Senate Education and Employment Legislation Committee Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Submission of the Fair Work Commission

February 2021

Introduction

The Fair Work Commission (the Commission or FWC) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee (the Committee) inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (the Bill).

The Commission is Australia's national workplace relations tribunal. It is an independent body with the power to carry out a range of functions including:

- dealing with unfair dismissal claims
- dealing with anti-bullying claims
- dealing with general protections and unlawful termination claims
- setting the national minimum wage and minimum wages in modern awards
- making, reviewing and varying modern awards
- assisting the bargaining process for enterprise agreements
- approving, varying and terminating enterprise agreements
- making orders to stop or suspend industrial action
- dealing with disputes brought to the Commission under the dispute resolution procedures of modern awards and enterprise agreements
- determining applications for entry permits; and
- promoting cooperative and productive workplace relations and preventing disputes.

The work of the Commission is carried out by Commission Members, overseen by the President, and supported by administrative staff in accordance with the *Fair Work Act 2009* (FW Act).

The Commission's role is to administer its jurisdiction in accordance with statute. The Commission does not enter legal policy debate other than to point out technical changes that may make administration of the law simpler or where the Commission foresees practical issues should proposed legislation be passed as drafted.

While the Bill proposes a number of changes affecting the Commission's functions, this submission is confined to discussion of:

1. the benefits of the proposed technical amendments in the Bill that would respectively enable the Commission to deal with more appeals 'on the papers', correct errors in decisions relating to enterprise agreements and better deal with unmeritorious applications

2. the concern that the Bill's restriction on the conduct of small claims conciliation may significantly compromise the Commission's ability to facilitate the resolution of underpayment claims by agreement between the parties; and

3. the operational impact of the Bill's 21 working day time limit for determination of enterprise agreement approval applications and enterprise agreement variation applications, and the potential for this to have unintended consequences contrary to the interests of the bargaining parties.

1. Technical amendments that will support more efficient Commission processes

The Bill includes 3 amendments the Commission has requested, to enable the Commission to deal with matters more expeditiously and facilitate more effective allocations of its resources. These amendments would enable the Commission to:

- deal with appeals 'on the papers' where appropriate

- vary or revoke decisions relating to enterprise agreements and workplace determinations, to correct errors; and
- deal more effectively with unmeritorious applications.

Appeals on the papers

The Bill's new s.607(1)(b) will remove the present limitation that the Commission may only conduct an appeal without holding a hearing (ie 'on the papers') if the parties consent. This will assist the Commission to deal with appeals expeditiously.

As a general proposition, the Commission is not required to hold a hearing in performing its functions or exercising its powers (s.593(1)). However, the situation is different for appeals and reviews. Section 607(1) of the FW Act presently provides that an appeal or review of a Commission decision may only be heard or conducted without holding a hearing:

- if it appears to the Commission that the matter can be adequately determined without oral submissions; and
- with the consent of the persons who would otherwise, or who will, make submissions in the matter.

A Commission appeal is an appeal by way of rehearing and the Commission's powers on appeal are exercisable only if there is error on the part of the primary decision-maker. A Full Bench of the Commission will usually deal with an appeal on the basis of the evidence in the proceedings which led to the decision subject to the appeal, rather than admitting further evidence.

There will be circumstances in which it is appropriate for the Commission to hold an oral hearing in determining an appeal. For example, procedural fairness may require that the Commission conduct a hearing in certain circumstances and the Full Bench may decide that it should admit further evidence, including oral evidence, in an appeal.

However, the present s.607(1) is unnecessarily restrictive, as it requires the Commission to hold a hearing unless all parties consent to the appeal being determined on the papers, even when the Commission considers the appeal can be adequately determined without oral evidence and submissions. This prevents the Commission dealing with the appeal in the most expeditious way and causes unnecessary delays in resolving the matter and increased costs to the parties.

The Bill's new s.607(1)(b) requires the Commission to take into account the views of the parties as to whether an appeal or review should be conducted without a hearing.

