

## AMMA STATEMENT ON FWC UNFAIR DISMISSAL FIGURES

### Introduction

The FWC's media release dated [22 November 2013](#) states that there has been misleading statistics and commentary in relation to the success of unfair dismissal applications decided by the FWC, and that "the quoted figure for the first quarter of the 2013/14 financial year of 61% of matters decided in favour of the applicant, does not include any decisions dismissing applications under s399A, which are now reported on separately".

AMMA rejects that the unfair dismissal statistics and commentary set out in its 2013 West Coast Industry Forum [opening address](#), spoken by Chief Executive Steve Knott, are misleading.

In AMMA's view, the quoted figure of 61% of matters decided in favour of the applicant correctly excludes applications that have been dismissed under section 399A of the Fair Work Act 2009.

The below analysis, and the analysis on which AMMA's earlier statements and statistics were based, simply compares the proportion of "successful" versus "unsuccessful" unfair dismissal applications each quarter for the preceding nine quarters (i.e. going back more than two years).

In short, AMMA has compared in each quarter those applications found to be "fair" versus those found to be "unfair" and has calculated the percentage of successful claims based on those figures only. We have done this consistently over the past nine reports.

It would be misleading to include in these statistics data relating to applications dismissed under section 399A, because those cases have not been the subject of an arbitrated outcome. There has been no finding made as to whether the dismissal was "fair" or "unfair". Accordingly, we reject that the data ought to have included details of applications dismissed under s399A as suggested by the FWC.

We set out below a summary of the analysis conducted by AMMA in the preparation of its statistics and commentary.

### Methodology

AMMA has taken the information from the past nine quarterly reports published by the FWC and used only those two columns of figures relating to dismissals that were found to be "fair" versus those where the dismissal was found to be "unfair" (the latter representing successful claims).

By undertaking this comparison each quarter, AMMA has arrived at a percentage figure for successful unfair dismissal claims each quarter, with the latest quarter showing a marked increase of successful claims at 61.1% compared to an average of 33.8% and 36.3% over the previous two years.

AMMA has confined its analysis to only those cases that were subject to a published decision as to whether the dismissal was "fair" or "unfair". AMMA has not included other peripheral figures published in the quarterly reports that show applications that were dismissed for a variety of reasons, including for lack of jurisdiction, etc.

As such, AMMA has not included figures relating to cases dismissed under s399A (as the FWC suggested it should have) because those cases would have no bearing on the proportion of cases subject to an arbitrated outcome where the dismissal was found to be fair or unfair. Cases dismissed pursuant to s399A have been disposed of before a finding of fairness or otherwise has been determined by the FWC.

## Section 399A

Section 399A is a new provision of the Fair Work Act that commenced operating on 1 January 2013 but it would have no bearing on the statistics relating to unfair dismissal findings referred to by AMMA, either before or after its implementation date. Section 399A applications are not included in either of the two figures that AMMA has drawn on in each quarter, because the statistics cited by AMMA are confined to an assessment of arbitrated findings of fairness or unfairness.

AMMA rejects the inference that it was attempting to obfuscate the true figures set out in the FWC's quarterly statistical report. To the best of AMMA's knowledge, the figures, which have been set out below, compare "apples with apples" for each quarter over the past two years.

The information presented in the FWC's quarterly statistical reports for the preceding two years is broken down in exactly the same way as in the latest quarterly report for Q1 in 2013/14 (July to September 2013). There is no discernible difference between how the figures for Q1 in 2013/14 are calculated or presented compared with how each of the figures relating to the previous eight quarters are calculated and presented.

## Clarification sought from the Fair Work Commission

Arising from the matters set out in the FWC's media release, AMMA seeks clarification from the FWC in relation to the following matters:

- Does the latest quarterly statistical report calculate the figures relating to unfair dismissal applications found to be "fair" and those found to be "unfair" differently to the manner in which the previous quarterly statistical reports calculated them? If so, where is this matter captured in the report?
- Section 399A ([hyperlink](#)) refers to applications that were dismissed because the applicant:
  - failed to attend a conference conducted by, or a hearing held by, the FWC;
  - failed to comply with a direction or order of the FWC relating to the application; or
  - failed to discontinue the application after the conclusion of a settlement agreement.

Why does the FWC consider that the figures pertaining to dismissals under section 399A ought to be included in the "fair" versus "unfair" breakdown, to the exclusion of other statistics evidencing the dismissal of applications?

AMMA has consistently excluded any other peripheral data in its calculations that would sway the figures one way or another.

- Does the FWC dispute the accuracy of the statistics arrived at when a calculation is performed in relation to just those two figures as reproduced below, being "dismissals found to be fair" and "dismissals found to be unfair"?
- Does the FWC intend to adjust the manner in which the figures cited for "fair" v "unfair" findings in the quarterly statistical reports are now calculated?

## **The issues at play: DP World example**

In AMMA's view, the official statistics clearly and unambiguously indicate that 61% of unfair dismissal claims were successful in the past quarter. If anything, this figure understates the challenges facing employers in matters before the FWC.

