COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION REFERENCES COMMITTEE

Reference: Building and construction industry inquiry

WEDNESDAY, 19 MAY 2004

MELBOURNE

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SENATE

EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION

REFERENCES COMMITTEE

Wednesday, 19 May 2004

Members: Senator George Campbell *(Chair)*, Senator Tierney *(Deputy Chair)*, Senators Barnett, Carr, Crossin and Stott Despoja

Substitute members: Senator Murray to replace Senator Stott Despoja for matters relating to the Workplace Relations portfolio

Senators Collins and Cook to replace Senators Carr and Crossin, respectively, for the committee's inquiry into the exposure draft of the Building and Construction Industry Improvement Bill 2003

Senator Johnston to replace Senator Barnett for the committee's inquiry into the exposure draft of the Building and Construction Industry Improvement Bill 2003

Participating members: Senators Abetz, Bartlett, Boswell, Brown, Buckland, Chapman, Cherry, Jacinta Collins, Coonan, Denman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fifield, Forshaw, Harradine, Harris, Humphries, Hutchins, Johnston, Knowles, Lees, Lightfoot, Ludwig, Mackay, Mason, McGauran, McLucas, Moore, Murphy, Nettle, O'Brien, Payne, Santoro, Sherry, Stephens, Watson and Webber

Senators in attendance: Senators George Campbell, Jacinta Collins, Crossin, Cook, Johnston, Murray and Tierney

Terms of reference for the inquiry:

To inquire into and report on:

(a) the provisions of the draft Building and Construction Industry Improvement Bill 2003 or any version thereof that the Government might subsequently introduce into Parliament;

(b) whether the draft bill or any subsequent bill is consistent with Australia's obligations under international labour law;

(c) the findings and recommendations of the Cole Royal Commission into the Building and Construction Commission, including an assessment of:

  (i) whether the building and construction industry is so unique that it requires industry-specific legislation, processes and procedures,

  (ii) the Government's response to the Cole Royal Commission, particularly with respect to occupational health and safety and the National Industry Building Code of Practice, and

  (iii) other relevant and related matters, including measures that would address:

    (A) the use of sham corporate structures to avoid legal obligations,

    (B) underpayment or non-payment of workers' entitlements, including superannuation,

    (C) security of payments issues, particularly for subcontractors,

    (D) evasion or underpayment of workers' compensation premiums, and

    (E) the evasion or underpayment of taxation;

(d) regulatory needs in workplace relations in Australia, including:

  (i) whether there is regulatory failure and is therefore a need for a new regulatory body, either industry-specific such as the proposed Australian Building and Construction Commissioner, or covering all industries,

  (ii) whether the function of any regulator could be added as a division to the Australian Industrial Relations Commission (AIRC), or should be a separate independent regulator along the lines of the Australian Competition and Consumer Commission or Australian Securities and Investments Commission, and

  (iii) whether workplace relations regulatory needs should be supported by additional AIRC conciliation and arbitration powers;

(e) the potential consequences and influence of political donations from registered organisations, corporations and individuals within the building and construction industry;

(f) mechanisms to address any organised or individual lawlessness or criminality in the building and construction industry, including any need for public disclosure (whistleblowing) provisions and enhanced criminal conspiracy provisions; and

(g) employment-related matters in the building and construction industry, including:

  (i) skill shortages and the adequacy of support for the apprenticeship system,

  (ii) the relevance, if any, of differences between wages and conditions of awards, individual agreements and enterprise bargaining agreements and their impact on labour practices, bargaining and labour relations in the industry, and

  (iii) the nature of independent contractors and labour hire in the industry and whether the definition of employee in workplace relations legislation is adequate to address reported illegal labour practices.

WITNESSES

Committee met at 10.20 a.m.

BOYD, Mr Thomas Brian, Senior Industrial Officer, Victorian Trades Hall Council

CHAIR—I declare open these proceedings of the Senate Employment, Workplace Relations and Education References Committee. On 16 October 2003 the Senate referred to the committee an inquiry into the provisions of the exposure draft of the Building and Construction Industry Improvement Bill 2003 or any subsequent version of the bill which might be introduced into parliament. The committee will consider, amongst other matters, whether the bill is consistent with international labour law, whether the circumstances of the building and construction industry are such that specific legislation is required for its regulation, the government's response to the Cole royal commission recommendations on occupational health and safety in the industry and the national industry building code of practice, the regulatory needs of workplace relations in the industry, the potential consequence and influence of political donations, mechanisms to address organised or individual lawlessness or criminality, and a number of employment related matters.

The committee has invited submissions from all stakeholders in the industry and is conducting hearings in all states. Before we commence taking evidence today, I wish to state for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to the evidence they give. Parliamentary privilege refers to special rights and immunities attached to the parliament or its members and those that appear before its committees. Parliament must discharge its functions without obstruction and people must be able to give evidence to its committees without fear of prosecution. Any act by any person which operates to the disadvantage of a witness resulting from evidence given before the Senate or any of its committees is treated as a breach of privilege. I welcome any observers to this public hearing and welcome our first witness. Mr Boyd, do you have any comments to make about the capacity in which you appear today?

Mr Boyd—I am also the convenor of the Building Industry Group of Unions at trades hall.

CHAIR—The committee prefers to take evidence in public but we will consider any request for all or part of evidence to be given in camera. The committee has before it submission No. 3. Are there any changes or additions that you wish to make to the submission?

Mr Boyd—In my five-minute address I have brought some extra material that I will address, and I will talk to it when I come to it in my brief submission.

CHAIR—I understand that only one of the documents is not a public document, and that is a document entitled *Victorian construction statistics*. Do you wish to table that?

Mr Boyd—There is an article from the *Financial Review*—

CHAIR—That is a public document, though. Do you wish to table the other one?

Mr Boyd—Yes, I do.

CHAIR—That being agreed, it is so ordered.

Mr Boyd—There is a copy also of the *Victorian Building Industry Agreement 2000-2005*.

CHAIR—That is a public document also. I invite you to make a brief opening statement before we begin our questioning.

Mr Boyd—First of all, I would like to explain what the Building Industry Group of Unions is in Victoria. It is a longstanding industry group based at the Victorian Trades Hall Council; it has been going on for many decades. I convene that group on a weekly basis, every Thursday morning. As you would be aware, every union has its own capacity to look after its members on enterprise bargaining and other policy matters but from time to time those unions collectively come together to consider matters of common interest, and that is the purpose of the building industry group at trades hall in Victoria.

One of the key exercises that those unions participate in is the Victorian building industry agreement, which is encapsulated in the 'little green book' as it is affectionately known, and there are copies there for you to have a look at. The key thrust of my submission is simply this: the Victorian building industry agreement has been going on for over 16 years. It is a very effective industry instrument that in itself, I argue strongly, means that we do not need the BCI Improvement Bill to operate in Victoria, never mind Australia.

The thrust of VBIA is simply to settle disputes effectively, efficiently and quickly. It is also an instrument that makes sure that the non-payment of workers' entitlements does not occur. It has got key clauses in that, agreed to by the parties, and one of the key areas of its operation is occupational health and safety. The statistics alone through the VBIA dispute settling procedures ensure that OH&S is one of the high priorities of the industry here in Victoria.

One of the key elements of the last enterprise bargaining round in Victoria in 2002 was the settlement of that dispute without any industrial action. I argue that it was the culture of the VBIA that helped the industrial parties to the successful conclusion of that enterprise bargaining round without industrial disputation—because the VBIA is that effective in most areas of its operation. If I take you to clause 17 in the little green book, you will see that the essential element of it is a dispute settling procedure. The disputes board is the element that polices that section of the VBIA, and one of the key elements of that dispute settling procedure and of the disputes board's criteria is that all industrial action must cease before a dispute can be heard before that panel. That means that, where there is disputation, the level of disputation on building sites is kept to a minimum.

As co-chair of the Victorian Building Industry Agreement's consultative committee, the statistics of the disputes board and information about how it manages its business on a year-by-year basis are made available to me. The most recent statistics, I was informed by our employee representative on the disputes board as recently as yesterday, show that about 35 per cent of disputes are about health and safety—and the rest consist of other disputes about payment of wages, lost entitlements et cetera. That statistic alone emphasises that the disputes board and the VBIA, which creates the disputes board, are very effective mechanisms in dealing with health and safety—and also the protection of workers' entitlements and wages.

The other element I wish to put on record is that the VBIA culture also encourages us to participate in tripartite bodies in Victoria that ensure that the building industry is managed to a

high level. For instance, all the state secretaries of the building unions participate in the government-sponsored Building Industry Consultative Council, which was set up by the industrial relations minister in the Victorian government and is chaired by ex-AIRC commissioner Bob Merriman. As I mentioned earlier, we participate in the bilateral body, the Victorian Building Industry Agreement's consultative committee , with the employers and the unions meeting on a monthly basis to process how the VBIA will operate. We also work with the Victorian WorkCover Authority, through its Foundations for Safety Committee, to make sure that OH&S is a top priority for the industry. All of those bodies are government, employer and union sponsored, and they work very effectively in Victoria.

One of the key issues that came out of the Cole royal commission was the idea that the cost of building in Victoria was higher than in any other state, particularly in comparison with New South Wales. I would like to dispute that on the basis of that public document that I have tabled. I draw your attention to the *Financial Review* article of 11 May 2004 headlined 'Vic building industry shows few signs of slowing'. At the bottom of the second column, the article says:

The largest increase was recorded for commercial property approvals, with a 56 per cent increase in permits for new office buildings throughout the state totalling $667 million in the March quarter.

The beginning of this article by Karina Barrymore talks about 'another billion dollar plus month' for the building industry in Victoria. If it is so costly to build in Victoria, and if it is so bad in Victoria compared with New South Wales and other states, why do we have a boom on? In fact, during the whole life of the royal commission period—from June 2001 until June 2003—the building industry in Victoria, and in Melbourne in particular, was booming. More workers were working in Victoria than had been for many years. So I would like to put to rest this fallacy that has been put around in some quarters that the building industry in Victoria is in some sort of crisis, that it is a mess and that no-one would want to invest or build here.

Unlike a previous royal commission into the building industry that was conducted 20 years before, the Cole royal commission did not even cause a blip in economic development in Victoria, never mind across the country. It did not have any political or industrial impact whatsoever. I think that that is an important point to take into account in terms of the politics of what has been put forward by the federal government in terms of the BCI improvement bill. The key thrust of that bill coming out of the Cole royal commission was to argue that there was a crisis. I argue here today that there is no crisis in the building industry—and there has not been a crisis that would justify having that act put forward. I finish on this note: as far as we in Victoria are concerned, plenty of infrastructure is already in place. There are plenty of instruments—including the Victorian Building Industry Agreement—that have things in place about industrial matters, health and safety, and how we deal with policy matters in terms of the state government. I named those things earlier. We can manage our own business without the need for that act.

Senator JOHNSTON—Mr Boyd, does the article that you have got from the *Financial Review* address any of the actual costs of construction in Victoria? It talks about the state of the market, but surely the state of the market does not address costs?

Mr Boyd—I assume that you are alluding to wages.

Senator JOHNSTON—You have taken us to two quotations. The article talks about an increase in permits and the gross value of building approvals, but it does not talk about the cost structure, does it?

Mr Boyd—No, the article does not.

Senator JOHNSTON—How do you draw the conclusion or get support from this article for the proposition that the building and construction industry, particularly commercial construction, is not overpriced in Melbourne?

Mr Boyd—As I understand it, the argument that it is overpriced was that wages, the enterprise bargaining process in Victoria and the Victorian Building Industry Agreement were too costly for a lot of the investors who wanted to build in Victoria. I argue that these statistics about the building boom in Victoria make a lie of that claim.

Senator JOHNSTON—It might be much more. The growth in building might be even greater than this, if the costs were proper—if the costs were fair and equitable. That is all you can draw from this, isn't it? The Cole royal commission did a detailed analysis of the cost structure of building and construction in Melbourne, didn't they?

Mr Boyd—They did some analysis. I do not know how detailed it was.

Senator JOHNSTON—Is the Victorian Building Industry Agreement your document?

Mr Boyd—It is a creature of the employers and the unions. It is a joint venture, endorsed by the state government.

Senator JOHNSTON—How did this joint venture document come about?

Mr Boyd—It started back in 1987, post the deregistration of the BLF.

Senator JOHNSTON—It contains dispute resolution procedure, does it not?

Mr Boyd—It does.

Senator JOHNSTON—I think the joint venture, as you call it, comprises representatives of the Master Builders Association; the Building Industry Group of Unions, which is the group you represent—

Mr Boyd—Yes.

Senator JOHNSTON—the Victorian Trades Hall Council; and employer associations. What is the standing of this document? It has some quite detailed rules and general guidelines, as I think we would call them. It is not actually the award, is it?

Mr Boyd—No, it is a stand-alone, common law agreement between consenting parties.

Senator JOHNSTON—Have the parties that are mentioned in the front signed this document?

Mr Boyd—They have.

Senator JOHNSTON—To say that they will abide by the terms contained therein?

Mr Boyd—Yes.

Senator JOHNSTON—What are the sanctions, if any, if there is a breach of some of the terms of this document?

Mr Boyd—If either side on the industrial landscape thinks that one of the elements in the VBIA is breached, the first port of call is the disputes board—to air that grievance.

Senator JOHNSTON—Is the disputes board a government established board?

Mr Boyd—No, it is a creature of that little green book.

Senator JOHNSTON—And who sits on the disputes board?

Mr Boyd—Mr Paddy Donnelly, the independent chair; an employee rep from the unions; and an employer rep from the master builders.

Senator JOHNSTON—If Mr Donnelly and his assistants on the board were to find that somebody, be it an employer or a union, were in breach of this agreement, what powers do they have?

Mr Boyd—They make a ruling, after hearing from the parties at a formal hearing of the disputes board, on how to resolve the breach. The parties are then obliged, under that document, to abide by the ruling.

Senator JOHNSTON—You called it a 'common law agreement', and I am very interested in that expression. Is that the correct description for what you have here?

Mr Boyd—As I understand it, yes. It is not registered in the AIRC.

Senator JOHNSTON—I think you said this was born out of a problem with the existing industrial relations system in 1988.

Mr Boyd—1987.

Senator JOHNSTON—So since then a common law agreement, arising from problems associated with the then industrial framework, has subsisted in Victoria between these various parties?

Mr Boyd—Yes.

Senator JOHNSTON—Has anybody ever sought to enforce their common law rights of remedy with respect to this agreement—in other words, in the civil courts?

Mr Boyd—Not to my knowledge. As co-chair of the VBIA consultative committee, the essence of that agreement is that it is voluntary. All the parties abide by its spirit and its intent, rather than going down any legal path.

Senator JOHNSTON—But it is signed? Is the document stamped pursuant to Victorian state law?

Mr Boyd—No, not that I am aware of.

Senator MURRAY—How long have you been involved with the building industry?

Mr Boyd—Since 1971.

Senator MURRAY—So 33 years?

Mr Boyd—Yes.

Senator MURRAY—It is a while now since I read the Cole report, but I seem to recall that it did identify problems that arise where you have more than one act to deal with. In my own state of Western Australia, I note that forum shopping occurs. With right of entry matters, for instance, or other matters, the unions concerned switch between state and federal law, looking for where opportunities arise. That is perfectly understandable, but it leads to some problems. In your opinion, has the fact that Victoria only has one act to respond to and adhere to improved matters in industrial relations practices in Victoria, as compared to when it had two acts?

Mr Boyd—My response to that is that the Kennett government did get rid of its industrial relations powers; it diverted them to Canberra, and we now basically operate under the Workplace Relations Act. But that act—even though it is only one act and we do not have two—is bad enough. It already causes enough problems in how we go about enterprise bargaining—and other rights that trade unionists normally have. So, even though it might be simpler in Victoria in one sense, that act alone still causes a lot of problems.

Senator MURRAY—Would you prefer the Victorian government to reintroduce its own industrial relations legislation?

Mr Boyd—From a general trade union point of view rather than the building unions' point of view, I think there is some argument that having another state system may help some unions. But the building unions in particular, and a number of other unions, are happy with a general federal law, as long as it is a fair law—and we do not have a fair law federally.

Senator MURRAY—One of the opportunities this committee has is to recommend that efficiency—and, perhaps, equity—in the building industry might be improved if as much as possible were to fall under federal law, as opposed to under both federal and state laws. So the evidence of people like you—people who have spent 33 years in the industry and have long experience of two regimes and then one regime—is of interest. The fact that you might think that

the Workplace Relations Act has deficiencies is one thing, but I am looking to find out whether efficiencies emerge simply because you just have one set of laws to deal with. I am not sure that I have got the impression from you that that is the case.

Mr Boyd—Going back to the history of this, through the seventies and eighties the trend of the building unions was to fight for federal awards, consolidating them through the early and mid-seventies and right through into the eighties. The trend was to have national effective awards across the board. In 1996 the Workplace Relations Act came in. It brought about the emphasis on enterprise bargaining that undermined that trend to national awards, which had been the trend for 20 or 30 years. That is now causing some of the key problems. I have no problem with a nationally based way of looking after wages and conditions for building workers, but if it is going to go under the guise of the Workplace Relations Act then I have got problems with it.

Senator MURRAY—Turning to regulation, the Brereton-Keating first wave in 1993 and then the Reith 1996 second wave of laws both sought to introduce enterprise bargaining, where the two parties could carry out their functions, in terms of wages and conditions for workers, without third party interference, as far as possible. There still is a need, however, for recourse to the AIRC, but there is also a need for recourse to regulation inspectors—people you can turn to when there is a blue. To an extent, this little book is one of those mechanisms. If you have a blue, you can go to someone. I want to ask you about the inspectorate—or task force or any of those kinds of bodies. What are the efficiencies or inefficiencies or weaknesses or strengths of the regulatory side? What do you have to say about the involvement of inspectors, police, OH&S people, the task force or anybody else in circumstances where they are needed?

Mr Boyd—The building industry task force commands no respect whatsoever in Victoria. Given the way it was set up and the kind of people recruited to it, there is no way known that the task force would ever have any effect on efficiencies. In fact, in my view it would probably create situations where there would be inefficiencies and unnecessary disputation, because of the way it operates. Having a police force for the building industry is actually anathema to trade unionism per se. I think it is a counterproductive way to go forward. I can see some merit in having WorkSafe inspectors and providing some more room for the AIRC to assist in settling disputes, but having our own police force would not work—in fact, it would cause more disputation than ever.

Senator MURRAY—Let me explain to you a little more of what is in my mind, using WorkSafe as an example. In both the Northern Territory and Western Australia, evidence was given to us that, when those inspectors are needed on sites and should be coming in where complaints have been made to them—or just in the natural course of things—they are just not there. They are under-resourced. The inspectorate are not available to do the job that they should be doing. I want to ask you whether, in your opinion, both from the federal inspectorate side and the state inspectorate side, out of their respective departments, you are getting the servicing which is necessary as the adjunct to the work that is done between the employer and the unions.

Mr Boyd—You would not be able to get enough OH&S inspectors to go around, especially to some of the medium to smaller sized building sites. There are not enough inspectors to go around. But I come back to your other question before this one: if you are talking about inspectorates in terms of industrial matters, that is a completely different issue. I would argue that the AIRC's and, in particular, the VBIA dispute board's procedures, where the parties come

together voluntarily to have a way forward for dispute settling, is a far better way forward for a mature industry than having imposed on it its own special task force.

Senator COOK—Mr Boyd, you have said that you have been active in this industry for 33 years. I invite you to take us on a bit of a time travel to 33 years ago and give us a snapshot of what the industry was like then, what the industry is like now and whether it has improved.

Mr Boyd—I worked on building sites in the early seventies, and I can remember many a dispute over sitting on cement bags for lunch, having no lunch sheds and no change sheds and fighting over where the toilet facilities were. I can remember all of those kinds of things. I can remember weekly disputes over people not getting paid properly, arguing over what was in their wage packets and so on. I would argue that today there is a clear understanding by employers that they must have the wages right. A building site would not even start today in Victoria, for instance, without a lunch shed, a change shed and proper toilets being set up. Safety is now the No. 1 issue, whereas, in the seventies and even into the early eighties, it was a constant dispute.

I think there is a maturity in the building industry across the board in terms of those kinds of basic elements. When a worker goes to work every day, they have a right to go home to their families, and the chances of having an accident should be limited. They definitely know their rights in terms of their wages, superannuation and redundancy entitlements. All of those things are now high in the consciousness of not only the workers but the employers who pay them, so I think we have got to a level of maturity that shows—in that article, for instance—that the building industry is a key element of our economy and deserves to be left to its own devices.

Senator COOK—Occupational health and safety then and now?

Mr Boyd—It has improved by 200 or 300 per cent in terms of consciousness. For instance, WorkSafe has now got its own dedicated bodies for the building industry. We had to fight for that. It was taken away from us during the Kennett years; we have now got it back. There was not even an understanding in the seventies and early eighties that there should be a dedicated inspectorate for the building industry. We now have got over 40 inspectors in Victoria alone looking after the building industry—never heard of 30 years ago.

Senator COOK—Training for the industry then and now?

Mr Boyd—Training was always a hotchpotch thing in the seventies. A lot of workers learnt on the job. The concept of the old-fashioned apprenticeships of four years are still a bit under threat and a lot more work needs to be done, but, overall, training is an idea that the union movement has taken up as a responsibility when it used to be just left to the employers' devices. With the union movement's intervention into training, again it has become a high priority.

Senator COOK—You have talked briefly about the evolution of superannuation entitlements and long service leave entitlements in that period. What about job security from a worker's point of view, then and now?

Mr Boyd—Job security in the seventies was nonexistent. You were on eight hours notice if you were lucky. Sometimes you got told at three o'clock that you were not needed again the following day. Nowadays we have a week's notice and we also have our own redundancy fund,

with many hundreds of millions of dollars in it, to look after workers between jobs. That was never heard of 30 years ago.

Senator COOK—This is a follow-the-job industry. Workers work in the industry and pick up jobs when they are available. In your view, how has the evolution of those types of schemes contributed to a greater stability—if they have—for the industry in the time we are talking about?

Mr Boyd—I think those kinds of schemes have contributed to stability in terms of jobs and moving from one site to the next. Most major builders now look after their own groups of workers. They plan ahead so that, when they finish one job, they can take the bulk of their work force to the next site. It used to be that, in the seventies, you would have to wait on a street corner in the city. There were certain corners where you could wait at six o'clock in the morning. The contractors would drive past in utes or small trucks and you would have to see if you could get a job that morning. Nowadays that does not happen at all.

Senator COOK—According to the cover of the green book you have given us—the Victorian building industry agreement—it was negotiated in 2000; is that right?

Mr Boyd—Correct.

Senator COOK—How does this relate to the industry-wide EBA?

Mr Boyd—They are now linked. They used to be two parallel documents. Each union had its own EBA framework, and then you had the VBIA, which sat to one side. But, over the last two negotiated EBA frameworks, the EBAs now reflect key elements of the VBIA. They have now merged into two creatures. The key elements of the VBIA have been recognised by key elements of the EBA. So they are sort of intertwined.

Senator COOK—We saw a high-rise construction job this morning—City Towers. You may be familiar with it. Would they be covered by this?

Mr Boyd—They would be covered by that and by the EBA of each union.

Senator COOK—Yesterday the federal government announced the prospect of closing down the National Occupational Health and Safety Commission federally. They have put that out for review, I understand by the Productivity Commission. The budget has just been brought down, and we have heard a lot about it—apparently the bounce went the wrong way. For centralised enforcement of industrial laws in the budget, the amount of money put aside was $30 million per annum to set up the building industry task force. That is $96 million over three years. And there was $9 million in that budget to fund the continuance of the building industry task force. So on one side, the National Occupational Health and Safety Commission is facing the exit door; on the other side, there are large appropriations of money to put an industry policeman in place. Can you tell us the proportion of time lost in Victoria through industrial action and occupational health and safety?

Mr Boyd—As I said in my opening remarks, the disputes board statistics for 2003 showed that over 35 per cent of the cases dealt with OH&S matters and the rest dealt with wages, conditions and all of that.

Senator COOK—I heard that. If I may interrupt you, that is not quite my question. Looking at the economics of the industry and looking at what the causes of lost time for the industry are, time is lost due to occupational health and safety matters and time is lost because of a range of other factors, one of which is industrial disputes. If we are trying to rationally approach this problem, which is the biggest problem—time lost through occupational health and safety or time lost through industrial disputes?

Mr Boyd—I was going to go on to say that, even though that is the percentage of disputes dealt with, the one issue that has more to do with time lost on a longer basis is OH&S.

Senator COOK—Do you know what the proportion is?

Mr Boyd—No, but I can check it out.

Senator COOK—Does eight to one in favour of occupational health and safety ring a bell?

Mr Boyd—No. For Victoria I do not know.

Senator COOK—I think the national proportion is eight to one, but that is a matter of statistical record, and we can come back and identify that. Your earlier point was, as I understand it, that industrial disputes can often have an occupational health and safety cause and the proportion of disputes that go to the disputes board that have an industrial—

Mr Boyd—It is over 35 per cent.

Senator COOK—So, presumably, if there were fewer occupational health and safety problems, there would be fewer disputes going to the board—

Mr Boyd—That is correct.

Senator COOK—and there would be less time lost overall?

Mr Boyd—That is correct.

Senator COOK—So, does it strike you as odd that the priority should be to abolish the National Occupational Health and Safety Commission while steepling up the amount of money available for the policing of industrial disputes?

Mr Boyd—I accept your proposition. I was shocked to learn of the planned abolition of the NOHSC. I think that is an abomination—that body has done so much good work nationally for so long. I am beside myself about that being referred now to some sort of administerial advisory committee. It is a big setback for the building industry.

Senator COOK—Particularly because the building industry is, unfortunately, an industry in which there are higher levels of occupational health and safety problems.

Mr Boyd—That is correct.

Senator COOK—I am having to go through my examination of you, Mr Boyd, at a fairly rapid clip because I am on a time constraint, unfortunately, but that is how these things are. You have given us a document today headed *Victorian construction statistics*. On the front page of this document, you say that, in terms of accidents in Victoria, there are 21.7 cases per 1,000 employees, and the Australian average is 30 cases per 1,000 employees.

Mr Boyd—Yes, that is what I am putting forward. They are NOHSC figures—their research has shown that. If you go over the page, you will again see a comparison between New South Wales and Victoria. Victoria's rate of accidents is far less than the rate in New South Wales. I would argue that the way in which the VBIA culture operates in terms of OH&S is why we have fewer accidents in Victoria than anywhere else.

