



*Future Directions -*  
Improving Institutional Performance and the concept  
of 'Public Value'

IRSNSW

**Justice Iain Ross AO**  
**President**  
**Fair Work Commission**  
**24 May 2014**

## IMPROVING INSTITUTIONAL PERFORMANCE AND THE CONCEPT OF 'PUBLIC VALUE'

Thank you. This morning I want to discuss the future direction of our National Workplace Relations Tribunal, the Fair Work Commission. I particularly want to discuss the steps we are taking to improve the Commission's performance and the related concept of 'public value'. In this context I am referring to both the adjudicative and the administrative arms of the commission.

Australia has had a national workplace relations tribunal for over a century. It is one of our key national institutions. It has endured by successfully adapting to changes in its legislative environment and because it provides an independent, competent and professional dispute resolution service.

But past performance does not guarantee future survival. Even successful institutions have a tendency to decline unless they continue to innovate and adapt to changes in their environment.

When I was appointed in March 2012 the organisation was facing a number of challenges.

The composition of it's work had fundamentally changed - from collective to individual dispute resolution.

The level of industrial disputation has fallen over time, and now, generally speaking, it is associated with bargaining following the expiry of the term of a collective agreement.

This chart shows the total number of working days lost per 1000 employees between 1988 and 2012. You can see that the average number of working days lost has steadily declined over successive industrial relations regimes. Measured as working days lost the level of industrial disputation under the Fair Work Act is one tenth of the level of disputation experienced in the late 1980's.

### [SLIDE 2]

No doubt one explanation for the decline in industrial disputation is the decline in union density. In the 20 years between 1980 and 2000 union density halved - from 50% to 24.7%.

### [SLIDE 3 and 4]

In this chart we can see a fall in both union density and industrial disputation in the four industries with the highest number of average working days lost per annum.

The size of the bubbles reflect the size of the industry by employment. The chart shows that employment in Manufacturing has declined over time, and union density and average working days lost per year within the industry has also decreased. In contrast, employment in Construction has increased (as noted by the larger bubble) although union density and average working days lost per year within this industry has decreased.

Collective dispute resolution will always be a core Commission function, because of the impact that such disputes may have on the parties and the community generally. But we also recognise that individual dispute resolution is now a substantial part of our work and collective dispute resolution work is declining in relative terms.

#### **[SLIDE 5]**

In the 1998-99 financial year, about two-thirds of the applications lodged with the Commission were collective in nature (represented by the blue bars). The remaining one-third comprised of applications lodged by individuals (the red bars). The Commission's work now largely consisted of individual matters, with over 60 per cent of applications lodged by individuals.

Two things flow from the shift in the nature of our work.

First, the parties to collective disputes - unions, employers and employer organisations - are 'repeat players'. They are familiar with the legislative environment and our procedures. The parties to individual disputes are quite different. They are usually 'one shotters'. They are often self-represented and unfamiliar with the provisions of the Fair Work Act and our procedures. We have an obligation to explain these matters to self represented parties.

The shift in the nature of our work also has implications for our stakeholder base. We need to engage with the community more broadly.

The second challenge the Commission faced in March 2012 was that over the previous 12 months or so the organisation, then known as Fair Work Australia, had been subjected to sustained criticism about the time taken to complete investigations into the HSU.

The HSU investigations were unprecedented in terms of size and complexity, but the inquiries and subsequent investigations took an unreasonably long time, raising legitimate questions.

#### **[SLIDE 6]**

Justice institutions rely ultimately on public confidence and the consent of the governed. There was an urgent need to repair the reputational damage to the Commission. We had to become more efficient and accountable.

We sought to address these challenges through a new change program - called *Future Directions*. **[SLIDE 7]**

The 25 initiatives in the first phase of *Future Directions* were announced in October 2012. Those initiatives were aimed at improving the performance and quality of the services provided by the Commission and were grouped under four themes:

**[SLIDE 8 AND 9]**

The first phase of its Future Directions was completed in December 2013. Each of the 25 initiatives was implemented.

I want to briefly touch on some of the initiatives we have introduced.

In July 2012, the Commission introduced timeliness benchmarks for the delivery of reserved decisions and in relation to the time taken to determine applications for the approval of agreements.

These performance benchmarks set the Commission's expectations of its Members and its processes. They have already had a positive impact on performance.

**[SLIDE 10]**

In the 12 months before the reserved decisions benchmark was introduced only 72% of reserved decisions were handed down within 8 weeks. About 14% of all reserved decisions were handed down more than 12 weeks after the hearing or final submissions. Now over 86% of all reserved decisions are handed down within 8 weeks and almost 96% are handed down within 12 weeks.

The Tribunal's performance against these benchmarks is published on our website and updated. I am currently taking a number of steps to further improve our performance in these key areas.

Any party who is concerned about the delay in the delivery of a reserved decision can lodge a query through the Commission's website. I deal with each of these personally.

The timeliness benchmarks are intended to set tight performance standards, to that extent they are aspirational. I expect that there will be individual instances where the Tribunal does not meet its own high standards, for a variety of reasons. But the setting of performance benchmarks and publicly reporting the Tribunal's performance are important accountability measures. Such measures are a practical recognition of the fact that justice institutions rely ultimately on public confidence and the consent of the governed.

In the second half of last year we introduced a range of initiatives to improve our performance and reporting in the management of appeals. I will return to those matters shortly.

I now want to turn to the concept of public value.

### **ABOUT PUBLIC VALUE**

In the private sector the aim of management is, broadly speaking, to make money for the shareholders. In simple terms it is about producing products or services that can be sold to generate revenue. Success can be measured in terms of profitability, market share and share price.

It is more difficult to define and measure success in the public sector.

Harvard Professor Mark Moore defines the aim of managers in the public sector in terms of creating 'public value'. Program evaluation and cost effectiveness analysis can help define public value in terms of collectively defined objectives.

#### **[SLIDE 11]**

We are starting to apply this conceptual framework to the Commission's activities.

We can enhance the Commission's 'public value' by providing an efficient dispute resolution service - a service which resolves disputes in a timely and appropriate way, and minimises the costs incurred by the parties. We have already taken a number of steps to improve our service delivery and reduce transaction costs for parties.

The information and assistance provided by the Commission to parties, particularly self represented parties is an important part of providing affordable access to justice.

We now provide a range of online information tools to assist the parties who appear before us:

- *Eligibility checklist*: An online checklist to assist potential applicants in unfair dismissal cases to work out whether they meet the eligibility requirements to make an application **[SLIDE 12]**
- *Outcome information*: we publish the outcomes of unfair dismissal conciliations and arbitrations on our website
- *Guides*: an extensive range of guides are available on our website to assist all parties to unfair dismissal applications at each stage of the process. We recently launched an interactive form to assist parties in preparing for unfair dismissal proceedings in the Commission. The checklist assists parties to address all relevant issues to ensure that their matter can proceed fairly and efficiently.

- *Online benchbooks*: a benchbook is a resource that brings together leading decisions that have been made on the key aspects of a particular jurisdiction. It is a resource that is widely used by judges and tribunal members. For many years Commission Members have had access to an unfair dismissal benchbook. Earlier this year the benchbook was extensively reviewed. In July this year we made the revised unfair dismissal benchbook publicly available, on our website. It contains plain English summaries of the key principles emerging from unfair dismissal cases. The benchbook will assist both applicants and respondents to prepare their case before the Commission.

We have also made greater use of technology to improve our work processes, service delivery and accountability.

We intend to move to 'smart' online application forms where the information entered can be automatically uploaded into our case management system.

Two other technology driven innovations are worth mentioning.

### **[SLIDE 13]**

In May last year we started trialling SMS alerts in unfair dismissal conciliations.

The alerts are sent to parties 24 hours before their scheduled conciliation conference. The objective is to reduce the number of adjournments which occur because a party has forgotten that they are to participate in a conference.

If we can reduce the number of adjournments we can reduce the transaction costs and inconvenience for parties, and deliver a more efficient service.

### **[SLIDE 14]**

In July last year we introduced a smart phone app, providing users with quick and easy access to the Commission's daily hearing lists. The app can be downloaded from the Commission's website and you can use it to view and search hearing lists up to seven days in advance of a hearing. You can also get directions to where the hearing will be held.

The implementation of the 25 initiatives set out in the first phase of Future Directions has been a major achievement. It is a testament to the hard work and commitment of our staff, our Members and our stakeholders.

