

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Supplementary Budget Estimates 2015 - 2016

Agency - Fair Work Commission

Department of Employment Question No. EMSQ15-000488

Senator McKenzie provided in writing.

Question

FWC - Time taken on decision-making

1. Please provide a breakdown on each individual Member of the Commission during the last 12 months for the number of matters heard by the Member in respect of:

- a) Unfair dismissal;
- b) General protection;
- c) Unprotected industrial action;
- d) Protect industrial action processes;
- e) Agreement approvals;
- f) Disputes;
- g) Right of entry disputes;
- h) Bargaining-related matters; and
- i) Appeals.

2. For each of these matters listed above:

- a) The average time taken by each Member to list the application; and
- b) The average time taken by each Member from application to finalisation.

3. Please provide a breakdown of the number of days on official commitments each Member spent outside their home state.

Answer

1. By questions one and two, the Committee has requested information about the allocation of matters to and timeliness (performance) of individual Members of the Fair Work Commission (Commission).
 - 1.1. **Table 1** presents administrative data on the aggregate number of hearings and timeliness performance for key matter types in the 2014–15 financial year:

Table 1: Number of Commission hearings and timeliness performance 2014/15

Matter type	Number of matters heard#	Average time lodgment to finalisation (days) except as otherwise described
Unfair dismissal	3868	35
General protections (involving dismissal)	2580	37
General protections (not involving dismissal)	734	29
Unprotected industrial action (lodgment to first order)	113	1
Protected industrial action processes [^]	376	3
Agreement approvals – single enterprise	4953	21
Disputes (s739)	3095	16
Right of Entry (Disputes)	119	NA ⁺
Bargaining ^{^^}	841	NA ⁺
Appeals (lodgment to first hearing)	357	60

'Number of matters heard' is a count of the hearings and conferences recorded against a particular matter type, noting that for some matters there may be multiple hearings and other matters that are decided on the papers will not have a hearing event recorded.

[^]The count of hearings for protected industrial action processes refers to applications made under ss 424, 425, 426, 437, 47, 448, 459 and 472 of the *Fair Work Act 2009* (Cth). The lodgment to finalisation data also includes applications for unprotected industrial action made under ss 418 or 419.

^{^^}Bargaining refers to matters lodged under ss 229, 236, 238, 240, 242 and 248.

+ 'NA' refers to matter types where the administrative data currently held does not include a timeliness calculation for the relevant matter type or for all of the matter types that fall under this category.

- 1.2. As explained further below, I regret that I cannot provide that information at the individual Member level, because to provide such information would compromise the essential independence of the Commission.
- 1.3. The President of the Commission is responsible for ensuring that the Commission performs its functions and exercises its powers in a manner that is efficient and adequately serves the needs of employers and employees throughout Australia: s 581 of the *Fair Work Act 2009* (Cth) (FW Act). The President has established a system for the allocation of work to Members.
- 1.4. The independence and standing of the Commission is central to the operation of the FW Act and the attainment of Parliament's objectives. The maintenance of public confidence in the independence and impartiality of the Commission depends on its capacity to operate free of external pressure or influence in exercising its powers and carrying out its functions.
- 1.5. The High Court decision of *Fingleton v The Queen* (2005) 227 CLR 166 (*Fingleton*) held that the allocation of magistrates to particular localities and the assigning of magistrates to particular work were not merely matters of internal administration, but were "intimately related to the independent and impartial administration of justice": at paragraph [52] (Gleeson CJ). Gleeson CJ noted that decisions that directly or indirectly determine how the business of the court would be arranged and allocated, such as the assignment of judicial officers to cases,

concern matters which go to the essence of judicial independence:

... As was pointed out in *Minister for Immigration and Multicultural Affairs v Wang*, where it is the function of a head of jurisdiction to assign members of a court to hear particular cases, the capacity to exercise that function, free from interference by, and scrutiny of, the other branches of government is an essential aspect of judicial independence. (reference omitted)

1.6. Gleeson CJ concluded:

If a Chief Magistrate could be called to account, in civil or criminal proceedings, for decisions about how Magistrates Courts arrange their business, or about the assignment of magistrates to cases, or classes of case, the capacity for the erosion of independence is obvious.