Senator COOK—The point is that nationally collected figures from the federal government's agency—the National Occupational Health and Safety Commission; the one that is up for the chop—are the source of those figures on your front page—

Mr Boyd—That is correct.

Senator COOK—and Victoria has an accident incident rate significantly—almost 30 per cent—below the Australian average.

Mr Boyd—Yes, it has.

Senator COOK—This is a robust industry. It is often said that the unions in this industry are militant. That is not illegal; it is quite appropriate for people to strongly represent their views, if they wish. Is there any link between the robustness with which the union polices occupational health and safety and the lower level of occupational health and safety accidents in Victoria?

Mr Boyd—I would argue that the emphasis on OH&S in Victoria, since I have been involved in it for 30 years, has contributed to the lower rate. You correctly say that our robustness in our treatment of that issue, in particular, has helped create that situation.

Senator COOK—Is it right that, if we have strong unions defending occupational health and safety, we have lower accident levels, a lower cost to the industry because of accidents—the premium figures are set out in your exhibit—and, if that passes through the system, lower prices to consumers?

Mr Boyd—That is correct. In fact, the recent state budget has reduced the premiums to employers because of that reduction in accidents in the Victorian building industry.

Senator COOK—Is it fair to say that a robust policing of occupational health and safety has contributed to or been a significant factor in the state government reducing the costs to employers of workers compensation insurance?

Mr Boyd—That is correct. You will see that in the document I have supplied. On the third page you will see that the reduction rates in Victoria are far less than those in most other states.

Senator COOK—Just so that I am clear about this, has that reduction in insurance premiums for workers compensation levied on employers which the state government has been able to bring about because of the lower incidence of accidents been associated with a reduction in benefits to workers—as is sometimes the case—or have workers benefits remained?

Mr Boyd—We have been assured by the Bracks government that the recent reduction in premiums will not lead to a reduction in benefits to workers.

Senator COOK—This is something that a lot of other state governments ought to look at. I think the worst word in politicalspeak is 'reform'. Every time I hear that word I arc up and worry about what is actually going to happen. In occupational health and safety or workers compensation reform we often see that if premiums are cut benefits are cut, but the proposition you are putting to us here is that premiums will be cut but benefits will remain.

Mr Boyd—Yes, that is what the government has told us in the recent state budget.

Senator COOK—So for small business—which is a large part of the wider version of the construction industry—the ability to bring down accident levels has resulted in less overheads for them in meeting compensation payments.

Mr Boyd—That is the result.

Senator COOK—That is quite a significant point.

Mr Boyd—I think so. But the key element of the little green book is how we deal with occupational health and safety in the building industry. That key element was agreed to by the industrial parties—that is, the employers and the unions—and I think it has shown results over the last few years.

Senator COOK—I am almost out of time so I will go to a wind up question—that is, a question to wind up my end of questioning, not a question to wind you up, Mr Boyd—are you the right person for me to talk to about the negotiation of the EBA?

Mr Boyd—No.

Senator COOK—I have here an exhibit tabled early in this inquiry. You may not be able to see it from here, so I will get someone to pass it up to you. I have invited anyone to criticise it for its accuracy. No-one so far has, but obviously someone could and we will deal with that if they do. You will see that in the top line is the number of hurdles under existing law in the negotiation of agreements and that in the bottom line is the number of new and extra hurdles that would be introduced into the system if the legislation we are inquiring into were adopted by the parliament and became law. You can see that the bottom line is much more complicated than the top line.

Mr Boyd—I understand.

Senator COOK—If that were imposed on the industry in Victoria, given your role in the negotiation of this green book, would it improve or damage the industrial relations climate in Victoria in your opinion, based on your 30 years of experience?

Mr Boyd—If the BCI Improvement Bill were passed and those new hurdles were put in place, it would be a disaster. As I said earlier in my comments about how the parties work in Victoria at the moment, the last round of the EBA was negotiated by the parties in—as I argue—the VBIA cultural framework without incident. Under this new regime it would be a disaster and cause chaos.

Senator COOK—I think your point to Senator Murray was that this is done by agreement between the parties now and that this law would impose the intervention of a government agency in enforcement and complication of negotiations that would damage the relationship in the industry.

Mr Boyd—I am arguing that, and, in particular, I argue that, if the work force at the building site level were being told by their union officials that they had to wait for all this to happen, they would not cop it one iota.

Senator COOK—Let me test the patience of my colleague the chairman—

CHAIR—You are already testing it!

Senator COOK—Mr Boyd, in your view, as a practical person in this industry, does the complicated set of technical steps that have to be taken introduce a new province for legal argument, and the introduction of lawyers into the system, as to whether there has been compliance with the process to negotiate and does that focus the attention away from what is being negotiated?

Mr Boyd—I understand what you are putting, and I believe that this would be a lawyers' picnic. They would have a ball.

CHAIR—Senator Tierney, you have five minutes.

Senator TIERNEY—I would point out, Chair, that Senator Cook just had 16 minutes.

CHAIR—He was originally entitled to 18 minutes.

Senator TIERNEY—He went from 10.47 to 11.04. I wonder why I am entitled to five minutes.

CHAIR—I am quite happy to have a meeting of the committee afterwards to explain to you how the times are worked out, but you have five minutes for this witness, so use it productively.

Senator TIERNEY—I will point out, again, Chair, that the last questioner had 15 minutes. If he has 15 minutes, I am entitled to 15 minutes as well.

CHAIR—No, you are not entitled to 15.

Senator TIERNEY—I will not take 15, but I note that you did not pull him up and you are trying to pull me up before I start.

CHAIR—He got the time of three people.

Senator TIERNEY—That is fine. Add up Senator Johnston's as well—you make your calculation.

CHAIR—Senator Johnston had seven minutes. Between you, you had 12 minutes; you have five. You have already used one of them.

Senator TIERNEY—That gives me nine minutes at least. You are showing the bias that has been evident right through this hearing, in the choosing of witnesses, in the way in which the days have been allocated, to get the result that you want out of this hearing, and you are doing it again in terms of the times that you are giving to various senators.

Senator COOK—Chair, I raise a point of order. That is an unfair reflection on the chair.

Senator TIERNEY—I think it is a very fair reflection on the chair.

Senator COOK—No; it is an unfair reflection on the chair.

Senator TIERNEY—It is the reality.

Senator COOK—No, it is not the reality. It is an unfair reflection on the impartiality of the chair and it should be withdrawn.

Senator TIERNEY—I will ask Mr Boyd the first question, before you interrupt me any further. Mr Boyd, you said that the group that you convene—which you mentioned in your opening comments—meet every Thursday. What did your group discuss last Thursday?

Mr Boyd—We discussed a range of matters, including our concern about the new Basslink project not using Australian made products and, instead, importing its steel from Turkey and India. We talked about this Senate inquiry and how we thought it was going.

Senator TIERNEY—How do you think it is going?

Mr Boyd—I think it is going all right.

Senator TIERNEY—I am sure you do. You pick the witnesses, there is an intimidation of witnesses from the employer side not to turn up to these hearings.

Mr Boyd—That is rubbish.

Senator TIERNEY—We have had hardly any evidence from these people.

Mr Boyd—They have been intimidated by who?

Senator TIERNEY—They are scheduled, and then they withdraw. I am sure you are very happy with the results.

Mr Boyd—I have no knowledge of what you just said.

Senator TIERNEY—I will move on to the next question.

CHAIR—I hope, Senator Tierney, you are not suggesting that Mr Boyd was intimidating the witnesses.

Senator TIERNEY—No; I am just talking about the whole way in which this industry—

CHAIR—I hope that you are not suggesting that Mr Boyd was intimidating witnesses.

Senator TIERNEY—I am not suggesting Mr Boyd personally is; I am making the comment on the way in which this whole set of hearings has gone.

CHAIR—If you have evidence of intimidation, you ought to bring it to the committee's attention.

Senator TIERNEY—I will bring it to the attention of the committee, by the number of witnesses who have been scheduled and are then withdrawn.

Senator COOK—What is your evidence?

Senator TIERNEY—They have withdrawn from the list of witnesses.

Senator COOK—What a joke! They can withdraw for any reason.

Senator TIERNEY—On other occasions in certain hearings, we find out at 11 o'clock in the morning that at three o'clock a witness will not be appearing. Why do they do that?

CHAIR—That is not an abnormal set of circumstances for a Senate committee hearing.

Senator TIERNEY—In my experience of committees over 13 years, this is the most abnormal set of hearings that I have ever been involved in, and the most biased, prejudiced and 'setting the railway tracks in a certain direction' hearing to get a result. That is what is happening in this hearing.

CHAIR—It is the old story: if you do not like the outcome, smear the process.

Senator TIERNEY—You have set it up in a certain way to get the outcomes you want.

Mr Boyd—I must insist that I have no knowledge of any intimidation of any witnesses. I can assure this inquiry that none of my colleagues in the building industry group were participating in any intimidation of any witnesses. I reject the assertion categorically.

Senator TIERNEY—Are you absolutely certain of that?

Mr Boyd—I reject the assertion categorically.

Senator TIERNEY—You can categorically reject that there was any intimidation of any person across the industry?

Mr Boyd—Yes.

Senator TIERNEY—You know that—in all states?

Mr Boyd—I just know. I am talking about my colleagues; I am not talking about the employers.

Senator TIERNEY—Let us go to your colleagues and let us go to Victoria. You mentioned the EBAs in Victoria. The VBIA was running in parallel, you said initially. And now they are in synchronisation—I think that is what you were implying.

Mr Boyd—Yes, roughly speaking.

Senator TIERNEY—Could you explain how that process works? How does the VBIA synchronise the EBAs?

Mr Boyd—The history of the VBIA started in 1987. There were national awards in place around that time. Around 1993 to 1996 there were moves towards enterprise bargaining. By 1996 onwards it was a forced situation: everyone had to have an EBA between individual employees and their employer. The VBIA existed parallel to those changes that occurred in the nineties. By the end of the nineties—and this will make sense—it was deemed that, because of the 20 allowable matters, if we were going to preserve the key elements of the VBIA wages, conditions and other entitlements with what the EBAs were allowed to do, the EBAs needed to start to recognise and put into them the key elements of the VBIA so they could be protected. And that is where the interlocking came into being in the late nineties.

Senator TIERNEY—So how do we have true enterprise bargaining in that sort of a system?

Mr Boyd—The unions, on behalf of the employees, struck agreements with the employers—that is how it happened.

Senator TIERNEY—So there is a pattern bargaining system across the whole industry.

Mr Boyd—We have pattern bargaining, yes; in essence.

Senator TIERNEY—I want to talk about some of the findings of the royal commission. This industry across Australia produces, according to the royal commission, 40 per cent of industrial disputes. It is seven per cent of the economy; it is producing 40 per cent of the industrial disputes—punching six times above its weight on the overall measure. One of the standout states is Victoria, where more days are lost than in other states. Could you explain why in Victoria the building and construction industry has a higher rate of industrial disputation than in other states?

Mr Boyd—It is on two fronts. Firstly, we talked earlier about our overall concern about occupational health and safety and how we take that seriously, so there is disputation to make sure that the occupational health and safety regs are policed very vigorously. Secondly, we police very vigorously the protection of wages and conditions of building workers. So I am unabashed. If we have a higher level of disputation in Victoria to do those two things, then we will do it.

Senator TIERNEY—I am just wondering why it is different from, say, Sydney or Brisbane? Why is it higher?

Mr Boyd—As I just said: we take those two issues seriously.

Senator TIERNEY—Unions don't in other states?

Mr Boyd—Well, I hope they do. How they do their business I am not aware.

Senator TIERNEY—The royal commission also found there is an urgent need for the reform of the culture in the industry in Victoria. Why do you think they made a finding like that?

Mr Boyd—Because they were asked to.

Senator TIERNEY—Could you give us a more objective view?

Senator JACINTA COLLINS—There isn't one.

Senator TIERNEY—Why do you think the commissioner found the rule of law no longer had any significant application in the industry in Victoria?

Mr Boyd—I think he got it wrong. I am glad you asked me that question, because I watched the *Four Corners* report in May 2001. I also read the rationale that was used by the OEA to call that royal commission. None of those key things about finding gangsters and corruption and all that stuff was ever found.

Senator TIERNEY—It seems to be focusing a lot on Victoria in terms of things being more of a problem than in other states.

Mr Boyd—Did Commissioner Cole find a gangster in the building industry in Victoria?

Senator TIERNEY—Well, he found a few other things, of course. He found a much higher number of cases of unlawful conduct in the industry in Victoria than in other states—58 separate incidents. That did not actually include the inappropriate conduct, which was another whole list. Again Victoria is standing out. The royal commission goes right across Australia. You are just whitewashing the whole thing and saying, 'There is no great problem here.' The commissioner did make 256 findings. I simply wonder why he made 256 findings if there is nothing wrong with this industry.

Mr Boyd—He had the so-called secret volume, volume 23—the red book. We are still waiting for those 33 charges to come out—the so-called serious charges. All the other findings could have been dealt with through the commission or normal legal processes that are already in place.

Senator TIERNEY—Finally, how would you describe the apparatus for occupational health and safety in the state of Victoria in terms of keeping checks on what is happening?

Mr Boyd—Since 1999 it has improved dramatically. As I indicated earlier, we now have a dedicated inspectorate, the WorkCover Authority, with over 40 inspectors, which we never had before—that was taken away from us by the Kennett government. I think it is working well. It can always be improved. The employers and the unions participate in the foundations for safety committee of the WorkCover Authority and, through that body and other connections with the WorkCover Authority, there is a very high level of participation by all the parties—the government, the unions and the employers—on OH&S.

Senator TIERNEY—So would you agree that Senator Cook's concerns were a bit misplaced when he talked about what is happening federally? He seemed to be giving the impression that the industry was exposed in the area of occupational health and safety. What you have just described, of course, is that the industry is not—that there is quite a good system here in Victoria for occupational health and safety control.

Mr Boyd—No; you have taken what I have just said out of context. One of the key bodies that the WorkCover Authority operates through is the NOHSC. With that body now under threat, the national approach—all the national codes of practice that we used to work with in Victoria—is now gone. The opportunity for that national impact is now gone.

Senator TIERNEY—Surely if there are codes of practice you could continue working under them if you so chose.

CHAIR—Senator Tierney, your time for questioning this witness has expired. This committee will take a short adjournment to have a private meeting.

[11.25 a.m.]

WELCH, Mr Brian, Executive Director, Master Builders Association of Victoria

ATTWOOD, Ms Kim, Manager, Industrial Relations and Occupational Health and Safety, Master Builders Association of Victoria

CHAIR—Welcome. The committee prefers all evidence to be given in public. However, it will consider any request for all or part of evidence to be given in camera. The committee has before it submission No. 122. Are there any changes or additions you wish to make to the submission?

Mr Welch—No, thank you.

CHAIR—Mr Welch or Ms Attwood, I now invite you to make a brief opening statement.

Mr Welch—Just by way of background, I have been the executive director of the association for nine years. Prior to that time I was with the Building Owners and Managers Association, now known as the Property Council of Australia, and prior to that with the Housing Industry Association. I have had a connection with the building industry for about 20 years. In my current role I am a director of the board of Incolink, which is the Victorian building industry redundancy fund; a director of the Victorian Brick and Blocklaying Training Foundation; a ministerial appointee to the Building Advisory Council; and also, as I think Mr Boyd was saying, a participant in the Building Industry Consultative Council. Kim Attwood is our industrial relations and occupational health and safety manager, and I am sure she will make a vital contribution to today's hearings.

The association employs about 85 people. We provide a range of services to members across a breadth of activities. Our membership numbers are 5,000 here in Victoria. Approximately 1,000 are related to the commercial sector; the balance to the residential. On a day-to-day basis, the association assists members with industrial relations and occupational health and safety issues, advice on terms and conditions of employment, freedom of association, certification of enterprise bargaining agreements, and occupational health and safety advice, both over the phone and directly on site.

The association assists members in dispute resolution, and these discussions are normally held with the CFMEU. Certainly we attend the jurisdiction that was discussed earlier—the disputes board—as well as the Industrial Relations Commission. Disputes occur over a host of issues: placement of labour, lost time payment claims, site allowances and alleged breaches of occupational health and safety. MBAV acts on behalf of its members to negotiate new enterprise bargaining agreements, and we have done so on many occasions.

In December 2001, I provided a statement and gave evidence to the Cole royal commission. In the evidence I stated that legal remedies available to employers are too slow and too expensive. Our submission to the Senate committee provides a recent case study that supports this still being the case today. It is for this reason that MBAV continues to call for a quick, inexpensive

and effective umpire who can resolve industrial disputes. The Cole royal commission found that in Victoria the building and construction industry was overrun by a culture of lawlessness. As a result, urgent reform is required to restore the rule of law.

One recommendation was the establishment of an independent body to ensure that parties comply with the law. MBAV supports this recommendation. As our case study illustrates, whilst the industrial instruments are in place to provide a dispute resolution mechanism, this is rarely utilised by the CFMEU. In addition, when employers seek a method of resolution this is a costly exercise in terms of finances and time. The association supports a separate piece of legislation to deal with these issues because of the endemic problems that exist both within Victoria and Australia. The case study illustrates that the existing legislation is ineffective in addressing unlawful behaviour of individuals and the CFMEU.

In my evidence to the Cole royal commission, I expressed my concerns with pattern bargaining. Whilst it is noted that it exists in Victoria and provides predictability in respect of labour rates, protected bargaining favours the larger or better resourced party. The CFMEU have used their network of job stewards and organisers to shut down significant components of the Victorian building industry, as evidenced in the 1999-2000 EBA round. The common expiry date allows protracted protected bargaining to occur when genuine negotiation does not occur. It is for this reason that we support the introduction of the Building and Construction Industry Improvement Bill and a limited period of protected bargaining. Master Builders of Victoria have always supported an environment where all parties adhere to the law. It is our belief that the introduction of the bill will go a long way towards achieving this aim. That concludes my statement.

Senator COOK—Mr Welch, we should stop meeting like this!

Mr Welch—Good morning, Senator Cook. It is nice to see you again.

Senator COOK—We met a long time ago, but it has been a long time between drinks. Can you tell us briefly what the nature of the MBA-CFMEU relationship is. Do you, for example, work together on training matters?

Mr Welch—Minister, we have a multilevel—

Senator COOK—Brian, since I last saw you I am no longer a minister. The voters have decided—

Mr Welch—Prospectively, perhaps. Senator, it is true that we have a multitiered relationship with the CFMEU. We deal with each other in a professional manner, I trust, on a range of issues, including training.

Senator COOK—Let us just go to that multitiered relationship for a minute. It is one thing to have the structure and the relationship. How would you characterise the officers of the union? Are they people who might be tough and vigorous in the pursuit of their goals but, when they reach an agreement, stick to it? Is that a fair characterisation or are they not so honourable? How would you characterise it?

Mr Welch—If we are specifically talking about EBA negotiations—

Senator COOK—Yes.

Mr Welch—it is most difficult indeed to strike a conclusion with the unions. That is because it is not just one union that we are dealing with. In terms of sticking to agreements, regrettably, they do not. That is the evidence we have given. If you would like me to elucidate, I will.

Senator COOK—What I am asking is: is it the key officers of the union who, in your submission, do not stick to the agreements or are they people with whom you can deal with respect and honour? These agreements cover work sites, and there are various tiers of officialdom, from shop stewards up. But are the people at peak level with whom you deal people you can deal with respectfully and honourably, in your view, or not?

Mr Welch—In the majority of circumstances, yes. But, I regret to say, not always.

Senator COOK—Can you give us an example of where 'not always' applies?

Mr Welch—As I was going to give you an impression of before, there was a very bitter and protracted EBA negotiation in 1999-2000. The unions' specific goals were met in the main after a very protracted dispute. An agreement was signed and shortly thereafter, contrary to the no claims clause, a further claim was pressed for long service leave benefits to be increased. In Victoria we had a wonderful situation where we had a self-funding long service leave scheme. There was a large amount of money there. The unions lusted after it to increase the benefits available to employees. This was outside of the EBA. After the negotiations, in a period where there were no more negotiations meant to take place, industrial action took place. Employers capitulated. There was an increase in benefits to employees and there was an increased cost to employers of approximately 1.5 per cent of wages. So I did not find that a particularly honourable outcome.

Senator COOK—In this bitter dispute leading up to this EBA, was that protected industrial action?

Mr Welch—In the lead-up to it, it would not have been. In the course of it, it was. It was a cumbersome process. Most parties endeavoured to comply with the law. Certainly the majority of the actions taken by the unions and employers were lawful.

Senator COOK—You have given us an example. Are there any others? We have got the union coming along later; we will ask them about them.

Mr Welch—I am sure they will give you their own point of view. There are, on an ongoing basis, demands made of employers and workplaces which are outside of the negotiated arrangements. That, I am afraid to say, is a daily occurrence and happens on any building site at any given time.

Senator COOK—Let us explore a bit further this multitiered relationship. You did indicate that training was an area where there is a degree of cooperation between you.

Mr Welch—We have cooperated in a number of forums on training with varying degrees of success and harmonisation. I would not call it a very cosy relationship, but we actually get some things done sometimes.

Senator COOK—No-one is expecting it to be cosy. Do you get a product out at the end of these negotiations that actually lifts the commitment to training in the state?

Mr Welch—If you like, I could point out a circumstance.

Senator COOK—Yes.

Mr Welch—I refer to the red-card training episode that there has been in Victoria. It is the base-level site induction training program. It exists in many states.

Senator COOK—We know it as the green card in Western Australia.

Mr Welch—Yes, it is almost a rainbow, isn't it? As it turns out, there was an agreement struck about how it would be implemented in Victoria, but the finite detail was not sealed off—that is, what would be a complete definition of what that training would need to be in order to be considered appropriate. That open interpretation has caused all sorts of industrial problems as unions arbitrarily declared some cards are acceptable and some cards are not, and whether they will accept anything done by MBA or just approve their own. There was a laudable goal, which was to try to define and put in place a base training module for good and sound occupational health and safety reasoning, but unfortunately it became yet another industrial relations imbroglio.

Senator COOK—You have the red card in place?

Mr Welch—We have a red card; other people have different colours in Victoria. So there are a multitude of colours in Victoria.

Senator COOK—Okay. So what you are saying is that there is disputation over the interpretation of entitlement about the card?

Mr Welch—Which manifests itself in industrial disputation, which should not occur in occupational health and safety matters but does.

Senator COOK—Have you taken this to the commission for resolution?

Mr Welch—It needs a person to take it to the commission, Senator, or a company or an individual willing to press the matter. We have not found anyone willing to do that yet.

Senator COOK—So it has not gone to the commission for settlement?

Mr Welch—I think that underlines the problems that we experience in the industry. Employers feel somewhat reluctant to put their head above the trench, to make themselves known to the unions as being in disagreement with their policies. They have a well-honed sense

of self-preservation. They believe by doing so they will expose themselves to some form of retribution.

Senator COOK—That is one argument. The other argument is that there is no big deal, that the amount of disputation is exaggerated and that employers are less worried about it than some of the spokesmen for employer organisations seem to imply.

Mr Welch—Senator Cook, I would be happy to shout you lunch and take you around to a few people who would support my view.

Senator COOK—There is no such thing as a free lunch, Mr Welch! But maybe one time when I get a bit of an opportunity I will take you up on that. In the *Herald Sun* on 17 May on page 5 there was an article 'Long Weekend Lives On'. Are you aware of that article?

Mr Welch—I saw it, yes.

Senator COOK—Is it accurate?

Mr Welch—It is an accurate rendition of the words that I gave to the journalist on the subject, yes.

Senator COOK—Okay. What are the standard working hours per week of a building industry employee?

Mr Welch—It varies; it depends upon employers and the nature of the projects but it can range from 52 to 56 hours for hours worked, although 36 is the ordinary hours of pay.

Senator COOK—But in the EBA isn't there a clause that provides a standard working period of about 56 hours?

Mr Welch—It provides for that to occur, yes, and the flexibility for working those hours to some degree.

Senator COOK—And if there is an argument that workers are not complying with that, you can take it off and have it settled, can't you?

Mr Welch—I understand, and I will rely on my colleague to assist here, that it was settled in the Industrial Relations Commission that the hours of work are the province of the employer to determine in consultation—that is, by telling the union secretaries what it is that they have elected to do. The practice is different to the procedure. What happens is that the shop stewards tell the contractor what he can do.

Senator COOK—Let me pick that point up. Firstly, with the pattern agreement, my understanding is that the work provision is for 56 hours per week. That is generally worked across the industry on the basis of four by 10 hours—that is, 10-hour days from Monday to Thursday and then two by eight hours on Friday and Saturday—and that is the standard working week. Is that right?

Mr Welch—In major CBD projects that is certainly the case, yes.

Senator COOK—So we are not talking about an industry that is always at leisure; we are talking about an industry that is mostly always at work—in fact, a six-day week.

Mr Welch—It is true that the industry works hard. It also works hard at overtime and on overtime, which is very lucrative.

Senator COOK—That is just a question of what the remuneration for working is, because it is taken in different forms. The point of this article, 'Long Weekend Lives On', is to suggest that workers are skiving off, that they are indolent and do not attend for work. But the truth is that they actually work a six-day week in this system.

Mr Welch—You are quite right to say that the potential is there. I think most other workers would find it very enjoyable to have as many rostered days off as the construction workers. I would enjoy it.

Senator COOK—I do not know that too many workers would like to work a standard 56-hour week, however. And isn't it true that a number of employers regularly apply for rostered days off to be worked?

Mr Welch—This is the very nature of the industry. I think that helps to explain a lot of things.

Senator COOK—That is a very important thing—it is the nature of the industry.

Mr Welch—It is the nature of the industry. We see time as money. The conclusion of a project is critical, and liquidated damages seriously affect contractors and their obligations to their clients. So it is the norm now to finish the job in the shortest time possible and to use labour as much as they are prepared to work—and because no-one, I think, puts a gun to their head to work the overtime they do, this is an option that is chosen by the industry. A high level of overtime meets the needs of the contractors and satisfies the employees because they have a high rate of remuneration. This industry is very susceptible to any form of delay. Anything that will interrupt the schedule exposes the contractor to liquidated damages from the client.

Senator COOK—I understand that point, but we have just established that this is a six-day, 56-hour working week for workers in this industry and that employers regularly apply for rostered days off to be worked. What you have told us is fair enough, because it is a justification for applying for rostered days off to be worked. This is a time sensitive industry; I agree. Are you aware of consent to work on rostered days off or extra overtime unreasonably being withheld?