But the implementation of these initiatives marks a beginning rather than an end.

### **[SLIDE 15]**

This next phase of our ongoing change program features 30 initiatives which will be delivered over the next two years.

Some of the new initiatives include: **[SLIDE 16 AND 17]**

- The introduction of an electronic case management system to improve processing times, and reduce costs for parties
- A review of the process for determining enterprise agreement approval applications to ensure the most timely and efficient resolution of these matters
- A qualitative research project to identify clauses in enterprise agreements that enhance productivity or innovation
- In conjunction with key stakeholders, the development and implementation of a strategy for the promotion of cooperative and productive workplace relations that facilitate change and foster innovation.
- Evaluate our performance against the Tribunal Excellence Framework.

The new list of Future Directions initiatives can be found on the Commission's website.

We are intent on improving our performance across the range of our statutory functions.

### **[SLIDE 18]**

The [Tribunal Excellence Framework](#) is an assessment tool which can be used by tribunals to identify the areas where they need to improve. The Framework identifies 'tribunal excellence' as having three broad dimensions:

- predictable, just decisions;
- procedural justice; and
- the delivery of a fair and efficient dispute resolution service.

#### ***Predictable, just decisions***

Predictability is about certainty. Different tribunal members faced with the same facts should, broadly speaking, reach the same outcome. Of course tribunal decisions often involve the exercise of a discretion and on the same facts different tribunal members may legitimately reach different conclusions. But such discretions must be exercised judicially and within acceptable parameters.

*A 'just decision' is one based solely on the application of the relevant law to the facts of the case.*

### ***Procedural justice***

Delivering justice is not just about the outcome. The parties who appear before tribunals and the community generally have a legitimate interest in procedural justice. Procedural justice includes the legal concept of procedural fairness. But it also embraces a judgment about whether a tribunal process is fair in a more abstract sense.

Satisfaction with the process of justice is an important metric for a tribunal, and more generally. Satisfaction with the judicial process has been found to have a measurable effect on society as a whole and contributes to the perceived legitimacy of the justice system.

### ***A fair and efficient dispute resolution service***

The service provided by a tribunal should be fair, in that it should provide access to a fair hearing. The service should also be efficient in the sense that the tribunal is affordable and resolves disputes in an appropriate and timely way. The costs incurred by the parties and the tribunal resources allocated to a proceeding must be reasonable and proportionate to the complexity and importance of the issues and the amount in dispute.

As I mentioned, I want to return to the issue of predictability - or consistent decision making.

There has been considerable media commentary in which a range of assertions have been made about inconsistent decision making within the Commission. These comments have primarily been made in support of a proposal for a new, and separate, appeal mechanism. There is no substance to this criticism. Two points can be made in this regard.

First, inconsistent first instance decisions are not unusual. Different Members may reach different outcomes on the same facts because in many aspects of the Commission's jurisdiction the decision of the Member involves the exercise of a discretion and reasonable minds can differ about how a discretion is exercised. This observation may be made of decision-making in any court or tribunal. In the exercise of a discretion there is no absolute 'right' or 'wrong' answer, rather the answer depends upon a consideration of a range of factors before the Member.

Of course a new appeal mechanism will not lead to fewer inconsistent first instance decisions. Where the original decision has involved the exercise of a significant level of discretion it is not enough that the Appeal Bench would have reached a different conclusion.

As the High Court observed in *House v The King*<sup>1</sup> an Appeal Bench may intervene only on the limited ground that an error has been made in the exercise of discretion.

The second point to note is that the existing legislation provides a range of mechanisms to address inconsistent decision making:

- appeals
- reviews
- referrals

The appeal mechanism is well known and understood. We have taken a number of steps to improve the efficiency of the appeal process.

We have launched a new section on our website dealing with appeals and judicial reviews of Commission decisions. In this part of our website we report against two timeliness benchmarks.

The first benchmark provides that:

- 90% of all appeals will get to a hearing within 12 weeks and 100% of all appeals within 16 weeks

Our website also provides a link to all appeal decisions and a table setting out the outcomes of appeals and judicial reviews over time.

The timeline commences from the day the application is lodged and measures the time between lodgment and the first appeal hearing.

Stay hearings are not counted as a first hearing unless heard at the same time as the first substantive hearing.

### **Lodgment to first hearing performance**

1 July 2013 - 31 March 2014 & 1 October 2012 - 30 June 2013 **[SLIDE 19]**

This slide shows the Commission's performance prior to and after the introduction of the listing benchmarks. Both time periods are compared against each other and against the lodgment to first listing benchmark.

The results *before* the first listing benchmarks were introduced (1 October 2012 - 30 June 2013):

- 92.8% of all appeals listed within 12 weeks
- 98.6% of all appeals listed within 16 weeks

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<sup>1</sup> (1936) 55 CLR 499

The results achieved *after* the benchmark was introduced (1 July 2013 - 31 March 2014):

- 94.4% of all appeals listed within 12 weeks
- 100% of all appeals listed within 16 weeks

Stay hearings are not counted as a hearing when measuring timeliness performance (unless heard concurrent with a substantive hearing) so the chart does not reflect the total number of appeal hearings in a month.

The reserved appeal decisions benchmark provides that 90% of all reserved appeal decisions delivered within 8 weeks and 100% of all reserved appeal decisions delivered within 12 weeks

The timelines commences from the final day of the hearing or the date of receipt of the last written submission, whichever is later.

1 July 2013 - 31 March 2014 and 1 October 2012 - 30 June 2013 **[SLIDE 20]**

The slide shows the Commission's performance before and after the introduction of the benchmark.

Before the benchmark was introduced:

- 82.4% of all appeals listed within 8 weeks
- 96.1% of all appeals listed within 12 weeks

The results achieved after the appeals reserved decision benchmarks were introduced (1 July 2013 - 31 March 2014):

- 91.6% of all appeals listed within 8 weeks
- 98.8% of all appeals listed within 12 weeks

In addition to appeals the existing legislation provides other mechanisms to address inconsistent decision making. The Minister can apply for a review to be conducted by a Full Bench of any decision by a single Member, if the Minister believes that the decision is contrary to the public interest (s.605(1)). Review applications are determined by a Full Bench (s.614) and the powers that can be exercised on a review are the same as those that can be exercised in an appeal.

If the Minister is concerned about inconsistent decision making he can institute a review. No reviews have been instituted by either the current Minister or his predecessor.

The other alternate avenue to deal with inconsistent first instance decisions is by referral to a Full Bench. Section 615A provides a procedure for the parties interested in a proceeding, or the Minister, to make application to the President to have a matter before a single Member referred to a Full Bench for determination.

In various articles and media commentary it has been asserted that there have been 'contradictory findings' in a range of areas. These assertions are either wrong or any inconsistency is being addressed by the existing mechanisms. Let me deal briefly with assertions.

### ***Drug and alcohol testing***

It is suggested the Commission's decision-making has been inconsistent in relation to the use by employers of urine testing of employees for drug and alcohol at the workplace.

In *Briggs v AWH Pty Ltd*<sup>2</sup> the Commission observed that the issue of whether the most appropriate method of workplace drug testing is by the collection and analysis of a urine sample or a saliva sample has proved to be controversial. The controversy exists at two levels. Firstly, there has been a scientific debate as to which method best detects drug use of a nature that may affect workplace health and safety. At the core of this debate are the propositions that urine testing is the more accurate means of determining whether an employee has at some time consumed any one of a range of drugs, but that saliva testing is better at identifying likely present impairment from drug use (particularly cannabis use) because it only detects very recent use.

Secondly, there has been controversy over which of two competing workplace interests should be given priority in the selection of the appropriate testing method. On the one hand, there is the interest of employees in not having their private behaviour subject to scrutiny by their employers. On the other hand, there is the interest that employers and employees have in ensuring a safe working environment by the taking of all practicably available measures to detect and eliminate or manage risks to safety.

Properly analysed, there has been no inconsistency in the Commission's treatment of this issue. The approach taken by the Commission has simply evolved over time on the basis of the material presented in particular cases. The cases of purported inconsistency arose in a range of different statutory contexts eg in unfair dismissal proceedings and in private arbitration under an enterprise agreement. In any event, it would be open to the Minister or an interested party to seek to refer any case dealing with this issue to a Full Bench.

