

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Additional Estimates 2014 - 2015

Agency - Fair Work Commission

Department of Employment Question No. EMSQ15-000016

Senator O'Sullivan asked on 26 February 2015 on proof Hansard page 46

Question

FWC - Failure to submit evidence

Senator O'SULLIVAN: So, the powers of the commission could force a person to deliver a document, for example, or to answer a question where failure to do so could result in the person facing prosecution, but at the same time—and we will use a document, Ms O'Neill, because it is probably a simple way to proceed—where the same document could incriminate them in relation to another offence or other behaviour, whether it be an offence or not. The coercive power state that you must produce the document. If you fail to do so there is a penalty. Upon production and consideration of the document—which is just an example and it could be a refusal to attend or a failure to give oral evidence or a whole range of things—that document could be admitted in some other process or some other proceedings to the detriment of the individual who has produced the document. Is that a fair appraisal of the nexus between my two submissions to you?

Ms O'Neill: I would really be more comfortable in taking that on notice, just because as I said it is not something I have looked at or considered. It appears to follow—

Senator O'SULLIVAN: Do you have any legal experts within your cohort of people here today that might be able to help?

Ms O'Neill: There is a number of lawyers or legally qualified people, including myself, but it is not a question that I or any of the other officers that are here are likely to have considered. What is going through my mind, which is making me reluctant in some respects, is I am aware, for example, in the context of the Registered Organisations Act, where certain evidence is obtained through the use of compulsory powers it in fact does mean that that evidence cannot be used in subsequent proceedings against that person. I just do not have the same level of familiarity at this very moment in relation to the proceedings before the Fair Work Commission.

Senator O'SULLIVAN: Would you accept that typically where there are coercive powers that is the case—in this case under the provisions of the Fair Work Act the fruit of the order cannot be utilised to proceed in other circumstances, except in cases of perjury if the evidence is given under oath?

Ms O'Neill: I have given the example in the context of the Registered Organisations Act where I am aware that that is the case.

Senator O'SULLIVAN: So, you will take that on notice for us?

Ms O'Neill: Yes.

Answer

Pursuant to subsections 677(1)-(3) of the *Fair Work Act 2009* (FW Act) respectively, a person commits an offence if the person fails to attend the Fair Work Commission (Commission) after being required to do so, refuses to take an oath or make an affirmation after being required to do so, or refuses to answer a question or produce a document after being required to do so. The specified maximum penalty for these offences is imprisonment for six months.

Subsection 677(4) provides that subsections 677(1)-(3) do not apply if the person has a reasonable excuse.

The Anti-bullying Benchbook published on the Commission's website includes a section on self-incrimination, as follows:

A witness may be required by the Fair Work Commission to answer a question or produce specific documents. Where a witness is required to answer a question and they fail to do so they commit an offence with a penalty of imprisonment.¹²⁸

A person may be required by the Fair Work Commission to answer a question or produce specific documents. Where a person is required to produce a document and they fail to do so, they also commit an offence with a penalty of imprisonment.¹²⁹

Where a person has a reasonable excuse not to provide the document or answer the question, they are not required to do so.¹³⁰

A person, including a witness, has a privilege against self-incrimination and this could provide a reasonable excuse. That is, a person is not required to answer a question or provide a document if they believe that the evidence they will provide will tend to incriminate them. This means that if they believe on reasonable grounds that their evidence will tend to prove that they have committed an offence, they are not required to answer that question. The same may apply in respect to a risk of exposure to a civil penalty.¹³¹ The Commission will not draw an adverse inference from the failure to provide that evidence. This means that the Commission cannot assume that the witness did not provide the evidence or the document solely on the basis that it would have harmed their case before the Commission.

However, the Commission will need to determine the application based upon the evidence that is before it. This means that a determination will be made in the matter without the evidence the witness would otherwise be providing if they had not relied on the privilege against self-incrimination.

A corporate entity does not have a privilege against self-incrimination.

¹²⁸ Fair Work Act s.677(3).

¹²⁹ Fair Work Act s.677(3).

¹³⁰ Fair Work Act s.677(4).

¹³¹ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Police Service Board v Morris* (1985) 156 CLR 397; *Valantine v Technical and Further Education Commission* [2007] NSWCA 208; but cf. *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 [31]; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 [24].

The above extract indicates that the privilege against self-incrimination is available in the Commission. The General Manager is not in a position to express an opinion as to whether, in circumstances where this privilege does not apply, it is typically the case that only limited use can be made of evidence obtained under coercive powers. To do so would involve reviewing the operation of a broad range of Commonwealth and State legislation that includes powers of this nature.