Correcting errors in decisions relating to enterprise agreements

The Bill would repeal ss.603(3)(b) and (c) of the FW Act so as to permit the Commission to vary or revoke decisions relating to enterprise agreements and workplace determinations. For example, this would permit the Commission to correct an error in an enterprise agreement approval decision, rather than the parties having to appeal the decision. This amendment will allow the Commission to deal with errors in such decisions expeditiously and so better use Commission resources and reduce the burden on parties.

Section s.603(1) of the FW Act empowers the Commission to vary or revoke decisions made under the FW Act, except those referred to in s.603(3). Section 603(1) may be used to correct errors or 'slips' in decisions, as well as in other circumstances, such as where the decision was based on incomplete or false information (see *Grabovsky v United Protestant Association* [2015] FWC 5161 at [37]-[38]).

The exclusions in s.603(3) include, in paragraph (b), decisions in respect of applications for approval of enterprise agreements made under Division 4 of Part 2-4 of the FW Act. This means that where there is an error in such a decision or an issue with the information on which the decision was made, the Commission Member responsible cannot just correct the problem (unless it is an error that falls within the very limited scope of s.602).

This will usually mean that a party which is prejudiced by such a problem with a decision will need to appeal the decision. On appeal the Full Bench can set the decision aside and either make a new decision or remit the matter to the Commission Member responsible or to another Member to be decided afresh. Although the Commission's appeal procedures operate efficiently and expeditiously, there will be an unavoidable delay and increased costs for the parties. The appeal will have to be listed on the next available appeal roster, a Full Bench of three Members will have to hear the appeal and, if the original decision is set aside, the matter must be reconsidered and a new decision made.

An example of this is *CFMMEU v A1 Earthworx Mining & Civil Pty Ltd* [2019] FWCFB 5836, in which the Full Bench on appeal quashed a first instance decision approving an enterprise agreement that had inadvertently been issued due to an administrative error in chambers. The appeal was dealt with expeditiously, with the Full Bench issuing its decision 8 weeks after the first instance decision.

The Bill's repeal of ss.603(3)(b) and (c) would avoid such delays by enabling the Member concerned to correct problems with their decisions where appropriate.

Unmeritorious applications

The Bill's new s.587 would broaden the grounds on which the Commission may dismiss an application to include the grounds that the application:

- 'is frivolous, vexatious, misconceived or lacking in substance', or
- 'has no reasonable prospects of success', or
- 'is otherwise an abuse of process of the FWC'.

The new s.587A would provide for the Commission to make orders about further applications, after an application has been dismissed on such grounds.

If the Commission dismisses an application on the above grounds, a Full Bench may (on its own initiative or on application) order that the applicant may not make a further application to the Commission of a kind specified in the order, without the permission of a Presidential Member of the Commission.

A decision to refuse to permit a further application cannot be appealed but would be subject to judicial review.

These amendments will align the Commission's powers to deal with unmeritorious applications with those available to the Administrative Appeals Tribunal (the AAT) under s.42B of the *Administrative Appeals Tribunal Act 1975*.

This would provide the Commission with more effective means of dealing with applicants who bring a succession of unmeritorious applications to the Commission.

While vexatious litigants make up a very small percentage of the people who come before the Commission, they impose significant and unjustified costs on the individuals and businesses drawn into their litigation and waste public resources. The demands of such litigants upon the Commission's time and resources can also affect the Commission's ability to provide timely services to others.

To illustrate this point, over recent years there have been a number of individual litigants who have each made multiple unsuccessful applications (from 5 to more than 20) under multiple sections of the FW Act, that relate to the same underlying dispute. In addition, the President of the Commission has dealt with a number of complaints from the same individuals and their associates in relation to their dealings with the Commission.

At present, the Commission does not have an effective mechanism to deal with vexatious litigants. While the Commission can dismiss an application that is frivolous, vexatious or has no reasonable prospects of success, broader grounds for dismissing an application are available to the AAT and to the courts, and even if a matter can be dismissed on these grounds, the Commission cannot prevent the applicant making further applications relating to the same underlying dispute or against the same party.

The Bill's new ss.587 and 587A would provide the Commission with more effective means of dealing with vexatious litigants, so as to avoid the costs to individuals and businesses that would otherwise be drawn into their litigation and the waste of public resources.

