



Fair Work
Commission

Fair Work Commission

Current issues and future developments

National IR Summit - "Industrial Relations - What to Expect Next?"

Presented by

Vice President Hatcher

March 2022



**Emerging from the pandemic
(hopefully)**



Rapid transformation of Commission procedures

12 March 2020 – Commission running as “normal” – in-person hearings with online hearings for shorter matters, publicly accessible registries, hard-copy as well as online applications and submissions.

26 March 2020 – all matters determined remotely (telephone or video conference) or on the papers, all registries closed, all application and submissions lodged online, all members and staff working from home.

Current position – across 2020-21 – 69% of all hearings and conferences conducted remotely, compared to 48% for 2019-20.

Microsoft Teams adopted as primary technology for conduct of Commission proceedings

Teams for Justice

Microsoft Teams for Online Hearings

“To facilitate hearings online with tooling that reflects the principles of Court procedure”



Court setup & scheduling

Court specific setup & configuration
Hearing scheduling & auto room creation
Search supporting Hearing history by Case



Prior to & during hearing

Auto routing of parties to private rooms
Moderated control of hearing join, & hearing recess
In hearing participant control of mute, unmute



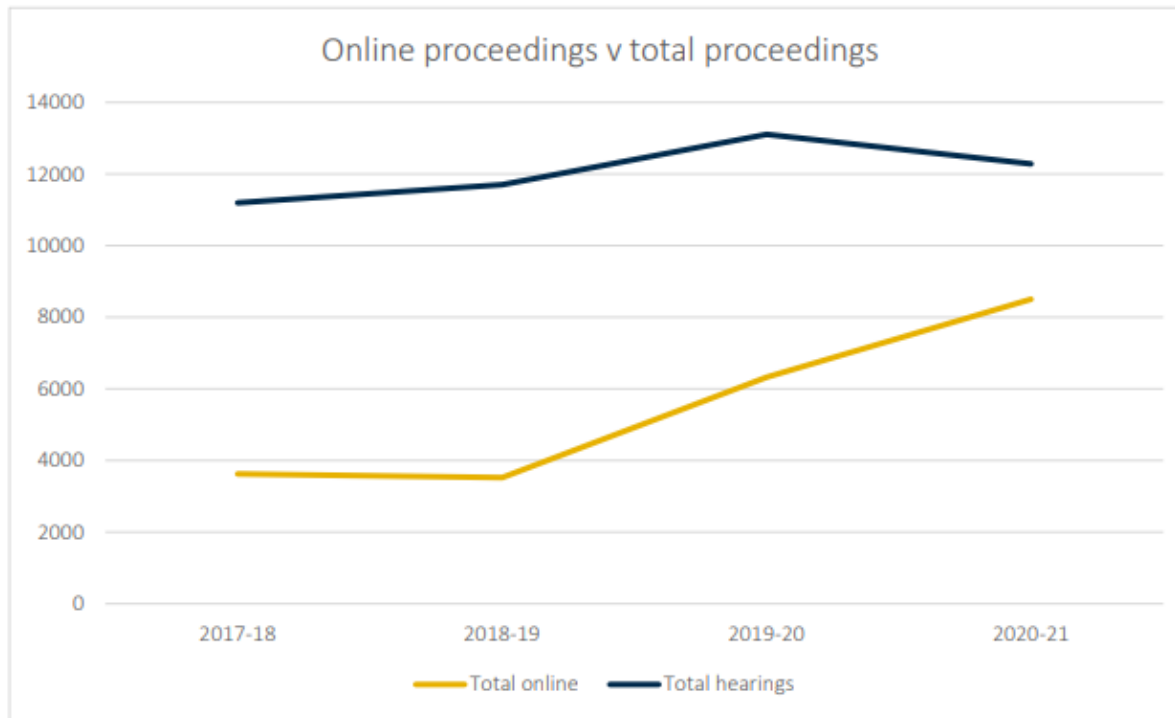


FIGURE 1 – HEARINGS AND CONFERENCES VOLUMES



Changes to workload

Peak period of pandemic – April-May 2020 - unfair dismissals up by 70%, general protections up by 40%

JobKeeper jurisdiction – started 9 April 2020, largely ended by 28 March 2021 – dealt with 826 applications, of which 724 were before 28 September 2020 – 80% of applications finalised in 4 days and 95% within 14 days.

