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SENATE

EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

Reference: Workplace Relations Amendment (Work Choices) Bill 2005

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SENATE

EMPLOYMENT, WORKPLACE RELATIONS, AND

EDUCATION LEGISLATION COMMITTEE

Friday, 18 November 2005

Members: Senator Troeth *(Chair)*, Senator Marshall *(Deputy Chair)*, Senators Barnett, George Campbell, Johnston, and Stott Despoja

Substitute members: Senator Murray to replace Senator Stott Despoja

Participating members: Senators Abetz, Barnett, Bartlett, Boswell, Brandis, Bob Brown, Carr, Chapman, Colbeck, Coonan, Crossin, Eggleston, Evans, Faulkner, Ferguson, Fielding, Fifield, Forshaw, Hogg, Humphries, Hutchins, Johnston, Joyce, Lightfoot, Ludwig, Lundy, Mason, McEwen, McGauran, Milne, Nash, Nettle, O'Brien, Payne, Polley, Ray, Santoro, Sherry, Siewert, Stephens, Sterle, Stott Despoja, Trood, Watson, Webber and Wong

Senators in attendance: Senators Barnett, Johnston, Joyce, Marshall, Murray, Nash, Siewert, Troeth and Wong

Terms of reference for the inquiry:

Workplace Relations Amendment (Work Choices) Bill 2005

WITNESSES

Committee met at 9.03 am

PLATT, Mr Christopher, National Industry Manager, Australian Mines and Metals Association

CHAIR (Senator Troeth)—We resume our hearings on the Workplace Relations Amendment (Work Choices) Bill 2005. This is the final day of hearings. I welcome our first witness from the Australian Mines and Metals Association. Thank you for your submission. I now invite you to make a brief opening statement before we begin our questions.

Mr Platt—The Australian Mines and Metals Association is a not-for-profit body that has represented employers in the mining industry since 1918. It is not and never has been a registered organisation within the Workplace Relations Act or its predecessors. Its members operate across a wide variety of mining industries, including coal, metalliferous mining, oil and gas and the services sector. The majority of our members work across a range of state borders.

I have provided you with a copy of *The case for ongoing flexibility in employment options in the Australian resources sector*. That document was prepared in 2004 and it contains a wealth of information concerning the productivity successes within our sector. I commend it to you for your reading. To update the figures from the 2004 document, turnover in 2004-05 was $67 billion; our exports represent 67 per cent of Australia's total commodity earnings; capital work expenditure is approximately $9.3 billion and we have approximately $40 billion in planning for future capital expenditure; and we employ 115,000 employees directly, and obviously a larger number indirectly. We have a low level of union membership.

In terms of agreement making, 60 per cent of the persons on agreements are on Australian workplace agreements, seven per cent of them are on non-union agreements and 33 per cent are on union agreements. We recognise that the reform process that we have come to at this point in time commenced in 1993 with the introduction of the non-union agreements by the then Keating government, followed by the introduction of individual agreements in 1996 in the Workplace Relations Act 1996.

Senator Bob McMullan made some comments in 1997 about how we should test the claims that were then made about the 1996 legislation. The test that he set out was that there should be fewer disputes, more jobs, the distribution of wage outcomes and benefits would be fairer, labour productivity would be faster and wages and salary outcomes would be more consistent with a low-inflation and low-interest rate environment. I note Senator Murray's presentation in 1999 reviewing those tests. At that point in time Senator Murray said that 290,000 new jobs had been created since the introduction of the Workplace Relations Act until 1999; that the wage outcomes were such that real wages had increased by 4.2 per cent and 2.5 per cent; that average weekly earnings had increased; and that national wage cases increases had totalled $36 per week, more than that under Labor. He said at that point that, despite the real increases, the distribution of income was unfair.

The figures we have since that time show an increase in growth as a result of increased flexibility in workplace relations legislation. As at 17 November this year we had a 28-year low in unemployment and wage outcomes have continued to grow. August 2005 ABS statistics show that there has been an increase of 6.3 per cent in male and 5.9 per cent in

female wages to August 2005. In the last three years there has been a $53 increase from the Australian Industrial Relations Commission and productivity has continued to increase. The figures for that are in the document that I have just referred to you.

The Work Choices package is a further incremental reform. It is not perfect. The submission that AMMA has presented focuses on some areas. We say that there should be provision for common law contracts, and that submission is supported by Rio Tinto; we say that the union greenfields site should be extended from 12 months to five years; we say that the old IR agreements should be treated the same as pre-reform agreements; we hope that one day the act will be expressed in plain English; we believe that section 127 provisions still allow for 48 hours of grief; and we believe that, in respect of unfair dismissals, there should be a total exclusion rather than the 100 employee exemption postulated by the legislation.

CHAIR—Thank you very much, Mr Platt.

Senator JOHNSTON—Thank you, Mr Platt, for your very concise submission. Let us go to this issue of greenfields agreements. I am very interested to note that you say it is 12 months. I think that is more by implication in the complex definition structure; it does not actually set out in section 96C, as your submission says, 12 months, unless I am mistaken—I could not see it there. I think it is by implication that these greenfields agreements are 12 months. My understanding of that is that that would be totally inadequate for your constituency.

Ms Platt—That is correct. The issue in relation to greenfield agreements is that you have projects with billions of dollars worth of investment that certainly take longer than 12 months in the main and, in a number of cases, longer than three years, which is the present standard.

Senator JOHNSTON—I could not think of one that was 12 months.

