

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Additional Estimates 2014 - 2015

Agency - Fair Work Commission

Department of Employment Question No. EMSQ15-000024

Senator O'Sullivan asked on 26 February 2015 on proof Hansard page 48

Question

FWC - Data on declined applications

Senator O'SULLIVAN: Can you take it on notice to the extent that, if there is a log of data and that is not a difficult task that you might respond; otherwise just inform us that the data does not exist? What I am concerned about is that you have a situation—and in fairness to you and the commission you have taken this on notice to give an answer—where if you have a coercive power where someone is forced to answer, attend or deliver a document, particularly where they are forced to give oral evidence or present documents or exhibits in the event that there is no immunity there, and that can form the foundation in part or whole for action to be taken, whether it be a court related action or a commission related action, that puts them in a very disadvantaged position. It would seem that for a person to wander into that quagmire without some serious ability to independently have your decision appealed in the event that they were not satisfied with it would be an important principle, would it not, in the principle of fairness for these people?

Ms O'Neill: I understand the issue.

Senator Abetz: It is potentially a policy issue.

Ms O'Neill: I am happy to take the question I have on notice.

Senator O'SULLIVAN: We will advance it at the next sittings, because it will be what it is and then that will allow us all to turn our mind to it and decide whether there is a further line of questioning there. I will just wrap up on this section of my questioning. These aspects that I have talked about—and I can refresh your memory if needed—these actions about applications for solicitors, the existence of the penalties or the sorts of things that might give or trigger a penalty, have they been a part of the Fair Work Commission's suite of law and processes for a long period of time or have some of these things been more recent arrivals?

Ms O'Neill: None of those areas that we have canvassed, to the best of my recollection, have fundamentally changed in at least the last decade.

Senator O'SULLIVAN: But the act itself, I am instructed—and I am not expert on the act—commenced in 2009.

Ms O'Neill: Yes. That is why I was taking your question: are these new provisions? The 2009 act was the successor to previous pieces of legislation. I was looking at the history of the tribunal and the legislation governing its operations.

Answer

The answer to this question is provided in EMSQ15-000020 and repeated below:

Representation by lawyers and paid agents is discussed at paragraphs 42–50 of the Commission's Fair Hearings Practice Note. This practice note can be found at: <https://www.fwc.gov.au/at-the-commission/how-the-commission-works/practice-notes/fair-hearings>

Decisions granting or refusing representation by a lawyer or paid agent are made in a wide variety of circumstances during the course of both determinative and non-determinative

proceedings before the Commission. Depending upon the context, such a decision may or may not be recorded in writing and/or published. For example, a decision on representation might be given orally in a conference in a matter that does not proceed to any substantive decision, it might be dealt with in oral or written procedural directions, it might be given in a written interim decision delivered in the course of a hearing, or it might be given orally during a hearing and subsequently included in a written and published substantive decision on a matter.

As a result, data is not available to enable the Commission to provide reliable estimates of the overall percentage of matters in which permission for representation is granted or refused. Further, whilst written records of decisions on representation are generated in some contexts, these are unlikely to be representative of decisions on representation overall.