Other work categories – a number of major urgent applications to vary awards, tripling in applications concerning variations to enterprise agreements but fewer applications for approval of new agreements, more stand down disputes, fewer applications for protected action ballot orders and bargaining disputes.

Now – unfair dismissal applications now back at about pre-pandemic level but total hearings and conferences still higher, although significantly lower than pandemic peak.



Continuing pandemic issue – vaccination mandates

Public health order requirements: Legal challenges to public health orders mandating vaccination for certain occupations have all failed:

Larter v Hazzard (No 2) [2021] NSWSC 1451; *Larter v Hazzard (No 3)* [2021] NSWSC 1595 – paramedic’s challenge rejected and ordered to pay NSW Health Minister’s costs.

Kassam v Hazzard; Henry v Hazzard [2021] NSWCA 299 – appeal from failed challenge by a range of workers rejected.

Harding v Sutton [2021] VSC 741 – challenge by plaintiffs working in healthcare, construction, transport, education, corrections and other occupations rejected.



Continuing pandemic issue – vaccination mandates

Employer mandate: *CFMMEU & Anor v Mt Arthur Coal Pty Ltd* [2021] FWCFB 6059

- Employer mandate held not lawful and reasonable because prior consultation obligation in its enterprise agreement not complied with.
 - Mandate otherwise lawful and reasonable – directed at ensuring health and safety; is rational and reasonably proportionate to Covid-19 risk; took into account circumstances at workplace including that person cannot work at home; and implemented only after employer had spent time encouraging and facilitation vaccination.
 - Employer has since complied with its consultation requirement and mandate implemented.
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Continuing pandemic issue – vaccination mandates

Unfair dismissal cases: flow of unfair dismissal cases from dismissal due to non-compliance with vaccination mandates working their way through the system. None successful so far. Examples:

- *Barber v Goodstart Early Learning* [2021] FWC 2156 (20 April 2021) – application dismissed.
 - *Glover v Ozcare* [2021] FWC 2989 (26 May 2021) – application dismissed.
 - *Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818 (29 April 2021); permission to appeal refused – [2021] FWCFB 6015 (27 September 2021); application for judicial review in Federal Court discontinued.
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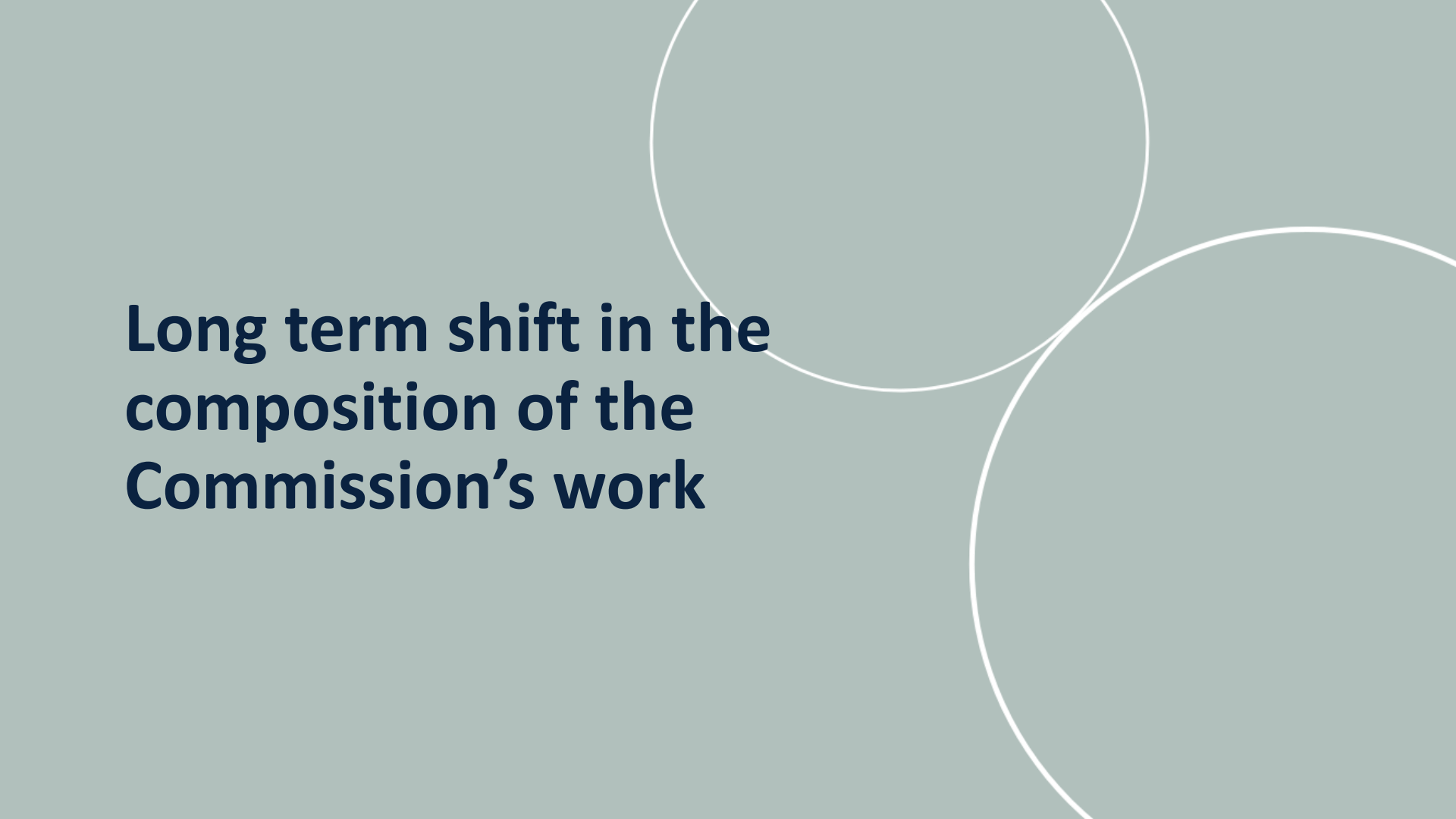
Online proceedings – the new normal?

What should be the new normal for Commission proceedings as we transition from the pandemic?

Commission has published a discussion paper about this on its website for public consultation. Feedback has been sought about:

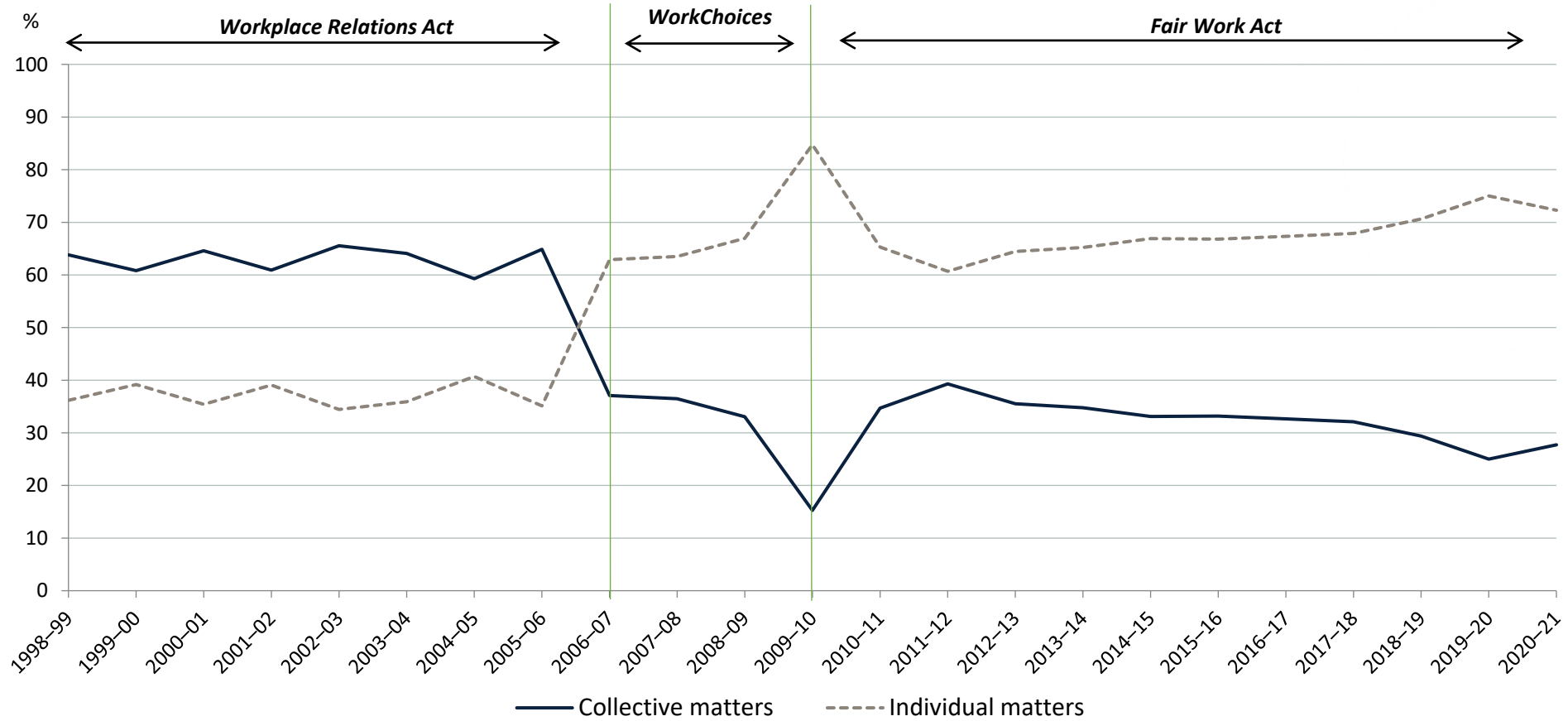
- any issues with how online hearings and conferences are currently used
- any benefits of how online hearings and conference are currently used
- users' experiences with, and perceptions of, online hearings and conferences at the Commission.

Commission will develop a draft framework to guide use of online hearings and conferences, and will be released for further consultation.