Ms Platt—Neither can I. We reference in our report the Gorgon project, which is an $11 billion project. We also talk about some projects being considered by Woodside Energy and BHP Billiton. Another project in my home state of South Australia is the expansion of the Roxby Downs mine. I am told that it is going to take four years just to dig the hole. Obviously, the provision of a greenfield agreement of 12 months will not work, and in fact three years is insufficient.

Senator JOHNSTON—Why is three years insufficient?

Ms Platt—It is insufficient because the time when you have expended the most amount of capital and the time when the project is at most risk of damage from industrial action is normally between the 2½-year and 3½-year time frame.

Senator JOHNSTON—So you are approaching cash flow. You have spent most of your capital. Your work force is in place. You have your infrastructure up and running. So you need to have a solid foundation of workplace arrangements.

Ms Platt—Absolutely. Some of the information that we have been provided is that you are looking at some damages in some cases of $3½ million a day.

Senator JOHNSTON—I appreciate that. Just explain this to me. Proposed section 96D talks about employer greenfield agreements. I am a bit confused about this. Are you saying that that should also be five years, or is it already?

Ms Platt—The provision that we are talking about is in relation to union-employer agreements, so the old section 170LL. We have not made a submission that the 12-month limit on the employer greenfield agreements should be changed.

Senator JOHNSTON—I said to Mr Shorten—and I think his is one of the principal unions involved in the development and processing of ore reserves in Australia today—that for some long time now, five years or more, there have been individual workplace agreements in the mining industry, particularly in my home state of Western Australia and that productivity has never been higher. In fact, we probably lead the world in terms of productive resource accessing. What is your experience with the transformation that has come across this industry in the last five-plus years with respect to the opening up of the labour market?

Ms Platt—The transformation comes from two reasons. I think the first part is the benefits of the direct relationship with the employee and the employer. There was one site that I visited where they did a comparison of two companies. One of the companies employed their employees on direct arrangements. The other employed them effectively through a third party. The difference between those two entities was 20 per cent. By discussion with the relevant employees, they told me that, under the collective system, when they came to work they had two bosses. One of them was a union shop steward who said that they should not do this and their supervisor told them that they should. So they spent most of their time in conflict working out whether or not they should do the right thing by their employer or the right thing by the union. I am told that those employees have a much more relaxed lifestyle and have a greater level of productivity where they have a direct relationship with their employer now.

Senator JOHNSTON—I want to talk to you about the industrial relations system as it exists for miners in Western Australia. Are you familiar with what happens within that system in terms of litigation, changing of awards and all of that sort of thing?

Ms Platt—Perhaps I could answer the question this way. At the moment we have six industrial relations systems. It is a very difficult job knowing which system you are in. For example, there was a matter in Western Australia in recent times where the issue of right of entry was brought up. The employer was under a federal arrangement, and it understood that the right of entry provisions were covered by sections 285A to 285G of the Workplace Relations Act. The Western Australian state commission thought differently—that the employee, or the union in that case, was able to exercise a right of entry under state legislation.

It is complex enough for us as practitioners, never mind someone who is actually trying to run a business and who does not spend all day poring through the Workplace Relations Act. We are looking for a simple system, a universal system, that provides for simple agreement making and dispute resolution processes for employers so they can get on and do what they should be doing—that is, improving productivity and providing growth for this country and, therefore, jobs.

Senator JOHNSTON—I have one last thing I want to ask before my time runs out. It has been put to us time and again that competition in the labour market between individuals leads to driving wages down. The minerals boom has been with us now for, say, two or three years. What about over the last five-plus years? What is your experience of that?

Mr Platt—I have not seen any evidence whatsoever of competition driving wages down. In fact, I was on a workplace earlier this year—it was a construction site—where the peggy, who is responsible for keeping the sheds clean, making sandwiches and basically just keeping the guys happy, was on $100,000 a year. I was in Newman some months ago and there was an advert for a boilermaker at $38.50 an hour. I have not seen competition in the mining industry drive wages down. In fact, it is the reverse. We have difficulties in getting enough skilled employees and it is a worker's market. If you are not rewarding your employees and providing them with an appropriate environment, they will be gone.

Senator JOHNSTON—Thanks.

Senator BARNETT—Thank you very much for your submission. It is quite comprehensive. I just want to pick up on the question that Senator Johnston asked, which is very important. We have had submissions this week from a number of witnesses, including the union movement and even some academics yesterday, saying that individual agreements, more flexibility and more competition drives wages down. Can you give us some examples and flesh out your reasons that that is not the case, and in fact that the opposite is the case? This is a threshold question for the committee.

Mr Platt—I suppose it is a simple equation of supply and demand. At the moment, skilled and semiskilled labour in the mining industry is in short supply. It is a situation that we do not expect is going to change in the near future. It is very difficult to engage skilled people. You then have the process of educating them about how your particular business operates and getting them organised to be a productive employee. You do not want to lose those people, you do not like good people leaving your workplace, so you make sure that you reward them appropriately and treat them properly. That, to me, will not be achieved by driving wages down.

If I was to offer an Australian workplace agreement to you at a 10 per cent discount to everybody else in my workplace, you are going to find out about it at the first coffee break, and what are you going to do? You are not going to be a very happy, productive employee, and that is not what we are seeking. I think in the real world in the mining industry, you could not show a case where AWAs have been used to drive wages down in the manner that you have described.

Senator BARNETT—Have you got an understanding in terms of AWA coverage and individual agreement coverage in the mining sector and how extensive it is?