Mr Welch—No, I am not aware of it.

Ms Attwood—There is quite a rigorous requirement within the EBA with regard to working on a rostered day off. The employer must give seven days written notice of that intention. They give that notice to MBAV and to the CFMEU. So we are notified of it, and it certainly is not our experience that this is a regular occurrence. We have had difficulties in the past. The EBA clause talks about 'notifying' the parties. The CFMEU have chosen to interpret that as a requirement

that they must give permission, and we have argued with that. Certainly it is our experience that they have tried on occasions to withhold permission, and I think that also supports the point that it is not a regular occurrence for people to work on rostered days off. Within the working day calendar there is also a requirement that they will not work on a rostered day off that is attached to a fixed long weekend—and there are seven of those per year. Once again, there would be no expectation that people would work on a rostered day off attached to those periods—traditionally Easter, Queen's Birthday and Labour Day—ensuring a four- or five-day weekend.

Senator COOK—Christmas.

Ms Attwood—Christmas is a separate issue in itself.

Senator COOK—These are standard holidays for all Australians.

Ms Attwood—They are standard public holidays. The rostered day off that is attached to them is certainly not standard.

Senator COOK—You say there are instances, and doubtless there are, but my point is about what the standard practice is. What is typical is one thing; the occasional instance is another thing. What I am trying to get to is what the typical scenario is rather than what examples of unusual behaviour there might be. You might be the right person to answer this, Ms Attwood.

My understanding is that the 56-hour, six-day week is standard in the industry, that there are regular occasions on which employers seek to work on rostered days off and that permission to do so is not unreasonably withheld. That is to say, it is withheld on occasions but not unreasonably so and that if you were to dispute that you have got a remedy under the EBA of taking the matter to the disputes body. How many matters have gone to the disputes body about this?

Ms Attwood—With regard to the disputes board, it is not my understanding that there have been a great many matters. I think I would like to take you back to what you said: it is not something where it is for either party to provide permission for working on an RDO. The EBA clause makes it very clear: it is a notification that if agreement has been reached on site then that is what is required. It is not for somebody as a third party to intervene and withhold permission.

Senator COOK—I accept that.

Ms Attwood—I would also like to point out—

Senator COOK—Your point was that there have been very few cases that have gone to the disputes board. That was the point you made initially.

Ms Attwood—I think there is a reason for that, because of the timing of it. Obviously if that permission is withheld within that time frame then the opportunity is lost to work on that RDO. I would also like to point out that the clause in the EBA talks about there being a provision to work up to 56 hours but it goes on to state that there is nothing that guarantees 56 hours as a normal week. That was a clause we were very insistent would be included in the last EBA because of members saying that it did not always suit them financially to have a situation where

people worked a 56-hour week; that at the beginning of a project or on a small project where there were not the same time restraints on them it was financially better for them to work 38 hours. The push for the 56 hours actually came from employees who were looking to increase remuneration.

Senator COOK—I am sure that is how it is written; I do not question your retelling of the provisions of the EBA. But what is accepted here is that the 56-hour week is a standard working week, a six-day week, for this industry. That is an unexceptional point—that is what happens in real life.

Ms Attwood—As we have said, it certainly happens on CBD sites. I would still suggest that it may not always be standard. There would be instances where we could demonstrate it as a 38-hour week.

Senator COOK—I am sure there are instances.

Mr Welch—It may be helpful to give you some advice about a survey that was conducted during the 1999-2000 dispute. It became a very important question: what were the hours of work on average? We sampled 300 employers of the industry—clearly not all on CBD sites—and the average came back at something like 46 hours. I was surprised myself that it was much less than the potential, and that was because not everyone needs or wants to work those hours.

Senator COOK—When was the last EBA negotiated?

Mr Welch—Just recently—2002.

Senator COOK—So we are talking about the EBA before that?

Mr Welch—Correct.

Senator COOK—Were there any disputes when the last EBA was negotiated?

Mr Welch—The last EBA round was peaceful by comparison with the other.

Senator COOK—Were there any disputes though?

Mr Welch—I cannot recall there being any significant disputes.

Senator COOK—So why are we using an example of the EBA before the last one to illustrate current behaviour?

Mr Welch—The difference between the two is that in 1999-2000 employers saw the prospect of a 36-hour week as something which would devastate their industry and their opportunities to work. They were very fearful of its introduction and rallied almost spontaneously against the concept. They fought to the best of their ability—and employers are hopeless at fighting. With 3,000 people involved in the negotiation on the EBA renewal with the CFMEU there were almost 6,000 opinions about how best to handle it. You might know what it is like trying to herd cats. It was almost like that. Employers were vigorous in their opposition. They expended a great

deal of effort and great deal of money and there was a great deal of damage done to the Victorian building industry. At the end of the day they did not have the stamina to sustain the fight. So when the next EBA round came forward employers said to themselves: 'Under the Workplace Relations Act we have little chance of getting a fair deal out of this thing. We'll cop it sweet and take the round.' They were not interested in fighting, and I suspect they will not be interested in fighting the next EBA round because of the flaws in the act itself.

Senator COOK—But that is life under the new industrial relations laws in this country brought in by this government.

Mr Welch—We would have to agree with you. We would like them changed.

Senator COOK—Could I make this point to you. I know of plenty of examples of workers who are in disputes about which they believe they have justifiable cause and who do not have the stamina to stay the course either, but I do not know of any union that is asking the federal government to introduce an apparatus to make sure that there is a taxpayer funded agency to strengthen their claims in the negotiation. But you are supporting that type of proposition because your members do not have the stamina.

Mr Welch—And consistently so: you will find that in all of our submissions we have said that there are basic and fundamental flaws. I think Senator Murray would recall that shortly after the 2000 dispute we visited him in Canberra and disgorged our contempt for and dislike of the act and the way it applied to our members. But we would be the first to admit that, if it does not sit well with us, clearly there would be examples of where it does not sit well with employee representatives either. So I think the contentious 'might is right' approach to the act needs to be changed. That is why we applaud the recommendations of Cole to limit the bargaining period, so that limited damage can be done to either party. I think that makes sense.

Senator COOK—That goes against the philosophy of the federal government, I might say, when it introduced the initial bill for the current act. But I want to go on to right of entry. You are aware of the right of entry provisions in the agreement. I do not need to rehearse them. Can you provide an example of a breach, during the life of the current pattern agreement, of those right of entry provisions?

Ms Atwood—Certainly we have had instances where that right of entry has been tested. We have had situations where members have then sought the assistance of the police on site to remove an individual. They have also sought the assistance of the Industrial Relations Commission.

Senator COOK—How many section 127 applications has the MBA made over right of entry?

Ms Atwood—We have not to my knowledge made any section 127 applications.

Senator COOK—You have not made one?

Ms Atwood—No, not over right of entry matters. There have been instances where they have been made by our members, but we have not made one.

Senator COOK—Is it your practice to refer your members to the services of a barrister called Mr Bruce Shaw for section 127 applications?

Ms Atwood—Yes, we have used his services.

Senator COOK—Can you confirm these figures: in the last 12 months has Bruce Shaw made applications on behalf of 19 of your members—mainly with respect to section 127 applications but also section 166A notifications? Has he made 19 over the last 12 months?

Ms Atwood—I would have to confirm those figures, bearing in mind that he is not the only solicitor or barrister who has made application.

Senator COOK—You have other barristers or solicitors acting on behalf of your members?

Ms Atwood—Yes.

Senator COOK—How many applications have been filed through them?

Ms Atwood—Again, I would have to come back to you with those figures.

Senator COOK—Could you provide us with those figures?

Ms Atwood—Yes.

Senator COOK—I want to get a sense of the type of activity, using the existing mechanisms in the act to seek remedy, your association has encouraged for its members. I think that is important. Can you confirm that only one of those matters through Mr Shaw, a matter involving construction and engineering in Morwell, has gone to hearing and determination?

Ms Atwood—I cannot. Obviously I am not familiar with that, but again I can come back to you with some details on that.

Senator COOK—You might confirm this when you come back to me: my understanding is that an order was granted in that matter and there is no evidence that the order has been breached—but, if you have a different view, I would be pleased to hear it—and that nearly all the others are being resolved in conciliation or were resolved prior to them reaching the commission. If you can confirm that, I would be appreciative of that as well.

Ms Atwood—Certainly.

Mr Welch—It occurs to me that this analysis—and I will leap ahead of you, if I may—will show you that we do not often have recourse to the Industrial Relations Commission.

Senator COOK—They are provisions in the act to resolve these matters.

Mr Welch—If you have little faith in it, or if the time taken to bring it to conclusion means that any victory per se would be pyrrhic because you have lost all your profit and liquidated

damages, that would mean only under the most dire circumstances would you be challenged to use it. Most other people would probably say—and these are the commercial realities of life—'We will settle the agreement by some other more practical means,' which would perhaps mean capitulation to the demands placed upon them.

Senator COOK—But if you do not use the provisions in the existing legislation to seek remedy, one could hardly believe there is a reason to change the legislation. I want to go into your case example, the Grocon case study. I doubt that there will be time available to do that but, even out of session, I would like to do that by questions on notice. In your submission you referred to 'intimidation and thuggery'. Can you give us some examples? By the way, what is the legal definition of 'thuggery'? There is no such charge, but what is it?

Ms Attwood—I think what we mean by 'thuggery' is in line with intimidation, standing over a person, a general fear for their wellbeing, a concern that they are in harm. That is what was meant by that.

Senator COOK—How many matters have been referred to the police on the grounds of intimidation, given that what you are referring to in your submission to us is a problem for this industry?

Ms Attwood—Again, I would have to take that question on notice.

Senator COOK—Can you confirm that no matters have been referred to the police?

Ms Attwood—No. In fact we have had dealings with the police. I have spoken personally to a police officer on a building site who had been called by one of our members because of concerns about the behaviour that has been occurring and concerns for his own wellbeing. I have spoken to the police in that instance.

Senator COOK—We all know about the tabloid screaming headline 'Charges have been laid', but we have a justice system in this country and you are only guilty when you are convicted. How many convictions for intimidation have been recorded in this industry?

Ms Attwood—The matter that was recently determined, with Mr Setka, is one that comes to mind.

Senator COOK—Are you going to get back to us with these details?

Ms Attwood—Yes.

Senator COOK—We will have a look at the case of Mr Setka as well.

Mr Welch—In the case of Mr Setka, the charges were proven. It was not an edifying experience for employers to see a $500 fine imposed for a threat to someone's wellbeing. It seems to us that the courts do not always deliver what would have been reasoned to be a satisfactory penalty.

Senator COOK—That is justice. That is what the courts decide, and we are all bound by what the courts decide.

Mr Welch—You collectively are law makers for our society at a national level. I am pointing out here—if it is of any value to you—that we do think much process of the way the industrial relations system works and we do not think much of the court systems that protect, say, employers in that process.

Senator COOK—I got that impression from your submission, Mr Welch.

Senator JACINTA COLLINS—Maybe he agrees with the MBAQ.

Senator COOK—But the question for us is: can you make a general proposition from one case? In logic that is usually a fallacious approach. I will conclude this point.

Senator JOHNSTON—Mr Welch, can you tell me why you think there is a culture of lawlessness in the Victorian building industry?

Mr Welch—The fact is that employers are extremely reluctant to press their rights under almost any jurisdiction, whether it be the disputes board, the Industrial Relations Commission or civil proceedings. They fear that, by doing so, they may exacerbate the losses that may be in front of them or suffer in some other way.

Senator JOHNSTON—What makes you say that?

Mr Welch—What makes me say that is the raw evidence provided to me by countless members of circumstances in which they have found themselves compromised, could not deal with the circumstances in the way they would have preferred and have capitulated to demands placed upon them.

Senator JOHNSTON—How long have you been representing the Master Builders Association in Victoria?

Mr Welch—For nearly 10 years.

Senator JOHNSTON—The case study you have drawn to our attention is an inclement weather matter. Are you aware of that in your submission?

Mr Welch—Yes.

Senator JOHNSTON—I note that the little green book that has been given to us also has, on page 48, a set of guidelines or a form of an approach to inclement weather. You have your EBA or other award terms and conditions with respect to inclement weather. You then have this green book, the Victorian Building Industry Agreement. So there are two sets of rules governing the inclement weather determinations on a site. Your case study says that they were simply ignored. What strength does this little green book have? Is this case study an example of a union just ignoring the agreements and the dispute resolution processes?

Ms Attwood—There are in fact three provisions for inclement weather. There is also a separate clause within the EBA itself. So there would be the three, bearing in mind that the EBA one is, to an extent, a replication of what is in those other documents. Certainly the fact that the company in that case study felt that they had to use the services of the Industrial Relations Commission shows that the disputes board was not effective in that instance. It is not my understanding that the matter was even referred there because of the severity of the bans and the industrial action that was occurring.

Senator JOHNSTON—I come back to this question of intimidation. Are you aware of your membership being aware of this committee's inquiry and terms of reference and not being prepared to suffer the consequences of making submissions to senators?

Mr Welch—Perhaps I will answer that. There is a clear reluctance for any employer, as I said before, to take a profile on issues which may seem critical of union conduct. This is no different from when the royal commission was in operation. There may have been, but I do not think there was, an employer who voluntarily gave evidence. They almost always, if not always, were commanded to be there. They were subpoenaed.

Senator JOHNSTON—You have had personal discussions yourself, one on one, with the sorts of people who would be able to bring evidence forward but who were very reluctant because of the likely repercussions.

Mr Welch—Correct. If I could hope to represent members' interests accurately, I think it would be fair to say that they think this committee is wasting time in so far as the recommendations of the royal commission are on the table. There is an abundance of evidence provided by the royal commission that there is lawlessness in the industry and that the industry is hopelessly incapable of providing any rule of law other than the rule of the jungle. Under those circumstances, they would like the bill to be put to parliament and passed.

Senator JOHNSTON—So, effectively, the reluctance and exposure that they feel in coming before this committee virtually underlines why the legislation is needed?

Mr Welch—I think so. I know so.

Senator TIERNEY—I will also follow up on that point about the culture of lawlessness that you mentioned earlier and Senator Cook's attempt to disprove that by saying that very few cases ever get through to the point of prosecution, judgment and penalty. What you seem to be indicating in your answers to Senator Johnston is that it operates on another level and that these things do not get to court. Just because things do not get to court does not mean there is no intimidation. I think you gave the case of one employer who you said just found this all too hard and then, presumably, gave way to whatever the issue was. Can you explain the mechanism of how that occurs in this industry?

Mr Welch—I can put it in the context of an attempt to use the legislation during the period 1999-2000, because that was a very active test of how it worked or did not work. There were 14 separate legal actions commenced by employers against unions during that EBA process. Someone mentioned before the profit made by lawyers. Well, they are capable people, and they capably assisted and they capably charged. I think there was $1.5 million worth of legal fees that

the association incurred at that time. At the conclusion of the discussions and settlement of the agreement all charges and proceedings were dropped as the first point in the agreement. That is another example of how people were wronged and people sustained losses but they did not choose to pursue the matters because they did not want to be in the position of a having a successful prosecution and action against the union which would put them in the spotlight for all to see.

The very premise of the system that we work under says that you need an aggrieved party that is going to stand up and say: 'I was wronged. I demand some sort of restitution.' That is why we strongly favour the advent of the task force concept and the proposals that are enshrined in the legislation: so that matters can be investigated and prosecuted on their merits, rather than relying on the strength of will or the determination of a party to prosecute for their own losses. There is a profound difference. You would see many more matters proceed to conclusion. To complete the answer, people do not wish to put themselves in harm's way so they do not avail themselves of their rights.

Senator TIERNEY—Can you draw a picture for us of what that sort of harm might be if they proceeded and got a successful legal outcome. What are the consequences for their businesses by doing that?

Mr Welch—I will give you an example of what might happen. If there were a constant ignoring of a union demand and that matter led to some investigation by any of the mechanisms available, industrial relations problems could turn quickly into occupational health and safety problems which may visit that particular site or another site, or even a site in another state or region if that employer worked in a number of different jurisdictions. The repercussions quite often occur by occupational health and safety contrived or alleged incidents that put pressure on the business to perform, make it different for them to lift their time schedules, cause aggravation on the work site and cause people to realise that continued opposition would be a penalty to their business. Most commonly that is the concern—penalty to their business and their employees.

Senator TIERNEY—What does 'penalty to their business' mean in terms of business outcomes if they proceed?

Mr Welch—Putting themselves in a position where they incur liquidated damages, which means that there would be no profit for the job, their company could fail, they may not have sufficient funds or be able to make progress payments in order to meet their obligations. Regrettably, businesses in the building industry do not operate on huge margins—developers may, but builders do not.

Senator TIERNEY—It is a pretty strong incentive just to cop it, isn't it?

Mr Welch—It is a clear incentive, and that is clearly what is happening.

Senator TIERNEY—I want to move to the way in which agreements are made. There are EBAs in the industry. We heard this morning that the VBIA and the EBAs have more or less become parallel or in synchronisation. Could you explain the effect of this on what should be true enterprise bargaining? Do you have true enterprise bargaining in this industry in Victoria if

you have this VBIA overarching the whole process? Don't you really just have a pattern bargaining approach here?

Mr Welch—There is no true enterprise bargaining in the building industry; there is pattern bargaining. Many employers see that under the current Workplace Relations Act is the only viable proposition they could work with, but they would prefer to negotiate their own agreements.

Senator TIERNEY—What effect does that whole approach have on costs in the building industry in Victoria?

Mr Welch—I have it on good authority from quantity surveying firms and builders who are doing work and comparing project costs between Sydney and Melbourne that Victoria is 30 per cent more expensive in which to build. The reason for that difference is not the substantial difference in labour costs; it is prolongation costs. There is no industry calendar in Victoria such as occurs in New South Wales. There are no industry lockdown weekends of the same type. The conditions and the way industrial relations operates in Victoria are substantially different to New South Wales. I would say there are, for example, very few non-union certified agreements in Victoria. In New South Wales there is an army of them and the number is increasing. So there is a marked difference between the two jurisdictions which shows that the more regimented operation in Victoria translates to higher costs. And that, ultimately, will be a penalty to construction workers as well as employers in this industry when this current boom of activity has concluded.

Senator TIERNEY—I was going to come to that point. From where we went down to Docklands today and when you look around the city there is a lot of building construction work, including high-rise, going on.

Senator JACINTA COLLINS—It was not Docklands.

Senator TIERNEY—Sorry, I am not familiar with the geography of Victoria. Anyway, it is very active; there is a lot of building. Inevitably these things go through cycles—you get to an inevitable downturn and then there is a start-up again. What are the prospects for this industry in Victoria compared to, say, in New South Wales if investors want to put up more high-rise buildings?

Mr Welch—That is a matter of some research of ours. We conducted a survey of developers. All politicians might be concerned about the view of a developer at a time about what their views are on a particular matter; it might suit their circumstances to say something. That is, I suppose, the way of life. But we surveyed a number of developers to try and get a balanced perspective of their perception of Victoria vis-a-vis New South Wales and Queensland. What came back to us is the perception developers have of Victoria as an investment destination—and this is not the state government building, as they have announced, 19 new police stations, other facilities and infrastructure in Victoria; this is the discretionary spending, the discretionary dollars. The developers have a perception of Victoria that is clouded and negative on three basic issues: (1) planning, (2) industrial relations, (3) taxes. Please note: there is no special order to those. Those are the issues which cause them to choose where to put money. New South Wales and Queensland have been winning more work as a proportion than Victoria would normally

enjoy for those reasons. A view that we can responsibly put forward is that industrial relations is a key component in the minds of developers and is therefore skewing work away from Victoria.

Senator TIERNEY—Coming to industrial relations, with this industry being seven per cent of GDP but providing 40 per cent of the strike action across the country and with Victoria punching above its weight compared to the other states—and I am not just talking about the culture of the building industry generally—what is it about the Victorian building industry that makes it stand out in industrial disputation?

Mr Welch—I think it is a historical issue as much as anything. Victoria has been the hotbed of industrial relations in many industries but certainly in the building industry, and that is because it is a culture that is well and truly implanted. We think we need external assistance to get it right. I do not think we would be the only state but certainly we are a stand-out case.

Senator TIERNEY—Are you aware of any organised crime involvement in this industry?

Mr Welch—No, I am not, but it is a fertile ground for it to invade should this situation continue.

CHAIR—You referred to a survey that had been done by your organisation. Could you make that available to the committee?

Mr Welch—I would be delighted to do so.

Senator MURRAY—I am interested in structural issues. You have been closely involved with industrial relations in the building and construction industry for two decades?

Mr Welch—More closely for just one. Three decades in the industry, but fortunately not in industrial relations in the other two.

Senator MURRAY—As you know, the Cole commission pointed mostly to two states—Western Australia and Victoria—as being problem states. In Western Australia we have two acts; in Victoria we have just one. You have had experience in operating under two acts in Victoria and just the one. What contribution does having just one act make to better performance in an industry?

Mr Welch—I would say a substantial amount. I think a single industrial relations system would be much preferred. We complain about the Workplace Relations Act as it effects our industry, but I think it would make it a much better proposition if it were the case all the way across Australia.

Senator MURRAY—Is your proposition, based on your experience, that if Western Australia, for example, had its building and construction industry just under the federal act then you would get better outcomes in terms of productivity performance and so on?

Mr Welch—I would not classify myself as an expert in terms of Western Australia. I would hate to say anything that would upset my colleagues in that state, since they probably know more about it than I do. I think you are well versed with them and know them. They might be able to

offer you a view. I can only speak of the experience in Victoria and say that we believe it has been a better environment. We are happy with that environment and would prefer not to go back to a state scheme here in Victoria.

Senator MURRAY—I have a simple proposition—that is, there are mechanisms by which federal law can be extended. If it were to contribute to productivity and better outcomes then that would be all to the good. You are not prepared to offer an opinion with respect to Western Australia so I will leave it at that. The second issue is one of regulation. The evidence we have had is that the police are worse than useless when it comes to assisting in matters on building sites and so on—maybe that is a bit harsh, but that is the impression I have gained. How about the other regulators from the state departments, inspectorates and federal departments, WorkSafe people, task force people and so on? If you need regulators on a site, what contribution do they make to better outcomes in the industry?

Mr Welch—I will deal with the building industry task force first of all. The task force, with their limited powers, are there to try and restore the application of law to building sites. I am sure that they are doing the best job they can under the circumstances. I am sure they are not liked by the unions. I am told that as soon as they walk onto a building site there is a very strong disposition to put the men in the shed. I do not think, at this stage, that it is a fair assessment of how a task force would operate in the long term. Right now there is a contest of wills afoot. I think anything that restores confidence in the industry that the rule of law applies would be a very good thing in the medium to long term.

Senator MURRAY—What about the WorkSafe side of things? OH&S is often, and rightly, cited as a significant issue. Elsewhere we have heard evidence that OH&S inspectors do not appear on time and do not have a rapid response sort of approach. We are told that problems fester simply because there are not enough inspectors, they are not properly resourced and they are not prompt in attending to their duties.

Mr Welch—To my knowledge, WorkSafe officials here do a very good job and are sufficiently resourced to do their job. That is my understanding. I think Mr Boyd pointed to the fact, in calling it a victory, that there was a significant increase in the number of personnel engaged and their appearance on building sites. I think that is so. Do they do their job adequately well? I think they do, but the trouble they have is trying to separate industrial relations from occupational health and safety. These things can sometimes get twisted.

You might recall—I certainly do—that when the royal commission first sat in Melbourne, curiously, there was an occupational health and safety breach on the chambers to be used by the commission. This delayed the commencement of the hearings, frustrating Mr Cole. I do not know whether that was a genuine exercise in occupational health and safety or not. OH&S officials would not have been able to help greatly. I think it was an industrial relations matter, and I think it was designed to frustrate and show who was in charge. That is the problem, I suspect, with occupational health and safety: it becomes cheapened by industrial relations activities.

Senator MURRAY—This is my last question. I am very supportive of the proposition that the penalties and enforcement of existing law need to be resourced and implemented to ensure that the rule of law applies. But the legislation before us wishes to change the law. Don't you think

there is a lack of logic in evidence which says to us, 'The industry operates pretty well, in comparison to Victoria and WA in Queensland, New South Wales and South Australia, but we want you to change federal law,' which then changes their legal environment as well as yours? If it is a cultural issue or an enforcement issue isn't that where the emphasis should be, rather than on changing the law, which then disturbs other environments which are operating better than, say, Victoria and WA?

Mr Welch—That is a perspective which you might be better able to comment on than me, because you see Australia as a whole. I see Victoria as a part of Australia. The challenge we have is a culture of lawlessness here in Victoria, and I can speak with authority about that. If we need to change laws to prevent that lawlessness and if Victoria is the worst case then I presume it would apply equally well in all other jurisdictions.

Senator MURRAY—But isn't a problem of the enforcement of the existing law? If the existing law were properly enforced and resourced, with the proper penalties, and everybody complied with the law then you wouldn't have the same problems as you are outlining, would you?

Mr Welch—Enforcement of the law requires in our instance someone to complain about the fact that they have been wronged or that there is an issue that they would like to prosecute, in whichever jurisdiction. They are not going to do it, and unfortunately it may be in the minds of some senators that we are talking about huge corporations that are being timid—the national building companies, for example. Put them right out of your mind: the people who are most savagely and disturbingly affected are small businesses of five people or fewer, which covers the broad spectrum of industry—small subcontractors who are hopelessly overcome by the sheer scale of the industrial relations might of, say, the CFMEU. If you say that the law works well, it works well at a cost—a cost they cannot meet, which is a risk to their business that they are simply not prepared to take. Under those circumstances, you have a law that may be able to function but is not going to be used because the consequences for the people who chose to exercise it would be more profound than they would ever wish to have visited upon themselves in their lives. You need to change the law to allow small enterprises some sort of equitable point of view or negotiating position against much larger organisations. In this case of employers versus the CFMEU, small employers need help.

Senator COOK—Chair, in view of Mr Welch's answer to some of the other questions, I have some further questions for him. May I ask them?

CHAIR—I am sorry, Senator Cook, but you know the rules: I apply them without fear or favour and you are out of favour, I am sorry! Mr Welch and Ms Attwood, thank you very much for your contributions.

[12.24 p.m.]

CERRITELLI, Mr Vincent, General Manager, Building and Construction, Central Equity Ltd

CHAIR—Welcome. The committee prefers all evidence to be given in public. However, it will consider any request for all or part of evidence to be given in camera. I now invite you to make a statement to the committee. Thank you for facilitating the visit of the committee to your site this morning.

