

STATEMENT
1 June 2010

Date: 11/06/2010

By: Fair Work Australia

[1] I thank Honourable Senators for the opportunity to make an opening statement. There are two matters that I want to deal with. The first relates to incorrect statements made in the public arena concerning my appearance at Estimates. The second concerns the situation which now exists as a result of the Senate resolution of 29 October 2009. That resolution dealt with attendance at Senate Estimates.

[2] In relation to the first matter, there were a number of misleading statements concerning the statutory nature of the position of President of Fair Work Australia and other matters. For those involved in the cut and thrust of politics misrepresentation of one's position may not be an unusual experience. Despite that, the record should be corrected because of the importance of the issues involved. There are quite a few corrections required.

[3] It was widely stated that I had refused to appear before this Committee. As Honourable Senators who are members of this Committee know, that was not the case and that has been acknowledged by the chair, Senator Marshall, in a letter dated 21 October 2009. It is my view that it is inappropriate that the President of Fair Work Australia appear at Estimates and I made that view known to the Committee. Never did I indicate that if the Committee wished me to attend I would refuse to do so.

[4] It was also stated that I had claimed to have the protections enjoyed by a member of the High Court and that such claim was false. As members of this Committee also know, all members of Fair Work Australia do have the protection and immunity of a justice of the High Court. Section 580 of the Fair Work Act reads:

“An FWA member has, in performing his or her functions or exercising his or her powers as an FWA member, the same protection and immunity as a Justice of the High Court.”

[5] The Act also confers on the President the same status as a judge of the Federal Court. That is in s.629A.

[6] It is relevant that the High Court has described the immunity of judges in relation to judicial decisions as an immunity from disclosing any part of the decision-making process and that the purpose of the immunity is to ensure that judges may be free in thought and independent in judgment. (see *Herijanto v Refugee Review Tribunal* (2000) 170 ALR 379 at paras 13-16).

[7] It was also widely reported that Fair Work Australia is a government agency or department of which the President is the head. This is also incorrect. Members of Fair Work Australia are not public servants. The President and all of the members are appointed under the Fair Work Act itself. Unlike a public servant, such as the head of an agency or department, the President of Fair Work Australia is required to act independently of the Minister and the Executive Government. This is made explicit in s.583 of the Fair Work Act. That section reads:

“The President is not subject to direction by or on behalf of the Commonwealth.”

[8] It is important to note that the General Manager is not subject to direction by the Commonwealth either, except in relation to matters specified in the Act. Section 659 deals with that.

[9] Of course, Fair Work Australia, like every other Commonwealth Court and tribunal is a portfolio agency for budget purposes. The President, however, is not the head of the portfolio agency. It is the General Manager who has that responsibility.

[10] The President does not have any accountability under the Commonwealth's arrangements for regulating budgets and expenditure. While the President can give directions in relation to the manner in which Fair Work Australia is to perform its functions, exercise its powers or deal with matters (s.582), the power to give directions to the General Manager is limited. The General Manager is not required to comply with a direction from the President if compliance with the direction would be inconsistent with the General Manager's performance of functions or exercise of powers under the *Financial Management and Accountability Act 1997* or the direction relates to the General Manager's performance of functions or exercise of powers under the *Public Service Act 1999*. In other words, it is clear that it is the General Manager

who is responsible for financial management and accountability and staffing matters and that remains the case no matter what direction the President gives. These provisions are in s.658 of the Fair Work Act.

[11] There is also a significant part of the statutory scheme which has apparently been ignored in the public discussion, and that is the guarantee of freedom from outside influence in the performance of functions. The Parliament, this Parliament, has enacted strong protections for Fair Work Australia members. Those protections are directed to ensuring that they exercise powers and carries out functions free from outside influence. Section 674 creates a number of offences, each with a maximum penalty of 12 months in prison. Those offences include the following:

- (a) conduct which insults or disturbs a member of Fair Work Australia;
- (b) recklessly using insulting language towards a member of Fair Work Australia;
- (c) the use of words either by writing or speech, that are intended to improperly influence a Fair Work Australia member.

[12] I will now address the second matter. On 29 October 2009 the Senate agreed to a resolution that, relevantly, the President of Fair Work Australia appear before the Education, Employment and Workplace Relations Committee to answer questions whenever the Committee meets to consider estimates in relation to Fair Work Australia.

[13] This resolution, in my respectful view, has put the independence of Fair Work Australia at serious risk. The requirement to appear and answer questions in the Parliament puts pressure on the exercise of powers and the carrying out of functions, including decision-making, of the tribunal. The conclusion might be drawn, whether it is correct or not, that powers have been exercised in a particular way, or a particular decision made, because of questions that have been asked, or that might be asked, by members of this Committee. When I appeared here before Honourable Senators on 10 February last I was asked many questions concerning the proceedings and decisions of

Fair Work Australia or the Australian Industrial Relations Commission. Some of those questions appeared to directly challenge the qualifications of members of the tribunal, various decisions they have made and the reasons for them.

[14] Another unfortunate result of this situation is that the President of Fair Work Australia is answering questions in an intensely political environment. One cannot in any sense criticise Senators for being political – the Parliament is the centre of our political life. But the head of a court or an independent tribunal like Fair Work Australia should not be put in a position where whatever answer is given may be turned to political advantage by one political interest or another. The maintenance of public confidence in the independence of Fair Work Australia depends in large part upon the tribunal not being involved in political debate.

[15] It seems to me, with great respect to those who think otherwise, that the present situation is simply unsustainable. It involves an ongoing risk of significant damage to public confidence in the independence and impartiality of the tribunal. The tribunal must be, and be seen to be, free from outside influence in exercising its powers and carrying out its functions. This is a fundamental principle and it applies equally to relations with the Parliament as it does to relations with the Executive Government.

[16] The options available to me to resolve this situation are limited. It seems, therefore, that the proper course is to raise the matter with the Committee today with the plea that the members of this Committee and all Honourable Senators reconsider the resolution of 29 October 2009. The principle at issue here is above politics. If Honourable Senators were aware of the true legal position, and the impact of the situation upon the independence of Fair Work Australia, I am hopeful that they might take appropriate action. When I refer to the true legal position I mean three things in particular. First, the widespread misconception, now exposed as false, that Fair Work Australia is a Government agency rather than an independent tribunal. Second the fact, apparently not recognised earlier, that all of the members of the tribunal do have the same immunities and protections as justices of the High Court. Third, the fact that the President has no authority whatever in relation to the management of budgets and expenditure.

[17] That concludes the opening statement. I thank Honourable Senators once again for the opportunity to make it.