Mr Platt—It depends on what sector you are in. The figures that I gave earlier indicated that some 60 per cent of persons covered by federal agreements in the mining industry are covered by Australian workplace agreements. Obviously on top of that you have got a number of people who are also covered by common law agreements, but it depends on the sector. In the coal industry sector, AWAs are not as prevalent. In the metalliferous sector, they are extremely prevalent. In the construction sector, it is more collectively based, although there is an increasing number of employer-employee collective agreements. Recently, I was pleased to hear that Australian workplace agreements are being used at construction sites with the knowledge of unions, and the sites were still operating.

Senator BARNETT—I think it is reasonably well accepted that the Australian mining industry is one of the most competitive in the world. Do you think that the flexible IR arrangements that you currently use are one of the reasons why it is competitive and successful in terms of productivity? Will the bill, and the more flexible arrangements allowed under it, allow for even further productivity improvements?

Mr Platt—The bill simplifies agreement making. Insofar as that increases the uptake of agreement making, it will benefit the industry. Insofar as it will reduce the transaction costs of making agreements now, it will also benefit the industry. I will give you an example. To do an agreement for someone working in the metal industry who is not covered by the federal award, I would have to do a no disadvantage test against every state metal industry award in the country. Under Work Choices I will do a no disadvantage test against the AFPC standard. The wage rate is going to beat the AFPC standard anyway. I know that, because otherwise I am not going to get anyone to work for me, but it means that I will have a much simpler process. Rather than spending two or three days doing no disadvantage tests against every award, I will just be able to check the AFPC standard, make sure it is met, and process the agreement in a much simpler manner than I do now.

Senator BARNETT—There are some arguments that have been put that the safety net conditions are not adequate. What do you say about that?

Mr Platt—The safety net, including the existing award safety net, is an irrelevance in the mining industry. If we paid anybody the award rates in the mining industry we would not get people.

Senator BARNETT—Are you paying way above the award rate?

Mr Platt—Absolutely. The example that I mentioned was the cleaner on a construction project who was on one hundred grand a year. Production workers on some of the projects are getting paid more than parliamentarians.

Senator BARNETT—Thanks for reminding us of that! Can you draw a link between the higher wages that you are obviously paying out and higher productivity? They have to be able to get their profits from somewhere, so the argument that academics and witnesses from the unions have put to us is that they are driving wages down and getting productivity out of that. It is an odd argument, but I want you to say to me how this impacts on productivity. We have talked about real wages going up. How does that lead to increased productivity?

Mr Platt—Productivity can be increased in two ways. I suppose one is by infrastructure investment and having significant machinery. If you look at any of the larger mines, they are already doing that. But you also have to have employees who are prepared to think flexibly and work to use that machinery or those devices as well as possible. In my view, that comes from two things. One is a fair reward, but you also have to treat your employees fairly and value the employees and the contribution that they make. It is not all about money; it is about relationships.

Senator BARNETT—Yes. My final question is about relationships and industrial disputes in your industry. At what level are they at the moment and what do you think will happen under this legislation? Will they go up or down, or can you not give a view on that?

Mr Platt—I do not have precise statistics in relation to industrial action in the mining industry with me today, but I can tell you that industrial disputation, and the threat of it, is still a concern within our industry. The commission's capacity to respond to it is also a concern. I will give you an example. There was a dispute in Victoria that went to the Industrial Relations Commission under section 127. The commission spent four weeks deciding whether or not it was an industrial dispute as defined by the act or whether it was a community picket and therefore not covered by the act. I know that at least one law firm made a couple of hundred thousand dollars out of that, but there were significant losses to the parties and significant losses to Australia's reputation as a country that is able to deliver product.

Insofar as the Work Choices legislation makes people more responsible for unlawful industrial action, I think that is a positive outcome and will result in a lessening of unlawful industrial action. I think that the fact that the commission will not be the automatic place to go to resolve a dispute will encourage people to take greater ownership of dispute resolution in their workplace, which is a good thing. It is always better to resolve the problems yourself than have a third party impose a solution on you.

Senator MARSHALL—Senator Johnston touched on this but I want to be clear. Your submission argues for union greenfields agreements to be extended to five years. I think you clarified with Senator Johnston that you do not support that position for employer greenfield agreements. Is that correct?

Mr Platt—It is not to say that we do not support it—we have not argued for it. We say that the 12-month limit on employer agreements is satisfactory.

Senator MARSHALL—Can you explain to us the difference?

Mr Platt—Our concern has been for the union employer greenfield sites. They are the mechanism, we think, that will have the greatest application in relation to the construction of large infrastructure projects for the mining industry. As for the employer greenfield agreement, I suppose that is an issue of whether you will choose to do that on a collective basis or whether you would use Australian workplace agreements to achieve the same outcome. My expectation is that the industry will continue to use Australian workplace agreements, so we have not devoted a huge amount of attention to employer agreements in that respect.

Senator MARSHALL—Do you think that union agreements are a more genuine type of bargaining than employer greenfield agreements?

Mr Platt—What do you mean by 'genuine bargaining'?

Senator MARSHALL—My understanding is that an employer greenfield agreement is effectively an agreement between the employer and themselves, whereas a union greenfield agreement requires some negotiation between the union or the unions that will potentially cover the employees on the site.

Mr Platt—That is right. In that sense you could say that an employer greenfield agreement is similar to an Australian workplace agreement or is similar to a common law contract. But the point that needs to be remembered is that the employer is still dealing with a market. I can

draft you a wonderful Australian workplace agreement that would pay you the minimum provided by the legislation but you would not work for me.

Senator MARSHALL—I understand that in your industry you have made it quite clear that the safety net in your industry is an irrelevance, as is the award in effect in its entirety, because no-one is on those conditions.