Mr Cerritelli—The fact that I am here is a result of this morning's visit by senators present here today. I will give a little background. Central Equity is a property developer in Melbourne. We are a public company. We were listed on the Australian Stock Exchange in 1987. We are developers of inner city residential apartments and have been for over 10 years. Since the early 1990s we have developed over 50 projects, including towers and residential estates, providing over 7,000 residences generally in the Melbourne inner suburbs to a value of over $2 billion. Our company is a developer; it is not a builder. We appoint builders, such as the builder you witnessed this morning, Multiplex Constructions. We appoint such builders after a tender process. I am not close to industrial relations, because we leave that up to the builders, so I may have limited answers to some of your questions.

CHAIR—Is your company purely developing in Victoria, or do you develop outside of Victoria?

Mr Cerritelli—No, we are a purely Victorian developer—or, I should say, a Melbourne developer. We develop nowhere else.

Senator MURRAY—One of the terms of reference of this committee's inquiry is political donations in this industry. Does your publicly listed company make donations to political parties, candidates or individuals in the political process?

Mr Cerritelli—I do not know. I cannot answer that.

Senator MURRAY—Would you take that on notice?

Mr Cerritelli—Yes.

Senator MURRAY—What I wanted to do was follow up with another question. There have been allegations in the media, and these have been said to me privately, that companies feel under pressure to make donations. In other words, they do not make them because they want to but because they feel they have to. I would like to know (a) whether your company makes donations and (b) whether it has a board policy which governs the way in which those donations are made, if it does make them. If it does not, I would like to know whether there is any sense of obligation—in other words, a sense that it is part of doing business, as it were.

Mr Cerritelli—Sure. I take that on board.

Senator JOHNSTON—Your company is involved in inner city residential construction, in contrast to commercial construction. As the developer—that is, the person who puts the project together in terms of finance, design and market response—do you perceive that there is an issue with respect to your project feasibility arising from industrial relations in the building industry in Victoria?

Mr Cerritelli—There are many factors that affect our feasibility, and certainly the cost of labour is one. But there are many others that are involved. We factor the cost of labour at any given time into that feasibility. It is just part of it, one number amongst many others that go into the feasibility on whether that project is viable or not.

Senator JOHNSTON—How long have you been involved in the inner city residential development industry?

Mr Cerritelli—Over 10 years.

Senator JOHNSTON—Have you observed a change in the cost structure with respect to labour?

Mr Cerritelli—Certainly costs have gone up over that time, as you would expect. Obviously we would all like costs to go down or stay the same, but that is unrealistic. Costs have gone up over that period of time.

Senator JOHNSTON—Unreasonably so?

Mr Cerritelli—I am not sure about that. There are lots of factors that have affected the increasing cost of development. I see that as just one of them.

Senator JOHNSTON—Why have you become before the Senate committee today? What do you seek to achieve by appearing?

Mr Cerritelli—As I said, senators visited our development this morning at Melbourne Tower/City Tower in City Road, South Melbourne. I basically wanted to put across our perspective on certain things. I welcomed the visit. I am not sure how many of the senators had gone to a multistorey building previously, so I think it will help their view on certain things. I also wanted to say that in most of our developments over the years we have had no unreasonable construction delays. I guess that is my focus.

Senator COOK—Thank you for coming forward, Mr Cerritelli. Are you here because the unions intimidated you into coming and told you to say what you have said, or are you here because you want to put your entrepreneurial and managerial expertise in a public spirited way before this committee?

Mr Cerritelli—Definitely the latter.

Senator COOK—Thank you. We heard this morning that the project we visited is ahead of time—I think several weeks or months ahead of time.

Mr Cerritelli—It was due to be finished in two stages: the first stage in late September and the second stage in November. We expect it to be completed at the end of August.

Senator COOK—That is quite a good performance. We heard that it was ahead of budget as well. Is that right?

Mr Cerritelli—In terms of the builder's budget I heard that same answer, so I need to look into that. In terms of our budget, it is on budget and it is what we signed up the builder on and it is within an expected range of movement due to some minor changes.

Senator COOK—How do you rate this—as a good, bad or average performance?

Mr Cerritelli—I would say that this was a very good performance. In view of that particular builder's professionalism, it was to be expected. As you can imagine, we have employed a number of builders. Generally we have found that our jobs have been finished on time or earlier. There have been some exceptions to that, as you would expect, after having completed over 50 development projects.

Senator COOK—We heard from the builder that, while there had been industry-wide factors relating to industrial relations delays on that site, no factors generated on that site had caused industrial relations delays. Is that your understanding?

Mr Cerritelli—That is my understanding.

Senator COOK—And the occupational health and safety record on that site has been very good. There have been one or two accidents but, given the number of people involved, the record is regarded as being good? Is that your understanding too?

Mr Cerritelli—That is my understanding. You need to keep in mind that, as you saw this morning, there are over 500 men in close proximity. It is a good record and of course we welcome it. We do not want to see accidents on our projects.

Senator COOK—Accidents cause delays, extra costs and human suffering, and you do not want to see that.

Mr Cerritelli—Exactly.

Senator COOK—This morning our attention was drawn to an article in the *Australian Financial Review* dated 11 May 2004. I do not expect you to identify it at this distance, but it is headed 'Vic building industry shows few signs of slowing'. The first paragraph says:

Victoria has reported another $1 billion-plus month for building approvals, with commercial property and housing leading the charge, despite forecasts of a slowdown in building activity.

The rest of the article is about what the actual performance of the industry is at the moment. Is it fair to say that the industry in Victoria is performing well at the moment, despite predictions of a downturn?

Mr Cerritelli—I am not sure how much expertise I would have in answering that particular question.

Senator COOK—We will leave it to the journalist, then. I am advising you in advance that I am now going to put you on the spot. We heard this morning that the state government is reducing workers compensation premiums but not reducing benefits. In future contracts would you be looking forward to those cost savings being passed on to you in the form of cheaper costs for building, and would you as a developer pass them on to consumers who are buying apartments from you?

Mr Cerritelli—Most of our cost structure is based on supply and demand and the market forces at any particular time, so we would do whatever it takes to continue.

Senator COOK—That is an extremely honest answer. Thank you very much for it and thank you for your time.

CHAIR—Thank you for appearing, Mr Cerritelli.

Proceedings suspended from 12.36 p.m. to 1.24 p.m.

BROMBERG, Mr Mordy, International Vice-President, International Centre for Trade Union Rights and President, Australian National Committee of the International Centre for Trade Union Rights

CHIN, Mr David, Vice-President, Australian National Committee of the International Centre for Trade Union Rights

GIBIAN, Mr Mark, Member, Executive Committee, International Centre for Trade Union Rights

LAWRENCE, Mr Anthony John, Secretary-Treasurer, Australian National Committee of the International Centre for Trade Union Rights

CHAIR—I welcome our next witnesses, who are from the International Centre for Trade Union Rights. The committee prefers all evidence to be given in public. However, it will consider any request for all or part of evidence to be given in camera. The committee has before it submission No. 77. Are there any changes or additions that you wish to make to the submission?

Mr Bromberg—No.

CHAIR—I invite you to make a brief opening statement.

Mr Bromberg—If the committee pleases, I will firstly indicate apologies for three members of the panel constituted by ICTUR to provide you with a report. Professor Keith Ewing and John Hendy QC are both located in the UK. They have been involved in the preparation of the report but are unable to attend. Both are eminent experts in the field of international labour law. Tony Slevin, a Sydney barrister, also apologises for not being here today.

ICTUR is an organisation which is accredited with both the United Nations and the International Labour Organization. We seek to carry out our activities in the spirit of international instruments, particularly ILO conventions. The Senate committee will be familiar with the fact that we have made a number of submissions to it before. I want to put our report in some context. The context is that Australia has assumed international obligations including ILO conventions and also, relevantly, the right to strike, which is recognised by the Universal Declaration of Human Rights. These obligations, in our submission, are important for a number of reasons. Firstly, they are obligations which put in place a standard which has tripartite acceptance. These are not union wish lists. They are, certainly with the ILO conventions, conventions which have been adopted through a tripartite process with the equal involvement of employers, employees and government.

Secondly, the core conventions of the ILO are regarded in international law as human rights, so we are not simply talking about labour standards. As far as the core conventions are concerned, and our report principally focuses on the core conventions, we are dealing with human rights and we ought to recognise the importance of observing fundamental human rights. Thirdly, Australia does play a role on the international stage and, in our view, it is important that

Australia demonstrates that it is a worthwhile international citizen, and in that respect it should observe the international obligations that it has voluntarily assumed.

The 2003 bill will breach Australia's international obligations in a number of very significant ways, and that is what our report focuses on. I will leave the nature of the breaches to be summarised by others on the panel. It is pertinent to note that you are at the end of a process that started with a royal commission. It is pertinent to especially note in that respect that one of the failings of the royal commission is that, despite the fact that it was taken to much of the international jurisprudence that we have taken you to in our report and despite the fact that it commissioned a discussion paper from academics at Monash University which dealt at least with the right to strike and international law in respect of that—despite all of that—the report ignores Australia's international obligations and does so in circumstances where the commissioner places a great deal of weight on the observance of the rule of law.

Much of the report, it seemed to us, was prefaced on the notion that there needed to be something done to ensure that the rule of law is observed. We say quite pointedly that, despite having the material before the commission, it ignored the international rule of law and did so on the quite specious basis that the criticisms made by ILO committees of experts about Australia's noncompliance, under the Workplace Relations Act, with international law are criticisms that have been criticised by this government. That is about all that the royal commissioner said about it before moving on to other matters. We say that that was not an appropriate conclusion. The royal commission should have considered Australia's international obligations, and we hope that the Senate gives those obligations due weight.

We note in particular that yesterday the government signed the free trade agreement with the United States. The relevant paragraph dealing with international labour standards says:

> The Parties reaffirm their obligations as members of the International Labour Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) (ILO Declaration). Each Party shall strive to ensure that such labour principles and the internationally recognised labour principles and rights set forth in Article 18.7 are recognised and protected by its law.

We would say two things to the government and to the Senate in this respect. Australia has voluntarily taken upon itself the obligation, as recently as yesterday, to strive to ensure that our legislation complies with our international labour obligations. We would ask the Senate to do two things in the process of striving to ensure compliance. The first is to reject the bill and the second is to urge the government to amend the Workplace Relations Act insofar as it currently fails to comply with Australia's international labour obligations. I will now hand over to Mr Chin, who will continue the opening statement.

Mr Chin—ICTUR has made an assessment of the 2003 bill by reference to, principally, two core ILO conventions. The first is convention 98, the Right to Organise and Collective Bargaining Convention. That enshrines the principle of voluntary collective bargaining, which in turn states that the parties should be free in their discretion to determine the level at which bargaining takes place—that is, either single employer, multi-employer or industry-wide. The second is by reference to convention 87, the Freedom of Association and Protection of the Right to Organise Convention, which the ILO committee of experts has determined provides that the right to strike is an intrinsic corollary of the right to organise protected by that convention, and

by the international human rights conventions referred to by Mr Bromberg. By reference to those international standards, we have in our submission determined at least five broad breaches of those conventions. I will outline them now. The first is the 2003 bill's prohibition on multi-employer bargaining or pattern bargaining. The second is the attenuation of awards by reduction of allowable award matters. The third is the limitation on the scope of collective agreements by an expansion of the definition of objectionable provisions. The fourth is the reduction in the scope for union right of entry in workplaces. The fifth is no less than a virtual ban on all industrial action in the building and construction industry, so far as we can see.

With respect to pattern bargaining, the Senate has not met with the provisions in the 2003 bill for the first time. In our submission, the provisions in this bill were previously rejected by the Senate in the Workplace Relations Amendment Bill 2000 and also in the bill that became the genuine bargaining act of 2002. The prohibition on pattern bargaining in this bill infringes upon the fundamental right of industrial parties to determine the level at which they form collective agreements. This determination has already been observed by the ILO supervisory bodies on no less than three and possibly four occasions since 1998. We deal with that in the appendices to our submissions, and I invite members of the committee to look at those at their convenience. The committee of experts have called upon the Australian government to take steps to review and amend the Workplace Relations Act to ensure that collective bargaining will not only be allowed but encouraged at the level determined by the bargaining parties themselves and not by way of stipulation in legislation. The 2003 bill presently before this committee is a retrograde step when regard is had to the assessment of the ILO committee of experts. Mr Gibian has some remarks to make in relation to the industrial action prohibitions and restrictions contained in the bill, and I invite Mr Gibian to do so.

Mr Gibian—Briefly, in relation to the industrial action provisions of the bill, the starting point for considerations of those provisions must be an understanding that the present common law of Australia and various legislative provisions have been found to inadequately provide protection for the right to strike as it is enshrined in the International Covenant for Economic, Social and Cultural Rights and in the ILO conventions which have already been referred to. This bill, if enacted, would take Australia further away from compliance with its international obligations in relation to the right to strike. The submission that we have made has endeavoured to highlight the principal areas in which that would occur. Briefly, they are as follows.

The bill proposes an unprecedented move which would have the effect of rendering as unlawful all industrial action other than a very narrow category of excluded action and making individuals or organisations who engage in such industrial action potentially liable for very significant civil penalties of up to $110,000 for an organisation and $22,000 for an individual. The second area of concern is the further narrowing of the type of industrial action which would be protected. Further limitations are proposed in terms of the motivation, the types of claims which could be made in connection with industrial action, the manner in which industrial action could be organised or put into effect such that even participation in the organisation of industrial action by other unions or employees of other employers would render it unprotected. The third area of concern is the secret ballot provisions. It considers that those provisions are both unnecessary in their complexity, and the unwieldy nature of those provisions would be such as to, in effect, frustrate any attempt to undertake industrial action within the limits which are proposed by the bill.

Senator JOHNSTON—Who is the lead spokesperson for the centre?

Mr Bromberg—I am happy to take on that role, although if you have questions about particular sections of our report I might hand over to others who have had more responsibility for those sections.

Senator JOHNSTON—How long has the centre been in existence?

Mr Bromberg—Internationally the centre has been in existence since 1987. In Australia it has been in existence since 1991. I think we have given you the detail about the International Centre for Trade Union Rights on page 7 of the submission, in the introduction. The committee was established in Australia in 1993.

Senator JOHNSTON—Where does it derive its funding from?

Mr Bromberg—We derive our funding from membership subscriptions. We have never had funding from any other source.

Senator JOHNSTON—How many members does the centre have?

Mr Lawrence—We have approximately 60 to 80 members at the present time.

Senator JOHNSTON—Would you be prepared to present a list of those members to the committee?

Mr Bromberg—I can tell you the kinds of members we have, if that is of assistance. Our membership would probably fall into three broad areas. The first would essentially be lawyers involved in labour law. In that respect we would have individual lawyers who from time to time or regularly appear for unions. We would also have lawyers who from time to time or regularly appear for employers. The second broad category would be academics, and we have a number of academics who are individual members. The third category would be unions. We have quite a number of unions who are members. We are open to any person, be they an organisation or an individual, who is prepared to support our objectives. Our objectives are, essentially, the support and promotion of tripartite instruments adopted by the ILO.

Senator JOHNSTON—Would you be prepared to provide a copy of your membership list and your constitution to this committee so that we can identify how the centre functions and how broad its membership base is?

Mr Bromberg—I do not think that there will be a problem with the constitution. I think we would have to give some consideration to the membership list. That is only for this reason: I have no idea whether members who have joined desire to keep their membership confidential for whatever reason. So I have some concern about that and I think that that is a matter that would need to be considered by our executive.

Senator JOHNSTON—Could you take it on notice that as a member of the committee I would like to see the membership list? If your executive resolves not to provide it, let the secretariat know.

Senator COOK—On a point of order, Chair: I do not know how providing the membership list of this organisation is relevant to our terms of reference.

Senator JOHNSTON—I am getting to that.

Senator COOK—I think it is a questionable matter.

Senator JOHNSTON—I am certainly happy to make it relevant. Mr Bromberg, how much are the subscription fees?

Mr Bromberg—I think they are currently $500 for an organisation and $50 for an individual.

Senator JOHNSTON—So the individual lawyers are paying $50 and the unions are paying $500.

Mr Bromberg—Yes.

Senator JOHNSTON—So what is the percentage break-up of the funding—

Mr Bromberg—Organisations such as law firms are also involved, and they pay $500.

Senator JOHNSTON—What is the break-up spreading between law firms, unions and individuals in terms of the funding of the centre?

Mr Bromberg—I do not think that I can tell you offhand.

Senator JOHNSTON—Could you take it on notice for me?

Mr Bromberg—I could. I would like to say that we are a voluntary organisation. The resources that we bring together are largely those of volunteers, including a number of lawyers and academics who are prepared to put their own time into doing the sort of work that you have before you here. The funding of our activities goes to one principal source. Most of our subscriptions—probably about 70 per cent of them—go to fund a well-respected international journal called *International Union Rights*, which is put out through our London office. The rest of our funding goes to pay for our postage and stationery.

Senator JOHNSTON—If I could ask for your last annual report, that would be interesting, together with the centre's accounts. I would be interested to see just how the centre functions. Are the four people before the committee today, all lawyers?

Mr Bromberg—Yes, we are all lawyers.

Senator JOHNSTON—In practice?

Mr Bromberg—In practice, yes.

Senator JOHNSTON—Are you predominantly in private practice, in other words not retained by the government?

Mr Bromberg—From time to time we are briefed by governments. Predominantly, I think that is probably right.

Senator JOHNSTON—How is it that the—

Mr Bromberg—I would like to clarify: you are asking for information about the Australian national committee, are you?

Senator JOHNSTON—I am asking about the witnesses that are here today.

Mr Bromberg—No, in terms of the information you sought.

Senator JOHNSTON—Sorry, I was asking in terms of the Australian national committee—is it broken up into state divisions?

Mr Bromberg—No, but the International Centre for Trade Union Rights is an international organisation.

Senator JOHNSTON—I meant the Australian version.

Mr Bromberg—Yes.

Mr Chin—The report prepared by ICTUR which is submitted before the committee, is a report and a product of the International Centre for Trade Union Rights internationally—that is, collaboratively with those in our London office and not restricted to an effort of the Australian national committee per se.

Senator JOHNSTON—How much practical experience actually on building sites in Victoria do each of you have?

Mr Bromberg—Are you asking whether we have worked on building sites?

Senator JOHNSTON—Have you worked on a building site; have you been on a building site?

Mr Bromberg—I have, yes.

Senator JOHNSTON—When was that?

Mr Bromberg—I think about 20 years ago I worked on a building site.

Senator JOHNSTON—What about more latterly, gentlemen? Have any of you been on a commercial construction site in the Melbourne CBD in the last five years?

Mr Bromberg—Speaking for myself, I do not know that I have actually been on a building site. I have passed many. I know the building industry reasonably well. I have been involved as an industrial relations practitioner in a number of cases which have dealt with that industry. I have heard a great deal of evidence about that industry through my work as an industrial practitioner. I assume—and you might have to ask each of us—that that would probably be fairly typical.

Mr Chin—For my part, I engage in the practice of some prosecutorial work for the WorkCover authority of New South Wales often involving accidents and breaches of safety taking place on building sites, but I must admit confined within the jurisdiction of New South Wales.

Senator JOHNSTON—Let us just clarify the point. You said 20 years; I think the answer is that you have not, in the last five years, been involved on the building site and observed the way commercial construction is managed and labour relations practically unfold—is that a fair and reasonable assessment of your position?

Mr Chin—That question presupposes that an understanding of that nature can only be gained by working at the site.

Senator JOHNSTON—It is a direct understanding, isn't it, as opposed to hearsay or viva voce evidence in some forum.

Mr Chin—Hearsay evidence is not admissible in criminal prosecutions at least in the courts in New South Wales. That, as I understand it, can be contrasted with the manner in which evidence is taken in royal commissions.

Senator JOHNSTON—But your knowledge arises from what someone has told you?

Mr Bromberg—Our knowledge of industrial relations and our knowledge of the topic, which we have made submissions about, arises as a result of our expertise in the area. That expertise extends to the building industry.

Senator JOHNSTON—I am talking about the practical way the building industry functions. I am not talking about the law; I am not talking about the ILO conventions. I am talking about the way the practical conduct on building sites in the CBD in Melbourne unfolds. I am taking it that you do not have any direct personal experience other than what people have told you.

Mr Bromberg—I perhaps cannot claim to have the same level of experience as the royal commissioner had because I was not involved in every aspect of the royal commission. But I sat through the royal commission and heard much of the same evidence that the royal commissioner heard.

Senator JOHNSTON—Let us take the right to strike as a given—a legitimate part of the industrial scenario in this country. What do you think is the resolution, remedy or solution where that right is being abused or subverted improperly?

Mr Bromberg—What do you mean by abused or subverted? Your question is pregnant with an assumption.

Senator JOHNSTON—Sure. Let us say the right to strike is being used not in accordance with the ILO convention but beyond that. Let us say it is being used repetitively in an extortionate, violent way such as to undermine the commercial integrity of an employer. What is the solution to that scenario?

Mr Bromberg—If it is violent, the existing criminal law would be more than sufficient to deal with it.

Senator JOHNSTON—Let us segregate that from existing criminal law, because we know about that. We are always talking about industrial relations as opposed to criminal law; we prefer industrial relations law instead of criminal law. What is the solution in an industrial relations legal framework? I do not see that in your submission.

Mr Bromberg—Our submission makes it clear that the right to strike ought to be respected. The right to strike is not an unlimited right. The right to strike is limited to action taken in furtherance of industrial claims: for instance, it is limited to action, by the Workplace Relations Act, which does not involve damage to property or defamation. There are a number of other such limitations that I think you will find in section 170MT of the Workplace Relations Act.

Senator JOHNSTON—So the remedy is a legislative one, isn't it? Where the right is being abused, the remedy for the government of the day is to legislate, isn't it?

Mr Bromberg—Probably not, because the common law in this country is so wide in its impact that the right to strike has never been regarded as lawful under the common law. In fact, the opposite has been the case. It has been necessary to legislate for the right to strike in Australia because of the common law position.

Senator JOHNSTON—Has the centre ever presented a dissertation on the 'no ticket, no start' scenario that pervades most commercial building sites in the Melbourne CBD?

Mr Bromberg—No.

Senator JOHNSTON—Do you accept the provisions of clause 173 of the bill that deal with coercion? Do you believe that that portion of the bill is a legitimate attempt to outlaw coercion? Are you not familiar with that clause?

Mr Bromberg—I am just trying to get the clause. We do not have a copy of the clause with us.

Senator JOHNSTON—I am sorry; I cannot help you. I might be able to help you.

Mr Bromberg—You will also have to explain what you mean by coercion. Economic coercion is an accepted part of collective bargaining which the Workplace Relations Act enshrines.

Senator JOHNSTON—It is defined in the act, as you say, and in the bill. But you have not made note of those portions of the bill that deal with coercion both by unions and by employers?

Mr Bromberg—Generally our view is that if you are talking about economic coercion by the exercise of a right to strike then that is legitimate. It is accepted as legitimate under international law. That is collective bargaining. That is what it is about. An employer has the right to impose economic coercion through lockouts and the employees collectively can strike as a means of imposing economic coercion on employers, as long as that is done as part of a bargaining process for reaching collective agreements.

Senator JOHNSTON—So you support lockouts?

Mr Bromberg—Yes.

CHAIR—Mr Bromberg, Senator Johnston put to you a number of questions requesting information about your organisation. It is entirely a matter for you whether or not you provide that information. You are not compelled to provide it, other than by resolution of this committee or by resolution of the Senate. I just make that clear because Senator Cook took a point of order at the time which I did not rule on.

Mr Bromberg—Thank you.

Senator MURRAY—Gentlemen, thank you again for a detailed submission. We on this committee have benefited from several over the years. I want to stay with the freedom of association provisions. Although the ILO convention does not say it, would you agree with me that the freedom of association provision in the ILO convention respects the right not to join and not to be a member as much as it respects the right to join and to be a member, providing there is no coercion either way? Would you agree with that interpretation?

Mr Bromberg—The answer is that it is a source of much debate. Freedom of association as a concept was based on the notion of freedom to associate rather than freedom not to associate. That is its fundamental objective. More recently—particularly in the approach taken in the Workplace Relations Act—freedom of association has been used as a concept which includes freedom of association together with freedom of nonassociation. Certainly the Workplace Relations Act deals with both sides of the coin. At an international level that is more debatable.

Senator MURRAY—The difficulty we have is that the Cole commission, this committee, other inquiries and individual senators are and have been approached by people both formally and informally on the basis that they resent being forced to join organisations. I am a great supporter of collective bargaining but I think the 'no ticket no start' concept that if you are not a union member you cannot get a job on a site is offensive to the principle of freedom of association. That is my personal opinion and I carry that opinion through as a legislator. If the law were to specifically outlaw such practices as 'no ticket no start', would you see that as in any way contravening international law?

Mr Bromberg—I do not think we have ever said so. As I said to you, I think the debate internationally is inconclusive as to whether there is a freedom to not associate. The Workplace

Relations Act already deals, through section 298, with the kinds of impediments you speak of. Coercing someone to join a union is already a breach of section 298.

Senator MURRAY—You accept that as a reasonable principle at law?

Mr Bromberg—I do personally. From an international perspective, it is—

Senator MURRAY—But does your organisation? I am really interested in that. Your organisation was specifically set up to express a view on Australia's relationship to our international obligations. I really would like a response from your organisation rather than your personal one, if I can get it.

Mr Bromberg—I suppose the difficulty is that, from an international law perspective, the question has not really been dealt with to a degree where one can say, 'Yes, international law does or does not recognise the freedom to not associate.'

Senator MURRAY—So there has been no jurisprudence, no tribunal finding nor anything of any nature that points to that issue?

Mr Chin—There has been some jurisprudence in other jurisdictions. For instance, I am aware of a Canadian Supreme Court decision that held that the positive right of freedom of association does not necessarily entail the negative right not to form associations and that in some circumstances positive encouragement of that right is legitimate.

Senator MURRAY—Can I interrupt so that I understand, because lawyers are careful with words. Positive encourage I support; duress I do not. They were not implying that duress was all right, were they?

Mr Chin—I think that is correct. But one enters into a territory of some uncertainty as to the line between what is positive encouragement and what might be regarded by others as duress. For instance, positive encouragement by way of union preference clauses in awards and so forth would be well within the positive right of freedom of association; others may take a different view.

Senator MURRAY—Yes.

Mr Chin—But certainly under international jurisprudence those forms of encouragement are perfectly legitimate and consonant with the fundamental ILO right.