1.7. Those observations apply with equal force to the operations of the Commission and to its relationship with a Parliamentary Committee.

1.8. The FW Act expressly provides that the President of the Commission is not subject to direction by or on behalf of the Commonwealth: s 583. The statutory framework of the FW Act also preserves the independence of the Commission and protects Commission Members from outside influence in the performance of their functions and exercise of their powers:

- a Commission Member has, in performing his or her functions or exercising his or her powers as a Commission member, the same protection and immunity as a Justice of the High Court: s 580;
- Commission Members have tenure of appointment: s 629;
- similarly to Federal Court judges, the appointment of a Commission Member may (subject to very limited exceptions) only be terminated, pursuant to an address from each House of Parliament, for proved misbehavior or incapacity: s 641;
- the President must not issue a direction to a Commission Member relating to a Commission decision: s 582(3); and
- there are certain offences designed to protect Commission Members in the performance of their functions, such as from improper influence: s 674(5); or from conduct which insults or disturbs a Commission Member: s 674(1).

1.9. It is therefore considered that providing information about the allocation of matters to individual Members could compromise the independence of the Commission. It is noted that the former President of the Commission, the Hon Geoffrey Giudice AO, has previously declined to provide information of this kind.¹

1.10. As recognised in *Fingleton*, the allocation of cases goes to the very heart of the

¹ Commonwealth of Australia 2010, *Senate Education, Employment and Workplace Relations Legislation Committee: Budget Estimates: official Hansard*, 1 June 2010 pp. 152-153.

Commonwealth of Australia 2010, *Senate Education, Employment and Workplace Relations Legislation Committee: Supplementary Budget Estimates: official Hansard*, 20 October 2010 pp. 100-102.

Commonwealth of Australia 2011, *Senate Education, Employment and Workplace Relations Legislation Committee: Additional Estimates: official Hansard*, 23 February 2011 pp. 91-95.

independence and impartiality of judicial/tribunal functions. Provision of that information could create a perception that the Parliamentary Committee was seeking to influence the allocation of matters to individual Members.

- 1.11. For those reasons, the Commission also respectfully submits that the Committee ought not decide that the circumstances warrant an order for production of the information, for the purpose of Resolution 1(2) agreed to by the Senate on 25 February 1988.
2. Question two asks for the average time taken by each Commission Member to list and finalise each of the types of applications specified in question one during the last 12 months.
 - 2.1. In addition to the information presented under question one, the Commission reports at an organisational level on its caseload and performance and has introduced timeliness benchmarks for certain activities. Those benchmarks are intended to set tight performance standards and the Commission expects that there will be circumstances where it does not meet these high standards; however, the Commission is committed to improving timeliness and publicly reporting on its performance at an organisational level.
 - 2.2. Information about the Commission's performance against those benchmarks is published on its website at:
www.fwc.gov.au/about-us/timeliness-benchmarks.
 - 2.3. For the reasons discussed above, I regret that I cannot provide this information at the individual Member level. The Committee's proper interest in the expenditure of public funds is adequately served by provision of the information at an aggregate level.
3. You have requested a breakdown of the number of days on official commitments each Member spent outside their home state in the past 12 months.
 - 3.1. For the reasons discussed in the response to question one, I regret that I cannot provide this information at the individual Member level, because such information is closely related to the way in which the business of the Commission is arranged and matters allocated to Commission Members.
 - 3.2. Providing that individualised information could create a perception that the Parliamentary Committee was seeking to supervise the official commitments of individual Members.
 - 3.3. It is not possible to provide this information at an aggregate level as the system from which the data would be drawn does not distinguish between interstate and intrastate travel.