Mr Platt—It is an administrative barrier to getting an agreement certified and we waste time and money processing it.

Senator MARSHALL—But I guess there are many industries in many different situations where the award and the safety net will be relevant.

Mr Platt—And I can see from the transcripts that those issues are being taken up with those industries.

Senator MARSHALL—You talked about supply and demand, and at the moment there is more demand for labour than there is supply. I take it that the reverse would also be true at a point in time?

Mr Platt—But when that point in time is, I do not know.

Senator MARSHALL—I know. I am not asking you to speculate on how the economy is going to go.

Mr Platt—I am told that China is a rapidly growing economy and that the good times will continue for a very long time. That is why companies are proposing to make a $40 billion investment in our industry.

Senator MURRAY—Mr Platt, you were quite right in quoting me in 1999. My views in 2005 have not changed. I think what I refer to as the second wave of 1996 legislation has in fact served Australia well. I and my party remain supportive of it. However, we are much less convinced by the changes to the act that are before us. Were you aware that that 1996 act has been amended in a significant way 18 times in the last nine years—12 negotiated with the Democrats, five supported by all parties and one just the coalition and Labor?

Mr Platt—I am aware that the act has been amended. I am also aware that there is a whole raft of amendments that were not supported and were not able to be progressed, some of which we supported. I guess like anything, this legislation is a working document. Parliament will continue to reform the legislation where it is in the interests of Australia, its workers and employers to do so. I do not expect that the bill as it presently is would be immune from amendment in the future.

Senator MURRAY—I thought that you and I were in agreement that the 1996 act had been good for the mining industry.

Mr Platt—Yes, it has.

Senator MURRAY—I want to focus on the unitary national system. As you know, I am a very strong supporter of a unitary system negotiated with the states. I notice that, in your conclusion in item 55, you continue to talk about a cooperative embrace of a national approach. My impression is that your association mostly represents big and medium sized businesses. We have heard from small business employer organisations—two examples are

the National Farmers Federation and Restaurant and Catering Australia—who have indicated that very high numbers of their industry will remain under state systems even after the passage of this Work Choices bill. Restaurant and Catering Australia said it would be 29 per cent. For the National Farmers Federation it ranges from as high as 90 per cent to zero remaining under state jurisdiction in places like Victoria. Will many of your members or people involved in your industry, do you think, remain under the state system after the passage of this bill or will you genuinely have a unitary system, at least for your industry?

Mr Platt—I do not think there will be any member of the Australian Mines and Metals Association in the state system after this bill is introduced. All of our members are incorporated. They will all be subject to this legislation. It will provide a single national platform in areas such as unfair dismissals, which we have been seeking for a number of years. That is a great outcome.

Senator MURRAY—So you will not have any of the uncertainty that has been expressed to us by groups like the non-profit organisations, churches, small business and so on? For your industry, the benefits of this bill are quite apparent?

Mr Platt—Absolutely.

Senator MURRAY—I was interested in your approach on the question of termination of employment. Do you support the restraints on termination of employment in the bill?

Mr Platt—Yes, we do. In fact, we say that they should go even further.

Senator MURRAY—Can you repeat your thinking? Has that always been your thinking?

Mr Platt—The position of the Australian Mines and Metals Association is that we have a number of examples where unfair dismissal legislation is used as a tool to extract settlements from employers and increase costs. I will give you an example—

Senator MURRAY—I am sorry; what about unlawful termination?

Mr Platt—We do not have an issue in relation to the unlawful termination provisions in the bill.

Senator MURRAY—So it is just the unfair—

Mr Platt—Yes. I will give you an example—

Senator MURRAY—I am not sure that you are able to. You know that the government prevents us from talking about this matter.

CHAIR—Senator Murray, we are getting into—

Senator MURRAY—I was after unlawful termination. You heard my question. I did not mention the word 'unfair'.

CHAIR—We are not discussing unfair dismissal though.

Mr Platt—Sorry; I may have misheard you. To make the point clear—Australian Mines and Metals supports the provisions in the bill in relation to unlawful termination. Our dissatisfaction is in relation to unfair terminations.

CHAIR—That is fine. You are allowed to say the words; it is just that we are precluded from discussing it.

Mr Platt—I thought for a moment that I may have been talking about unfair dismissals and Senator Murray about unlawful dismissals. I just wanted to clear that up.

Senator MURRAY—That is all right. We have been gagged, but it does not matter; we know what it is all about. You are quite correct—the AMMA has lobbied for five-year terms for many years. I have been torn between their case and the general case because the difficulty with changing legislation is that it is a one size fits all approach. Have you thought that it would be appropriate for five years to apply in your industry but three years in other industries?

Mr Platt—I do not think that the legislation is a one size fits all approach; it is a suite of options. You have a range of different agreements, and it is a maximum term of five years. You may be able to negotiate an arrangement that suits the parties for five years; you may not. You may negotiate an arrangement that has fixed increases; you may negotiate an arrangement that has provisions for increases to be based on external indicators or key productivity indicators. It is a maximum of five years. At the end of the day, the length of the agreements will be a matter for discussion between the parties.

Senator MURRAY—You make an important point. Do you think in your industry large numbers of members will stay with the three-year agreement template, which they are on at the moment?

Mr Platt—I think they, particularly the more sophisticated workplaces, will move to five years. The reason I think they will move to five years is that it will remove the transaction costs of bargaining and the anxiety associated with bargaining; it will enable sophisticated employers to have in place a system that provides for wage improvements, either based on external factors or productivity; and they will not have to worry about the overlay of a round of negotiation every three years or more frequently, which is the arrangement under the present system.

