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Education, Employment & Workplace Relations  
Legislation Committee

Budget Estimates 2010-11

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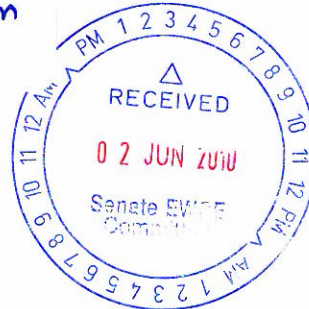
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Date: 2 June 2010, 4:21 pm

2 June 2010

By: Sen. Fisher.



Senator Mary Jo Fisher  
The Senate  
Parliament House  
CANBERRA ACT 2600

Dear Senator Fisher

You have asked for advice about the statement made yesterday evening by the President of Fair Work Australia at the estimates hearing of the Education, Employment and Workplace Relations Legislation Committee. Much of the statement seemed to be in response to comments that have apparently been made in the public arena about the President's appearance at estimates. I have no observations about these as they are not relevant to the committee's or the Senate's consideration of Justice Guidice's position as an officer. The press gets things wrong – or at least not entirely right – every day and there is nothing unique about this case. Any person about whom incorrect comments have been made is free to respond however they choose to do so.

In paragraph 7, Justice Guidice distinguished Fair Work Australia and its employees from a government department staffed by public servants, apparently in response to incorrect reporting. Again, this does not affect the Senate's determination of the key issue which is whether Justice Guidice is an "officer" within the meaning of the standing orders. Standing order 26(5) provides:

The committees may ask for explanations from ministers in the Senate, or officers, relating to the items of proposed expenditure.

"Officer" has always had a broad meaning to facilitate the wide-ranging scrutiny of the operations of government agencies that occurs through the estimates process which is seen as an effective and essential means of ensuring the accountability of the Executive and its operations to the Parliament. As you would be aware, there are many agencies established by statute whose employees are engaged under the terms of the particular statute rather than under the *Public Service Act 1999*. This makes no difference to their status for estimates. In the same paragraph, Justice Guidice notes that, pursuant to section 583 of the Fair Work Act,

the President is required to act independently of the minister and the executive government. Again, it is common for many agency heads to have statutory independence. They cannot be directed by a minister in relation to carrying out their functions. In one sense, independence from ministers makes the accountability of such agencies to the Parliament all the more important. The estimates process operates as an essential forum in which to question the effectiveness and efficiency of an agency's operations.

In paragraphs 9 and 10, Justice Guidice reiterates the point that the general manager of Fair Work Australia has budgetary responsibility for the agency. The committee would also be aware, however, that the principal instrument of accountability of an agency to the Parliament is its annual report. Under section 652 of the Fair Work Act, it is the President who is responsible for presenting the annual report to the Minister for presentation to the Parliament.

Against all these considerations, there can be no dispute that Justice Guidice is an "officer" for the purposes of estimates. Indeed, I do not believe that Justice Guidice has disputed this.

In paragraph 11, Justice Guidice refers to the statutory provisions designed to protect the members of Fair Work Australia from outside interference. These protections include the creation of a number of offences in section 674 of the Act. Justice Guidice suggests that these protections have been "ignored in the public discussion". It is not clear for what purpose Justice Guidice has raised this issue. In particular, it is not clear what connection this point has with Justice Guidice's appearances at estimates.

The existence of statutory offences is of no relevance to Justice Guidice's appearance before the committee. It could not seriously be argued, for example, that, because these offence provisions protect the members of Fair Work Australia from disturbing and other conduct, that they should also be protected from the "disturbance" of appearing before a parliamentary committee. Justice Guidice would surely be aware of the operation of the law of parliamentary privilege. In particular, section 49 of the Constitution provides that the powers, privileges and immunities of the Houses of Parliament, their committees and members, cannot be abrogated except by express statutory declaration. In other words, it is not enough to infer from the existence of offence provisions in the Fair Work Act that Parliament somehow intended that the President and members of Fair Work Australia should not be subject to scrutiny. If Parliament intended to limit itself in any way in relation to the scrutiny of Fair Work Australia, an express statutory declaration would be required. There are very, very few such limitations on the Commonwealth statute books and there is no such limitation in the Fair Work Act.

One of these rare provisions is in the Migration Act 1958 and relates to the Refugee Review Tribunal but it does not seem to have inhibited the Principal Member of that tribunal appearing routinely before estimates committees and accounting for that agency's operations, including matters of workload and work flow, and the recruitment of members.

If, however, these comments relate to "disturbing" commentary in the public arena, then there are no doubt appropriate responses to them.

In the second part of his statement, Justice Guidice puts forward the view that the effect of the Senate order of 29 October 2009 has been to put the independence of Fair Work Australia at serious risk. Whether he has made a compelling case is a matter for individual senators and, ultimately, for the Senate as a whole. It should be noted, however, that the estimates process is for the purpose of seeking explanations relating to items of proposed expenditure. If any witness believes that it would be inappropriate for them to answer such questions, then it is open to the witness to make a claim of public interest immunity and to put forward reasons as to why particular questions should not be answered. It is then up to the committee to decide whether to press for an answer or to accept the reasons proffered. These processes are well provided for in the Senate's standing and other orders and, in particular, the resolution of the Senate of 13 May 2009. They are often relied on by officers who are in a similar position to Justice Guidice, and are a well known and well established feature of Senate committee inquiries of all kinds, from routine inquiries into technical matters to the more politically sensitive or controversial inquiries.

Please let me know if I can provide any further assistance.

Yours sincerely

A handwritten signature in cursive script that reads "Rosemary Laing". The signature is written in black ink and is positioned above the printed name.

(Rosemary Laing)