Senator MURRAY—I would draw distinction between something which is in writing in an agreement and is a preferment clause and somebody with folded arms swinging a baseball bat at a building site entrance. One is duress and the other is positive encouragement. I have one last question on the same theme. You say in your submission, at pages 9 and 10:

... the *ILO Declaration on Fundamental Principles and Rights at Work* which was adopted at the International Labour Conference in 1998.

You say it 'declares forcefully' a number of things, including:

(d) the elimination of discrimination in respect of employment and occupation.

I presume you quote that because you support that.

Mr Bromberg—Yes.

Senator MURRAY—It is problematic, though, isn't it? If you take into account the occupations of priests, rabbis and mullahs, women are discriminated against in occupation and employment. If you take a political party in this country which says you cannot be a member of that party and be employed unless you are a union member, that breaches that item. There are constant breaches in my view in daily law, in religion, in politics and elsewhere with respect to that aspect of employment and occupation.

Mr Bromberg—Each of the items set out in the paragraph that you refer to are referable back to very detailed conventions that deal with those subject matters. For instance, convention 111 deals with discrimination in employment. So the reference to eliminating discrimination with respect to employment occupation needs to be read in the context of the fact that there is a very detailed convention that deals with that subject matter. That convention does have some qualifications in it. I have not looked at it for a long time, but it does, from my recollection, allow for some conduct which might be seen as discriminatory but which, perhaps for religious or other reasons, is exempted.

Senator MURRAY—Simply because it is just too hard.

Mr Bromberg—I suppose at the end of the day these conventions seek to balance competing interests and competing rights. In my view they generally achieve that. They achieve it through a very longwinded process involving all the relevant interest groups coming to a compromise on the issue. That is why we emphasise that these are standards that are not partisan in any particular direction. They have been the subject of rigorous scrutiny from all interested parties.

Senator COOK—I forget which philosopher said it, and I have not got the words right: no matter how strong are the grounds to question motive, first deal with the merit of the argument. I thought earlier you were being examined on motive. I would like to examine you on the merit of the argument and pick up where we just left off in this discussion about the right to strike and no ticket no start. I have great respect for Senator Murray, but I respectfully disagree with him about no ticket no start. I am entitled to be an opinionated person because I am elected for that purpose in framing law, and I express that view. Isn't the issue here to look at the collective bargaining convention? If workers are able to freely associate and bargain that there will be no free riders on their deal—that people who wish to access the deal who come to the work site later are required to be members of the union—under the ILO convention under collective bargaining that is a competent decision to be negotiated between the workers and the employers.

Mr Bromberg—There has been some jurisprudence on bargaining fees. The ILO committee of experts has considered the issue of bargaining fees. Again it is a little while since I looked, but generally the approach has been that bargaining fees—within some limits—are considered acceptable on the basis that the employees have operated as a collective and that the cost of putting in place a collective agreement should be shared, and there ought be no free riders, as

you put it. I suppose there is a distinction between being required to contribute to the collective agreement made and being required to join an association.

Senator COOK—My question was: isn't it competent, though, under the collective bargaining convention, for a bargain to be struck between a union, representing the collective, and an employer that free riders will be obliged to join the organisation or join in with the collective that struck the bargain—the union, in this case?

Mr Bromberg—I do not think there is any doubt about that, especially where the majority of employees vote for the collective agreement which includes that clause.

Senator COOK—Does it therefore follow that we are in breach or potentially in breach of the collective bargaining convention if our law does not recognise that?

Mr Bromberg—Yes, potentially so, and that was a matter that was recently the subject of some legislation.

Senator COOK—Yes.

Mr Lawrence—It is one of the reasons why the conventions are deliberately not prescriptive, because the conventions take the view that, as far as possible, matters should be left to the bargaining parties as to what is contained in whatever agreement eventuates from that process.

Senator COOK—Yes. In fact, the history of Australian industrial law, from the very earliest establishment of the Conciliation and Arbitration Commission, defined what is an industrial matter, which in fact limited bargaining rights—which, under the convention, arguably is too narrow a limitation of those rights.

Mr Lawrence—That is right.

Mr Bromberg—And there is also an argument that, from a constitutional perspective, the Commonwealth parliament has a greater capacity to deal with industrial relations than the capacity that is given under the Workplace Relations Act. In other words, the act limits its activities to industrial matters and it defines them fairly restrictively. It need not do so; the parliament has far wider powers than that under the Constitution.

Senator COOK—Do you have any comments to make, then, about the parliament legislating in the industrial arena not from the constitutional head of power about industrial relations but from the corporations power—a constitutional power put in the Constitution for another purpose?

Mr Bromberg—I suppose that we would clearly support the use of the treaties power as a source of legislative power.

Senator COOK—The High Court has upheld the treaties power.

Mr Bromberg—Yes, it has. Specifically—and I noted that this was in the discussion paper given to the royal commissioner—the High Court in Victoria and the Commonwealth referred to

the right to strike as being an international right in relation to which the parliament was entitled to legislate domestically. I am not sure that I can answer the question about the corporations power without giving it greater thought, to be honest. I do not know whether others can.

Senator COOK—I appreciate that.

Mr Bromberg—It is really beyond the scope of what we came here to talk about. I suppose, like any legislation, perhaps it is not the source of the power but ultimately the fairness of the result which might really matter.

Mr Lawrence—That is what I was going to say. The conventions provide a role, obviously, for national law to operate within the confines of the conventions, but say nothing about where national laws and the authority to make them may spring from. But they do focus then on the degree to which those laws infringe or otherwise the relevant convention.

Senator COOK—Because I do not have a lot of time I want to go through a number of popular issues related to this general inquiry. We are presented—as recently as this morning—with this proposition: there is widespread coercion in this industry; it cannot be proved because the people who are coerced will not come forward, and they certainly will not come forward for an inquiry like this because, if they do, they will be identified and coerced; therefore, the evidence of coercion cannot be properly adduced in any material way. But we are then invited to take the word of those who allege that this coercion exists that it is widespread. As a foundation upon which to make a considered judgment, that seems to be very flimsy.

The next proposition put to us was that the powers involved in this legislation are necessary to prevent this coercion from occurring and, further to that, that the interim building task force is unable to do its job effectively because it does not have—and here is the other element of coercion—coercive powers to compel evidence from those people who are allegedly the subject of coercion. What we are building here is a scale of coercive powers by the state, if we were to go down this course. Do you have any comment to make about that type of structure for this field of industrial relations, given that you have practised in industrial relations law and have, as part of your association, an international perspective on these matters?

Mr Bromberg—I think one needs to note that there has been a royal commission into the industry. That royal commission had some of the most extreme coercive powers available to any authority. It had powers to compel witnesses. It had power to require witnesses to answer questions—in other words, the right to silence was not a right that any witness brought before the royal commission had a right to maintain. That royal commission did not find any systemic coercion or corruption of the kind that rumour has it. As I understand it, it came to a number of conclusions—yet to be tested in the courts, largely—about individual persons and individual conduct on both sides of the industrial fence—some in relation to employers and some in relation to union officials.

None of that was particularly surprising to anyone who works in the area. I think that, overall, the royal commission did not tell us anything we did not know before. So the rumour mill remains just that, in my opinion. We have had a royal commission that, as I say, had the power to uncover the problem if there was a problem and it has not uncovered a systematic problem. It has found a number of individuals acted inappropriately in individual cases. We do not see that

as a platform for the kind of legislation that is before you. There is just no basis for that approach in our view.

Mr Chin—May I add that the kind of standards about which we are concerned are universally applicable. They are standards for which there are only very limited exceptions—for instance, essential services and some public sector employees. The construction industry does not fall within a legitimate exception to those standards.

Senator COOK—I turn now to the royal commission itself. It has been put to us that some of the practices of this royal commission in the way in which it conducted its own inquiry were unusual compared to royal commissions as a class. Do have any comments to make about that?

Mr Bromberg—I was involved in the royal commission as an advocate. I represented a number of parties who were called as witnesses before the royal commission. I probably spent the best part of four to five months either appearing in or preparing for proceedings before that commission. In my opinion, the starting point is the fact that a royal commission was not suited to the terms of reference that were given to it. When you look at the terms of reference you see that in large part the royal commission was asked to engage in an ideological debate. That is not a debate suitable for investigation through a royal commission. Royal commissions are good at finding out why there was a fire at Esso at Longford, they are good at discovering who is responsible for a train disaster; they are good at getting at facts. They are neither appropriate nor suitable for answering policy questions, especially policy questions which are, from any perspective, highly charged. That is your role, as far as I can see; that is really parliament's role. Insofar as the royal commission enters the political debate, in my view involving a royal commission in that task was inappropriate.

Senator COOK—In order to understand the nature of royal commissions, the contention put to us, and I invite your comment on it, is that a royal commission is not a judicial procedure—that is, it is not seen in the separation of powers as part of the judiciary. It is a creature of the executive, conducting an inquiry on behalf of executive government.

Mr Bromberg—That is absolutely correct. There is a common perception that a royal commissioner is a judge who is there acting in a judicial capacity—that is quite wrong. A royal commissioner is an administrator, exercising the administrative power of the government. Whilst the High Court has recognised that limited aspects of natural justice need to be applied, a royal commissioner is not bound to act, and does not act, like a judge. I will give you an example: one of the first things that Commissioner Cole did was sit down and have fireside chats with interested persons in the building industry—employer groups, and I think, to be fair, he invited unions and others, who largely did not participate. He took from those discussions a great deal of information. We do not know how he used it. The information that was given to him was never tested. No person that he sat with and gained information from in that context was ever cross-examined. Nobody knows what he was told, let alone whether it was accurate.

The informal way in which a royal commissioner can receive information is, of course, foreign to a court process. Even with the formal hearings that were conducted in a court-like setting, the rules of evidence were inapplicable and the right to cross-examine was very limited. The commissioner exercised a great deal of control. In fact, I recall one occasion where he basically said to counsel that they could cross-examine on this issue and that issue, but not on

anything else. That was within his rights as an administrator. It is something, of course, that a judge could not do.

In terms of procedure, I should say that it was an incredible experience for me—very foreign to anything I have ever seen before in a court setting. There was almost no time given for preparation; case studies were conducted in circumstances where those involved for people being accused of wrongdoing were provided a day or two before with 15 to 20 statements of witnesses who were going to accuse them of wrongdoing. The opportunity to consider the material, let alone the opportunity to test it, was very limited and inadequate.

Senator COOK—And that material was written in the report as evidence?

Mr Bromberg—Absolutely. He makes findings—and he is entitled to make findings; I am not arguing about that—but it needs to be understood that those findings are not made by reference to a judicial process.

CHAIR—I will follow up this point before we move off it. Given the experience of the way in which this particular royal commission was controlled, is there an argument for an amendment to the Royal Commissions Act to ensure that there is a greater application of natural justice to people either appearing before commissions or accused within royal commission hearings? There has been a great deal of criticism about the way in which this was run. I am wondering whether there is actually an argument for looking at the act that governs the formation of royal commissions to make provision for greater application of the rules of natural justice or the gathering of evidence, witnesses, et cetera.

Mr Bromberg—I think the position broadly is that the powers are vast, but the way in which different royal commissioners end up exercising their power and their discretion varies. So you get some royal commissions that are run very much like courts, and perhaps that is why there is a common misconception that they are like courts. Some royal commissioners have tended to see their role as being more in keeping with the standard judicial role; others have not. In some respects, the nature of this inquiry made it difficult, even for Commissioner Cole, because it was not just an inquiry about getting to the bottom of particular facts, it was an ideological debate. I, for one, would support some review of the royal commission powers because I think that, in circumstances such as some of those I saw in this royal commission, there is a very large risk of people's fundamental civil liberties being denied. Not only are their reputations tainted, but their capacity to continue in their employment as an organiser, or their livelihood, was affected.

Some of the worst things that happened in this royal commission included this: the royal commission would begin a case study—for instance, they did a case study on the building of Federation Square. What would happen with these case studies is that counsel assisting the royal commissioner would make an opening. The opening would appear on the front page of the next day's papers, before any of the evidence was called and before any of the evidence was tested. People's reputations were scarred in circumstances where, when the evidence was called, often the evidence that it was stated in the opening was going to be called was never called. Then, insofar as an opportunity was given to test the evidence, it was often the case, in my view, that the evidence did not come up to the allegations which were stated in the opening. What does a person do in circumstances where the story has come and gone and their reputation is damaged

before they are even given a chance to test the allegations against them? In my view, that is not appropriate.

Senator COOK—I am running out of time and I have a couple of other areas that I would like to cover. I do not want to limit your answer but I am going to have to try to cover it as quickly as I can, if I may. You raised the question of the Australia-US free trade agreement, which was signed overnight, but which, of course, does not come into effect unless the Senate adopts all the implementing bills. I should declare an interest: I am chairing the Senate inquiry into that free trade agreement. Rightly, you point out that enshrined in the document signed in Washington yesterday is a provision that recognises ILO conventions and calls on the governments to act jointly to use their best efforts to enforce them. This is a bit of a leading question, but then we have got that privilege on this committee. In effect, does that mean that, if a case is made in Australia that impresses our biggest trading partner—the United States—that this country is in breach of its ILO conventions, they are entitled to take trade sanctions against us and injure us economically?

Mr Bromberg—I think the answer to that is no. If you read closely the agreement, you will see that little is said by way of the enforcement mechanism which would allow such a complaint to be brought and heard.

Senator COOK—What the enforcement mechanism might be is not set out, but if you are in breach of the terms of the agreement the enforcement mechanism can then be decided by the United States Congress or perhaps by resorting to a WTO procedure. I hear your answer but will move on because I want to cover this ground quickly. One of the things that bedevils this debate is that terms in common usage in criminal law now frequently appear in arguments over industrial matters. For example, 'right of entry' is characterised as 'trespass', and 'bargaining' can be characterised as 'intimidation' or in some circumstances as 'extortion'. These words, which are dramatic language in popular currency, are used in industrial relations. It seems to me that there is a blurring of what are appropriate terms for the criminal jurisdiction, appropriate terms for the civil jurisdiction and appropriate terms for the industrial relations system. Are there any comments that you can make about this type of syndrome that we are now seeing?

Mr Bromberg—I think it is inappropriate. It really is a reversion to the culture that permeated through the common law a hundred years ago. One would hope that we have moved well beyond that, but it seems that we have reverted to it to some degree.

Senator COOK—We have not reverted to it, but some commentators seem to have reverted to it. These are well-settled areas of the law, and the terms as I understand them are appropriate to those provinces of the law; they are not interchangeable.

Mr Bromberg—No, they are not. As I said before, economic coercion—again, that is a term that has its own colour—economic pressure is part and parcel of collective bargaining; that is the nature of collective bargaining. We used to have a system of conciliation and arbitration where, instead of the application of economic pressure, there was an independent arbitrator who determined a balanced result. Given that we have moved to a collective bargaining system, economic pressure is part and parcel of the fabric of that system. So it is wrong, in my view, to take economic pressure and wrongly characterise it in the language of the criminal law. There is no doubt that it is economic pressure, but it is a legitimate part of the system.

CHAIR—Unfortunately, Mr Bromberg, we will have to conclude there. I am sure that if any senators have any questions they want to pursue further with you, they will be happy to put them in writing and ask you to respond. Thank you all for your attendance.

[2.34 p.m.]

KONZA, Mr Mark, Deputy Commissioner, Small Business, Australian Taxation Office

READ, Mr Ian, Assistant Deputy Commissioner, Small Business, Australian Taxation Office

CHAIR—Welcome. The committee prefers all evidence to be given in public; however, it will consider any requests for all or part of evidence to be given in camera. The committee has before it submission No. 120. Are there any changes or additions you wish to make to the submission?

Mr Konza—No.

CHAIR—I invite you to make a brief opening statement.

Mr Konza—Thank you for this opportunity to speak to the committee. In responding to your request that we appear before the committee, the ATO submitted a copy of its submission and statement to the Royal Commission into the Building and Construction Industry, our compliance plan and our public updater on activities in this industry. From these documents it can be seen that the tax office has had a close interest in the building and construction industry for a long time. The industry contains a number of enduring compliance risks with which we have been dealing for number of years.

The ATO remains active within this industry. So far this year we have raised over $20 million in tax and penalties in income tax and $28 million in GST in general audits; more than $103 million in tax and penalties in income tax and GST in large business audits; and more than $33 million in tax and penalties in phoenix cases. We have wrapped up the bodgie labour-hire schemes, raising more than $124 million in tax and penalties over last few years, although we retain a watching brief on this issue. We have also been reviewing the integrity of the Australian Business Register and reviewing alienation cases to ensure that personal services income legislation is being followed. Of course, these are part-year results and more casework will be finalised before the financial year closes.

The ATO has about 260 people in different specialist areas working on the compliance risks associated with the building and construction industry. Further, the commissioner has steadily strengthened our serious noncompliance investigative capability and we have a number of major investigations under way in conjunction with the Australian Federal Police. We continue to work with industry to address the issues. Through top-down inquiries on major projects, walk-ins on sites or the Building and Construction Industry Forum, the ATO is active in the industry. We seek to work with those who want the best for the industry. We seek to detect those who try to avoid their obligations.

Over the last few years the ATO has raised over $500 million in tax and penalties through its investigations. The ATO has actively contributed to the implementation of the recommendations of the Royal Commission into the Building and Construction Industry. The commissioner very quickly implemented one of the royal commission's recommendations and established the

Building and Construction Industry Forum, which includes key players from the industry. He has asked the forum to initially focus on, but not be limited to, the specific taxation concerns identified in the royal commission. Within the limits of our legislative environment, we are working collaboratively with state revenue offices and other government departments. We have concluded a memorandum of understanding covering information transfers with ASIC.

In conclusion, noncompliance with taxation laws by some within the building and construction industry remains a significant concern for the ATO. Our tax system must be fair for everyone and people must have the confidence that the system is working properly. To make this happen the ATO has devoted a significant active compliance effort to this industry and will continue to give it ongoing, intense scrutiny. However, the tax office is also keen to work with all other participants in the industry in resolving these issues and we believe that this cooperative relationship is advancing well.

Senator MURRAY—Mr Konza, do you have a memorandum of understanding with the building industry task force?

Mr Read—With the interim task force?

Senator MURRAY—Yes.

Mr Read—No, there is no memorandum of understanding.

Senator MURRAY—Is there a reason for that? Is it impossible because they are not a statutory agency?

Mr Read—I am not aware of any inhibitors for a memorandum of understanding. We regularly meet with the interim task force. In fact, they are also a member of the industry forum that has been set up under the royal commission and are regular attendees at regional cash economy task force meetings as well.

Senator MURRAY—I sit on a number of other committees that deal with other regulators—APRA, ASIC, ACCC and so on—so I am aware that MOUs are an important device for ensuring interagency cooperation with the ATO so that you meet common objectives. Given that the interim task force is right at the coal face—at building and construction sites—I would have assumed it would have been important for the ATO to use every mechanism possible to guarantee the best outcomes from your perspective. So I wonder if it was something you had not got around to, or whether there were real impediments to prevent it that I would not be aware of.

Mr Konza—You are right—memoranda of understanding are important to the ATO. Because of the strict legislative environment we work within, we need to understand what we are doing and be clear about that. They are useful in defining the totality of the relationship between the two organisations. It would probably be desirable for us to have a memorandum of understanding with the task force but, having said that, our relationship has been quite cooperative so far and I do not think the absence of a memorandum of understanding has led to any problems yet. But it is our practice to try and get things into memoranda, and we should do that.

Senator MURRAY—Without going into specifics—because I do not think that is proper—would you be able to explain what you mean when you say your relationships have been quite cooperative so far? What does that mean? Are they able to say: 'We think this person is not paying their tax, or not paying the super that is due to employees'? What is the physical outcome of your interaction with the interim task force?

Mr Read—The interim task force has provided exchange of information on a number of matters relating to the industry. A couple of phoenix issues have been highlighted. We are unable to provide exchange of information back to the interim task force on those activities. However, through a number of forum meetings, industry partnership meetings and cash economy meetings, we have been able to discuss the broad analysis of the industry and the strategies the ATO are putting places as well as getting a better understanding of the operations of the interim task force.

Senator MURRAY—You mentioned that you have site visits. We as a committee have been told—and I have been told privately—that members of the task force have been subject to intimidation at construction sites. Have your ATO officers experienced intimidation and threats?

Mr Read—I am not aware of any threats. I understand that over the last nine to 10 months we have visited 670-odd building sites. I am not aware of any threats to ATO officers.

Mr Konza—The only report we have had was of an employer being threatened after we visited.

Senator MURRAY—Because he had not done the right thing, or because he had done the right thing?

Mr Konza—Because he was encouraged to do the right thing.

Senator MURRAY—What do you mean by that?

Mr Konza—I cannot remember the exact circumstances, but I think we had asked them to clarify the payments that were being made to the contractors, and we understand they took exception to that. That is the only report we have had. The tax office takes the personal security of its staff very seriously. When we have anything like that we usually contact the Federal Police straightaway and have them help us. But we have not had cause to.

Senator MURRAY—I have seen a fair bit of Mr Read over the years, but I have not seen a lot of you, Mr Konza. Have you two been involved in the building and construction industry oversight for any period of time during your service in the tax office?

Mr Read—For the last four years I have had responsibility for small business field activity in the building and construction industry.

Mr Konza—I have only been in charge of the small business part of the ATO for the last nine months or so.

Senator MURRAY—The point of that question is that I wanted to know if there had been an improvement or a deterioration in the ATO's opinion with respect to compliance in the building and construction industry. You might not know. You might not be able to answer that.

Mr Konza—I might ask you to define the question—if you are talking about the orientation towards compliance or the actual level of compliance. The answer might be very different.

Senator MURRAY—We have had very strong evidence to this committee from unions in particular about the degree of avoidance of the proper payment to entitlements, the level of cash payments by employers and contractors, the failure to pay superannuation and the avoidance of GST obligations to suppliers—all those areas where people are avoiding their obligations under the tax acts, super acts and the Corporations Law. The question was about whether they are reflecting a worsening situation, a situation which has always been the case or a situation where it has really improved. I asked the question because the tax office has had a strong compliance agenda certainly throughout the period that I have been listening to them in committees.

Mr Konza—It is hard to say. We do not estimate the gross level of noncompliance taking place in the industry. Certainly there are integrity measures that have been introduced in recent years to do with the ABN, and withholding and reporting requirements that have helped us. For us, noncompliance in the building and construction industry is a significant problem and remains a significant problem. Whilst there have been changes to the law which have, I think, helped us, it remains a significant problem.

Senator JOHNSTON—As Senator Murray was remarking, the principal theme of a number of union witnesses to this committee has been that the government has been dilatory when it comes to enforcing taxation law in the building industry against contractors, subcontractors and large employers as opposed to the government's political agenda, as argued by the CFMEU, for example, with respect to the findings of the Cole royal commission. From what you have said about the amount of success that you have had, that is not the case. Am I correct in assuming that the government has an ongoing, consistent approach through the ATO, through your good offices, in pursuing tax avoidance, tax evasion and all of the things you have mentioned—phoenix companies, subcontractors, cash payments, GST avoidance and FBT? Am I correct in putting that to you?

Mr Konza—We have been very active. We have received the support that we have sought. But the problems remain significant and persistent. It is possible to say that it is both a difficult problem and a problem which is being actively addressed.

Senator JOHNSTON—Good.

Mr Konza—We have been very active in that area.

Senator JOHNSTON—I want to talk to you about training centres. There are a number of training centres run throughout Australia by various unions. Are you aware of those?

Mr Konza—Not directly. I am aware through their relationship to other taxation issues but I am not aware directly.

Senator JOHNSTON—Do unions pay income tax?

Mr Konza—No, I do not think so.

Senator JOHNSTON—Do they pay any tax at all?

Mr Konza—I am not sure about indirect taxes.

Senator JOHNSTON—FBT?

Mr Konza—Yes.

Senator JOHNSTON—They do?

Mr Konza—I think so.

Senator JOHNSTON—Are you aware of whether not-for-profit training centres pay FBT?

Mr Konza—No, I am not aware. I would need to check.

Senator JOHNSTON—I put it to you that many of them do not, that they have stamp duty advantages in the purchase of things such as motor vehicles and that, in a number of circumstances, motor vehicles are being used by union organisers on the union side of the ledger without paying FBT or any of the other taxes that would normally apply. Have you heard about that before?

Mr Konza—No, I have not.

Senator JOHNSTON—You have now.

Mr Konza—Yes; thank you.

CHAIR—Presumably you might want to look at the employer organisations as well. They might be doing the same thing

Senator JOHNSTON—With great respect, Chair, I think they probably are.

CHAIR—They are probably all engaged in the same practice.

Mr Konza—I have now received two lots of information, so thank you.

Senator JOHNSTON—You mentioned the situation with respect to nonresidents. Can you give me an indication of how widespread the use of nonresidents is—that is, those people who are illegitimately working in the building and construction industry as noncitizens—and can you give us some examples? I do not necessarily want names but examples, state by state, of how widespread this practice is.

Mr Read—I cannot give you an indication of how widespread it is. All I can say is that we have ongoing exchanges of information with DIMIA and joint operations at various times on sites. We have organised with DIMIA, especially in New South Wales, to get an understanding of the sites that they are looking at and to spread the load so that they are looking at various sites while we are looking at other sites.

Senator JOHNSTON—What is your track record? Have you had any success?

Mr Read—Yes, we have. At the moment, I am not able to provide you with any detail around that, other than knowledge of a case on the north coast of New South Wales where joint operations found 111 illegal immigrants on a site.

Senator JOHNSTON—That was a building and construction site?

Mr Read—That is right.

Senator JOHNSTON—111?

Mr Read—That is right. I would need to confirm it. That is off the top of my head.

Senator JOHNSTON—Goodness. That is obviously a very large site.

Mr Read—That was on a number of sites, as I understand, not just the one.

Senator JOHNSTON—Can you tell us the nature of the sites? Were they government buildings?

Mr Read—I do not have that detail with me.

Senator JOHNSTON—Can you take that on notice for me?

Mr Read—Yes.

Senator JOHNSTON—I would like to know the magnitude of those jobs.

Senator MURRAY—Do you mean how many workers?

Senator JOHNSTON—Yes. I want to know the gross capital value of those jobs in broad terms—$20 million, $50 million; what they were—whether they were hospitals, schools, hotels or that sort of thing; and an understanding, if you can give it to us, of how it came to be that over 100 people were engaged in the building and construction industry when they were not entitled to be.

Mr Konza—This would be more DIMIA's area.