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<sup>2</sup> [2013] FWCFB 3316

Earlier this year I set up a five Member appeal in DP World Brisbane Pty Ltd. The appeal is to be heard on 13 June 2014 and the grounds of appeal raise issues about the relative merits of saliva and urine testing and the reasonableness of the employer's policy. The appeal decision may provide greater clarity about these issues.

### ***Pornography***

The second issue referred to is whether an employee can be dismissed for distributing pornography on work computers. These comments appear to have been in response to the decision of the Full Bench in *D'Rozario and others v Australian Postal Corporation T/As Australia Post (Australia Post)*<sup>3</sup>.

The approach of the Commission in cases involving employees using or dealing in pornography was first encapsulated by the Full Bench in *Queensland Rail v Wake*<sup>4</sup> in 1996. The decision in that matter stated (at paragraph [21]):

“Obviously each case is to be decided on its merits, but in general it is in the public interest that, subject always to considerations of fairness, the Commission's decisions should support employers who are striving to stop inappropriate email traffic.”

The majority of the Full Bench in *Australia Post* stated [at 121]:

“We endorse the right of employers to regard compliance with such policies as a serious matter. We acknowledge that, depending upon the circumstances, a breach of such a policy can ground misconduct that may justify a dismissal that would not be harsh, unjust or unreasonable. However, upon a full consideration of the particular circumstances of the present case, we are satisfied that each of the dismissals was harsh.”

The majority granted permission to appeal on the basis of a concern that the Full Bench decision in *Wake* was being misinterpreted.

The decision of the Appeal Bench is currently the subject of proceedings in the Federal Court and that application specifically challenges this aspect (among others) of the majority decision. In short, the applicant is challenging the asserted basis for the grant of permission to appeal. It is contended that there was no evidence before the Fair Work Commission that there are any decided cases of the kind referred.

The very issue of whether there have been inconsistent first instance decisions dealing with pornography is now the subject of proceedings in the Federal Court. It is not appropriate for me to make any comment about the majority's observations on this issue.

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<sup>3</sup> [2013] FWCFB 6191

<sup>4</sup> Print PR974391

The appeal was heard by the Full Federal Court on 18 March 2014 and judgment is reserved.

### ***Fighting in the workplace***

Fighting in the workplace is the third example of alleged inconsistent decision-making. This is a reference to the DP World litigation.

General principles relating to fighting in the workplace were set out in the decision of Moore J in *AWU-FIME v Queensland Alumina Limited*.<sup>5</sup> In that case, Moore J said:

“... whether a dismissal or termination arising from a fight in the workplace is harsh, unjust or unreasonable will depend very much on the circumstances... generally the attitude of industrial tribunals tends to be that in the absence of extenuating circumstances, a dismissal for fighting will not be viewed as harsh, unjust or unreasonable. The extenuating circumstances may, and often do, concern the circumstances in which the fight occurred as well as other considerations such as the length of service of the employee, including their work record, and whether he or she was in a supervisory position.”

Last year, both the Commission and the Federal Court have had occasion to consider the application of the unfair dismissal provisions of the Act to circumstances where an employer dismisses an employee for fighting in the workplace. This has arisen in the context of litigation between DP World and Lambley.

The first Full Bench<sup>6</sup> quashed the decision of the Member at first instance to reinstate Mr Lambley.

The decision of the first Full Bench was the subject of proceedings for prerogative writ relief in the Federal Court. In determining that application Katzmann J held that the first Full Bench erred in the propositions it set out and in reaching its conclusion in reliance on them. At paragraphs [34] to [38] of her judgement, Katzmann J said:

“34 DP World accepted that it was an overstatement on the part of the Full Bench to say (as it did in [27]) that the authorities establish that the dismissal of an employee found guilty of fighting at the workplace “can only be found” to be harsh, unjust or unreasonable in extenuating circumstances. It is certainly not an accurate reflection of what Moore J said in *AWU-FIME Amalgamated Union v Queensland Alumina Limited* (1995) 62 IR 385, which is one of the two authorities to which the Full Bench referred. There, his Honour observed that generally the attitude of industrial tribunals tends to be that, absent extenuating circumstances, a dismissal for fighting will not be regarded as harsh, unjust or unreasonable. Even if this could be said to be the effect of the authorities, it was not a binding rule which could be applied to confine the discretion of FWA more narrowly than the Parliament intended (*Norbis v Norbis* (1985) 161 CLR 513 at 537 per Brennan J).

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<sup>5</sup> (1995) 62 IR 385

<sup>6</sup> [2012] FWAFB 4810

In the first Full Bench decision, the Bench concluded that the discretion of the Deputy President at first instance had miscarried and quashed his decision, but did not go on to exercise the discretion itself. It could have done so (see s.607(3)) but it did not. As the first Full Bench made no order disposing of Mr Lambley's application, Katzmann J concluded that the application needed to be determined afresh.<sup>7</sup>

The second Full Bench<sup>8</sup> reheard the matter and, by majority, dismissed Mr Lambley's application for an unfair dismissal remedy. At paragraphs [43] to [46] the majority dealt with the principles pertaining to fighting in the workplace and applied what was said by the High Court in *Byrne* and by Moore J in *Queensland Alumina*.

The only inconsistency evident in these cases is in the overstatement of the relevant principle by the first Full Bench, as identified by Katzmann J. This was accepted by both parties and rectified by the second Full Bench which referred to and applied the long-standing authority of Moore J in *Queensland Alumina*.

### ***Bankrupt applicants***

Reference has also been made to the uncertainty surrounding the capacity for bankrupt employees to pursue remedies under the Fair Work Act's unfair dismissal jurisdiction.

The issue of the capacity for a bankrupt employee to pursue an unfair dismissal remedy comes up infrequently, perhaps once a year. It needs to be remembered that over 14,000 unfair dismissal applications are lodged each year.

The Full Bench in *Melanie Millington v Traders International* [2014] FWCFB 888 (23 April 2014) has resolved the conflicting first instance decisions on the capacity for a bankrupt to bring an unfair dismissal claim - at least where the unfair dismissal application is made after bankruptcy has occurred.

The Full Bench found that in these circumstances an application for an unfair dismissal remedy was not properly vested in the trustee and that both reinstatement and compensation were available. The Bench observed that the result would probably have been different if the bankruptcy had been declared *after* the unfair dismissal claim was lodged.

That matter has been determined and the issue has now been clarified. This provides an example of the existing mechanisms in the Act being used to clarify uncertainty, rather than providing a justification for changing the existing arrangements.

In summary, the purported rationale for altering the existing arrangements - the examples of allegedly inconsistent decisions cited by some commentators - provide no justification for changing the existing appeal mechanism.

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<sup>7</sup> [2013] FCA 4 at [51]

<sup>8</sup> [2013] FWCFB 9230

Further, as a matter of logic it is difficult to see how some inconsistency in first instance decisions will be avoided through the creation of a new Appeals Panel. The rectification of inconsistent decisions at first instance is the reason for an appeal jurisdiction, but provides no justification for an 'alternative appeals process'.

Can I briefly provide some other examples of where recent Full Bench proceedings have clarified certain aspects of the Fair Work Act.

The first is the Full Bench decision in *Peabody Moorvale* [2014] FWCFB 2042. This decision concerns two issues relevant to the approval of enterprise agreements pursuant to s.185 of the *Fair Work Act* 2009 (the Act). The first was whether the notice of employee representational rights (the 'Notice'), provided by Peabody to each employee who would be covered by the Agreement, complied with s.174(1A) of the Act and, if the Notice did not comply, was it necessarily invalid and of no effect (the 'Notice' point). The second issue was whether Regulation 2.06A(b)(i) of the *Fair Work Regulations* (the Regulations) requires that an application for the approval of an enterprise agreement be accompanied by a signed copy of the agreement which includes the 'residential address' of each person who signs the agreement.

The consequence of failing to give a Notice which complies with the requirements of s.174(1A) is that the Commission cannot approve the enterprise agreement.

The Full Bench agreed with the Minister's submissions on the notice point and held that there is simply no capacity to depart from the form and content of the notice template provided in the Regulations. A failure to comply with these provisions goes to invalidity.

As to the second matter the particular issue was whether 'address' meant the persons' residential address or whether it was sufficient if a work address was supplied. The Full Bench rejected the CFMEU's submission that 'address' in Regulation 2.06A(2)(b)(i) meant 'residential address'.