2. The restriction on the conduct of small claims conciliation

The Bill would amend the small claims procedure in the FW Act to introduce new procedures under which a magistrates court or the Federal Circuit Court could refer matters in dispute in small claims proceedings before the court to the Commission for conciliation. After conciliation ended, if the dispute has not been resolved it may go back to the court or the parties could agree to the Commission arbitrating. The Commission could only arbitrate if the parties agreed.

The Commission has highly effective processes for conciliating unfair dismissal applications and general protections dismissal dispute applications. In 2019–20 the Commission conciliated 12,965 unfair dismissal applications and 3,453 general protections dismissal dispute applications. The great majority of these applications (94.5 per cent of unfair dismissal and 68 per cent of general protections applications) were resolved by agreement between the employer and employee parties reached before, in or shortly after conciliation, or by the applications being withdrawn or abandoned after conciliation.

Where the employer and employee parties reach an agreement in or after conciliation, this will often involve the employee agreeing to release the employer from current and further legal claims in consideration of a payment or other benefits from the employer.

The Bill's new s.548C would regulate the conduct of the Commission's small claims conciliation. The proposed new s.548C(9) provides:

> 'The FWC must not facilitate an outcome as part of the conciliation process that would be inconsistent with this Act, or a fair work instrument that applies to the parties to the proceedings.'

The Bill's new s.548D(7) would impose a related restriction on the outcomes of the Commission's consent arbitration of small claims.

It is not apparent from the Bill and the Explanatory Memorandum for the Bill what practical impact proposed s.548C(9) is intended to have on conciliation. However, the Commission is concerned that it may significantly compromise the Commission's ability in conciliation to facilitate the resolution of underpayment claims by agreement between the employer and employee parties. For example, it appears that:

- it may place Commission conciliators at risk of contravening the FW Act when they conciliate a dispute in which it is unclear what the employee's entitlements are on the

basis of the information available to the conciliator — for example, where an employee claims long-term underpayments but only limited evidence of them is available to the conciliator, or where there is a real question as to the correct interpretation of an enterprise agreement payment provision

- where an employee's entitlements are unclear on the basis of the information available to the conciliator, it may require the conciliator to proceed on the basis of an overestimate of the entitlements so as to ensure they do not contravene s.548C(9)
- it may prohibit a conciliator facilitating an agreement between the parties that would exclude further court proceedings or claims
- it may prohibit a conciliator facilitating an agreement between the parties that involved the applicant accepting a compromise of their entitlements having regard to the costs and risks of litigation; and
- if the parties in conciliation proposed to enter into such agreements, it may require the conciliator to terminate the conciliation and prohibit the Commission offering any assistance to the parties to conclude their agreement.

3. The 21 day time limit for determination of enterprise agreement applications

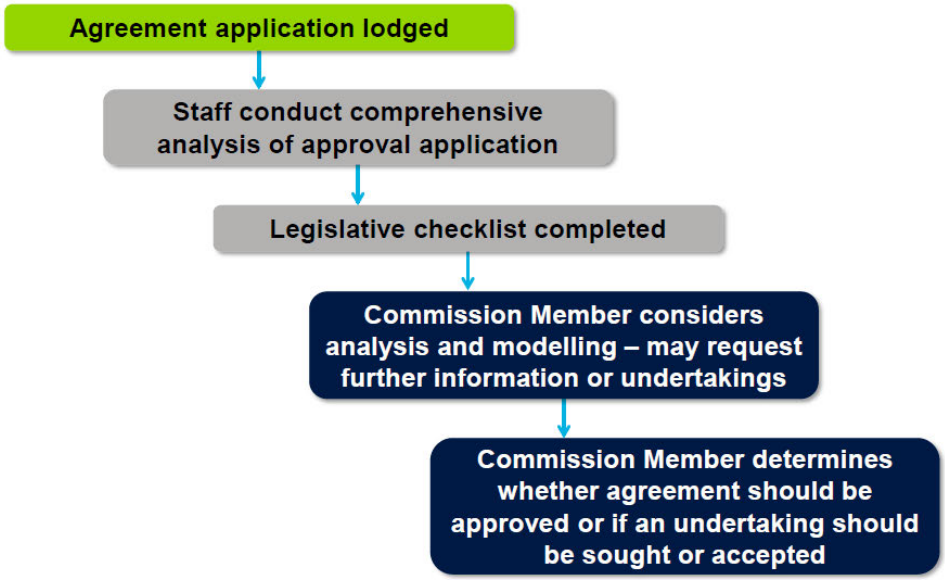
The Approval Process

In 2019–20, more than 4,300 agreement applications were finalised by the Commission. Of these, 4,099 were approved, 40 were dismissed, and 244 were withdrawn.