Senator JOHNSTON—But that is the problem. DIMIA has a much broader focus than you. These are tax matters, ostensibly. These people are probably working for cash and below rates.

Mr Read—There is a mix.

Senator JOHNSTON—I would venture to suggest, Mr Read, that probably your department and your section's focus is the one that is going to uncover them. Some workers are going to say, 'These blokes are all getting cash payments.' No-one is going to dob them in. No-one is going to be conscious of the fact that they have not got citizenship, because they are just going to be paid differently, I would have thought. That is very interesting. You talk about cash payments in the industry. Can you give me a description of what a cash payment looks like—who it is between, why it is being paid and what the advantages are. Give me a bit of background on that.

Mr Read—On the smaller sites—

Senator JOHNSTON—Are you talking about home building?

Mr Read—Not usually.

Senator JOHNSTON—Commercial building and construction.

Mr Read—Yes. On those sites that are probably between that $2 million to $10 million turnover. The employer group is sometimes obviously lower as well, but a lot of the time we find that the weekly wage is paid and tax deducted. That which relates to overtime or weekend work is paid in cash. Then there will be other sites where the majority of the pay is in cash without having withholding. A lot of those types of activities usually are involved in phoenix activities as well.

Senator JOHNSTON—So is it the case that, when you confront the beneficiary, he says, 'I'm a contractor'?

Mr Read—We have a mix of cases, Senator. On occasions when you front the taxpayer, it is that the employer had said that they were going to be paid in cash. On the employer's side, the employer says the employee will not work unless they are paid cash. The status of the worker issue, while it is involved in those types of cases, is usually a separate issue as well.

Senator JOHNSTON—Let us just pause there. The worker, on the one hand, says, 'The employer wants to pay me cash for overtime.' The employer, on the other hand, says, 'I can't get them on the job on Saturday or a Sunday unless I am paying them some cash.' Firstly, let me ask what your experience is in this area. How long have you been in your section looking at the building and construction industry?

Mr Read—The last four years. My experience is being responsible for the overall small business field force, a part of which is the building and construction teams and phoenix teams.

Senator JOHNSTON—These workers are legitimately employed, paying their tax on a PAYG or a PAYE basis from Monday to Friday—or Monday to one o'clock on Saturday—

Mr Read—Yes, and we have also found that their super guarantee for those payments is usually paid, especially in a phoenix activity.

Senator JOHNSTON—So these people would be union members on the larger sites, wouldn't they?

Mr Read—I am sorry, I do not have that detail.

Senator JOHNSTON—You do not know the correlation between the people who are receiving cash payments and whether the site is a union site. In Victoria I can tell you that those sites are very clear to find. You do not know about that?

Mr Konza—It is not a factor relevant to our investigations, other than to say that I think what Mr Read is trying to say is that during the week they are regular employees.

Senator JOHNSTON—But, you see, the union complains that there are cash payments in the industry. From what you tell me, a substantial number of these payments are to employees, and someone is telling you that they are because the employees are asking for them. Correct?

Mr Read—That is right. We have a whole mix of cases, Senator.

Senator JOHNSTON—I am sure you do. What about cash payments going to unions and/or individuals with respect to guaranteeing industrial harmony. Have you come across any of those?

Mr Read—My advice, from our audit activities, is that we have not. We followed the royal commission evidence and, in those situations, we have looked at those types of issues as well.

Senator JOHNSTON—So you have carried out audits on unions.

Mr Read—We have not carried out audits on the unions at this moment.

Senator JOHNSTON—What about audits on individuals within those unions?

Mr Read—We have undertaken profiling and reviewing of officials from the unions.

Senator JOHNSTON—What does that mean?

Mr Read—That means that we have risk-assessed all evidence that was provided at the Cole royal commission.

Senator JOHNSTON—I am still in the dark. What does that mean?

Mr Read—That means that, depending on our profiling activity, the type of evidence that was provided and our internal and external sources of information, we would have come to a judgment as to whether we should undertake any audit activity or not.

Senator JOHNSTON—So we have a body of evidence that says that a payment is being made for harmony or for some type of accommodation and you have resolved not to pursue those?

Mr Read—No, I did not say that. I said that overall we have actioned 85 per cent of the evidence provided to the royal commission and we are continuing to risk assess those that are outstanding.

Mr Konza—It is important to say that evidence to the royal commission in our hands are allegations which must be tested to see whether they can be backed up and used to found an assessment. We go through what we call risk assessment. A lot of effort goes into risk assessment because we have to make sure that when we commence an investigation there is a reasonable prospect that it will amount to something.

Senator JOHNSTON—Does risk assessment involved prioritisation?

Mr Konza—Yes, it does. We take into account the relative size of the tax involved, for example. That is across the board in the tax office, though.

Senator JOHNSTON—I am sure. I have no further questions.

CHAIR—Mr Konza, are you familiar with the recent reported raid on Doyles restaurants by DIMIA?

Mr Konza—I saw it on TV, that is all.

CHAIR—Was the tax office involved in that process?

Mr Konza—Not to my knowledge.

CHAIR—Do you have any working arrangements with the immigration department in respect of the pursuit of illegals and the pursuit of tax evasion in the employment of illegals?

Mr Konza—Yes. We have a memorandum of understanding with DIMIA and we participate in joint exercises with them from time to time.

CHAIR—Why, for example, in a case like the Doyles case would there not be an automatic involvement of the Taxation Office in a set of circumstances where they are pursuing the question of illegals? My experience is that illegal employees and tax evasion go hand-in-hand, for very obvious reasons.

Mr Konza—We may well have been involved. I am probably in the lucky position where I can honestly say that I have no knowledge as to whether or not we were involved. If I did, I would probably be unable to tell you in any case.

CHAIR—But you would tell me that you were unable to tell me?

Mr Konza—Yes, I would tell you that I was unable to tell you.

CHAIR—Mr Read, are you unable to tell me?

Mr Read—I would be advising Mr Konza that he is unable to tell you and I definitely am unable to tell you.

CHAIR—Earlier on in your submission you said that you have 260 officers involved in the building and construction industry. Can you tell us what the geographical spread is of those 260 officers, roughly?

Mr Read—The largest numbers are obviously in New South Wales and Victoria. They would probably take up just over 50 per cent or more of the staff. They are spread between small business activities, GST and large business.

CHAIR—For example, are any people stationed in the Northern Territory?

Mr Read—In the Northern Territory we have general compliance officers that would look after any risk associated to property and construction. There are a number of GST officers. I am not sure of the exact number.

CHAIR—How often would these officers visit construction sites, or construction companies, for that matter?

Mr Read—Are you asking specifically about the Northern Territory?

CHAIR—I am asking generally.

Mr Read—Generally, as I said, over this last year there have been over 600 visits to building sites. That does not take into account that a lot of our activities are with the tax agents of the entities, so there is quite a lot of other activity, interviews et cetera, either at the agent's premises or at the taxpayer's premises rather than at the building site.

CHAIR—Would it surprise you to know that Mr Andrew Ferguson, Secretary of the CFMEU in New South Wales, has said in the transcript of this hearing that he has had 25 years experience in the industry and he has never yet come across a tax inspector on a building site?

Mr Read—It wouldn't. I actually asked a tax inspector who had 27 years experience in the building construction industry, and he had not seen Mr Ferguson either on a building site.

Mr Konza—The fact of the matter is that the ATO does site visits. However, it is not generally the ATO's way to commence raids or blitzes or enter building sites with great fanfare, so it is easily possible for a taxation officer to visit a site, make his or her inquiries, and leave a site without perhaps the local union organisation necessarily being aware. We do not encourage taxation officers to make a great fuss in their duties. We go in, we want to look at the books, we want to get a copy of the books and that sort of thing.

Mr Read—Mr Ferguson, however, has had a number of discussions with me and ATO staff. We have been quite willing to accept any exchange of information that his union is willing to provide us with. We have also utilised Mr Ferguson in providing presentations to our staff around concerns that he has in the construction industry, and we have found valuable the exchanges of information with Mr Ferguson.

CHAIR—I am pleased that, at least, there is a relationship there. I did not expect Mr Ferguson to ring you and tell you when he was visiting building sites any more than I expected you to ring him and tell him when you were visiting them. But you did anticipate my follow-up question—that is, how tax inspectors approach the issue of on-site inspection. Essentially, you are saying it is a pretty low-key affair: really an information-gathering process?

Mr Konza—That is right.

CHAIR—The evidence that we were given in the Northern Territory by a contractor in the Territory—I think he said he had 15 years experience—was that he had never had, presumably, a visit from a taxation officer and, as well, he had never experienced one being on a particular building site. I presume that you are familiar with that evidence.

Mr Konza—Yes. That is possible. ATO officers have no power of arrest or detainment, no power to compel the answering of questions in the street, so we are not the police in that respect.

CHAIR—Sure; I appreciate that. Are you familiar with the evidence that was given to us in Darwin?

Mr Konza—I have seen some excerpts.

CHAIR—You would be familiar with the claim made by Mr Cridland that, in fact, the use of personal contracting—or what he termed 'bodgey personal contracting'—was widespread in the Territory, to an extent that he said he would prefer to employ his people as direct employees but, because of the way in which the industry was working in the Territory, he had no choice other than to do it the same way as others to survive in the industry. Has that concerned you?

Mr Konza—Yes. I think the use of contracting and the use of interposed corporate entities, that sort of thing, have been around for a long time. It does concern us. It is something that we are doing something about. We have conducted inquiries in a number of cases. However, I think we will probably need to do more in the future to make sure that the contractor is a true contractor, rather than an employee acting as a contractor.

The problem that we have had is that in many cases these contractors are responsible for the results of their work. So it is not a lay-down misere that if you go out you are going to turn all these contractors into employees. It is a difficult issue because whether someone is a contractor or an employee really depends on the contract relationship existing at that time. Someone can be a true contractor for a certain series of jobs or a certain period of time and then be asked to do different duties. They are then not a contractor. It is a complicated issue.

CHAIR—Mr Cridland used the figure of 80 per cent for people employed in the industry in the Northern Territory who were not genuine contractors but employees, which is a substantially significant figure. Has the department paid any particular attention to the Northern Territory, given the claims by Mr Cridland in respect of the industry up there and its operation?

Mr Konza—We have not really had the opportunity to respond to Mr Cridland's evidence.

Mr Read—As with the royal commission, in the inquiries that are going on here we are looking at the evidence that is being provided and our people are taking all that into account.

CHAIR—I have one final question. Senator Cook is jumping around on his seat waiting to get in. In tax evasion generally and the way in which the department deals with it, do you develop profiles of companies operating in the building and construction industry, for example, that reflect your knowledge of who is most likely to be involved in tax evasion or tax avoidance in that industry? Do you have a profile of the type of company that is likely to engage in those practices?

Mr Read—Our highest risk subindustries are excavation, site preparation, form work, scaffolding and steel fixing.

CHAIR—I am not asking you to identify them. Are there any characteristics of these companies which stand out to you and immediately set off warning lights that there may be companies engaged in this particular practice?

Mr Konza—Which practice? There is a number of practices.

CHAIR—At the end of the day it is tax evasion in one form or another.

Mr Konza—We use a form of outlier analysis where we use our computers to tell us whose income does not seem to be matching their gross income and their GST credits and whose income might be outside the industry average. We profile on an ongoing basis in that way. Profiling a whole set of characteristics is difficult because there is so much diversity in the industry and tax evaders also know that shifting their identity, shaping their identity, is an important part. You can fool those trying to profile by using dummy directors, changing addresses and all those sorts of things. It is very difficult in that respect.

Senator COOK—You gentlemen are here representing the tax commissioner. He is a statutory officer.

Mr Konza—Yes.

Senator COOK—That is, he is not obliged directly to the government; he is obliged to carry out the terms of the tax act.

Mr Konza—Yes.

Senator COOK—He makes recommendations to the government from time to time about where there are loopholes in the act which legislatively should be closed over.

Mr Konza—Yes.

Senator COOK—How much tax income is not collected in the building and construction industry?

Mr Konza—We do not have an accurate estimate of that figure.

Senator COOK—Just give us a ballpark figure.

Mr Konza—I do not think I would want to even put a ballpark figure on it. We say only that it is a severe problem for the Taxation Office.

Senator COOK—You say in your 2003-04 compliance program:

> Building and construction remains a high-risk industry from a tax compliance perspective.

Does that mean it is an industry in which there is a large slab of tax forgone?

Mr Konza—Yes, it is not collected.

Senator COOK—So as far as the rest of us are concerned—who all pay our tax—we have to actually pick up the slack that this industry does not meet because it is noncompliant to a large extent?

Mr Konza—Yes, I guess so.

Senator COOK—So it is an impost on us that this industry—to the extent that it is a non-complier—does not shoulder its responsibilities. To all honest taxpayers that is a burden.

Mr Konza—Yes.

Senator COOK—If you cannot say how much is forgone but you can say that it is a significant problem, is the legislation under which you operate adequate to deal with resolving the problem?

Mr Konza—The Cole royal commission has made some very helpful recommendations around changes that are needed to the law.

Senator COOK—But I am not talking about them. The Cole royal commission, for example, did not examine the cottage industry. I submit to you—and it is a matter of notoriety—that the cottage industry is the area where most of the tax is avoided. The Cole royal commission did not even look at that. From the point of view of the tax office and your obligations under the act, are there sufficient mechanisms under the tax act to deal with the problem of non-compliance in the sector?

Mr Konza—Most issues in taxation are a question of fact and establishing the fact. The problem that we have in the building and construction industry is to do with matters of competition that occurs in that industry driving behaviour, and establishing the facts is probably harder than saying that there is a law that would fix our problems in this area. We have people paying cash in order to avoid recordable transactions; we have people using false identities. I do not know that we would say that there is some change to the legislation that we need that would fix our problems for us.

Senator COOK—Let me put my hand up straightaway as a legislator. Parliament should look more favourably upon retrospective legislation where tax avoidance is concerned, to be able to

reach back and wipe out ill-gotten gains that were never intended. Parliament has been slow to do that, and as a consequence we have to wait for the problem to become manifest and serious before we will address it. I think that is a bit of a failing, but that is me expressing a private opinion—you do not need to respond to that. It is of course partly about what the facts are, but the facts stand against what the law says. If the law is unclear, vague or easily able to be evaded or manipulated by unscrupulous individuals in order to prevent their paying tax, that is a legislative concern. Are you saying in your answer that the law is as clear as crystal and there are no problems on that front and it is just a matter of getting more inspectors into the field to establish the facts? Is that what you are saying?

Mr Konza—I am partly saying what you just said—that is, there is an issue about getting out there; we need to be continually active and vigilant. There are things that can be considered that would make our lives easier, but it is probably not for me to vent those, because all those sorts of reporting obligations and things come with a price, and there is a balance which only parliament and the government before that can balance. Reporting systems and those sorts of things are commonly turned to in taxation, but that is a matter for government.

Senator COOK—As you say, it is a matter for parliament. We are a committee of the Senate and our concern about the imperviousness of the tax act is a transcendent concern for us all. Why don't you just tell us what those things are?

Mr Konza—All that I am saying is that if you—

Senator COOK—We will see the commissioner in a week or so's time at estimates. We will ask him, but save him the trouble and tell us now.

Senator JOHNSTON—You are asking an officer of the department to discuss policy.

Senator COOK—He is not responsible to the government, he is responsible to upholding the act and he reports to the parliament. We are a parliamentary committee: tell us.

Mr Konza—All I am saying is that we report on our experience in the industry. We report on how successful we are in using the legislation that we have. From time to time, we may be asked by the government for advice about what is needed, but that is really a matter for the government to consider because there are other things that have to be balanced up as well.

Senator COOK—But it is ultimately a matter for the parliament to consider?

Mr Konza—Ultimately, yes.

Senator COOK—I take your point that it is prudent and reasonable—and I do not dispute it in the slightest—that the commissioner should report these things to the government, but he is not beholden to the government. Ultimately, he is beholden to the parliament. You are saying here that the building and construction industry remains a high-risk industry from a tax compliance point of view. We know that means a lot of tax is evaded; we know that means it imposes a burden on the rest of us. There are some things that can be done. They might not be dramatic and change the whole landscape, but they can be done. Maybe you will take it on notice, because I do not want to unfairly pressure you nor do I want to embarrass you, but I think

it is important for the parliament to know what those things are. We are conducting an inquiry into this industry and how this industry, from a social policy point of view, pays its way in society is an important consideration in our report. We might want to be here to help you. If those things gel with us, we will recommend them and argue for them in the parliament. That is a reasonable proposition, isn't it?

Mr Konza—Yes it is. I think, though, that we would first seek to give that advice, if it is needed, to the government. As you say, ultimately it is an issue for the parliament but I do not think that it is for me to float policy suggestions when I am not in a position to consider the balancing considerations that go with them.

Senator COOK—Okay. I am not going to put you in a position where I am inviting you do something that you should not do—that is not my purpose. I do want you to report to the commissioner, if you would. My interest at least, and I suspect the wider interest of others on this committee, is that, if there are areas in the law—and you indicate that there are—that parliament should have regard to in closing down avoidance in this industry sector, which by your own report is critical, we would like to know about them.

You then say in your compliance program report for this current year that 'our focus is on major infrastructure projects and other issues raised by the royal commission', and on you go. Mr Read, a moment ago in identifying civil construction and other areas in fact effectively repeated that. That is what the royal commission said, but the royal commission did not look at the cottage industry. Isn't it notorious that that is the area where cash in hand, under the table payments are made and most tax is avoided?

Mr Konza—I do not know that it is notorious within the ATO, but it is part of the industry and part of our concern, yes.

Senator COOK—What priority do you give it?

Mr Konza—We do not give it a priority in terms of a particular project focus. However, it is part of our general compliance focus where we do things, as I said, such as check income declaration levels on an industry basis, so we would pick up people in the property services or the building and construction sectors if they were shown up in our systems as an outlier. As I said, we would risk-assess them, so we would pick some of them up in that way, but we do not have a specific project on it.

Senator COOK—So the royal commission makes a song and dance in the commercial construction sector but the big problem in the dwelling sector or the cottage industry does not get a particular priority from the tax office. Why not?

Mr Konza—The reason we supplied the compliance program booklet was to show the breadth of compliance risks that the commissioner deals with. They are very wide. We need to try and stay across all those risks but we also try to make sure that within the various segments of the community we address what we believe to be the most egregious behaviour—as well as try and encourage general compliance with the law. So in the building and construction industry, for example, we have had a particular focus on issues like phoenix companies and major projects because we wanted to make sure that egregious behaviour, notable behaviour, behaviour that

would be a bad influence on the community was eliminated. In addition to that, we have a general compliance program. All I am saying is that the cottage industry, as you referred to it, is mainly picked up in our general compliance program—as are many other risks in the tax system.

Senator COOK—Have you done a study—including the cottage industry in the widest definition of building and construction—to see where the balance of the problem mostly is?

Mr Konza—No. The difficulty with questions of this nature is that they ask the commissioner to calculate that which he does not know. Apart from perhaps macro-economic measures, which we sometimes use to try and compare things to see whether we have a hot spot, generally issues around quantifying noncompliance ask the commissioner to quantify that which he does not know.

Senator COOK—I am not asking you to quantify it. My question was: taking the industry in wide shot, not as narrowly defined by Cole but as it really exists, have you done any studies to see where the balance of the problem is—in which sector the burden of avoidance mostly is—in order to try and select your priorities? Have you done that sort of study?

Mr Konza—I do not believe so.

Senator COOK—Why not?

Mr Read—Some years ago we did a number of cash economy projects which went through a number of the cottage industries. I think overall, if memory serves me correctly, as far as avoidance or evasion went it was pretty similar amongst all of those cottage industry activities. I would need to get back to you on more detail around that.

Senator COOK—I would be very interested in that. If there is a study, no matter how grey in the beard it might be, I would be delighted to see it. I received a piece of advice from an authoritative source that there are more ABN numbers issued than there are workers in this industry. Are you able to comment on that?

Mr Konza—You have to keep a couple of things in mind when speaking about ABNs. People who intend to or are going to carry on an enterprise are entitled to apply for and receive an ABN. A percentage of those people will receive their ABN and will continue for some time to intend to carry on an enterprise. They may in fact not go on to carry on an enterprise.

It is a fact in the small business sector that many small businesses go out of business. Many people get ABNs and subsequently go out of business. It would not be surprising that a register such as the ABN might have more registrants than it should have. We do undertake processes to check the integrity of the ABR. We check ABNs to see whether tax returns have been lodged afterwards, to find out whether in fact the business was undertaken. We cancel ABNs in those circumstances. We check income tax returns to see whether business income has been declared in those returns. If it has not, we find out whether the enterprise actually took place or not, and either the registration goes or the business income appears. We check business activity statements and tax returns to validate. Also, it is quite possible for an individual to legally have more than one ABN. It is not like a tax file number, which is a personal identifier. Many entrepreneurs do have several businesses and so would have several ABNs.

Senator COOK—I think I am out of time once more. I would ask you to take on notice my question about where the gaps are in the tax act. Our job, partly, is to help you do your job. Given the large area of noncompliance you yourself have identified for this sector, if there are elements of legislation we need to look at it. I know, having chaired the inquiry into the GST, that we as a consequence of that made recommendations to the parliament which resulted in the Treasurer commissioning work on closing off some of the loopholes. When it came to actually legislating for it, it faltered at the post and fell over. From a social policy point of view, we need to know about that and whether or not we should now press ahead with that type of legislation.

CHAIR—Thank you, Mr Konza and Mr Read.

[3.33 p.m.]

MERRIMAN, Mr Robert Frederick, (Private capacity)

CHAIR—Welcome. The committee prefers all evidence to be given in public. However, it will consider any requests for all or part of evidence to be given in camera. The committee has before it submission No. 8. Are there any changes or additions you wish to make to the submission?

Mr Merriman—Yes, thank you. I have taken the advantage of reading the evidence given in Perth by Mr Drake-Brockman and Mr O'Connor. Can I say that I agree substantially with what they say, with two minor amendments. Mr Drake-Brockman refers to the fact that it is vital that section 170MW remains, as far as the building industry is concerned. He talks about the tests that are applied. I disagree with him that the tests should be time. I think the tests should be fact, not time. Mr O'Connor, in dealing with the same section of the act, talks about the threshold being too high. I have the view that there should be a threshold in dealing with section 170MW which goes to no industrial action at all. So I do not think the bar is too high; I do not think there is a necessity for the bar.

I would also like to point out that I support some of the material they gave you. Drake-Brockman talked about establishing a further body to look into the management of this industry, virtually sitting on top of the Industrial Relations Commission. I agree with him. The experiences I had with the Coal Industry Tribunal, the flight industry crew tribunal—which ultimately led us to the disastrous pilots' strike—the stevedoring industry and the public sector tribunal all lead me to the same conclusion as Mr Drake Brockman, that we do not need to have more than what we have already got as far as the Industrial Relations Commission is concerned, given that it has proper powers and reverts to its strength. I support those views.

I would also like to add to my written submission the fact that I did mention that I am chairman of the Building Industry Consultative Committee in Victoria—an appointment made by the state government of the day. I do not come here speaking on behalf of that body, but I would like to inform this committee that that body, from its initial review of the material from the Cole report, took a position looking at what needs to be done as far as industrial relations is concerned in this state—and, therefore, the federal act—to assist us in bringing forward a better understanding and dismissing the perception that the industry in this state is a basket case. The Building Industry Consultative Committee is made up of the major employers in the building industry in Victoria: Grocon, Baulderstone, Multiplex and others. It is made up of the Master Builders Association of Victoria, the plumbing industry employers' group, National Electrical Contractors Association and the unions in the industry, together with the building industry investment council in this state.

In February this year, after looking at where we were going in industrial relations, the committee agreed that there was a need for the Workplace Relations Act to be improved to provide the Australian Industrial Relations Commission with powers to make good faith bargaining orders, to increase the capacity of the Industrial Relations Commission to resolve disputes on its own motion, to strengthen section 127, to increase resources to the commission

and to ensure timely resolution of disputes—something that is not occurring in this industry because of the resources available to the commission at the moment. The third recommendation was that the Workplace Relations Act be amended to remove the limits on the subject matters on which the Australian Industrial Relations Commission can make determinations—in other words, the restrictions placed by section 89A of the act; to amend the Workplace Relations Act to require all agreements to provide effective dispute resolution mechanisms which allow the Australian Industrial Relations Commission to arbitrate outcomes within those dispute resolutions, not just to conciliate; to amend the Workplace Relations Act to provide a legal framework for site agreements, where the parties seek it; to amend the Workplace Relations Act to provide for industry-wide bargaining—again, where the parties seek it; to amend the Workplace Relations Act to ensure that subcontractors receive a fair minimum wage and conditions; and to provide for the effective enforcement of awards and agreements made under the act. They were the major points that the committee put forward, which were adopted by this government and which have now gone to all the state governments, and they certainly represented the view of the tripartite body in the state. They are the points I wish to add to my written submission.

Senator TIERNEY—You have had many years of experience in this industry in Victoria and you are a former AIRC commissioner. From your long-term view of the industry, why do you think that it has such a high disputation rate? This industry represents 40 per cent of the disputes when it only makes up seven per cent of the economy. Particularly, even within the nationwide industries in Victoria, why does it stand out as having a higher level of disputation compared to other states in the same industry?

Mr Merriman—Firstly, I challenge that record over the last three years. I believe that it has been very significant that since the establishment of a number of activities by the current government in Victoria—and I include the Building Industry Consultative Committee's involvement in those activities—if you look at what has occurred in the recent round of negotiations in the building and construction industry in Victoria, in the 2002 negotiations there was not one moment of lost time in the industry at all associated with that pattern bargain that went through the whole state of Victoria, compared with New South Wales and other states, or even if you compare it in this state with the recent round of negotiations in the metal industry.

You can then look at what occurred in the building and construction industry in this state in 1999, when the position of exercising the right to lock out was taken. We had a potential three-month lock-out in this state in 1999. The commission—and I was the unfortunate commissioner who had to deal with this matter—looked at the question for 11 days under section 170MW on whether I would sign a piece of paper that cancelled the bargaining period for 236 companies. While those presentations were going on before me, a couple of lawyers certainly made a lot of money. But, fortunately, Commissioner Tolley and the parties were conciliating and negotiating in a separate part of the commission, and they came to a conclusion that stopped any further industrial action after the 2½ months of industrial action that had been in place.

The lesson of 1999 in this state was well learned by all parties, to the extent that in 2002 we had a situation where the same parties negotiated a three-year deal without one moment of lost time in the building and construction industry in this state. I believe that neither side in this industry wants the ability for protected action and nor do the employers want the ability to lock

out. My understanding is that employers like to keep working and make profit. I think the act does not encourage that.

