Statement of the Australian Institute of Employment Rights Inc. (AIER) regarding the threat to the independence of Fair Work Australia from the Senate.

The decision to require the President of Fair Work Australia to appear before the Senate Education, Employment and Workplace Relations Reference Committee (SEEWRR) is an attack on the independence of this important tribunal.

Embedded in Australian expectations of a fair system of employment rights is the notion of an impartial tribunal independent of government. The Australian Charter of Employment Rights endorsed that notion. Those involved in drafting this Charter saw it as integral to the establishment and maintenance of fair minimum standards for just conditions of work. The AIER was concerned at the time that the legislative design of Fair Work Australia (the FWA) had flaws. These flaws are now being exploited. Even so, AIER has maintained and continues to maintain this key proposition: Fair Work Australia is "an impartial tribunal independent of government". We call on the Senate to rescind the Senate Motion of 28 October 2009 and restore the independence of the tribunal.

AIER has consistently argued that the strength and integrity of FWA as an independent institution must be fostered. We have publicly criticised measures or actions by the previous Rudd Government that we considered might compromise the FWA being and being seen to be a robustly independent institution

By Senate Motion dated 28 October 2009, his Honour Justice Giudice, the President of FWA was required, "on each occasion on which the Senate Education, Employment and Workplace Relations Reference Committee meets to consider Estimates in relation to Fair Work Australia, to appear before the Committee to answer questions."

No head of an Australian industrial tribunal had previously been required to appear before a parliamentary committee to answer questions. Justice Giudice appeared before the SEEWRR Committee on three occasions in 2010. In his second appearance before the Committee in May 2010, Justice Giudice said, the requirement involved an "*ongoing risk of significant damage to public confidence in the independence and impartiality of the tribuna*l".

Australian Institute of Employment Rights Inc.
PO Box 237, Seddon West, Victoria, 3011 Tel: +613 9647 9102 Fax: +613 9647 9199 Email: admin@aierights.com.au www.aierights.com.au

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Justice Giudice appeared again before the Committee last week and was the subject of questioning which went, inappropriately to the internal decision making processes of the tribunal.

The AMMA is a mining industry lobby group. The AMMA is an organization whose political stance has generally been intolerant of third party intervention in individual employment relationships. On 12 January 2011, the Chief Executive of AMMA wrote to Senator Fisher, a key Coalition protagonist in securing the Senate order of 28 October 2009. That letter expressed concern about the purpose and utility of requiring the President of FWA to attend Senate Committee hearings.

AMMA pointed out "*The Estimates process is for the purpose of seeking explanations relating to items of proposed annual expenditure of government departments and authorities. The position of President FWA does not involve the management of budget and expenditure… On each of (three occasions in 2010 requiring attendance), the President was asked questions relating to the decision-making process of FWA where he declined to respond in any detail, referring to the independent discretionary decision-making rights of individual FWA members*."

On 11 February 2011, *Workplace Express* quoted Senator Fisher as saying that the Coalition-led insistence on Justice Giudice attending SEEWRR Committee hearings will continue.

The Senate is an institution integral to the checks and balances that enforce Executive accountability in Australia. The AIER is dismayed that the Senate as a whole would appear to be indifferent to the damage being done to another institution that has the core function of being an impartial tribunal independent of government.

The rationale and substance of the application of the Senate Estimates Committee process to compel the attendance of the President of the FWA at SEEWRR may now be assessed by reference to a considerable body of written material. That material includes the transcripts of the hearings at which Justice Giudice has appeared, the correspondence to and from Harry Evans the Clerk of the Senate, and letters by Senator Gary Humphries, another Coalition protagonist for the course approved by the Senate.

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No well informed reader of that material would doubt that political partisanship and facile point scoring against the Fair Work legislative regime is the primary object and outcome of subjecting the President of FWA to the hearing process. In particular the material illustrates:

- ignorance or specious distortion of the history, terms and scheme of the legislative framework
- partisan political provocations and stunting
- instances of disrespect for the office held by the President and for the functions that he is mandated by law to perform.

For many reasons, those incidents of the application of the Senate's process to the President of FWA are inimical to sustaining public confidence in the independence and impartiality of the tribunal.

It has been trite law since at least 1914 that the head of the federal industrial tribunal is an "officer of the Commonwealth" within the meaning of the Australian Constitution. As such, an incumbent head of the industrial tribunal has always been susceptible to the prerogative review jurisdiction of the High Court. Presumably the head of the tribunal has always been susceptible too to whatever powers of compulsion the Senate or House of Representatives may assert over an officer of the Commonwealth.

Hitherto, there has been no assertion of a requirement for officers exercising judicial and quasi-judicial functions to attend parliamentary hearings. That phenomenon should not be attributed to a lack of power in the Parliament. Rather it ought to be attributed to a clear and reasonable political choice against intrusion into areas of public administration whose independence and integrity should be fostered.

So far as immediately relevant, the scheme of the *Fair Work Act* can be found in Part 5-1 Division 2 especially Subdivision B: and Part 5-1 Division 8 especially Subdivision A and Subdivision C. Those provisions reflect an almost adamantine adherence to an established legislative drafting public administration protocol generally applied to departmental and statutory agencies. Under that legislative scheme, and in accord with the protocol, the duty of the President of FWA under Part 5-1 Division 2 is to direct the business of the agency including measures for its efficient operation. That duty overlays the role of the General Manager who is

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nonetheless designated the "Head of that Statutory Agency", for purposes of budgetary and staffing control compliance and accountability under the coordinating controls of the machinery of government generally.

The Senate has set the SEEWRR Committee up as the monitor of the exercise of duties vested in the President of FWA. That assertion of power to interrogate is a subversion of the administrative and accountability dichotomy between the President and the General Manager prescribed in the *Fair Work Act*. That subversion is a departure from the long established shielding of the head of the industrial tribunal from direct involvement in partisan political debate. It transgresses the direct accountability requirements placed on the President. It weakens the protection accorded to directions issued in pursuance of the President's duty to direct the business of FWA. The subversion of the scheme of the Act and established treatment of the office of head of the industrial tribunal by the Senate SEEWRR process has been roundly criticised and opposed by a number of experienced and broadly representative industrial commentators outside the partisan debate.

The AIER earnestly submits that responsible elements within the Senate should act as promptly as practicable to rescind the Senate Motion of 28 October 2009. The outcome should be that, in the ordinary course, budgetary and administrative accountability of Fair Work Australia through Senate processes should be achieved by requiring the General Manager of Fair Work Australia to answer the questioning of the relevant Senate Committee. There are important matters of principle at stake. The Senate should guard against intrusion into areas of public administration whose independence and integrity should be fostered.

Australian Institute of Employment Rights Inc.
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