The second case concerns the use of loaded rates enterprise agreements which incorporate the pre-payment of annual leave.

In *Hull-Moody* a Full Bench, by majority, approved such an agreement. A subsequent Federal Court judgment (in *Jeld-Wen Glass Australia*), in a different context, was relied on in some first instance proceedings in the Commission to cast doubt on the correctness of *Hull-Moody*. There were instances of inconsistent first instance decisions, some following *Hull-Moody* and some applying *Jeld-Wen*. To resolve this issue a 5 member Full Bench was constituted to deal with an application to approve the Canavan Building Pty Ltd agreement. The Canavan agreement is essentially the same as the agreement in *Hull-Moody*. A hearing has been held and the decision is reserved.

I want to conclude by making some brush strokes on a broader canvass - by discussing how the Commission might contribute to improving Australia's productivity performance.

Productivity matters. Our productivity performance as a nation underpins our standard of living. National growth rates are determined by three factors - population, participation and productivity.

In the coming decades, as the population ages and the workforce participation rate falls productivity will have to do the heavy lifting if Australians are to enjoy rising living standards. In the past decade the terms of trade have been a significant contributor to income growth. If incomes are to grow in the next decade there will need to be a significant improvement in our productivity performance.

Public policy settings and institutional support can facilitate productivity growth - because they affect the environment within which business operates - but the key to improving productivity lies at the workplace level.

The Commission is committed to the development of a new workplace engagement strategy in consultation with the major peak employer and union bodies. The object of this initiative is to promote cooperative and productive workplace relations. The development of a more cooperative workplace culture that facilitates change and fosters innovation will be at the heart of the Commission's engagement strategy.

We have already taken a number of steps in this regard.

Towards the end of last year I set up a workplace engagement team - led by Vice President Catanzariti - to further develop our strategy for promoting cooperative and productive workplaces. The project team has reported back to me and we are currently sorting out the best way to implement this initiative. We have, as you would know, a number of demands on the Commission's resources at present. The development of our engagement strategy will be transparent and will be done in consultation with the key industry peak bodies, the Members of the Commission and the community we serve.

Later this year we will conduct and publish research identifying clauses in enterprise agreements that enhance productivity or innovation. This is one of the new initiatives announced as part of the second stage of Future Directions.

The Commission's engagement strategy is not a panacea for the productivity challenge facing us as a nation - but each public institution must play its part.

I look forward to your contribution to that process and to your support in making a great national institution better. Thank you.



# Future Directions

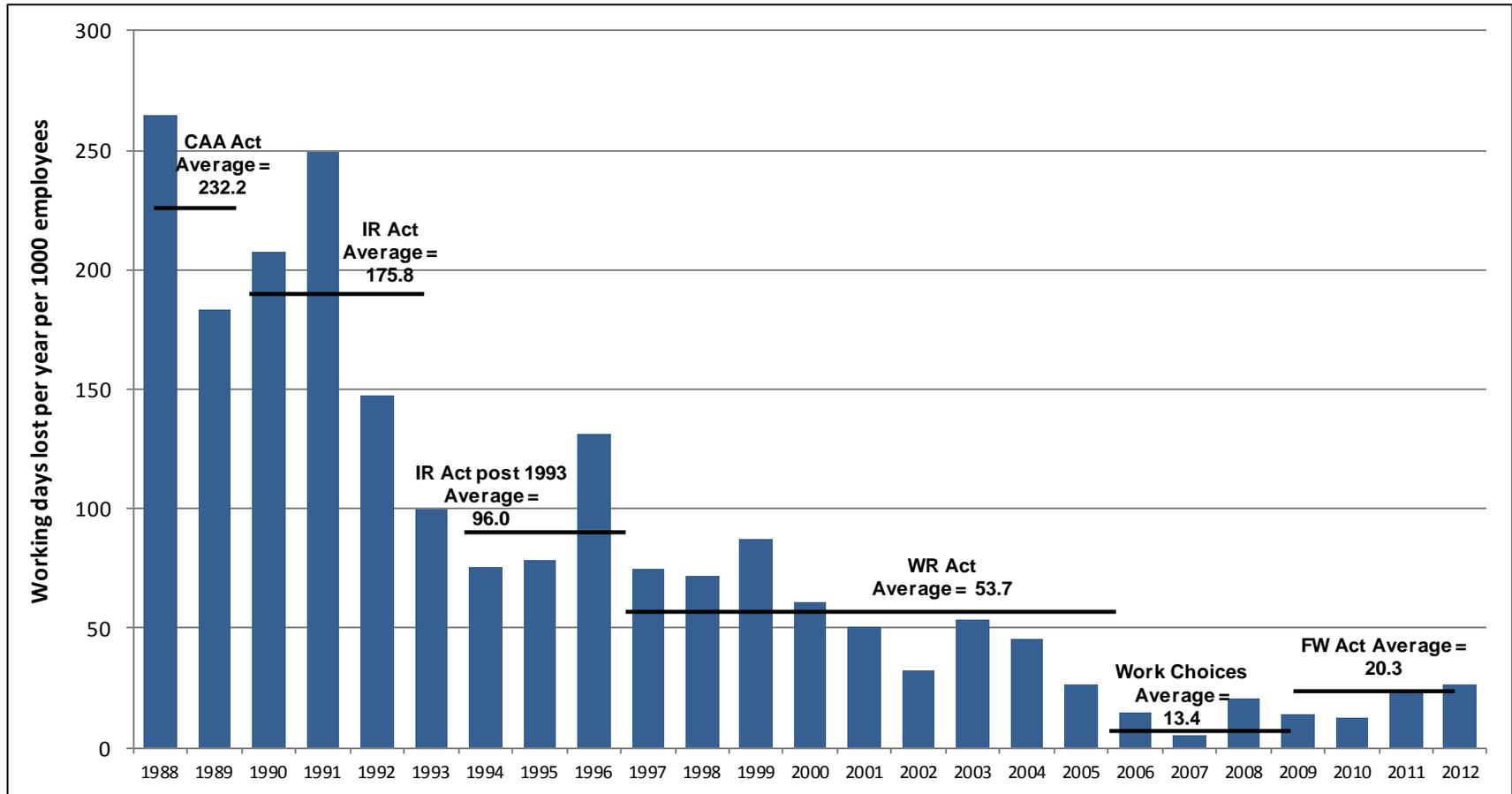
for Australia's National Workplace Relations Tribunal