Senator SIEWERT—I want to follow up the point on what will happen with wages. My understanding of your point was that you were talking specifically about the mining industry.

Mr Platt—That is correct.

Senator SIEWERT—We have heard evidence here and I have heard evidence in the past that in Western Australia the impact of the reforms in the nineties was to drive down the minimum wage and that it was $50 below the rest of Australia. I want it to be quite clear that what you are referring to at the moment is the mining industry and your beliefs in the mining industry.

Mr Platt—That is correct. I am talking about the mining industry only.

CHAIR—Thank you very much for your appearance today.

[9.44 am]

CHAPMAN, Ms Anna, Senior Lecturer, Centre for Employment and Labour Relations Law, Law School, University of Melbourne

COONEY, Dr Sean, Senior Lecturer, Centre for Employment and Labour Relations Law, Law School, University of Melbourne

MURRAY, Dr Jill, Associate Member, Centre for Employment and Labour Relations Law, Law School, University of Melbourne; and Senior Lecturer, School of Law and Management, La Trobe University

PATMORE, Mr Glenn, Senior Lecturer, Centre for Employment and Labour Relations Law, Law School, University of Melbourne

CHAIR—Welcome. Thank you for your submission. I invite you to make a brief opening statement before we begin questions.

Dr Cooney—I will present a brief overview on behalf of all of us, but I would identify now the particular areas of expertise among the panel here. Questions to do with antidiscrimination and termination are best directed to Anna Chapman and issues about the British and European law systems are best directed to Jill Murray. Work and family matters and test case questions can be directed to both Anna and Jill and questions about new forms of workplace organisation and employer representation are best directed to Glenn Patmore. For the committee's information, Mr Patmore is visually impaired.

CHAIR—Thank you.

Dr Cooney—We would like to begin by thanking the Senate inquiry for hearing us. We oppose the passage of the bill because we do not think it is smart regulation. It combines highly intrusive state command and control elements with broad employer self-regulation. It is overly complex, too punitive, one-sided and interventionist. Our focus here is to offer a positive, alternative approach to reform. Our approach is based on our expertise in two areas. The first area is regulatory theory. This is a field of study about how to make laws work in practice not just on the statute books. It is a field of study that grew out of the failures of excessive and counterproductive legalistic regulation. The second area is comparative and international employment law.

This background leads us to advocate smart regulation of the labour market. Let me explain that in a bit more detail. As in other areas of economic and social life, smart regulation involves a range of legal techniques and policy instruments. Neither extensive command and control state intervention nor unaccountable self-regulation are likely to lead to socially optimal results. Coregulation and enforced self-regulation are frequently superior ways to address social problems. We see smart regulation in Australia in fields such as occupational health and safety, and consumer protection through the work of the ACCC.

Let me draw out, in a preliminary way, three implications of this approach for regulating the complex area of work relationships. They concern standards setting, employee voice and agreement making. Turning first to standards setting, in our view the bill's approach to standards setting is to introduce a meagre and static Australian fair pay and conditions

standard and to set up a new and rather non-transparent agency, the Australian Fair Pay Commission. Our suggested approach is that work relations need responsive, innovative and dynamic regulation. They need a regulator that operates in that way, one which involves the various stakeholders in setting norms, operates in an open and transparent manner, can adapt to new social, economic and technological conditions and can devise standards which balance community expectations and individual circumstances.

The AIRC has shown that it is capable of being such a responsive, innovative and dynamic regulator in its test case processes. We refer, for example, to its determinations on outworkers—I understand that the committee has heard evidence about that—and on reasonable hours and family leave. However, we do recognise that the system could be improved. So we have suggested some, perhaps radical, ways in which it could be made more effective. These include shifting the constitutional basis for its determinations away from the conciliation and arbitration power, but not to the corporations power, rather to the external affairs power; focusing on devising effective strategies to balance social and economic policy objectives rather than resolving disputes, which is the legal form in which it proceeds at the moment; and also enabling a wider range of organisations to invoke its processes, not simply registered organisations.

The second proposal we make relates to employee voice. Regulatory experience tells us that self-regulation often leads to poor outcomes in terms of accountability, balancing of stakeholder interests, disclosure and compliance. This applies to the workplace just as in other areas of human activity. Employees are of course key stakeholders in the workplace and our concern is that the bill limits their capacity jointly to express their voice. This in turn limits their capacity to influence and monitor workplace outcomes. Existing forms of worker organisations have played a very important regulatory function, giving voice to employee interests. We do not think they should be stifled; rather, they should be given a fair opportunity to adapt to work in the 21st century. Moreover, responsive regulation would explore new ways of giving voice to workers. We have pointed to some in our submission, particularly new methods of informing and consulting employees.

The third aspect relates to agreements. We note that the bill sets out a uniquely complex and prescriptive approach to agreement making, with an extraordinary degree of government intervention. We propose a much simpler framework, which we believe respects party autonomy. We point here to the important role of contract law in private agreement making.

As in other areas of contracting, such as consumer contracts or contracts between small businesses and major corporations, some modification of contract law is needed to overcome asymmetries in the bargaining process. In all other advanced industrialised countries, one of the modifications includes the option for employees to negotiate collectively. An international experience shows that collective bargaining schemes can be quite straightforward. We refer, for example, to the elegant laws of New Zealand and Japan. We do not see why Australian workers alone should be deprived of this mode of regulating their conditions.

