

(1) The requirement to apply the test by reference to each 'prospective award covered employee' (in addition to each current employee) has been replaced by a requirement to apply the test in respect each 'reasonably foreseeable employee'.

(2) The Commission is required to have regard only to patterns or kinds of work, or types of employment, that are reasonably foreseeable at the test time.

(3) The Commission must undertake a global assessment of all the terms of the agreement.

In my view, these provisions are largely confirmatory of the approach that was already being taken by the Commission rather than constituting anything radically new. The new provisions apply to agreements made on or after 6 June 2023. There have already been some agreements dealt with under the new provisions, but nothing of note has arisen in that respect yet.

Conclusion

So to wrap up, I can say that, with a lot of hard work by the Commission's members and staff, we have moved well down the path of the successful implementation of the Parliament's legislative reforms while maintaining throughout our efficiency and timeliness in dealing with our caseload.

As I said at the outset, we are expecting that the Parliament may legislate for a further major suite of industrial relations reforms later this year. The agenda for change which has been publicised is challenging, but I consider that the Commission is well placed, with the systems and resources it now has, to implement whatever is legislated for.