The overwhelming majority of approval applications are for single-enterprise agreements.

The following figure provides a high-level overview of the Commission's process for dealing with enterprise agreement applications.

Figure 1: High-level overview of the Commission's process for dealing with enterprise agreement applications



After an approval application is lodged with the Commission:

a) details of each application and a link to the agreement are published on the Commission's 'Agreements in progress' webpage within 2 working days of lodgment;

b) all identified bargaining representatives are sent an email confirming the approval application has been lodged and outlining their obligations to serve copies of the application on other persons. Parties are notified that they have 7 business days from the date of lodgment of the application to make any submissions supporting or objecting to approval of the agreement; and

c) a Commission Member may then determine whether the agreement can be approved having regard to materials lodged and any further information requested by the Commission.

Most approval applications are dealt with 'on the papers', that is, without a hearing. Only around 10 per cent are listed for hearing. However, a Member may consider it necessary or desirable to conduct a hearing, and an interested party may also request a conference or hearing at any time during the approval process. Any requests are considered by the Member dealing with the application.

The Commission's power to inform itself

The Bill includes a new s.254AA which would limit the information the Commission may have regard to in determining applications for approval or variation of enterprise agreements, unless satisfied there are 'exceptional circumstances'.

The Regulatory Impact Statement in the Explanatory Memorandum to the Bill at p.lxiii states that the intention of the new provision is to 'rectify unnecessary delays in the approval process caused by intervention from parties which were not parties to the bargaining for the agreement'.

The Commission notes there is no suggestion the intent of the amendment is to limit the extent to which the Commission may inform itself on the basis of information collated or produced by Commission staff from information provided by a permitted source under the new section. Accordingly, the Commission understands that the new s.254AA would not affect the Commission's ability to inform itself in this manner. As Figure 1 shows, the materials considered by a Commission Member dealing with an enterprise agreement application generally include a legislative checklist and analysis and modelling prepared by staff.

Improved Timeliness

The Commission's processes for dealing with applications for the approval of enterprise agreements are robust and efficient. From 1 July to 31 December 2020, applications that were complete and compliant at lodgment were finalised within a median of 14 days. All applications were determined in a median of 26 calendar days, down from 79 days in 2018-19.

As at 31 December 2020, there were no applications in the system more than 15 weeks old. Of the applications currently being considered by the Commission, 88 per cent were lodged less than 4 weeks ago.

Table 1 shows the significant improvement in timeliness that has occurred across all categories of agreement applications since 2017-18.

Table 1: Median calendar days to approve agreements

Median calendar days from lodgment to approval	PBS KPI [a]	2017–18	2018–19	1 July–31 Dec 2019	1 January –30 June 2020	1 July – 31 Dec 2020
Agreement approved without undertakings	*32 days*	32 days	30 days	20 days	17 days	**16 days**
Simple applications [b]	–	n/a	19 days	15 days	14 days	**14 days**
All agreements approved (with & without undertakings)	–	76 days	79 days	37 days	33 days	**26 days**

a This is the Portfolio Budget Statement Key Performance Indicator set in the 2019–20 Budget Papers at p.127

b 'Simple applications' are complete and compliant applications that can be approved based on the material provided at lodgment. 'Complex applications' are all other applications, including those that require an undertaking or follow up by the Commission after lodgment

This improvement has been achieved through a combination of initiatives focussed on the Commission's processes, together with providing better tools, information and assistance to parties. A list of key initiatives is at **Attachment A**.