In short and to conclude, Australia needs a regulatory framework which encourages ongoing creativity and ensuring decent working conditions, while building productive workplaces. We fear that hundreds of pages of detailed rules, offences and invitations to

ministerial intervention are not the best way to achieve it but rather the pursuit of responsive, inclusive regulation is. That concludes our overview.

CHAIR—Thank you.

Senator MARSHALL—Your submission develops the concept of what you called the 'worst jobs'. You go into some detail about who will get the worst jobs. You also indicate that the government's rationale for people not ending up in the worst job scenario as you have developed is market forces. Would you explain that in more detail please?

Dr Cooney—That submission was prepared by Dr Jill Murray, so I will refer your question to her.

Dr Murray—As I understand the processes set out in the bill—they are very difficult to understand and I am happy to admit that I do not understand them perfectly at this stage—it seems to me that the bill envisages that some workers in Australia will have as their only legal entitlement the very worst conditions, that is, those in the fair pay and conditions standard. The point I am making is that the government's argument for creating that very low base is that it will permit market forces to generate employment at the bottom end of the labour market. I am concerned that the rest of the bill provides insufficient protection for other workers. To give you an important example, the bill contains a provision that permits an employer unilaterally to terminate a collective agreement. In that circumstance, those workers become workers on the worst pay and conditions. Their only legal entitlement is to those very lowest of the low standards, which I believe, in themselves, are not appropriate. The processes in relation to individual bargaining provide insufficient protection for workers. The bills provisions in relation to duress, which I believe the committee has heard quite a bit about, do not really protect workers against duress. In other words, I think market forces will operate in an unmediated fashion and employers will have the capacity to place any workers—not just workers at the bottom of the labour market—on those lowest of low standards.

Senator MARSHALL—I suppose it is no surprise to you, as it is no surprise to me, that through this inquiry the only organisations to put evidence fully supporting this bill are employers.

Dr Murray—And as I understand, some employers are not interested in such a system. I think the automobile employers association has put to the committee, as have many good employers in the past, that they want good laws. They do not want bad jobs to drive out good; they want to treat their workers properly, yet they may be undercut by unfair competition in a system that sets standards too low.

I might raise another issue in my submission: I am particularly concerned about workers in rural and regional Australia in relation to these market forces. A small business in a country town may not have any capacity to offer rates of pay higher than those very low minimum conditions if in a neighbouring town another business does not. Therefore what are workers going to do—pack up, take their kids out of school, take their mum out of the nursing home and move to another city? I think a system that is predicated on total mobility of workers across the country is going to disadvantage people in rural and regional Australia who may very well end up with those very low conditions as their only legal entitlement.

Senator MARSHALL—A number of employer organisation have clearly submitted to us that they seek an elimination of penalty rates, they want to flatten wages and at least in one instance have indicated that they believe wages are too high already in their industry. Does that surprise you?

Dr Murray—It does not surprise me on the evidence of employer submissions to the safety net wage adjustments and in the test case process. I think most employers are reasonable. Most employers want to reward their workers properly, but they do so within a legal framework. If the legal framework permits a lower floor then employers, maybe despite their best wishes, may be forced to employ people on that lower standard. So I was urging the committee to look very hard at that lower standard—what I have called the worst job standard—and just make sure we are happy to have fellow Australian citizens operating on jobs like that. From my perspective, I do not think we should be. I think those standards are insufficient for any Australian worker.

Senator MARSHALL—You have indicated in your submission that you would believe the bill does not provide sufficient legal protection to stop the incursion of the worst job standards across the labour market generally. You have said that it is your opinion that the worst job standards are not acceptable for any Australian worker in 2005 and beyond. Can you explain why you think that is the case?

Dr Murray—There is a whole package of reasons, but one important reason is that we would be in breach of our international obligations to create and protect the right of freedom of association and the right to collectively bargain. The worst job standards do not permit that right. In substantive terms, I think we may be generating, as other people have said, a working poor class, an underclass, in Australia. I think they are disastrous from a work and family point of view. The hours provisions give the employer nearly total flexibility and control over scheduling, and so I think in many respects they represent a grave challenge to the living standards of Australians.

Senator MARSHALL—Given you mentioned scheduling, I will just pursue that. Is it the case that you believe that the bill actually provides for unlimited flexibility in the way an employer can determine the hours on a day-by-day basis?

Dr Murray—It is not completely unlimited but it is limited only in a very extreme way, so hours of work are to be a maximum of 38 averaged over 12 months ordinary hours. That essentially relieves employers of the need to pay overtime or penalty rates because ordinary hours can be averaged over 12 months, so you could work an 80-hour week of ordinary hours provided at some other point in the year your hours dropped to be commensurate with an annual average of 38. I note, too, there is no guarantee in the bill that your income will not fluctuate in that way, so you would be paid for the 80 hours one week and for the 10 hours the next week.

Senator MARSHALL—That is something we are going to try and resolve with the department later on today. In terms of notice for that flexibility, is there any requirement under the act to give an employee notice of a change of hours?

Dr Murray—None whatsoever; not as I understand it.

Senator MARSHALL—On a day-by-day basis you could be told, 'I only want you for an hour tomorrow,' or 'I don't want you at all,' or 'I may want you for 10 hours.'

Dr Murray—I understand that is the case, yes.

Senator WONG—Dr Cooney et al, thank you for your submissions and for your positive contributions in terms of the determination suggestion and others. I have to say I remain doubtful that the government is likely to take it up. In your opening statement, Dr Cooney, you described it as having elements of a highly intrusive state command and control approach as well as a shift in bargaining power. Are you able to identify very briefly those elements of the bill which you would regard as falling into that category of being highly intrusive in terms of the government's or the minister's capacity to intrude into the employment relationship?