*Improving institutional performance and  
the concept of public value*

JUSTICE IAIN ROSS AO *President*

# Dimensions of change

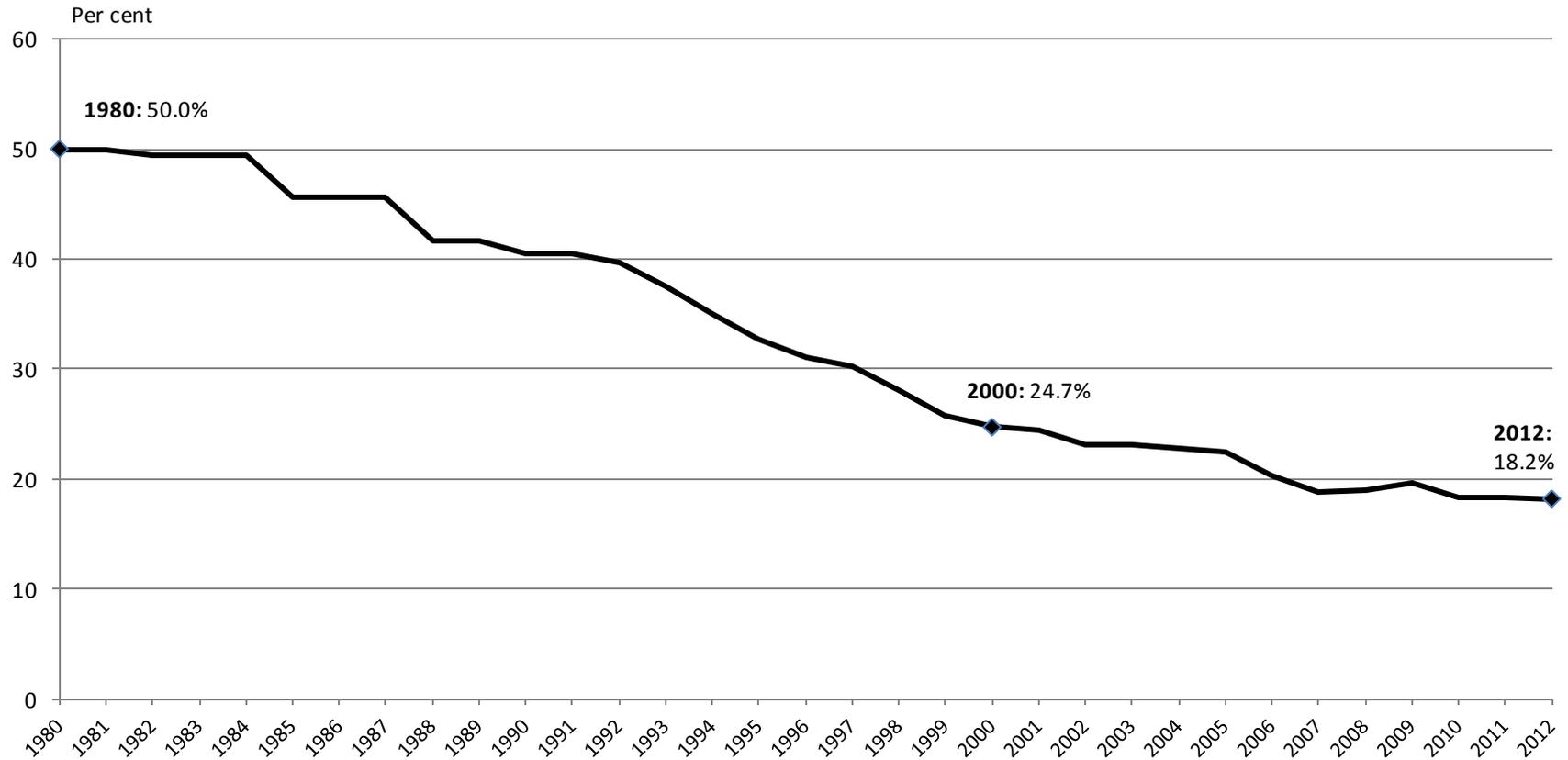
Chart 10: Working days lost per 1000 employees, 1988–2012



Source: Fair Work Commission calculations based on ABS, *Industrial Disputes, Australia, Dec 2012*, Catalogue No. 6321.0.55.001. Weighted averages are for the quarters covered by different employment relations arrangements.

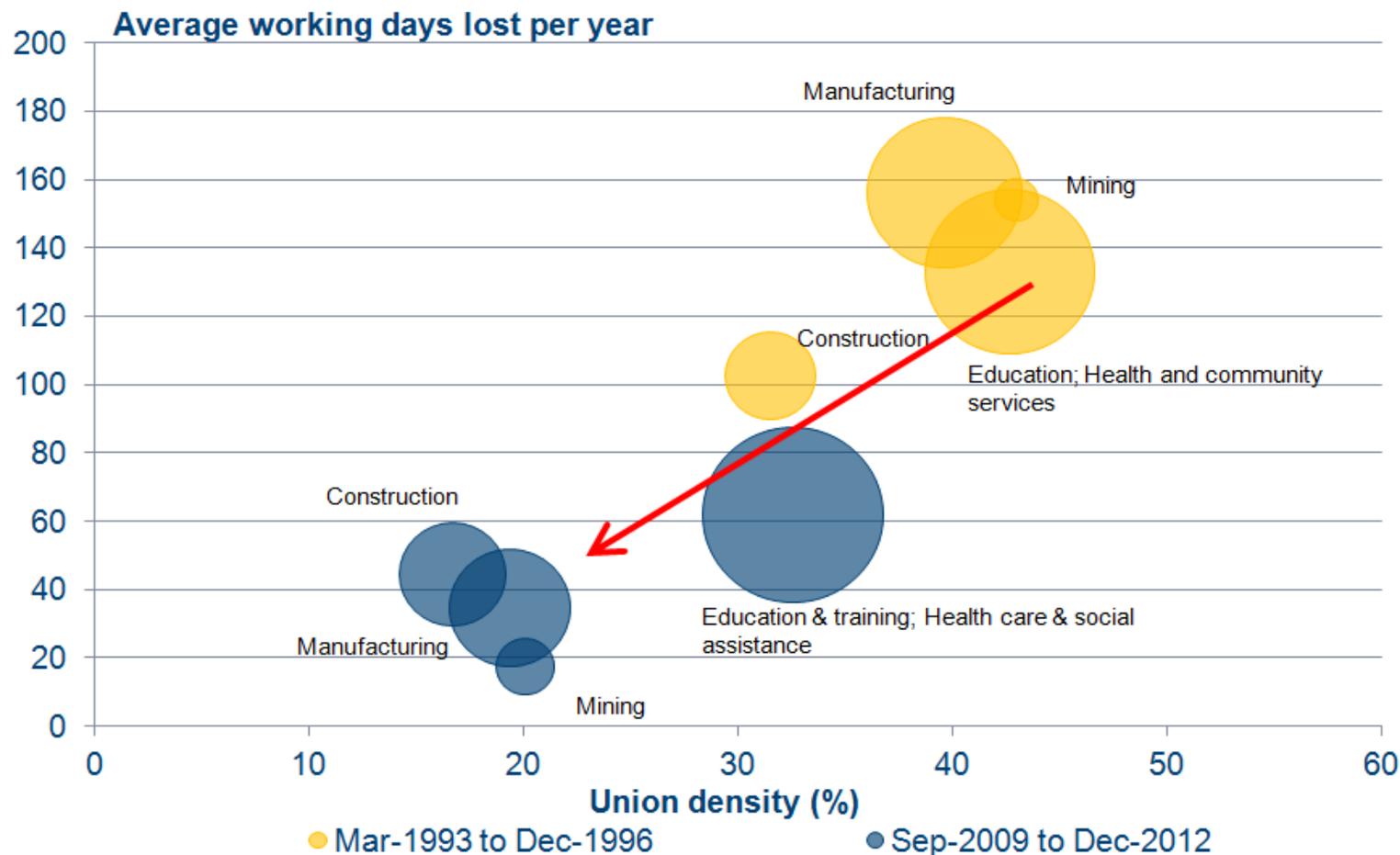
Based on, and extending, Chart 4.16 at p. 75 of *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation*, report prepared by the Fair Work Act Review Panel, DEEWR, 2012.

# Decline in union density, 1980–2012



Source: ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2012*, Catalogue No. 6310.0.

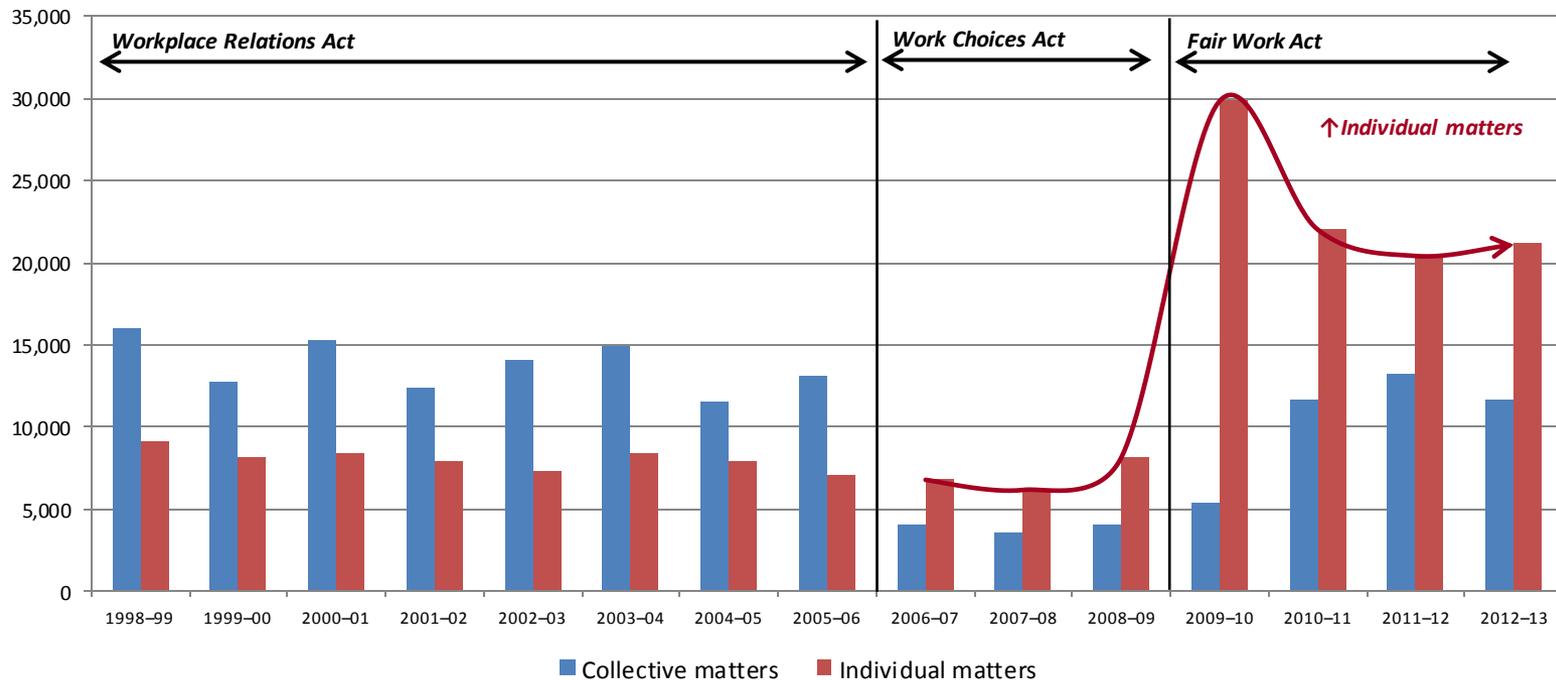
# Disputation, union density and size of industry by employment, 1993–2012