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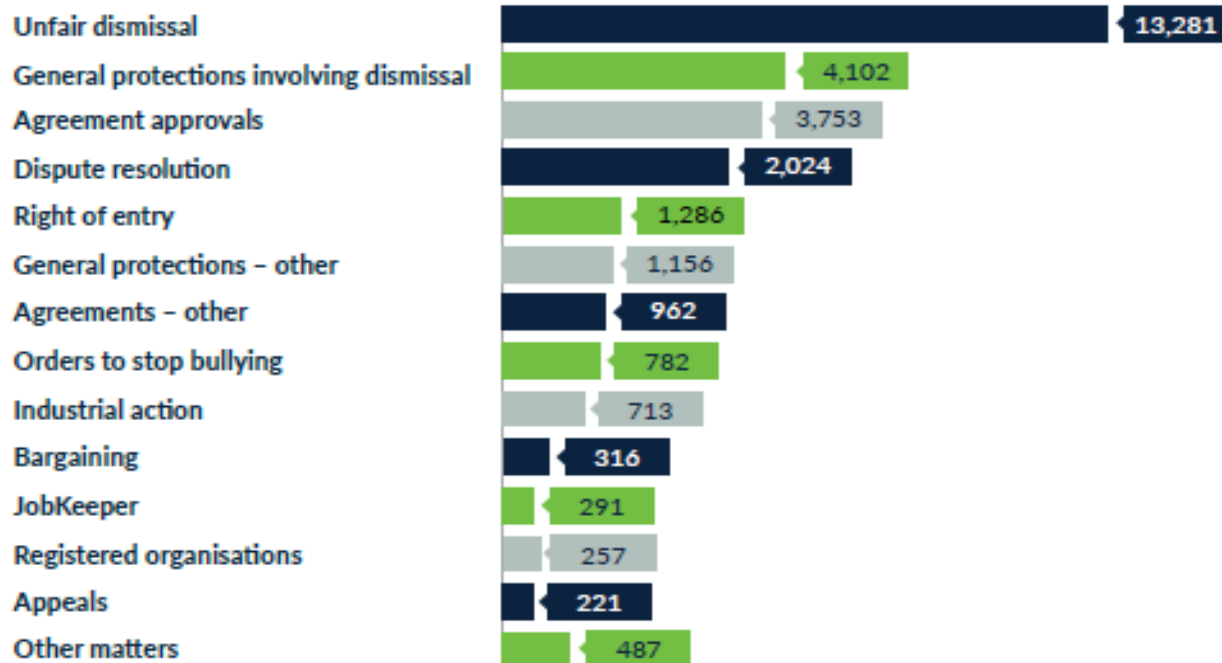
**Long term shift in the
composition of the
Commission's work**

Changing nature of Commission users





Workload by matter type in 2020-21



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Innovation in service delivery

Our role

‘It should never be forgotten that tribunals exist for users and not the other way around. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases.’

Sir Andrew Leggatt (2011)
Tribunals for Users – One System, One Service
Report for the Review of Tribunals



Modern awards pay database

On this page

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[2021 data](#)

[Hospitality and Restaurant industry awards](#)

[Previous years](#)

[Glossary](#)

[Feedback](#)

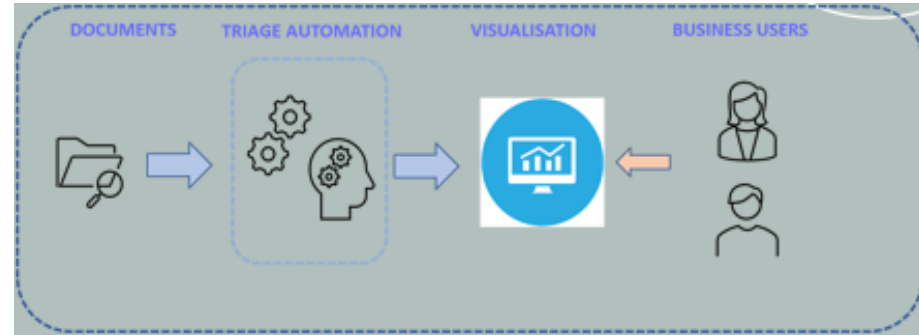
[Privacy](#)

Artificial intelligence

Phase 1 Real-time Agreement Triage Processing

We have commenced a project to see if we can use technology to identify applications that are more likely to be compliant, categorise similar applications and ultimately process them quicker

Phase 2 Intelligent Case Assistant Platform



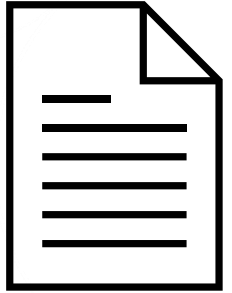
Smartforms

Online Lodgment service and Smartforms F16 / F17:

- FWC has developed a new and improved lodgment service
- Released our first smartform, Form F16
 - 12 March 2021 - F16 soft launch to small number of users
 - 19 August 2021 Wider public launch
 - 30 September 2021 34% of agreement applications were made using the smart F16.
- Form F17 is under development and expected to be delivered early 2022.

