



AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE
CANBERRA A.C.T. 2600
TEL: (02) 6277 3350
FAX: (02) 6277 3199
E-mail: clerk.sen@aph.gov.au

hl.let.16957

20 October 2009

Senator Mary Jo Fisher
The Senate
Parliament House
CANBERRA ACT 2600

Education, Employment & Workplace Relations
Committee
Supplementary Budget Estimates 09-10
DEEWR
Tabled Document No. 1

Date: 21/10/09

By: *Senator Fisher*

Dear Senator Fisher

ESTIMATES HEARING – APPEARANCE OF PRESIDENT, FAIR WORK AUSTRALIA

You have asked for advice on the issues arising from the correspondence between the Education, Employment and Workplace Relations Committee and the President of Fair Work Australia relating to the proposed appearance of that officer before the committee in the course of its estimates hearings. You have provided me with a copy of the relevant correspondence, as you are entitled to do as a participating member of the committee.

The first observation I make is that it is disturbing that a public office holder of the Commonwealth should refuse a formal request by a committee to appear before the committee in a hearing relating to the expenditure of public funds ultimately under the authority of that public office holder.

In their past practice the Senate and its committees have acknowledged only two limitations on their ability to require public office holders to appear before them:

- As a matter of comity between the Houses of the Parliament, the Senate and its committees do not require members of the House of Representatives to appear before them, but such members have appeared voluntarily by invitation.
- As a matter of comity between the Commonwealth and the states in the federation, the Senate and its committees do not require members of state parliaments or state public office holders to appear before them, but such officers have appeared voluntarily by invitation.

These conventions may have some basis in constitutional law, but this has never been determined.

Apart from those conventional limitations, there are no established limitations on the persons in the jurisdiction who may be required to appear before Senate committees. In

particular, there are no categories of public office holders who may not be required to appear to explain the performance of their public responsibilities.

The Senate, beginning in 1971, repeatedly passed resolutions declaring that those who expend public funds have a responsibility to explain their administration of those funds. The most recent such resolution was passed in 1988.

The Senate resolved in 1999 that any question going to the operations or financial positions of departments and agencies are relevant questions for the purposes of estimates hearings.

Senate committees have frequently expressed the view that the chief officers of departments and agencies, including the secretaries of ministerial departments, should appear in the course of estimates hearings to provide maximum assistance to the committees in their inquiries.

The committee's letter of invitation to the President of Fair Work Australia made it clear that the committee sought his attendance at the estimates hearing to answer questions about the discharge of his administrative responsibilities. He has a statutory responsibility under sections 581 and 582 of the *Fair Work Act 2009* for the efficient performance of the functions of Fair Work Australia. This purpose of his proposed appearance before the committee was in accordance with the established procedures and past resolutions of the Senate.

In his response to the committee's invitation, the President of Fair Work Australia gives two reasons for his refusal of the committee's invitation:

- the committee's questions may best be answered by the General Manager of Fair Work Australia
- it is "accepted that heads of similar Commonwealth institutions, such as the High Court, the Family Court and the Federal Court, who have responsibility for the administration of those bodies, do not appear ...".

The first point is contrary to the principle that it is for the committee to judge who may best assist the committee in its inquiries, and to the frequently expressed view of committees in the past that chief officers of public bodies should appear to provide the maximum assistance to committees. It also ignores the point that, under the statutory provisions mentioned, the president is specifically charged with responsibility for the efficient performance of the functions of the body.

As for the second point, the other bodies mentioned are all courts established under chapter 3 of the Constitution exercising the judicial power of the Commonwealth under those constitutional provisions. It may be, as a matter of comity between the legislature and the judiciary, neither the Senate nor its committees would seek to require the attendance of the judicial officers of those courts. The Senate has never acknowledged, however, that it will observe any such convention, and it would be open to the Senate or its committees to require the attendance of a judicial officer to explain the administration of the courts established by the Constitution or the Parliament.

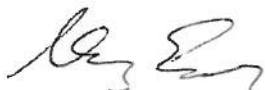
In any event, Fair Work Australia is not a court established under chapter 3 of the Constitution to exercise the judicial power of the Commonwealth. It is not a court, and does not exercise judicial power. It has administrative responsibilities under statute. The analogy sought to be drawn is, therefore, misleading. In that regard, the title accorded to the president of "justice" is purely a courtesy title in acknowledgement of his former judicial office. It should be not be taken as indicating that he is the justice of a court exercising a judicial function. Only a member of a court exercising the judicial functions of the court has that status.

The request of the committee for the president to appear, and a requirement by the committee that he appear, should the committee decide to issue such a requirement, therefore, is entirely in accordance with the procedures and practices of the Senate. The president's refusal to appear is not grounded in any of the procedures or practices of the Senate or in any matter of principle.

It is for the committee to decide whether it will require the president to appear. If the committee decides not to require him to appear, I recommend that this decision be conveyed to him in writing. I also strongly recommend that such a letter explicitly repudiate the suggestion that he has the same status as a judicial officer of a Commonwealth court, and therefore has some immunity from appearance, or that his office has any other kind of conventional immunity. It would be unfortunate for the committee to give any basis to any notion that its decision establishes a precedent that the President of Fair Work Australia will never appear before a Senate committee.

Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'H. Evans', written in dark ink.

(Harry Evans)