Current priorities for further improvements include upgrading the Agreements section of the Commission's website to make it easier for parties to navigate and find the information they need, and developing online versions of a number of agreement-related forms. The online forms will assist both parties and the Commission by alerting users when key information has been omitted, reducing the need for follow up and consequential delays in approval.

As a result of the improvement initiatives implemented to date, in the most recent 6 month period to 31 December 2020 the Commission performed strongly against its internal timeliness benchmarks for enterprise agreements:

Table 2: Timeliness Benchmarks

Enterprise agreements timeliness	Internal benchmark	Actual performance				
		2018–19	1 July–30 Sept 2019	1 July–31 Dec 2019	1 January –30 June 2020	1 July – 31 Dec 2020
Simple applications [a]:						
• approved in 3 weeks	**50%**	60%	61%	64%	77%	83%
• approved in 8 weeks	**100%**	89%	95%	96%	97%	100%
Complex applications [a]:						
• approved in 10 weeks	**50%**	21%	65%	72%	76%	97%
• approved in 16 weeks	**100%**	62%	80%	85%	90%	99.7%

a 'Simple applications' are complete and compliant applications that can be approved based on the material provided at lodgment. 'Complex applications' are all other applications, including those that require an undertaking or follow up by the Commission after lodgment.

The Commission is confident that it will be able to sustain this level of timeliness, provided resourcing and application levels remain broadly consistent.

Effect of the proposed 21 day requirement

The Bill's new s.255AA would require that the Commission:

- 'as far as practicable' determine enterprise agreement approval applications and enterprise agreement variation applications under s.210(1) within the 'decision period' of 21 working days after the application is made
- if it does not determine the application before the end of the decision period, 'as soon as practicable' give written notice 'setting out why the Commission was unable to determine the application during that period, including whether any exceptional circumstances exist':
  - to each employer covered by the agreement
  - for an application to approve an enterprise agreement—to each employee organisation covered by or seeking to be covered by the agreement
  - for an application to vary an enterprise agreement—to each employee organisation covered by the agreement, and
  - to the applicant (if not covered by the above); and
- if it gives such a notice, publish the notice on the Commission's website or by other means.

For the period 1 July 2020 to 31 December 2020, of 1655 applications finalised approximately 70 per cent of enterprise agreement approval applications were determined within 21 working days, and 30 per cent were determined outside that time.

The Commission anticipates its process of continuous improvement will yield further gains in timeliness. While it is difficult to quantify the expected gains, particularly as application volumes may be affected by external factors such as economic conditions and bargaining cycles, they are likely to include an increase in the proportion of agreements determined within 21 working days.

The Bill includes a number of measures that may also be expected to generate efficiencies. For example, proposed amendments to reduce the level of prescription in some of the pre-approval steps and to introduce a model National Employment Standards (NES) interaction term may reduce the proportion of applications in which the Commission must consider the impact of non-compliance with pre-approval requirements and the proportion of agreements requiring undertakings before they can be approved by the Commission.

Despite these improvements and efficiencies, it is likely that there will remain a proportion of applications that cannot be approved within 21 days. Overwhelmingly, this cohort will be comprised of agreements that do not meet the statutory approval requirements (at least without undertakings) and approval applications that are contested and/or require undertakings in order to be approved.

Commission Members could deal with non-compliant agreements and approval applications more quickly by dismissing them in order to meet the prescribed time limit. However, this would not assist the parties who have made an enterprise agreement. Instead, Members currently assist the parties by seeking further information and/or undertakings, in order to be able to approve the agreement. Before accepting an undertaking, the Commission must seek the views of each bargaining representative for the agreement and be satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement, or result in substantial changes to the agreement. While this takes time, it

is much less disruptive to the parties than having to recommence bargaining following the dismissal of their application.

The introduction of a statutory time limit to determine applications is likely to have unintended consequences that are contrary to the interests of employers, employees and their representatives who have negotiated enterprise agreements.

Commission Members may continue to follow the current, facilitative approach to agreement approval applications, which seeks to assist parties to achieve compliance and secure approval of their agreement, notwithstanding the additional time this entails. In many instances the time taken by parties to formulate and reach agreement on appropriate undertakings will mean approval of the application after more than 21 working days.

