

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Additional Estimates 2014 - 2015

Agency - Fair Work Commission

Department of Employment Question No. EMSQ15-000036

Senator McKenzie asked on 26 February 2015 on proof Hansard page 62

Question

FWC - declaration in regards to application for a statutory right of entry permit

CHAIR: Can you take on notice how many there are from Mr Hanna. Post September everything that Mr Hanna has signed has gone off to tribunal?

Mr Enright: I do not know.

CHAIR: Could you just check? I would assume—and it could be incorrect; I could be making an assumption that is not valid—that if Mr Hanna signed Mr Collier's as true and accurate and a fit and proper person, then surely anything that Mr Hanna signs has to be called into question with respect to this issue?

Mr Enright: I do not know the circumstances of this matter, but I know where there have been other matters—

CHAIR: He has been suspended.

Mr Enright: In relation to Mr Hanna?

CHAIR: No, Mr Collier has been suspended. He was championed by Mr Hanna in the application—

Mr Enright: Yes. I do not know whether questions have been asked of Mr Hanna, but I can say that in other applications there have been errors where the committee of management person who has made the declaration has made that declaration believing that when he or she made the declaration it was true and correct. On other occasions other issues have emerged that the person was not aware about. I do not know the circumstances of this case.

CHAIR: You would hope that before you sign something like that you would actually do a bit of due diligence and work out if they had been convicted of theft, for instance.

Mr Enright: You would hope so, yes. So, is the question on notice whether he signed applications in the meantime and how many?

CHAIR: So Hanna having co-signed an application is not one of the criteria that you would automatically send off? Okay. Do you know what steps were taken in the case of Mr Hanna signing off to determine whether the information provided on his permit application was accurate and complete? Do you know if there are internal processes that he signs off?

Mr Enright: No, I do not, other than the declaration. That person declares that he or she has made inquiries to the best of their ability. I am not sure of the exact words, but I do not know the process.

CHAIR: Are you aware that the Commonwealth Criminal Code makes it an offence for a person to: (i) knowingly or recklessly make a statement that is false or misleading or omits material information; (ii) the false or reckless statement is made to the Commonwealth; and, (iii) the false or reckless statement is made in an application for a permit?

Ms O'Neill: Yes.

CHAIR: Will the Criminal Code apply to Luke Collier in respect of the declaration he made in his application for a statutory right of entry permit?

Ms O'Neill: Not necessarily, for this reason. As I understand it, there is a defence to any such prosecution of those provisions unless the person concerned was warned in advance of that potential consequence. In other words, if you really do not tell the truth in this form then that may be an offence, you may be prosecuted and so on. This is something that has come to our attention recently. We are in fact in the process of amending the forms. We have just gone through the rules committee process to provide that precise warning to ensure that that

defence would not be available.

CHAIR: It is a defence to a breach of the Commonwealth Criminal Code for me to say, 'I didn't know that lying was bad'?

Ms O'Neill: I will not adopt that language.

CHAIR: I did not think it was particularly offensive.

Ms O'Neill: It is not offensive, but my understanding, as I have indicated, is that it is a defence to such a charge that no warning or the person making the declaration was unaware of the potential consequences of making a false declaration.

Senator Abetz: Do company directors get that benefit? I am sorry. That is a rhetorical question.

CHAIR: Will the Criminal Code also apply to whoever it was from the senior ranks of the CFMEU that vouched that Luke Collier did not have the relevant criminal convictions?

Ms O'Neill: The same issue arises.

CHAIR: Are our forms worth the paper they are written on?

Ms O'Neill: As I have indicated, we have just gone through the process of amending them to address that issue that has come to light.

CHAIR: When did this significant issue, particularly around protecting the public confidence and the integrity of the commission, come to light?

Ms O'Neill: I will have to take the detail of that on notice. I do not have a date for you.

Question (a)

Are you aware that the Commonwealth Criminal Code makes is an offence for a person to: (i) knowingly or recklessly make a statement that is false or misleading or omits material information; (ii) the false or reckless statement is made to the Commonwealth; and (iii) the false or reckless statement is made in an application for a permit?

Question (b)

Will the Criminal Code apply to Luke Collier in respect of the declaration he made in his application for a statutory right of entry permit?

Question (c)

When did this significant issue, particularly around protecting public confidence and the integrity of the Commission, come to light?

Answer (a)

There are three sections of the Criminal Code that could apply to applications for entry permits under section 512 of the *Fair Work Act 2009* (FW Act).

Section 136.1 of the Criminal Code appears to be the section referred to by the Chair of the Committee in this question. This section makes it an offence to knowingly or recklessly make a false or misleading statement to a Commonwealth entity (such as the Commission) in certain applications, including an application for a permit. Section 136.1 does not require that a person be warned in advance about this offence.

Section 137.1 of the Criminal Code makes it an offence to knowingly give false or misleading information to a Commonwealth entity. However, under subsection 137.1(4), this offence does not apply if, before the information was given to the Commonwealth entity, the Commonwealth entity did not take reasonable steps to inform the person giving the information of the existence of this offence. Subsection 137.1(6) provides that it is sufficient to use the words "Giving false or misleading information is a serious offence".

Section 137.1 also makes it an offence to knowingly give false or misleading information where the information is given in compliance or purported compliance with a Commonwealth law (such as the FW Act or the Commission's rules as given effect by that Act). In addition, section 137.2 makes it an offence to knowingly produce a false or misleading document, where the document is produced in compliance or purported compliance with a Commonwealth law. No warning in advance about these offences is required.

In referring to a 'defence', the General Manager was referring to subsection 137.1(4) of the Criminal Code.

Answer (b)

Yes.

The Fair Work Commission does not have jurisdiction to investigate potential contraventions of the Criminal Code. The relevant investigatory agency is the Australian Federal Police.

On 22 March 2015, pursuant to section 655 of the FW Act, the President of the Fair Work Commission authorized the release of information concerning the declarations made by Mr Luke Collier and Mr David Hanna to the Australian Federal Police. On 24 March 2015 this information was referred to the Australian Federal Police.

On 26 March 2015 the Fair Work Commission wrote to the Senate Standing Committee on Education and Employment advising of the reference of this information to the Australian Federal Police.

Answer (c)

As indicated in response to question (a) above, the 'defence' referred to by the General Manager was a reference to section 137.1(4) of the Criminal Code, which provides that it is not an offence for a person to knowingly give false or misleading information to a Commonwealth entity under section 137.1 if, before the information was given to the Commonwealth entity, the Commonwealth entity did not take reasonable steps to inform the person of the existence of this offence.

The potential availability of this defence arose in the context of inquiries in relation to, and notices of adverse findings about, a number of office holders of the Victoria No 1 Branch of the Health Services Union, in or around March 2014.

While no such warning is required for the purposes of section 136.1 and some other potentially relevant offences under the Criminal Code, the Fair Work Commission considers it desirable in terms of discouraging the provision of false or misleading information and being open and transparent, to include a warning on its entry permit application forms.

Accordingly, while a warning would not strictly be required if only section 136.1 of the Criminal Code was to be relied upon in prosecuting a person in relation to false or misleading information in an entry permit application, the Fair Work Commission is currently in the process of amending its entry permit application forms to include such a warning.