Source: ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2012*, Catalogue No. 6310.0; ABS, *Labour Force, Australia, Detailed, Quarterly May 2013*, Catalogue No. 6291.0.55.003; ABS, *Industrial Disputes, Australia, Dec 2012*, Catalogue No. 6321.0.55.001.

# Dimensions of change

Chart 14: Matters dealt with by the national industrial relations institution, 1998–99 to 2012–13



# Dimensions of change

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*Fair Work's hospital handball leaves a mess for the DPP*

**'Rebrand'  
watchdog**

| Failure to produce report 'incompetent'

**Fair Work in Abetz's sights**

Abbott cries scandal over FWA

**Fair  
Work  
it isn't**

*Business embarrassed by FWA*

**Fair Work farce leaves  
reputations in tatters**

Fury at Fair Work chief over Thomson probe



FAIR WORK  
AUSTRALIA



# FUTURE DIRECTIONS

for AUSTRALIA'S NATIONAL  
WORKPLACE RELATIONS TRIBUNAL

OUR PLAN FOR  
THE YEAR AHEAD



# Future Directions

for Australia's National Workplace Relations Tribunal

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

# Future Directions

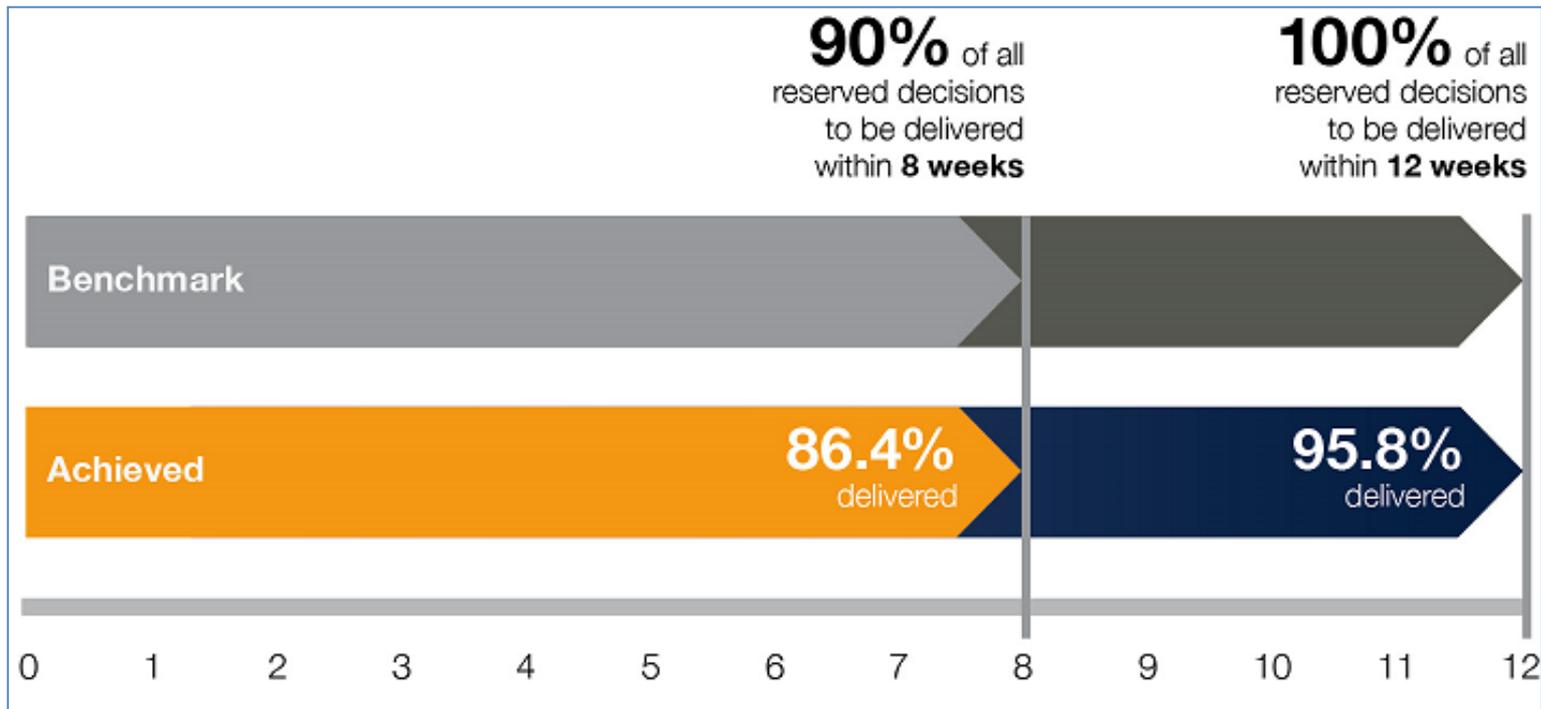
for Australia's National Workplace Relations Tribunal

## First phase completed



# Improving our performance

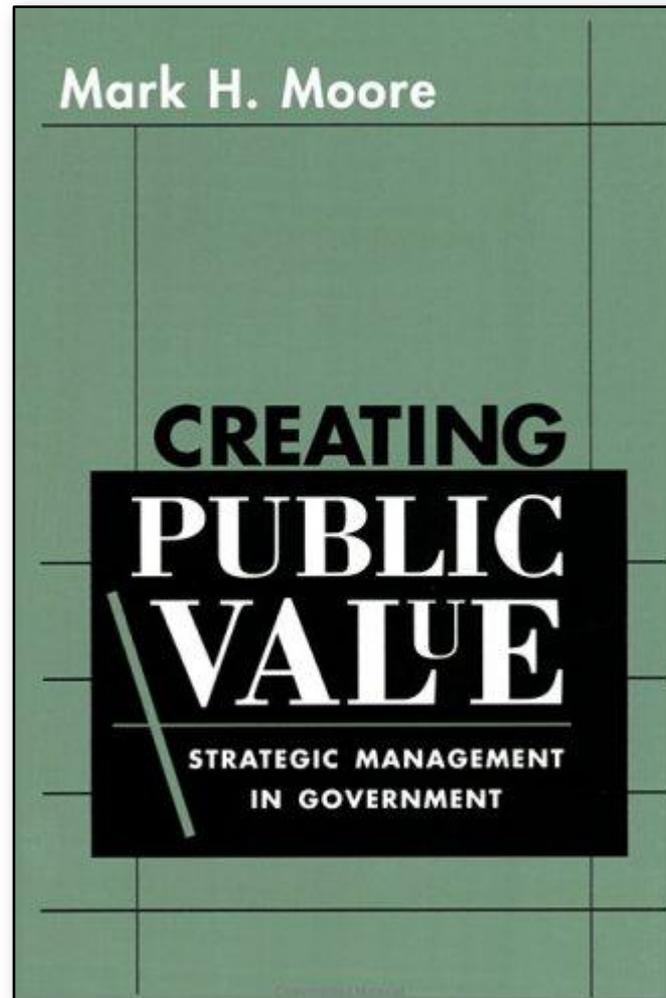
## Reserved decisions benchmark November 2013 – April 2014



Time will run from the final day of the hearing or the date of receipt of the last written submission, whichever is later.