Dr Cooney—One of the most striking examples of that is the provision that enables the minister to effectively void provisions in negotiated enterprise agreements. That is a power which I understand is going to be exercised through regulation. It is rather disturbing, particularly from an international perspective, to see something like that emerging. That capacity for the minister to intervene in that way does not seem to be subject to many criteria that would restrain it. I would say that is one of the most striking and somewhat extraordinary powers that is included in this bill. It is interesting to contrast that with the notion of private ordering, where people can agree between themselves without having a government jump in and cancel at large what people have negotiated.

Senator WONG—Is there anything else that you would particularly refer to or isn't it something you have turned your mind to?

Dr Cooney—The other example is non-allowable matters. Again, that is put in regulations, so the minister has an at large power to remove matters. One thing I want to do is contrast these sorts of processes with one which we have been used to in terms of the AIRC, where decisions about what can or should be in agreements are made in an open process that involves stakeholders and unions and employer groups—and we are saying it should involve other groups as well. Contrast that and the situation where people agree in the workplace between themselves with a system where the government, at any time and without any restriction, is able to come in and pull the floor out from under people. That is a very undesirable development in regulation.

Senator WONG—It is not actually the government; it is the minister.

Dr Cooney—Yes, that is right.

Senator WONG—There is no indication that that would necessarily be the subject of executive approval at a cabinet level.

Dr Cooney—No. If you look at other developed countries, it seems very much out of place.

Senator WONG—All of you made some comment about the haste with which this is being considered by the Senate. Does anyone at the witness table consider that they have a full grasp of how this bill would operate?

Dr Cooney—Not at all. It has been extremely difficult. This is a massive change to Australia's approach to regulating the workplace. It is a huge issue. We have brought up ideas

about alternative approaches, and I am sure there are other people in the community who could do that as well. If this is going to happen, it should happen after a very inclusive process that seeks to hear people over a proper period of time, not within one week. It seems that is a recipe for disaster, in my view. You have 700 pages of unindexed legislation that even some of the experts in the field say they cannot understand, and yet we are here trying to come to grips with what is going to be a fundamentally important decision for this country.

Senator WONG—I presume there are a couple of doctorates and a couple of masters degrees, at least, at the table. If you do not understand it in the time frame I am not sure how senators are supposed to be able to. I want to ask a couple of brief questions of both Dr Murray and Ms Chapman.

CHAIR—You have two minutes.

Senator WONG—I have two minutes. Mind you, we do have all day for the department, so I would suggest that perhaps we can defer the tea break by five or 10 minutes to enable questioning of the University of Melbourne Law School, if the committee does not mind.

CHAIR—No. The allocated time is 45 minutes. We started early.

Senator WONG—I again put on record my concern. We have the University of Melbourne Law School before us; we have the department for the rest of the day. This is a very well-regarded law school, and I want to place on record that to not be able to question them sufficiently is entirely inappropriate.

Ms Chapman, the issue I want to raise with you is the unpaid parental leave and the relationship between the supposed minimum rights and the family provisions test case. Can you quickly tell me about the disparity there in terms of what employees would arguably be entitled to now, on the basis of the test case, as opposed to what is in Work Choices?

Ms Chapman—Yes, certainly. The Work Choices bill has quite a meagre offering on unpaid parental leave compared to what was offered by the parental leave test case earlier this year. The only right in the bill as it currently stands is a right to unpaid parental leave of 12 months. After extensive hearing of the parental leave test case, the commission handed down a number of different sorts of rights giving employees and employers a great deal of flexibility. For example, the major way that the test case built on what has been the existing standard of 52 weeks or one year of unpaid parental leave is that the test case gave employees a right to request an extension for a further year of unpaid parental leave, taking it to 24 months. An employer has a right to refuse that request on reasonable grounds. So it is basically a right to request an extension, with an employer right to refuse, all couched around a requirement of reasonableness and taking into account the employee needs and the employment situation and the employer's business concerns. That is an important difference between the bill and the parental leave test case.

The parental leave test case also gave a right to have eight weeks simultaneous leave as maternity or paternity leave. That has not been taken up in the bill. The parental leave test case, very importantly, gave a right to request to return to work on a part-time basis. That has not been taken up in the bill. A final thing given by the test case was a requirement on employers to keep employees informed by taking reasonable steps to communicate with employees when they are on parental leave. That has not been taken up in the Work Choices

bill. I think what is important is that the commission test case went through a very extensive period of hearing submissions, undertaking investigations and a very extensive inquiry process, and it handed down a decision that the commission itself described as 'a cautious decision'. I think it was a cautious decision, basically giving the employee a right to request and the employer a right to refuse on reasonable grounds. There is quite a cutting-down from that minimum standard in the bill.

Senator WONG—So what—

CHAIR—Sorry, Senator Wong, you are out of time.

Senator WONG—So you are stopping me from asking questions?

CHAIR—No. You are out of time on the allocation that we agreed to earlier in the week.

Senator WONG—No, imposed by the government, not agreed to. Let us be clear.

CHAIR—It was agreed with the Deputy Chair, Senator Wong.

Senator WONG—Let us be clear. The government put in place an unreasonable time frame on this inquiry and the government has chosen which witnesses should be here and the timetable for witnesses.

CHAIR—We have had a very balanced program. The allocation of time was suggested by your Deputy Chair and agreed to by me and that is the basis on which we have proceeded throughout the week.

Senator MARSHALL—Senator Troeth, while technically that is true—

CHAIR—Technically that is true, Senator Marshall.