Form digitisation and next steps:

- Completely transition from paper based to online forms, we will be digitising all our forms in a series of tranches.



Online learning modules

Fair Work Commission
Home Learning catalogue Login Create an account Payment Search

Fair Work Commission Online Learning Portal

The Fair Work Commission's Online Learning Portal is a place for the Australian Community to learn more about workplace relations.

What's new

Latest Module	Who is this for
The interest-based bargaining process How does interest-based bargaining work in practice and what does it take to succeed?	Everyone Outcome You will have a thorough understanding of the process to follow and the factors that help you succeed at interest-based bargaining.

LEARNING MODULE
What is interest-based bargaining?

RENEE WHITESIDE
MERCER

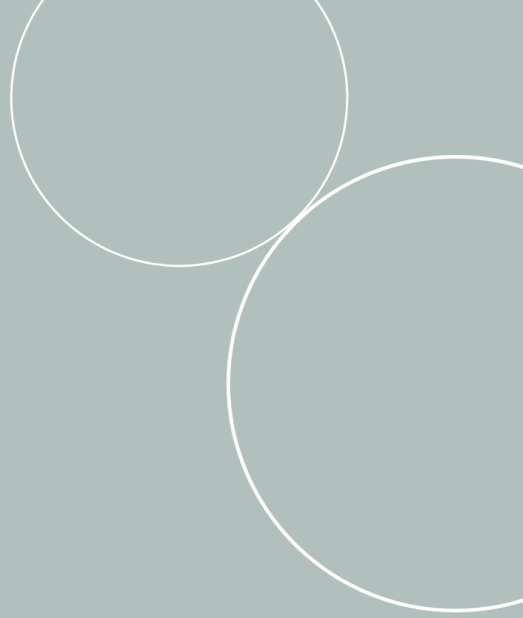
LEARNING MODULE
What is interest-based bargaining?

What is **interest-based** bargaining

LEARNING MODULE
What is interest-based bargaining?

Older radiologists will be able to undertake professional development, but I'm worried younger radiologists will miss out.

Enterprise agreements





More agreements being approved faster

- Lodgements of new agreements for approval dropped sharply in 2020, but have returned to pre-pandemic levels.
 - Lodgements in 2021 were 67% higher in corresponding quarters than 2020, and 16% higher than 2019.
 - Median time for approval of all agreements (including those requiring undertakings) has been reduced from 76 days in 2017-18 to 21 days in 2020-21 (and 13 days in 3rd quarter of 2021).
 - FWC's focus on education has led to a significant reduction in the proportion of agreements requiring undertakings before they can be approved.
 - Proportion of agreements approved without undertakings has increased to 58% as at 30 June 2021, from a low of 30% in late 2017.
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**Legislative amendments:
casual definition and conversion and
stopping sexual harassment**



*Fair Work
Amendment
(Supporting
Australia's Jobs
and Economic
Recovery) Act 2021*