# Public Value

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# Promoting fairness

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## Online information tools

**Have you been dismissed?** 

Check if you're eligible to lodge an application for **unfair dismissal**

### Checklists for applicants

The following checklist applies if you are the applicant (employee) in an unfair dismissal matter:

-  [Interactive applicant's merits checklist](#) 
-  [Printable applicant's merits checklist](#) 

The following checklist applies if you are the applicant (employee) in an unfair dismissal matter where the respondent (the employer) has objected to your unfair dismissal application and you have raised an objection, you do not need to use this checklist:

-  [Interactive applicant's objections checklist](#) 
-  [Printable applicant's objections checklist](#) 

### Checklists for respondents

The following checklist applies if you are the respondent (the employer) in an unfair dismissal matter:

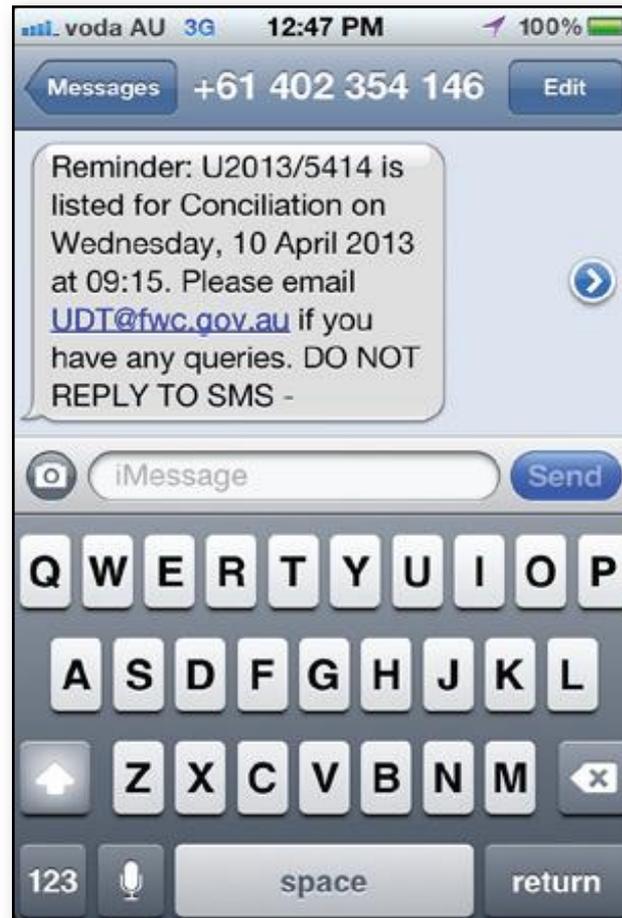
-  [Interactive respondent's merits checklist](#) 
-  [Printable respondent's merits checklist](#) 

The following checklist applies if you are the respondent (the employer) in an unfair dismissal matter where you have objected to the unfair dismissal application and you have not raised an objection, you do not need to use this checklist:

# Innovation

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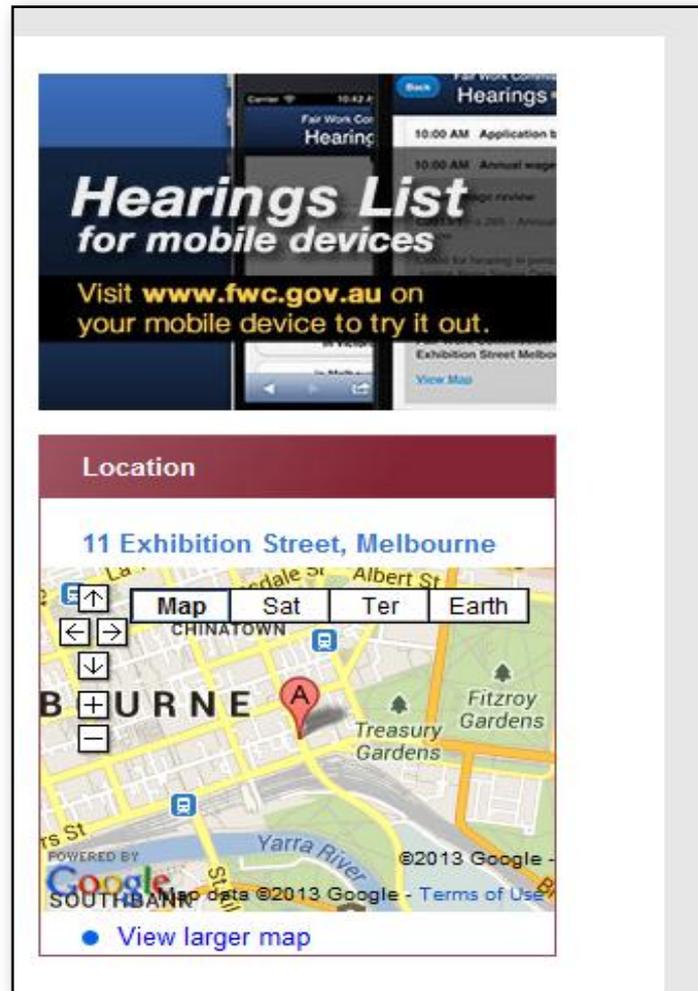
## SMS notifications



# Innovation

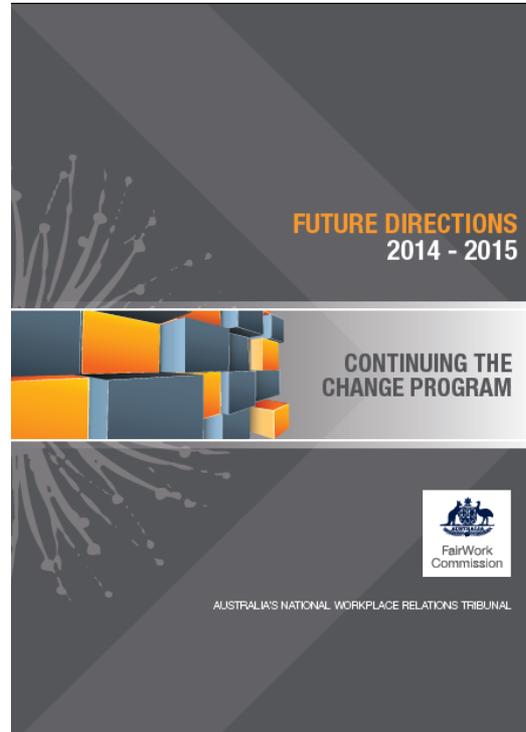
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## Hearings list app



# Continual improvement – the next phase

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# Continual improvement – the next phase

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## Some of the new initiatives include:

- The introduction of an electronic case management system to improve processing times, and reduce costs for parties
- A review of the process for determining enterprise agreement approval applications to ensure the most timely and efficient resolution of these matters
- A qualitative research project to identify clauses in enterprise agreements that enhance productivity or innovation
- In conjunction with key stakeholders, the development and implementation of a strategy for the promotion of cooperative and productive workplace relations that facilitate change and foster innovation.

# Continual improvement – the next phase

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- Develop further benchbooks and make them available on-line
- By the end of 2015 we will provide access to the audio files of most Commission hearings.
- In 2014-15 we will review the scope of the current pro-bono lawyer program to provide these services on a broader geographical and jurisdictional basis.
- Evaluate our performance against the Tribunal Excellence Framework.