Also, I seriously challenge the figures. One could argue that, under the enterprise bargaining arrangements we have had, probably since the commission's structural efficiency decision of 1989, industrial disputation has diminished. In my view, strikes have diminished but bans and limitations have not diminished. The measurement of bans and limitations is not in the same category as the question of strikes. So I have a real concern about the accuracy of the figures comparing where we are now to where we used to be.

I believe that a significant part of the strikes in the building and construction industry in the period you are talking about came not so much from what I would call the true building side of the industry but from the metals and manufacturing side. In recent times, in major projects in this state, the buildings have been well and truly completed but, when we come to the installation phase—and you can look at the *Age* project and a couple of other projects in this state—the metals and manufacturing side have led to the industrial disputation and not so much the building side. In the figures, I think that is just lumped in as a building project, but the building and construction unions have not really been involved when it come to installations.

Senator TIERNEY—Do you mean the finishing of the buildings?

Mr Merriman—Yes, by other trades.

Senator TIERNEY—Surely that is part of building as an industry, though? When we talk about building being seven per cent of the GDP, we include the finishing of buildings in that. In fact, that tends to be a higher proportion of the cost than the construction of the building in the first place. You cannot really eliminate it.

Mr Merriman—I am not trying to eliminate it; I am trying to make sure it is properly understood. The Cole royal commission did not look at the metal installation side of this industry in depth; it mainly looked at the building and construction side. I think that is where a significant part of the lost time is associated.

Senator TIERNEY—You say this has all changed in the last three or four years, but, of course, the Cole commission was not that far back in time. It was in 2002 and 2003.

Mr Merriman—I did not say it was because of the Cole commission. I said it was partly because of the activities that had been undertaken by the Building Industry Consultative Group and other groups that had been associated with settling disputes in this state.

Senator TIERNEY—You were talking about a time span; you were saying it has all changed in the last four years. What I am saying is that the Cole commission was reporting in the last two years or 18 months.

Mr Merriman—I think the evidence would show that there was more disputation because of its very existence than there would have been if it had not been there. There were major stoppages because of the Cole commission being heard.

Senator TIERNEY—That is a very interesting interpretation. You have made a lot of the fact that this building industry consultative committee have been working across unions, across business, across investment. What is the view they are putting forward in terms of why the cost structures in the building industry are so high in Victoria compared to other states?

Mr Merriman—As the minister has recently announced in this state, they seriously challenge that question of the 30 per cent. I cannot go into detail—that is a matter for him—but there is a serious challenge against those facts that have been widely put around. I cannot go any further than that. I do not know the detail of that. It is not an industrial relations matter, as I see it.

Senator TIERNEY—Since people are asserting that, is there any way we can get access to that?

Mr Merriman—That is something that needs to be examined. The assertion that it is all to do with the industrial behaviour of some unions within the industry, or the employers within the industry, I think is wrong.

Senator TIERNEY—You are saying that there is not as much industrial disputation in this industry. I just wonder why the royal commissioner felt he had to make 254 recommendations about changes in this industry and the culture of the industry if you are indicating there is no high level of problem.

Mr Merriman—I suppose I can give the standard answer to that: you should ask him. I cannot say what he had in his mind, except to say this: I share the view of Mr Drake-Brockman and Mr O'Connor that, if the recommendations that are made in that report are put into effect, then there would probably be a significant amount of industrial disputation arising from that. I have yet to speak to an employer who wants to be the employer who happens to be running a job when somebody from that job is put in jail. We have had the O'Shea history. We have had numerous histories of that occurring. If we go to the extent which is foreshadowed, then I can support Mr Drake-Brockman and Mr O'Connor's view that there will certainly be a significant increase in the industrial disputation on that basis.

Senator TIERNEY—Were you here before lunch when the Master Builders Association presented evidence?

Mr Merriman—No, I was not.

Senator TIERNEY—Their evidence from Victoria seemed to be very much backing up the royal commission. The royal commissioner said there was an urgent need for reform and he criticised particularly the culture in the industry and the culture of lawlessness—as the MBA put it today—in Victoria. Are you saying that is all wrong—that the MBA has got it wrong? You might criticise the royal commission, but do you think the MBA have got this wrong as well?

Mr Merriman—There is no doubt in my mind that they are wrong. I would rely on the evidence from Multiplex, from Grollo, from Baulderstone and from other major builders as to the culture and the activities in this industry. The facts over the last three years are very clear as to the question of the negotiation of an enterprise agreement—an EBA—in every workshop, in every employer, to do with this industry. There was no lost time whatsoever.

Senator TIERNEY—But don't we have a situation where the big unions and the big builders sort of get together and make these agreements, but the ones that really bear the brunt of it are the little contractors down the track? Also bearing the brunt of those agreements overall are the industry and the economy generally, because the way those agreements are put together drives up costs.

Mr Merriman—I think that is wrong. I will give you my reasons for saying that. In an environment where we go for enterprise bargaining, one would expect that there would be agreements made between the major employers and the major unions. That is the first thing that occurs. The fact that all of those people then want to have a situation where, on major projects—where there could be over 100 employers, contractors and subcontractors—standard conditions apply so you do away with disputation is commonsense and the way the industry is operated best.

The other thing I come to is the terribly important question of where subcontractors fit into this. The subcontractor finds himself, knowing what the agreements are for the site, only competing in respect of his own productivity, not in a situation where what the rates may or may not be is unknown. The rates are established. The conditions are established. All he then has to compete against is other subcontractors, based on his productivity. The last point I would like to make is on the question of where these costs are going. This state in the last 12 months has had its highest growth of investment in the building and construction industry—record growth every month for the last 12 months. People would not be investing money if it was such a basket case.

Senator TIERNEY—It is interesting that you say that. I suggest that you look at the evidence the Property Council provided us with in Sydney. They made the rather alarming point that international investment is a lot lower than it could have been because of the way this industry operates.

Mr Merriman—In New South Wales.

Senator TIERNEY—No, they were making the point about Australia. Given that Victoria seems to have the worst record, one could conclude that you in this state are losing the most business. Although you do have a property boom, you might have had a much stronger one if you had a reformed industrial relations system.

Mr Merriman—I do not know that we could have—

Senator TIERNEY—I suggest you look at the evidence. It is very compelling.

Mr Merriman—Yes, but we could not have accommodated any more. We are running out of skilled labour. We are running out of people to do the jobs. I think we are just at total capacity.

Senator TIERNEY—The point was made to us this morning on a Multiplex site that there are a whole lot of buildings at a fairly similar point in their construction and it has been creating problems in terms of getting trade. I put it to you, particularly in the light of the comments from the Property Council, that this industry has a classic boom-bust cycle over time. It has a history of that. What happens after the next downturn? Where is Victoria placed after that? If Australia, according to the Property Council, is disadvantaged by its IR system in this industry and Victoria

in particular is disadvantaged, what is your chance of getting your proper share of investment in the next cycle?

Mr Merriman—I would agree with that on the basis that the IR system needs changing. That is the submission I made. It is the submission O'Connor made, it is the submission Drake-Brockman made and it is the submission the BICC makes—that the current system is no damn good.

Senator TIERNEY—But I take it that your viewpoint is more a harkening back to the system as it used to be, with greater powers for the AIRC.

Mr Merriman—I never want to go backwards, because that was too good! Let me go forwards and say to you very clearly that we have a hybrid system now that we have got to do something about. We have nothing to do with genuine, good-faith bargaining. If you are going to have bargaining you are going to have to have that protected and you are going to have to have some rules around it.

Senator TIERNEY—So would you prefer to go back to the system of, say, the early eighties?

Mr Merriman—No, I would not, but we should learn from history. We should not ignore history; we should build on it. For 90 years the first objective of members of the commission was to prevent industrial disputes. We have a system now where you have a right to go on strike by simply writing a letter and giving somebody a day's notice without even starting the bargaining process. There is a lot wrong with that kind of system, in my view.

Senator TIERNEY—Mr Merriman, what were you doing before you were an industrial commissioner?

Mr Merriman—I worked for 27 years with the Ford Motor Company as the labour relations manager.

Senator TIERNEY—What is a labour relations manager?

Mr Merriman—My whole life has been dealing with unions for the employers.

Senator COOK—I will start on a slightly frivolous note, if you will indulge me. I understand that you are a senior figure in the Australian cricket control board.

Mr Merriman—Yes, I am.

Senator COOK—This is an impertinent suggestion—

CHAIR—You are not going to advocate for Warnie, are you?

Senator COOK—This is an impertinent suggestion from me but, if you will respectfully tolerate it, I think Adam Gilchrist can not only wicket-keep for Australia and lead the batting for Australia but would make an excellent captain at some future time for Australia.

Mr Merriman—One of the advantages I have as being chairman of Cricket Australia is that I have the great ability to select the selectors. I do not select the side or nominate the captains.

Senator COOK—That means you can escape a lot of social criticism.

Mr Merriman—Yes, but I join in and support the other 19 million selectors that we have got in this country.

Senator COOK—I want to go back several paces and take up the discussion about this legislation in the context of some of the ideas or proposals that were in the air around the time of the Cole royal commission. We have three that I want to focus on: the notion in this industry of criminality, the notion of illegal behaviour and the notion of inappropriate conduct. All three have been referred to in the royal commission. Given your experience in this industry, is there anything you can tell us about criminality in this industry?

Mr Merriman—I have no direct knowledge of criminality in the industry. The worst example that came to my knowledge was during the MCG light towers dispute in the mid-eighties, when the Rialto building was being built here. A picket was established around the MCG to stop the Transport Workers Union taking material in there. The Transport Workers Union retaliated by putting a picket around the Rialto building. I think that Bruno Grollo got sick and tired of that. He called all the shop stewards in and produced a piece of armoury and said, 'You'd better get up to the trades hall and get this fixed.' That is about the worst I have seen. The matter got fixed within five minutes.

Senator COOK—One would not want to use that example as an incentive for it to occur more often.

Mr Merriman—I have not seen any example of thuggery or standover tactics or any of the issues that would go under the criminality side of it.

Senator COOK—I need to ask you this question, which I should perhaps have asked you ahead of the principal question I have just put to you. When you were an Australian Industrial Relations Commissioner, did you have, in the way in which industries were assigned in the commission, responsibility that covered this industry?

Mr Merriman—For 14 years.

Senator COOK—Fourteen years of this industry?

Mr Merriman—Yes.

Senator COOK—And that means the disputes arising in this industry that were related to the jurisdiction of the federal commission would have come to you?

Mr Merriman—Yes. To give some details on that, I was the member dealing with the development of Wagerup, Worsley, the North West Shelf, the pipeline from Port Hedland down to Bunbury, the pipeline from Moonee to Whyalla, the MCG light towers and Loy Yang. I have

been on all the major projects in Australia, either as a single member or on full benches, and I have not witnessed any of the things that are put there.

Senator COOK—That is insofar as this broad allegation of criminality is concerned. I now go to the next one: illegality or illegal behaviour. I am not quite sure what that means, because illegal behaviour obviously is capable of a legal solution or a legal remedy, but, as I define it, the way that this phrase is used is to infer that there is a consistent pattern of illegal behaviour out of control and running unchecked in this industry. That is my definition of it; I am trying to objectively define it as it is used in popular practice. But, without necessarily sticking to my version of it, can you comment on this industry and the notion of illegal behaviour?

Mr Merriman—The example that I would go to would be the question of underpayments. But that is not peculiar to this industry.

Senator COOK—No.

Mr Merriman—The question of illegal entry, again, is not peculiar to this industry; I have had that more in the pastoral industry than I have in this industry. They are the only examples I can bring to my mind.

Senator COOK—Calling upon your experience on the bench looking at these matters, is there a persistent and aggravated pattern of this type of behaviour?

Mr Merriman—No, certainly not. If I go back to the days of Norm Gallagher, we would certainly know by 8.30 on a Monday morning what the issue or the claim for the week was going to be. And that would be throughout the whole of Australia, not just in one state. The commission would exchange notes by about a quarter to nine to see what issues we were going to be up to. But one would not put that in the category that you are putting it in. It would be in genuine industrial claims.

Senator COOK—I understand part of the illegal behaviour argument is that workers at one time or another may be taking unprotected industrial action or applying bans or limitations. One can argue about how you characterise that in legal terms, but are there any comments you want to make for us on the practical management of those issues? What I am really asking is: is that behaviour capable of being resolved by the use of legal penalties, or is it more capable of being resolved by a process of conciliation and resolving the issues at argument?

Mr Merriman—Clearly, section 127 has opened up an area where the commission must make orders. I think recent examples show that the commission is much more successful in resolving those matters by conciliation rather than by issuing orders. Drake-Brockman and O'Connor both gave examples of circumstances where orders had been made and that was the end of the matter. Whether the issue got dealt with or not we will never know, but certainly in the last two years of my time in the commission, when 127 became the flavour of the month, it was more common for members of the commission to sit down and start to work through the issues and get the issues resolved, rather than sign a piece of paper which never went near the issues. That is the trouble with 170MW also. If you were going to say to me, 'Are they illegal activities or unprotected actions?' on a number of occasions they would be unprotected action. But then you get into a significant argument about what is protected action and what is not protected

action. The commission over the last four or five years is full of decisions going all over the place on that. I think there has been great inconsistency on that because the act is not clear.

Senator COOK—I think one of the problems about this debate is that at popular level terms like 'criminality' and 'illegal behaviour' get bracketed together in public discourse to suggest some underlying rottenness in the industry, whereas you have just used the term 'illegal behaviour' in an industrial relations context as a technical thing capable of being resolved—and, in fact, in a manner which you might well argue strengthens the relationship on the job.

Mr Merriman—I suppose I should say 'potentially illegal behaviour' because until it gets to the court and gets determined it is not. But it is not hard to say that, during a period when you have an enterprise agreement, certain industrial action is obviously not in accord with that agreement and if it did go to the court it would probably be found to be illegal. Again, my experience puts to me that that is not uncommon across industry. It is not just peculiar to this industry.

Senator COOK—What do you apprehend by the phrase 'inappropriate behaviour' with respect to this industry?

Mr Merriman—I have difficulty with that. Behaviour has changed so much over the years that it is sometimes difficult to determine what is acceptable and what is not acceptable. I had situations where it was alleged that a particular shop steward had picked up a shovel full of sand and put it in the time clock. I would see that as unacceptable behaviour. There was also a situation where an employer has allegedly asked somebody to suggest to a person to leave the site because he is not welcome. In some circumstances that can be unacceptable behaviour because he may have a perfect right to be there. I find that very difficult, unacceptable behaviour.

Senator COOK—I am sorry, but I have to be a bit pedantic. The phrase that is used is 'inappropriate behaviour'. You are talking about unacceptable behaviour.

Mr Merriman—Okay, inappropriate behaviour.

Senator COOK—If we apply our powers of pedantry to this, it could well be argued that inappropriate behaviour is at a level below unacceptable behaviour.

Mr Merriman—I think we are getting very fine. It becomes beyond definition somehow.

Senator COOK—I will move on. In the second paragraph of your submission you say that you believe:

> ... that any model of industrial relations based upon confrontation ... is not one that facilitates harmonious industrial relations nor a method of dealing with disputation as it arises in the workplace.

I take it that, rather than looking at the behavioural patterns, you are thinking more about how problems that arise in the practical course of a complex industry like this are best resolved.

Mr Merriman—The current system, where you do not get to deal with the issues and resolve the differences between the people, will never be successful. Unless you can resolve the issue

that is causing the differences between the people you will go nowhere. That was the trouble in 1999 with the big strike in the building industry in Victoria—11 days were spent talking about whether to sign a piece of paper or not and none of it had to do with the employers' claims. Unless you get down and deal with the matter that is in the disagreement between the parties, the thing does not get resolved. It is no use going off to court with orders, suggesting that you are going to throw somebody in jail or whatever, if you are not dealing with the matter between the parties. If the matter remains unresolved, so does the dissatisfaction at the workplace.

Senator COOK—In paragraph 3 of your submission you say:

From my experience, what is required is for this Government to take the Commission seriously and for a start to abide by the Act in respect to appointments.

You go on to explain that a bit. Can you expand on that point for the committee?

Mr Merriman—Section 10 of the act still requires a person appointed as a deputy president to have skill and experience in industrial relations. It is the key factor to the appointment. Some of the most recent appointments had no experience in industrial relations whatsoever. The appointment to be a commissioner still requires the skill and experience in the field of industrial relations. Again, you have the situation where there has been a number of appointments where the people have not been anywhere near the field of industrial relations. That creates a real credibility problem with people who appear before them. I am not here to criticise the individuals. I am saying that, unless you have people with good standing who are respected by those who appear before them, the commission does not have the power that it needs. In recent times members have been appointed who, before they were appointed, were openly criticising the institution. I find it difficult to see how you can take an oath to serve the institution when you have spent most of your life criticising it. That is the type of thing that has been concerning me over the last four or five years.

Senator COOK—Because as a commissioner you take an oath of office to uphold the act.

Mr Merriman—Yes.

Senator COOK—So if you are a rampant critic of the act—

Mr Merriman—Then how can you do that, yes.

Senator COOK—I will just pass this up to you. I will introduce what you about to receive by saying that this is an exhibit tendered to our inquiry that was drawn up by a union. We have had it now for a number of months and a number of hearings, and I have produced it on nearly every occasion; you are the unfortunate recipient today. But I have asked for any criticism of the accuracy of this be registered, and so far none has—that is not to say that there might not be in the future but, for the record, so far none has. The exhibit shows the hurdles under the current system—that is on the top line—to be gone through in order to negotiate an EBA. On the second line down are the hurdles implicit in the bills under inquiry by this committee. If the current system is complicated, the second line is even more complicated.

Mr Merriman—What is missing on this diagram is a better system again.

Senator COOK—This only looks at what is and what is proposed.

Mr Merriman—Yes.

Senator COOK—In answer to an earlier question, I think you very cogently explained that the current system, in your view, is defective—I think you used the words 'unwelcome hybrid', or words to that effect. But we are working with what we have at the present time, rather than looking at what should be. Given your experience on the bench, and appreciating you have only had this before you for a few minutes, do you feel able to make any comment on the likelihood—if we adopted the new system—of that bringing about industrial peace and harmony in this industry?

Mr Merriman—I noticed, from just quickly looking at it, there is an indication of a cooling-off period. In my life, I have had had one experience of a cooling-off period. It was ordered by Senior Commissioner Taylor in the Ford Motor Company. We had 23 strikes during that period and we were glad when it was over. So I am not too sure that cooling-off periods have a great success record. I have had experience of secret ballots. My experience with secret ballots is that they give you a nasty shock when they do not work out the right way. You are locked in forever. We had one in the Ford Motor Company with over 3½ thousand workers. We took around ballot boxes—which looked more like mobile toilets than they did ballot boxes—but everybody voted and, to our horror, the vote went the wrong way. Once you have done that you are in terrible trouble. You have got nowhere else to go except throwing rocks through the window.

Senator COOK—I do not want to interrupt your answer—you may have additional comments to make in answer to my question—but on that very point the Queensland Master Builders Association said that what they termed pre-strike ballots were insane, and they gave support to pattern bargaining. They said, on pre-strike ballots, 'What do you do if the ballot goes against you?'

Mr Merriman—I think that Daniel Grollo just found that out here at the MCG. We had a ballot there for an LK agreement and it went down. You have to start all over again from miles behind scratch, and I agree with that comment.

Senator COOK—Out there in the public domain it gets asked, 'Why can't you have a secret ballot before a strike?' It gets asked as a rhetorical question. What are the practical implications of that?

Mr Merriman—First of all, you have a two-week debate about what the question should be. That has been my experience. You have a huge argument about what the question on the ballot paper should be. That is where you start. Then, when you finally get to it, you have an argument about the Greek interpretation of it. I have had that experience, where the interpretation in Greek was different to what the actual question was. It is not just a simple matter of writing out a question and saying, 'Chaps, come and vote on it.' It takes time and it takes a damn lot of involvement to get the thing properly done—or even done. I am not too sure that the old method of people being given the opportunity to cast their vote by hand has got any disadvantage compared with what happens with a secret ballot.

Senator COOK—Did you refer earlier to an example earlier where the insistence on a secret ballot actually prolonged a dispute?

Mr Merriman—Yes, it certainly prolonged it, by at least two weeks. They are the two things that I see just from my own experience, looking quickly at this document—the cooling off period and the ballot. Given that you have something like 2½ thousand to 3,000 enterprise bargain agreements in this industry, and probably another thousand in the electrical contracting industry supporting the building industry, if you had to go through a secret ballot for every one of those the three years would be up before you got the first one registered.

Senator COOK—As you can see on the second line of the document I gave you, the number of hurdles and steps one has to go through to negotiate are extended and complex. Do you have any comment to make on whether that opens the possibility for legal argument about whether those steps have been complied with, which obfuscates or crowds out the possibility of talking about what the issue in dispute is?

Mr Merriman—I can only go by what happened when we first introduced protected action. You and others would be aware of Hunter No. 1, where protected action was taken by the mining unions and the CFMEU. 170MW proceedings to cancel that protected action took place before Judge Bolton. He heard it and decided to cancel the bargaining period. A full bench of the commission then heard an appeal. They overturned the Bolton decision. The matter was then taken to the Federal Court. The Federal Court believed that the full bench of the commission had applied the wrong tests. It was then taken to the High Court. The High Court found that the Federal Court had applied the wrong tests, and sent it all back to the full bench of the commission. Two and a half years later the 170MW was dismissed. The same applied in respect of 1999 in the building and construction industry here in Victoria—the case that I sat on for 11 days. My decision was obviously going to be appealed and go through the whole system, and you would never have got it resolved. As I said before, and I meant this seriously, the people who won out of the case before me were Frank Parry and Steve Rothman. Nobody else won anything out of that. They ran the case.

Senator COOK—Frank Parry and Steve Rothman were the lawyers?

Mr Merriman—Yes, and very good lawyers at that. This appears to me to open up a new chapter for industrial relations lawyers. It would be an absolute Christmas.

CHAIR—That is a remarkably consistent answer to that we have had on that document.

Mr Merriman—I have not consulted with anybody.

Senator COOK—I do not think there is any suggestion that you have. The other question I invite your commentary on is: if we were to enact this legislation we would select an industry sector—in this case the building industry sector—and impose on it industrial relations provisions different to those applying to the rest of the community. In my view, and I think it is a common view, these industrial relations conditions would be inferior to those for the rest of industry. There have been occasions in the past where there have been sector jurisdictions in industrial relations law. From my memory—I am flying on memory and I will call on yours now—they have not imposed inferior conditions or lesser conditions, rights and entitlements for people in

those sectors; rather, they have provided a more specialist focus on those sectors. Is my recollection right?

Mr Merriman—Yes. If you take the four tribunals I referred to earlier, they were specialist tribunals on the basis of looking at the peculiar operations of the particular industry that they were assigned to or that they applied to. In all of them, particularly in the flight crew tribunal, nothing could be done without consent. It was a very gracious kind of area that gave in every time that the pilots put their hands up, until we got to 1989. I would say the same about the public sector tribunal. I think that was to try and look at the things that were needed for that area—not in a way of diminishing but certainly in a way of improving. In stevedoring it was the same.

Senator COOK—Again calling on your experience in this industry, are there any observations you would care to make about the likely impact of imposing a lesser set of rights and entitlements on this industry sector than what prevails elsewhere in Australia?

Mr Merriman—Firstly, I would say it is unfair. I do not think it is necessary. If we can get the current act to the situation of having proper dispute-settling procedures—and I mean proper dispute-settling procedures that are enforceable by the commission—and if we can give the commission back the power that it had, that is all we need to do to resolve the problem of some of the figures that were quoted to me earlier. Going the next step and imposing on the industry an absolutely different—and harsher, to go to the example—set of criteria will only create greater disputation. Every time it has been applied over the years, whether in the post office or wherever else, we have seen nothing but greater anarchy and ultimately the need to back down from that legislation in the interests of the operation of the business.

Senator COOK—I will conclude on this question. I thought in your initial remarks to us, before we began to ask questions of you, there was an inference from your remarks—and I am asking this to see if I have taken it correctly—that the building industry committee you chair in this state has improved, and does contribute materially to the improvement of, the industrial relations climate and that that approach is to be preferred to any other approach that might invite more confrontation. Is that right?

Mr Merriman—That is an overarching situation. That council at the moment is examining a particular form of industrial relations that it believes should apply to this industry. That is why I referred to the 10-point plan that it had developed. That is not in place yet. What the BICC has done is have the debate and have all the parties—including the Master Builders Association of Victoria—participate in the debate, and it has adopted a way it thinks we should go forward.

Senator COOK—The BICC being?

Mr Merriman—The Building Industry Consultative Committee. The Master Builders Association of Victoria are a member, and they have picked up the 10-point plan that we have developed and adopted. We have spoken to Vice-President Ross of the Industrial Relations Commission, who is the head of the building panel, to see if we could get greater access to having matters before him dealt with in the way we believe they should be dealt with—that is, in conformity with what we are trying to achieve. It is hoped that before September the Building

Industry Consultative Committee will have a joint position on the exact form of disputation resolution that should be applied in this industry. We are working towards that aim.

Senator COOK—What are your expectations for reaching that?

Mr Merriman—At the moment the subcommittee that is working on it seems to be going very well. We have not really put the acid test back on the parties yet, but so far the council have been able to achieve all of the assignments that we have undertaken.

Senator COOK—While inquiring into this, it is easy to identify things that you might not agree with. It is often harder to come up with a positive proposal for how to make things better. I can recollect CIDA, the Construction Industry Development Agency—which we tried to establish when I was industry minister—and that seems to mirror the structure you are talking about. In order for us to consider whether there are any proactive, positive suggestions that the committee can put into the mix in this debate to lead us to a more constructive outcome, should we consider what you have said to us about your committee being something we ought to look at?

Mr Merriman—Most certainly.

Senator COOK—And promote?

Mr Merriman—Most certainly.

Senator COOK—Thank you.

CHAIR—Mr Merriman, you were a member of the commission in the eighties?

Mr Merriman—Yes.

CHAIR—Do you remember when the changes were introduced to the act as a result of the Hancock inquiry?

Mr Merriman—Yes.

CHAIR—One provision that was introduced at that time was for the panels to establish industry councils to deal with industry issues broader than the specific issues of wages and working conditions.

Mr Merriman—Yes.

CHAIR—Why do you think that specific change to the act never got utilised across industries as much as it perhaps should have?