**Fair Work Amendment (Supporting Australia's
Jobs and Economic Recovery) Act 2021**

No. 25, 2021

**An Act to amend the *Fair Work Act 2009*, and for related
purposes**



Casual terms award review 2021

- Commission required to review terms in all modern awards concerning casual employment after *Fair Work Act (Act)* amended to add a standard definition of casual employee and NES casual conversion provisions.
 - *Passenger Vehicle Transportation Award* changed.
 - Previously, casual was “an employee engaged as such and paid by the hour”.
 - Now, award refers to s 15A of the Act: offer and acceptance of employment on the basis that employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work.
 - Previous casual conversion clause removed and award refers to the new NES provisions.
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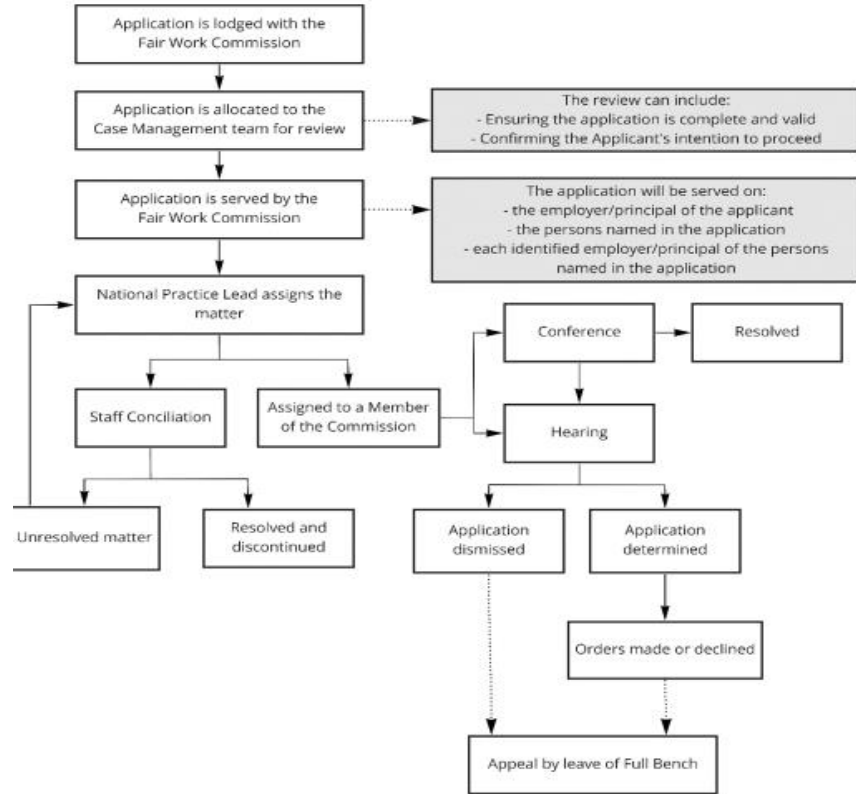


Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021

- Commenced September 2021
 - Gives effect to recommendations made in the Australian Human Rights Commission's Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces.
 - Extends the Commission's stop-bullying jurisdiction to enable the Commission to make orders to stop sexual harassment at work.
 - Makes clear that sexual harassment can constitute a valid reason for dismissal
 - Amends NES compassionate leave entitlements of employees to include 2 days' compassionate leave if the employee, or their spouse or de facto partner has a miscarriage.
-



Fair Work Commission process





Examples of sexual harassment

Inappropriate
staring, leering
or loitering

Using suggestive or
sexualised
nicknames for a
person

Unnecessary
familiarity, such as
deliberately brushing
up against a person

Unwelcome
touching

Persistent
unwanted
invitations to go
out on dates

Displaying
material of a
sexual nature in
the workplace

Suggestive
comments or jokes,
insults or taunts
based on sex, or
sexual gestures

Intrusive questions
or comments about
a person's private
life or body

Communicating sexually
explicit material in
person or through phone
calls, online interaction,
email, social media or
text messages.

Orders and remedies

Requiring the individual or group to stop the behaviour

Regular monitoring of behaviours by an employer

The provision of information, additional support and training to workers

Review of the employer's bullying/sexual harassment policy

Compliance with an employer's bullying/sexual harassment policy

Cases of interest





***RTBU v Busways* [2021] FWCFB 591**

- FWC approved greenfields agreement between Busways and TWU to apply to tender to operate privatised bus service region, despite opposition of RTBU
 - Decision affirmed by Full Bench.
 - RTBU sought judicial review of the decision in the Federal Court.
 - Full Court heard the case on 3 August 2021.
 - Judgment reserved.
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Questions?