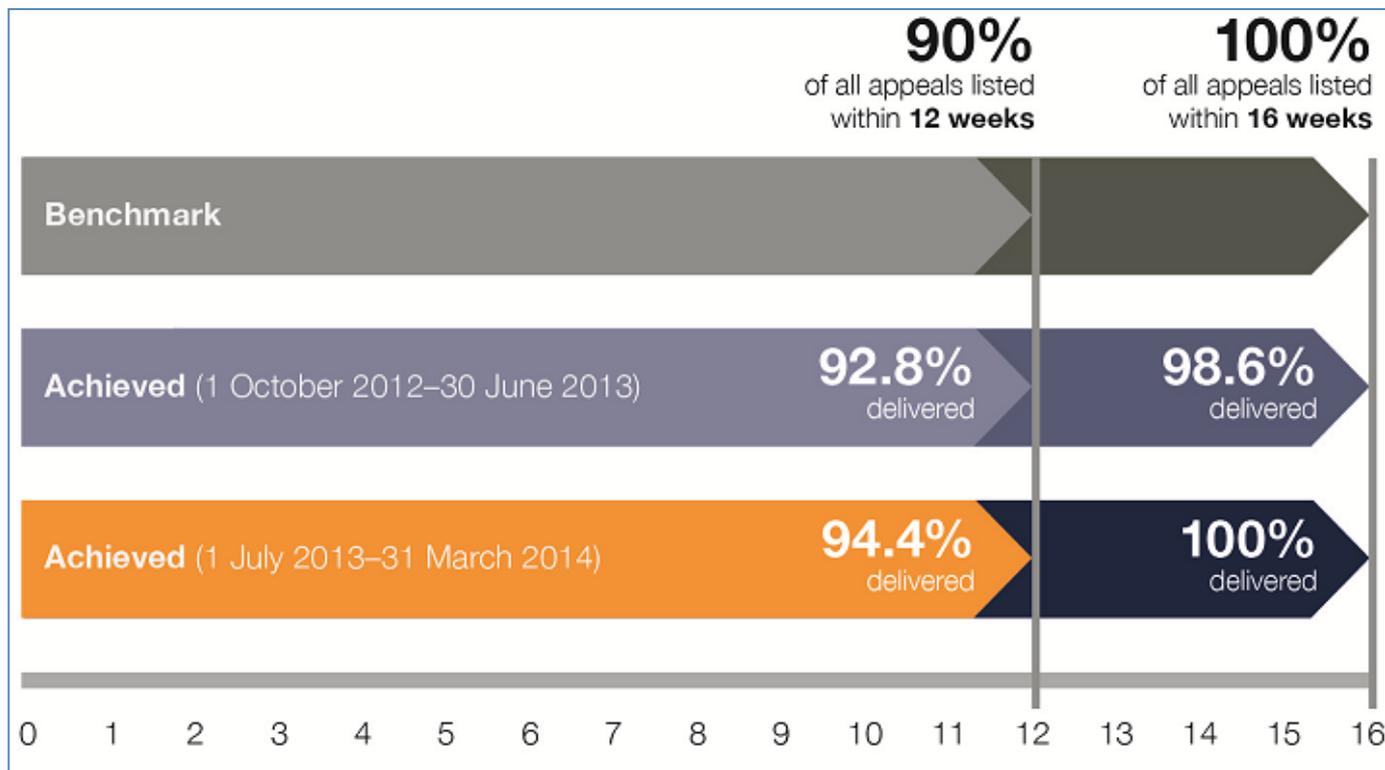
# Tribunal Excellence

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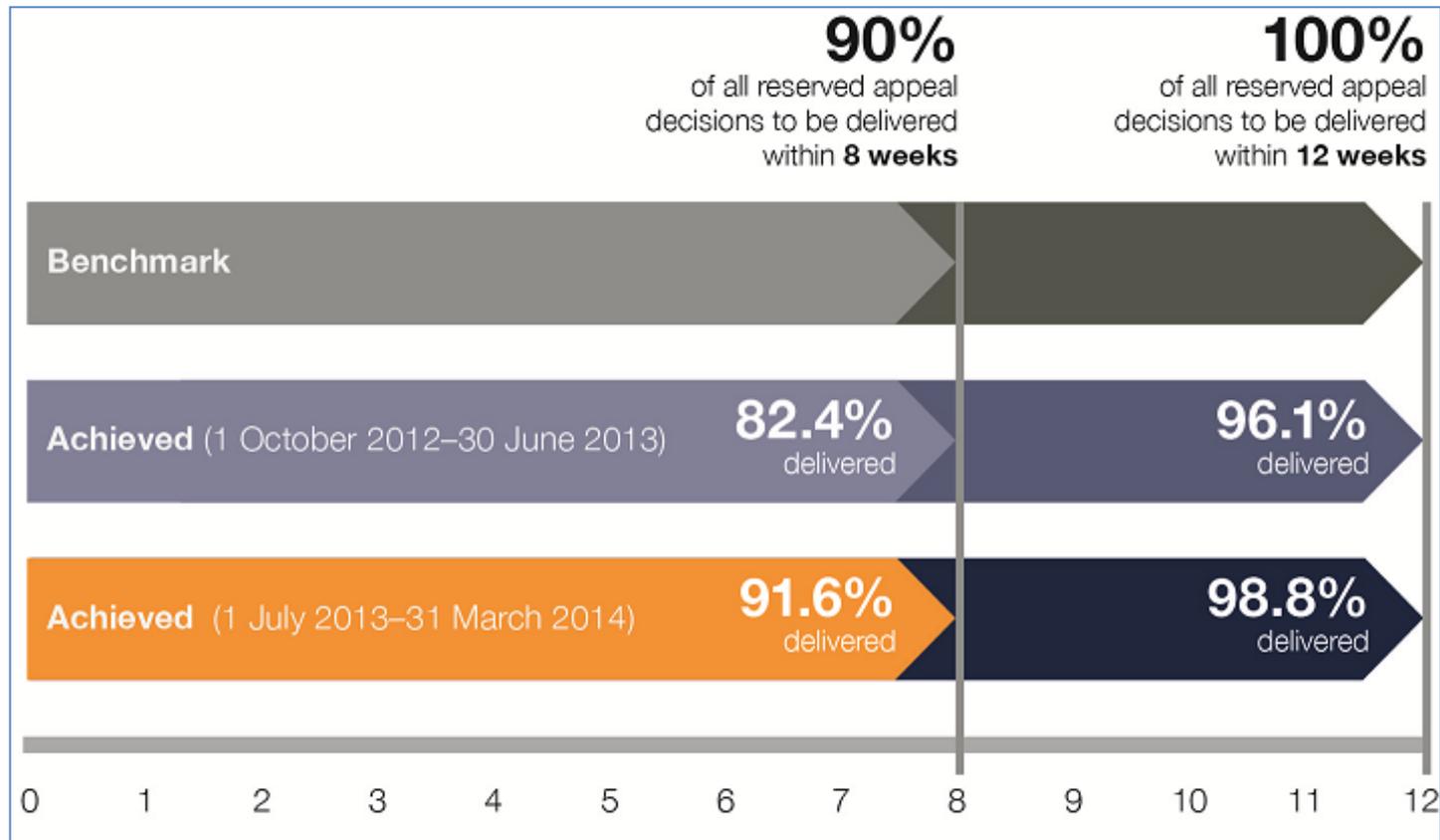
# Improving our performance

## Lodgment to first hearing performance



# Improving our performance

## Reserved appeal decisions benchmark



# Inconsistent decisions

<b>1. Drug and alcohol testing</b>	<b>Different contexts – different decisions</b> <i>DP World Brisbane</i> [2013] FWCFB 8557
<b>2. Pornography</b>	<i>Qld Rail v Wake</i> (2006) 156 IR 393 <i>Australia Post</i> [2013] FWCFB 6191 FCt review
<b>3. Fighting in the Workplace</b>	<i>AWU–FIME v Queensland Alumina Limited</i> (1995) 62 IR 385 <i>DP World v Lambley</i> [2012]FWAFB 4810 [2013] FCA 4 [34]-[38] [2013] FWCFB 9230
<b>4. Bankrupt applicants</b>	<i>Millington v Traders International</i> [2014] FWCFB 888

# Other matters

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## 1. Notice of Employee Representation Rights

*Peabody Moorvale Pty Ltd v CFMEU*  
**[2014] FWCFB 2042**

## 2. Loaded rates – pre-payment of annual leave

Hull Moody – [2011] FWAFB 6709

*CFMEU v Jeld-Wen Glass Australia*

[2012] FCA 45 ( per Gray J)

Canavan Building Pty Ltd (reserved)

# Workplace engagement

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- Member/staff project
- The functions of FWC include “Providing assistance and advice about its functions and activities.” (s 576(2))
- FWC must perform its functions and exercise its powers in a manner that:
  - promotes harmonious and co-operative workplace relations (s 577(d))