Consider last Friday's (22/11/13) decision of [FWC Full Bench DP World v Lambley](#) including the dissenting decision in the above.

This case involved a worker assaulting his supervisor, who did not fight back. When the supervisor fell to the ground, the worker then kicked him in the head in an attempt to cause maximum injury.

These events were captured on CCTV footage and not disputed. The worker argued that he had been bullied by the supervisor, but as outlined in the evidence, there were other options open to the worker to pursue, including consulting management or walking away, in lieu of the serious and deliberate actions he instead chose to take to injure the supervisor.

At first instance, Deputy President Sams found that a valid reason existed for the worker's dismissal, but held that it was harsh given the conduct of his supervisor, the worker's age and his unblemished 30 year work history.

The decision of Deputy President Sams was quashed on appeal to a Full Bench of the FWC, comprised of Vice President Watson, Deputy President Hamilton and Commissioner Simpson.

The finding of the Full Bench was upheld by Justice Katzmann of the Federal Court.

The matter was reheard before a differently constituted Full Bench comprised of Vice President Catanzariti, Vice President Lawler and Commissioner Cambridge. Vice President Catanzariti and Commissioner Cambridge found that the dismissal was not harsh, unjust or unreasonable, having weighed "the seriousness of the conduct against the mitigating circumstances" (at [55]). Vice President Lawler handed down a dissenting decision.

The case highlights the degree to which FWC members disagree over the proper application of fighting authorities, despite the fact that the basic principles were established in the 1990s. As evidenced in this case, those principles are now applied inconsistently.

These uncertainties make it very difficult for FWC conciliators to guide parties to the likely result of an unfair dismissal matter. The consequences include settlements based on lack of clarity on what decision makers may do and the reluctance of some employers getting caught up with some sort of FWC member lotto process.

This begs the question: does such uncertainty fuel the incidence of commercial settlements and the ever increasing number of applications? With conflicting FWC member decisions like this, is it any wonder that the unfair dismissal area is the FWC's core workload?

It is not hard to deduce that the legal costs in this matter, running over several years, would have been enormous.

### ***Relevance to an appeals body***

In AMMA's view, that FWC members can reach such inconsistent findings in relation to the issue of fighting in the workplace, as seen in the DP World case, notwithstanding the degree of violence

engaged in by the worker and the alternative options open to the worker to pursue, further highlights entrenched problems with both the FWC appeal processes and some inexplicable determinations.

An independent and specialist appeals jurisdiction, as currently being considered by the Coalition Government, would lead to clearer principles, fairer treatment and fewer cases. Beneficiaries will be the direct industrial parties and reduced taxpayer costs through a reduced need to provide hearings for unmeritorious unfair dismissal claims.

It should also be of concern that from 1 January 2014, the FWC will have new powers to stop bullying in the workplace. With this new area of activity, and a tribunal racked with inconsistency, AMMA is concerned that such inconsistencies will be similarly exploited in this jurisdiction, leading to applicants rolling the Tribunal lotto dice all in the hope of some 'settlement' offer rather than a FWC order to stop bullying.

It is highly desirable to have an appeal jurisdiction preventing inconsistent findings in relation to these matters.

### Analysis of past 9 quarterly FWC reports

The below analysis covers:

Q1 – 2013/14 | Q1, Q2, Q3, Q4, - 2012/13 | Q1, Q2, Q3, Q4 – 2011/12.

*Latest FWC quarterly report for July to September 2013 (first quarterly report for 2013/14 year):*

- Dismissals found to be unfair – 55
- Dismissals found to be fair – 35
- **Success rate – 61.1%**

*All four quarterly reports for 2012/13 year*

Q4

- Dismissals found to be unfair – 35
- Dismissals found to be fair – 89
- Quarterly success rate: 28.2%

Q3

- Dismissals found to be unfair – 36
- Dismissals found to be fair – 35
- Quarterly success rate: 50.7%

Q2

- Dismissals found to be unfair – 39
- Dismissals found to be fair – 57
- Quarterly success rate: 40.6%

Q1

- Dismissals found to be unfair – 35
- Dismissals found to be fair – 73
- Quarterly success rate: 32.4%

Total found unfair in 2012/13: 145

Total found fair 2013/14: 254

**Overall success rate for 2012/13: 36.3%**

*All four quarterly reports for 2011/12 year*

Q4

- Dismissals found to be unfair – 30
- Dismissals found to be fair – 53
- Quarterly success rate: 36.1%

Q3

- Dismissals found to be unfair – 24
- Dismissals found to be fair – 43
- Quarterly success rate: 35.8%

Q2

- Dismissals found to be unfair – 27
- Dismissals found to be fair – 51
- Quarterly success rate: 34.6%

Q1

- Dismissals found to be unfair – 31
- Dismissals found to be fair – 72
- Quarterly success rate: 30%

Total found unfair in 2011/12: 112

Total found fair 2011/12: 219

**Overall success rate for 2011/12: 33.8%**