In other cases, Members may consider that the appropriate course of action is to dismiss non-compliant agreements and approval applications that cannot be rectified within 21 working days, or parties may choose to withdraw their applications before that occurs. In the 6 months to 31 December 2020, 4.98 per cent of applications were withdrawn and 0.11 per cent were dismissed. A potential outcome of the introduction of the 21 day requirement is that the proportion of applications withdrawn and dismissed will increase.

Compromising the rigour of the decision-making process for agreement approval applications is not an option. The consequences of failing to identify a technical or substantive defect in an agreement-making process or in an agreement itself are potentially very significant for the parties. A wrongly approved agreement will be exposed to collateral attack in the courts, with the possibility of the agreement being found not to operate under the FW Act. The Commission will continue to do everything it can to determine applications for the approval of enterprise agreements as quickly as possible with the resources available to it, while maintaining the high level of rigour the community expects.

The proposed requirement that Commission Members give written notice setting out why an application was unable to be determined within 21 days, will itself require additional time to consider, write and publish the notice. Perversely, this will reduce the time available to deal with approval applications.

The Commission considers that the proposed requirement to determine applications within 21 days is unnecessary and will have unintended consequences that are contrary to the interests of the bargaining parties. Past timeliness issues have been addressed by the Commission and the Commission anticipates that timeliness will continue to improve, including with the assistance of some other measures in the Bill.

Attachment A

Initiatives to improve enterprise agreement finalisation timeliness

Major initiatives implemented by the Commission to improve the timeliness with which applications for the approval of enterprise agreements are finalised include:

(a) Providing an online tool to enable employers to lodge a compliant Notice of Employee Representational Rights (NERR), reducing the incidence of applications lodged with a non-compliant notice from nearly 20 per cent in June 2017 to less than 5 per cent.

(b) Establishing a user group comprising the employers and organisations that lodged, or are associated with, the greatest number of agreement applications in 2018. Outreach with parties has continued, with 14 sessions taking place in 2020 (mostly via video conference) with 150 attendees from 45 organisations to discuss how they could improve their agreements and approval applications. Tailored information was provided to each party identifying common errors in their applications and how they could be overcome.

(c) Publishing 'Assisting parties to make compliant agreement applications' which identifies the most common issues and defects in applications and provides information as to how to avoid them.

(d) Updating the Agreements pages on the Commission's website to make them easier to navigate and publishing information tools and resources, including:

- Step-by-step guide to making compliant single-enterprise agreements
- Legislative checklist
- Online automated date calculator to assist parties to comply with all legislative timing requirements
- Online automated NERR generator that provides parties with a compliant notice for their specific circumstances
- Legislative checklist for varying single enterprise agreements; and
- Guide to making undertakings in relation to enterprise agreements.

(e) Distributing a weekly Bulletin and Quarterly Practitioner Update on case law to subscribers. This includes guidance on specific matters that result in common mistakes, such as model terms for NES precedence clauses.

(f) Amending the Commission's Rules to remove the requirement to lodge statutory declarations, reducing the regulatory burden on parties and assisting with social distancing required during the COVID-19 pandemic.

(g) Modifying the triage process. As well as providing the Member dealing with an approval application with the analysis of an application, previously triage staff also dealt with follow-up communication with the parties including any requests for additional information or undertakings requested by the Member.

In order to further improve timeliness, this additional follow-up activity is now mostly sent from the relevant Member's chambers rather than from the agreements triage team. This has streamlined the communication process and enabled triage staff to focus on completing the analysis more promptly, enabling approval applications to be dealt with more quickly overall.

(h) Conducting a user-experience project involving parties, including registered organisations, about their experiences and ideas to improve the Commission's agreement approval processes. This research, along with a document outlining the Commission's responses to the recommendations and observations was published on the Commission's website in October 2019.

(i) Increasing resources. To address the backlog in applications, in 2019 the Commission temporarily increased the staff in the Agreements Team to reduce the quantity of applications in the system. This was a key contributor to the rapid reduction in the backlog. The case management model in place involves a group of (currently) 26 Members who deal with applications to approve or vary agreements as part of their caseload. This approach enables specialisation and close working with the triage staff.