Mr Merriman—At around the same time we introduced the structural efficiency principle, and all of our efforts went to getting the structural efficiency principle, the benefits from that and the accord of the day. That had No. 1 priority, and I think the very important aspects of the Hancock inquiry did not gather the strength that they should have. I know it happened in the

metals area, and it worked very well in the metals area. It is a subset of that that is being applied in building and in metals manufacturing in Victoria now. If I take what Minister Hulls has done here—and recent discussions that I had with Vice President Ross on this—we are really picking up part of the Hancock proposal in what we are proposing. What happened in the commission afterwards, of course, was that we had the 1992 eruption and away we went down a different path. Then we got ourselves in a situation of spending useless hours simplifying awards. If ever I wasted two years of my life, that was it.

CHAIR—We had a couple of academics appear before us in Sydney—Professor Loosemore and Professor McGeorge, who have a lot of experience in the building industry.

Mr Merriman—Who are they?

CHAIR—Professor Loosemore and Professor McGeorge—two people who have had a lot of experience in the building industry. I am precising what they said, but essentially they said that this approach of using the stick to resolve the problems of the industry was the wrong approach, that essentially what was required was cultural change and that you only achieve that by working with the parties to institute it. Why couldn't the mechanisms under the commission—like the provision for those industry councils or a body similar to the CIDA type approach—be utilised to enable the parties to actually work together effectively to promote change in the industry? One of the things that this inquiry clouds—or that the Cole royal commission clouded, in fact—is that there has been significant change in the industry over a number of years.

Mr Merriman—That was the first point I was going to make. There has been a significant change in the culture in this industry, compared with the eighties. You just need to look at the productivity in this industry. It has significantly changed. There has been a lot of change in this industry. There has been a lot of technological change in the methods by which work is done—the questioning of a lot of the old practices. How long is it since we have had a concrete pour busted? There has been a big cultural change in this industry that really is never recognised.

I think one of the problems with the national body that you refer to is that there are different problems in different states, particularly in this industry. The thing that I think Minister Hulls was trying to drive at through the BICC was something just for the building industry in Victoria, and I think that would work much better than a national body. You can also have the national body, but I think it is terribly important, in this state in particular and maybe in Western Australia, to have a state one that is very active.

Senator COOK—How are we going to do in Zimbabwe?

Mr Merriman—I am just about to go and get a plane and find out, to be honest with you. I am due over there tomorrow.

Senator COOK—Give them our best wishes.

Mr Merriman—Thank you very much.

Senator MURRAY—For me, I hope you don't; you shouldn't be there.

Mr Merriman—Well, we are there—we might come home.

Senator MURRAY—I have one last question, Mr Merriman. It is of great use to have the views of former commissioners, especially those with experience as long as yours, but of course it does not happen until after they have left the commission. Just in terms of the practical expertise that commissioners have, is there any way in which the government is informed annually when it is looking at legislative change? Does the government come and ask the commission in any formal sense to let it know what law changes the commission thinks would assist in the development of workplace relations practice? Is the commission consulted by government to improve legislation?

Mr Merriman—I was fortunate enough to serve under four presidents. Certainly Sir John Moore, to my knowledge, was consulted on some changes and Barry Madden certainly was. I do not know about Justice O'Connor, but I am aware of Judge Geoff Giudice being involved in being able to make views known as to suggested changes.

Senator MURRAY—But there is not an annual process whereby, for example, Judge Geoff Giudice would formally ask all the commissioners to put up any views or ideas they might have?

Mr Merriman—The commission has a statutory meeting each year, and at that the president generally asks the members to give him their views, although it is not just at that meeting; we were free to do it at any time. Certainly in my time there were periods set aside in the annual conference for us to put forward views about the act. My belief is that many of those went forward to the department for the government of the day. To my knowledge, there is no formal requirement that before legislation comes in it must be run past the president.

Senator MURRAY—Do you think it would be helpful if there were such a formal requirement?

Mr Merriman—Yes, I do. I wish it had happened in 1992.

Senator MURRAY—I am asking you deliberately because I am wondering whether it should be one of the things the committee might say—that is, that it should be formalised.

Mr Merriman—That would be very important and it would be a very good recommendation to formalise that so that there is an opportunity given. For instance, if in Minister Reith's act, because they go back that far, if anybody looked at section 170WC—and I must say it is appropriately titled—nobody could operate that section. It really means it is in the AWA area; which is meant to be the free area. It is an area where, if you and I were to have a contract and you were about to perform for me and I had booked out the Brisbane stadium and had television rights and sponsorship rights and you came up to me seven days before the event and said, 'Despite the contract we've got, I'm now going to give you a document claiming another couple of million dollars and I want 50 per cent of these rights despite what we have done,' then under section 170WC, providing you follow the right process, our earlier contract is invalid and we start all over again—seven days before the bloody event! Harry Miller has done it a couple of times. It is there for the wrong reasons.

As soon as I saw that section, I rang up somebody who I thought was the draftsman and asked them whether they really meant it. He said, 'No, we don't mean that.' Some of those things can be avoided by going back to the practitioners who have got to administer the act—after all, that is what the commission has to do: look at some of the nasties that are in there that are not intended to be in there. I am sure that if the current government had shown the commission the freedom of association material before it went in the government would have changed a hell of a lot of it.

Senator COOK—Chair, Mr Merriman made a remark about how he wished it had operated in 1992. I should own up: I was the industrial relations minister at the time. I know what he is referring to. As the minister at the time I was well aware of the views of the commission, although your point was there was no formal structure to properly convey it.

CHAIR—Now we have the platitudes out of the road, thank you very much, Mr Merriman, for your attendance this afternoon.

Mr Merriman—Thank you.

[4.34 p.m.]

CLAYTON, Mr Marcus, Partner in charge of Industrial, Employment and Public Interest Unit, Slater and Gordon

CHAIR—Welcome. Are there any changes you wish to make your submission?

Mr Clayton—No. Slater and Gordon is a national law firm with offices in each of the mainland states and the ACT. The history of the firm has been intertwined with that of the labour movement. We act for many unions and we make no secret of or apology for being advocates of and for unions and employees and their interests. Neither the firm nor I claim to be experts on the building industry. We have acted for the CFMEU construction and general branch in Victoria for the last five years and in Western Australia for about four years. We acted for those branches in the Cole royal commission, and we acted for Martin Kingham in defending his prosecution arising from the royal commission. Those charges were dismissed and costs ordered against the prosecution. I was the partner responsible for the Victorian branch's representation at the royal commission, and I think I attended nearly every day of the Melbourne hearings.

There are two areas where I think I may be of assistance to the committee, and these are the focus of our written submission—firstly, in relation to the Cole royal commission and, secondly, in relation to analysing the implications of the bill for the fundamental and longstanding civil rights of building unions and building workers. Our views on these matters are based on our deep involvement from start to finish in the Cole royal commission as it related to Victoria and WA and on the firm's long history of involvement in litigation aimed at protecting and advancing civil liberties.

Firstly, the Cole royal commission: the bill would establish a literally extraordinary regime for the building industry. The government points to the royal commission hearings and its final report as the justification for this dramatic step, but, in our view, actual and detailed involvement with the royal commission would lead any fair-minded observer to the conclusion that it did not form a reliable foundation or justification for this extraordinary bill.

The royal commission's terms of reference, the background of its key personnel, the matters it chose to focus on and the matters it chose not to, the procedures it followed, particularly in relation to cross-examination, and the way its hearings were conducted all meant that its main conclusions were inevitable. The hearings and final report present a distorted picture of many of the particular events that were highlighted and a distorted picture in general, because nearly the entire focus was on the union's industrial action, protests, demonstrations, pattern bargaining and efforts to maintain high levels of union membership. Other issues in the industry of very serious concern to workers and the broader community were almost entirely ignored in the hearings, such as fatalities, serious injuries and safety generally; intimidation of employees by employers; systematic underpayment of workers; companies going broke and workers losing their livelihoods and entitlements; and the anti-union activities of the Office of Employment Advocate, to name just a few. The royal commission's modus operandi was to focus on case studies as the basis for its conclusions. If it would be of assistance to the committee, I am able to outline some case studies from the Victorian hearings to substantiate our views about the royal commission.

Secondly, there is the bill itself. The provisions of the bill are complicated and to grasp how they would operate in practice the unique characteristics of the building industry need to be borne in mind. However, as we say in our submission, a proper analysis of the bill leads us to conclusion that the essence is this: all industrial action in the construction industry would be effectively outlawed; right of entry for construction union officials would effectively be abolished; it would establish a repressive Australian Building and Construction Commission, which would be part industrial police force, part standing royal commission and part prosecution authority, whose real role would be to regiment and control building workers and destroy construction unions; and it would create a legislative framework for the wholesale disqualification of officials from office and the bankrupting and deregistration of construction unions.

Our submission sets out the basis for these conclusions about the bill in sections 3 to 7. Our submission does not cite the particular clauses of the bill which we say will have the effect we claim. If it would be of assistance to the committee, I am happy to identify which clauses we are talking about here today, and/or we could forward to you a copy of our submission with footnotes citing the relevant clauses.

The overall point is this: the rights of unions and employees in Australia to organise industrially and to take industrial action are fundamental civil rights which have evolved over more than a century. This bill grossly infringes those rights for building workers and unions. It is an orthodox position to say that such infringements should only occur in the most exceptional circumstances and, in our view, such circumstances have not been made out here.

Senator JOHNSTON—In what capacity do you appear before the committee today?

Mr Clayton—I appear as a representative of Slater and Gordon.

Senator JOHNSTON—So you speak on behalf of Slater and Gordon?

Mr Clayton—I do.

Senator JOHNSTON—Are they retained by the CFMEU?

Mr Clayton—Yes, we act for the Construction and General Division of the CFMEU in Victoria and in Western Australia, and also the FEDFA division, which is active in the building industry in Victoria.

Senator JOHNSTON—And you have a retainer agreement?

Mr Clayton—I am not sure precisely what you mean by that.

Senator JOHNSTON—You are retained; they pay you an amount of money to be at their disposal when they need you, and you defer all other clients to their exception.

Mr Clayton—We do have such a retainer arrangement in Western Australia. We have a retainer agreement whereby we provide certain legal services to the union and its members, not

to the exception of all others. We do not have such a retainer agreement with any other part of the CFMEU; I wish we did.

Senator JOHNSTON—So you are here today representing a firm which is in effect the ongoing lawyer for the CFMEU.

Mr Clayton—We have lots of clients.

Senator JOHNSTON—I am sure you do.

Mr Clayton—The CFMEU is one of them.

Senator JOHNSTON—Are you charging a fee for today?

Mr Clayton—No.

Senator JOHNSTON—Are we to presume that this is a freebie from you today?

Mr Clayton—I am expressing the views of our firm here today, and we are not charging anyone for it.

Senator JOHNSTON—Tell me—given that your firm is retained by the CFMEU in Western Australia, are you going to express any other views? I would be interested to hear you say that.

Mr Clayton—I am expressing the views of the firm.

Senator JOHNSTON—The firm is bound, is it not? It has retained its client, you are here and we are talking about the client's best interests according to you. We are not going to get any view other than one that accords with your client's wishes, are we? Educate me.

Mr Clayton—The views of the firm, which I have expressed in our submission and in my opening, probably coincide with the interests of our client. I do not think they are in conflict with them.

Senator JOHNSTON—You are not in a position to have any alternative view, are you? You are a lawyer for a firm that is retained by the CFMEU. You cannot argue against your client's best interests, can you?

Mr Clayton—I did not say we could not; I said we do not want to.

Senator JOHNSTON—It is not a question of election on your part.

Mr Clayton—Your point is that we could not express a view that was contrary to the interests of our client. I suppose that would be in relation to some particular matter.

Senator JOHNSTON—That is what I am getting at.

Mr Clayton—My point is that the views the firm holds do not conflict with the views of the union.

Senator JOHNSTON—But here today in a public hearing you are giving us a submission. I am putting to you that it could not, in the light of your retainer, conflict with anything the CFMEU believes.

Mr Clayton—It does not conflict with them.

Senator JOHNSTON—I am not talking about whether it does or whether it does not; I am saying that surely it is not possible for you to do anything that is going to conflict with your client's best interests.

Mr Clayton—That is probably right.

Senator JOHNSTON—Thank you. I am sure it is right.

Mr Clayton—I am saying that the views of the firm do not conflict with those of the CFMEU.

Senator JOHNSTON—There is absolutely no possibility that we can get an objective opinion from you on any of the matters contained in this term of reference, given that you are retained by the lead building and construction union in Western Australia. That is the point.

Mr Clayton—What the committee make of our views is a matter for them.

Senator JOHNSTON—I just think it is a matter of the way lawyers are forced to do business.

Mr Clayton—As I said, we had a great deal to do with the royal commission. We formed views about it, and I have expressed those views, for example. I have read the bill and I have formed views about what the effect would be.

Senator JOHNSTON—I am sure you have. Tell me how many personal injuries cases your firm derives from its relationship with the union movement.

Mr Clayton—I anticipated you might ask something like that. Slater and Gordon is comparatively a very big firm now. Historically, most of our personal injury suits were referred by union clients. That is much less the case now. It varies. We have offices around the place. It would be more true in Western Australia, for example. The statistics are not fully formulated, but across the country six per cent of the files opened so far this year across all practice areas have been referred to us by the CFMEU and about 20 per cent have been referred to us by unions generally. That is not just in the personal injuries area. Slater and Gordon is pretty much a household name. We get about 1,200 unsolicited phone calls a week from the public just in Victoria asking us to act for them.

Senator JOHNSTON—You say in your submission at page 1 that all industrial action in the construction industry is effectively outlawed. What does the word 'effectively' actually mean in that sentence?

Mr Clayton—What I mean is that I think that, if one analyses in the concrete conditions of the building industry how this regime would work, one sees that in effect you would never get to protected industrial action, and the bill provides that if it is not protected then it is unlawful. The problem is the hoops that would need to be jumped through. I think reference was made to this before. Take the situation in Victoria. I think there are about 3,000 or 4,000 individual enterprise agreements in Victoria. If this regime were imposed, I think it would be practically impossible for the union and the workers of each of those employers to go through the process here in order to reach protected action. If they took industrial action, it would not be protected and therefore would be unlawful. That is the aim of the bill, it seems to me, when you read it.

Senator JOHNSTON—Can you make the statement that all industrial action in the construction industry is outlawed by this bill?

Mr Clayton—Effectively, as the submission says. The whole scheme of the bill is to look as though it does not outlaw industrial action, but that would be the effect.

Senator JOHNSTON—Let us just go with the expression. You have used the word 'all'—

Mr Clayton—Yes, and 'effectively'.

Senator JOHNSTON—and then you have used the word 'outlawed', and then you will not agree with me that all industrial action in the construction industry would be outlawed under this bill. You will not agree with that.

Mr Clayton—It is not outlawed—

Senator JOHNSTON—Thank you!

Mr Clayton—but it is effectively outlawed.

Senator JOHNSTON—It is not outlawed, but it is effectively outlawed.

Mr Clayton—Correct.

Senator JOHNSTON—It is an interesting position. You have said in your submission that right of entry for construction union officials, again, is abolished.

Mr Clayton—We have said that it is effectively abolished.

Senator JOHNSTON—Surely it is either abolished or it is not.

Mr Clayton—With due respect, Senator, I reckon the government is cleverer than that. The bill is cleverer than that. The bill purports to maintain protected industrial action, right of entry for union officials and other industrial law rights, but the effect of it—and the intended effect of it—would be to take away those rights. That is the whole point.

Senator JOHNSTON—What operations of the Australian Building and Construction Commission have you seen?

Mr Clayton—No-one has seen any of them because it has not started.

Senator JOHNSTON—How do you know if it is repressive?

Mr Clayton—It is, in my submission, repressive to set up an industrial relations industry-specific body with coercive powers to compel the production of documents and compel answers to questions on oath without the privilege against self-incrimination. Those powers are normally reserved for terrorists and organised crime and suchlike.

Senator JOHNSTON—Do you think that there is a problem with the building and construction industry in Australia?

Mr Clayton—As I said, I am not and we are not experts on the construction industry. You have had lots of witnesses, including the bloke before me, who are. I am sure that there are problems in every industry.

Senator JOHNSTON—But you are an expert on attending to your client's instructions in the Cole royal commission.

Mr Clayton—Yes.

Senator JOHNSTON—That is right. I have no further questions.

CHAIR—Senator Tierney?

Senator TIERNEY—I think Senator Johnston has done an excellent demolition job. I have no questions.

CHAIR—I think it was interesting watching two lawyers go at it head to head.

Senator MURRAY—Mr Clayton, I just have to say this: do you agree with Senator Johnston's proposition that, because of your links as a firm with the CFMEU, this is a Clayton's submission?

CHAIR—The phrase of the day!

Senator JOHNSTON—The comedy club is just up the road!

Senator MURRAY—I want to explore one part of your submission. I turn to the concept of genuinely trying to reach agreement. Step back from the content of the bill and just focus as a lawyer on the concept. Do you think it is possible to regard genuinely trying to reach agreement as equivalent to good-faith bargaining?

Mr Clayton—It depends on how you define it, doesn't it? The point we are trying to make in the submission is that if you look at those precise indicators in clause 62 in the context of 4,000 EBAs in Victoria, if the CFMEU had to follow those indicators in relation to each of those employers, it would be the size of a government department. It is just impossible to fulfil. But in

terms of the general point of good faith bargaining, the present act provides that you have to be trying to reach agreement.

Senator MURRAY—It is affected by the detail but, keeping with the concept, the government, both at the time of negotiating the 1996 act and subsequently, because the Senate has moved amendments in this area, have assiduously avoided accepting the good faith concept, even though it is common in commercial law contracts and was in the industrial relations law prior to the Workplace Relations Act. If there is an equivalence between the two concepts in a legal sense, is it finally, in your view, a recognition by government that inserting good faith bargaining into the act is a desirable way to go?

Mr Clayton—It is thought provoking, isn't it, in view of the government's determined opposition to good faith bargaining in the system as a whole, that it is apparently being introduced here. I was saying before to the committee that it appears to be innocuous, even praiseworthy. But in the concrete conditions—the actual conditions in the building industry—it is part of an elaborate structure which would operate to make industrial action unlawful. I think that is the purpose of the provision in the bill.

Senator MURRAY—Turning now to the substance of clause 62, as opposed to the concept and the legal ramifications attached to it, do I understand your submission correctly—I am reading between the lines—that all those dot points you have under item 5 of your submission are entirely appropriate in a general sense as representing genuinely trying to reach agreement, but if you were required to comply with them in the sense of verifying that you have done them completely that would clog up the negotiation process and make it impossible to work?

Mr Clayton—The difficulty is that the way the bill works is, as we have tried to put it, that if the ABC Commissioner or the employer can say that you have not complied with one of these requirements then the bargaining period can be terminated and there will be various other consequences. While it looks innocuous in itself, anyone who has been in a negotiation, particularly in the building industry—I have not been to many; I have heard about a lot of them—knows they are pretty trenchant and willing affairs. For example, if you do not attend a meeting that you have agreed to attend, that is not automatically an indication that you are not trying to genuinely reach agreement—on either side, for that matter. There are lots of negotiating tactics. It might be one thing to say that these are principles which generally are desirable; it is another thing to make them strict criteria with severe consequences if they are not met.

Senator MURRAY—But arising both out of commercial law precedent, practice and jurisprudence and out of industrial relations law precedent, practice and jurisprudence, good faith bargaining in a general sense means that, if this little list represents the behaviour, you have not been carrying out good faith bargaining. What lies behind this is the fact that these have been techniques used to apply pressure in the bargaining process. Many people would regard that as perfectly reasonable. But I think it is a positive to try to introduce good faith bargaining or genuinely trying to reach agreement through a section or clause added to the act—maybe not with respect to the BCC bill, but certainly as a general principle. I assume that, as a practitioner, you would support that, wouldn't you?

Mr Clayton—I would support the concept of good faith bargaining but I would make the point that you can walk out of a meeting, for example as part of a tactical approach, because that

is what happens in negotiations, and still be engaged in good faith bargaining.. It does not mean that the negotiation is not in good faith. Our objection or concern is, once again, in the concrete conditions of the building industry with so many employers, how do you do these things with each employer and with each subbie? There might be 100 subbies on a big job: how can you, in a direct union to employer way, carry out these things? It is practically impossible.

Senator MURRAY—Let me conclude this way. If your criticism of clause 62 is the direct linkage with the bill and the way in which it interacts with the general philosophy, if you were to take that out, would you as a firm be able to come back to the committee and recommend how the act itself might include a general good faith bargaining provision—

Mr Clayton—The Workplace Relations Act?

Senator MURRAY—In the Workplace Relations Act. How would you phrase it to include genuinely trying to reach agreements, since that is the phrase the government accepts? Could you phrase it for us in a way which complies with what you regard as an acceptable and desirable legal concept without any of the traps which you have outlined in your submission? It is a request, you do not have to do it, but it might be of assistance to people like me who think that there is a halfway house.

Mr Clayton—Certainly, Senator.

CHAIR—Mr Clayton, you said that you had sat through most of the Cole royal commission—

Mr Clayton—In Melbourne.

ACTING CHAIR—or you had represented clients before the Cole royal commission. Have you had any other experience of royal commissions?

Mr Clayton—Yes, I was involved, on behalf of the Victorian Trades Hall Council, in the Longford royal commission into the Longford gas explosion. I have been involved in coronial inquests which have some similarities.

CHAIR—You have had experience of different approaches in terms of how royal commissions operate. I was involved with three royal commissions in the 1970s. It was not a pleasant experience, but at least I had the opportunity to question my accusers. The experience I had was that they very much operated as courts of law, or appeared to give that impression, whereas the approach in terms of this royal commission was radically different. Was there a precedent for the way in which this commission operated as opposed to the standard practice in the way that other royal commissions have operated?

Mr Clayton—As I think we might mention in the submission, in relation to cross-examination, for example, the normal thing in royal commissions is that they operate in a similar way to a court, in that a witness is called and those who have leave to appear as a general rule get an opportunity to cross-examine the witness, particularly if the witness is giving evidence adverse to the interests of the client concerned. It is true that royal commissioners are anxious to control the proceeding so that it does not get out of hand.

Here, of course, that was not the case: you could only cross-examine the witness if your client had submitted a statement, and only in relation to facts, not in relation to the credit of the witness. We had, obviously, expert counsel involved and we did research ourselves. The only example we could find in Australian history—and there have been a lot of royal commissions—was the Lowe royal commission into communism in Victoria in 1949. There seemed to be a similar rule then, according to an article in the *Australian Law Journal* about how that royal commission operated—which of course was at the height of anticommunist hysteria in this country.

CHAIR—So, outside of that one particular experience, it is fair to say that the standard practice of royal commissions in this country has been, essentially, to follow normal court procedures in dealing with witnesses and treating evidence, in a general sense.

Mr Clayton—With the exception of more tightly controlling the field of cross-examination, but generally allowing cross-examination as in the ordinary courts, yes. This was very different from that.

CHAIR—I understand—and I am certainly not a legal practitioner—that in fact what this royal commissioner had done was capable of being done within the purview of the Royal Commissions Act. He did not tread outside of what powers he was able to use, although it might have been unusual for those people who experienced the way it was run. In your assessment of the commission and its functioning, is there an argument or an issue that this committee ought to look at in terms of perhaps making a recommendation to amend the Royal Commissions Act to ensure a greater application of the rules of natural justice and rules of evidence in treating issues before a royal commission? Should we put that in the guidelines—is that a reasonable approach?

Mr Clayton—Yes, the Royal Commissions Act could be amended to provide that, unless there are exceptional circumstances, cross-examination should be allowed, within limits determined by the royal commissioner, and that procedural fairness should be accorded to those who are the subject of adverse evidence and inferences. You only had to sit through it, to go to the royal commission hearings, to see that when union witnesses were in the witness box the atmosphere, the approach of counsel assisting and, for that matter, the royal commission, was palpably hostile. Royal commissions wield very considerable coercive power. It showed that what the problem can be with royal commissions, for all the reasons I said, is that they can seem to head in a particular direction. As you said, from your own experience, it is not pretty.

CHAIR—I appreciate the fact that you did not attempt to cloak your position. When you made your opening submission to the inquiry you made clear where you were coming from, who you represented and the reason that you were here. Setting that aside, you have looked at the contents of the proposed bill. In your view, is that bill challengeable under either domestic or international law? Have you looked at that side of the issue?

Mr Clayton—To be honest, I have not considered it in any detail at all. The history of challenging domestic law on the basis of international instruments is not altogether a happy one. Clearly much of the bill would infringe the international instruments to which Australia is a party. There may be constitutional questions involved, but I am not a constitutional expert and I would not want to comment on that. Perhaps another way of looking at it is that the thing would be an absolute minefield for lawyers. There are so many interconnecting provisions, complicated

hoops for people to go through, and commission and court hearings all over the place. It would be a recipe for a proliferation of litigation in the courts and in the commission.

CHAIR—We have a chart which Senator Cook has been assiduously distributing around to various witnesses. As he said, no-one has yet challenged the assumptions that are made in that chart. The conclusion of all the witnesses who have seen it has been that this will be a feast for the legal profession.

Mr Clayton—There is some positive side, then!

CHAIR—Yes, this is going to increase substantially litigation in this area. You obviously mix in legal circles—and, I presume, not just with representatives of unions but representatives of employers. Is there a general view amongst the legal profession involved in the industrial relations area that that is the case?

Mr Clayton—I think the view I just expressed—that it would be a field day for lawyers—is a general view. I think it is a universally accepted that the Workplace Relations Act in itself has given rise to much more litigation in both the courts and the commission. This would be an order of magnitude higher than that.

Senator COOK—I really do not have any questions of you, Mr Clayton, because the chairman has asked the questions I had in mind, other than to clear up one small point. In your submission you refer in a couple of places to a 'Clayton's right of entry' and you make another reference to Clayton. That is not a reference to you, is it? That is a reference to the Clayton's non-alcoholic drink?

Mr Clayton—Yes, the drink you have when you are not having a drink.

CHAIR—Senator Murray already stole your thunder.

Senator COOK—Did he?

Senator CROSSIN—Yes, Senator Murray beat you to that.

Senator COOK—That just shows you that great minds think alike.

CHAIR—The secretary did make the point that anybody under 25 years of age would not know what you were referring to.

Mr Clayton—I notice that the ads seem to have disappeared from television.

CHAIR—Thank you, Mr Clayton, for appearing here today.

Committee adjourned at 5.06 p.m.