Senator MARSHALL—But it was done on the basis of an unreasonable allocation of time for this inquiry. You are correct that, given the constraint of time, we did have to come to an agreement about how we could use that minimal amount of time, but I do not want anyone to infer from what you have said that we are in any way satisfied with the amount of time that this committee has been allocated to investigate this bill.

CHAIR—But, technically, it is true that you agreed to the allocation of questioning time. I have question for Dr Murray. Correct me if I am wrong, but I think the scenario that you put about workers in rural and regional areas was that businesses in small towns may not be able to offer a suitable rate of pay or a suitable salary and that workers would be forced to move to other towns for suitable payment. Is that correct?

Dr Murray—Basically.

CHAIR—Could I suggest to you—and you may like to consider this—that, in my view, that is a pretty unrealistic view of what people set out to do or what they hope to achieve with both a work and a family situation. I put to you for your consideration that if people are reasonably happy, they have their family around them and may have extended family around them, they may considering moving to another town but, with the additional costs of more expensive housing, moving home and moving their family to another town, that is a decision that families would not embark on lightly. Save for particularly extreme situations, there are many other factors to be taken into consideration by those families apart from the rate of pay.

Dr Murray—Yes, I agree. But my point is that it is the role of law in Australian society to ensure that every job in this country is legally mandated to be of a decent standard. My concern is that people in rural areas are going to be particularly vulnerable to having as their only legal protection the fair pay and conditions standard, which I believe is inappropriate. The Prime Minister has said to that, 'If you don't like it, get another job.' But my point is that, if you live in Bendigo, Castlemaine or outback New South Wales and your mum is in a nursing home, your kids are in primary school and your husband runs a farm, what are you actually going to do? I think that is where the law should step in and say: 'The worst jobs in Australia are jobs we're not ashamed of having in this country. They're decent jobs.'

CHAIR—My response to you on that would be that, with the fair pay and conditions standard which guarantees that people will not be paid less than they are now, what you have got you keep. With those added societal influences of the mother in the nursing home, the husband on the farm and the children attached to local sporting teams et cetera, there are a lot of factors for people to weigh up besides whether they are being paid at a fair rate. However, I am simply putting that into the mix.

Dr Murray—Might I say, with the greatest of respect, that I am very concerned about your statement that what you have got you keep. That is not what the bill says. I am sorry, but it simply does not say that and it is of grave concern to me that you would think that it does. It does not say that.

CHAIR—Some of my other colleagues will be taking that up with you. I put to you a statement from your submission. You say at paragraph 6k that in the worst job in Australia there is, 'No right to collectively bargain with other people at the workplace unless employer gives it to the worker.' That is one statement. You are aware that under Work Choices there will be six types of agreements: employee collective agreements, union collective agreements, Australian workplace agreements, union greenfield agreements and employer greenfield agreements. Unless there is only one type of agreement at the workplace, there will be a range of agreements and there is no prohibition whatsoever on collective agreements.

Dr Murray—The point is that, if the employer chooses that there not be a collective agreement, the bill is deficient in the rights that it gives the employee to seek a collective agreement. It is in breach of international standards of freedom of association for that reason, and it does not provide workers with that protection. It is simply not in the bill.

CHAIR—But if they are in a collective agreement at the moment there will be no way that they will be forced to make any other arrangements.

Dr Murray—But that is not true, is it? With 90 days notice, the employer can terminate the collective agreement and they are back on an individual contract. That is what the bill does. That is why it is a grave invasion of people's rights to collectively bargain.

CHAIR—Can I also put to you that it says in the *WorkChoices* booklet:

A penalty regime, including financial penalties, will apply where agreements are varied or terminated without the consent of employees.

Dr Cooney—That is not what is in the legislation in the unilateral termination provisions.

Dr Murray—Also, that is if you are lucky enough to have one. Let us take the worker in the small country town who wants to band together with the other people in the dairy factory. There is nothing in the bill that can assist them in the face of employer refusal. Although the bill may create provisions to do with collective agreements—

CHAIR—It does.

Dr Murray—there is actually no protection of the right to collectively bargain.

CHAIR—I want to go on to ask you about another statement in paragraph 6k of your submission:

WorkChoices makes it lawful for the employer to provide duress to the worker to place or keep them on an AWA.

Dr Murray—That is correct. It does.

CHAIR—Duress is unlawful.

Dr Murray—That is not correct. The bill says it is not duress if an employer says to the employee that signing an AWA is a condition of their employment. So that is a licence to individualise.

CHAIR—I put to you that it says that it is, and will continue to be, unlawful under the act for an employer to apply duress in forcing an existing employee onto an individual Australian workplace agreement.

Dr Murray—I am amazed that you are reading that to me, because this is an example of where the explanatory memorandum is inconsistent with the terms of the bill. As Sean has said, we are facing a process where unintended consequences are likely to emerge from the haste through which this is being done. The bill does not say what the explanatory memorandum says. That is the view of other legal experts, not just me.

Senator MURRAY—Chair, are you reading from the memorandum? I do not think so.

CHAIR—I am reading from the sheet that I have. It is not the explanatory memorandum, but I certainly believe that this is the case.

Dr Murray—Surely, then, you will amend the bill so that it says that.

CHAIR—It will obviously be explored during debate in the Senate.

Senator JOHNSTON—Dr Cooney, thank you for your submission. I am left up in the air when you talk about associations. Are you in support of the concept of 'no ticket, no start'?

Dr Cooney—No.

Senator JOHNSTON—So you are happy that there can be people in the workplace who are not members of associations?

Dr Cooney—Yes.

Senator JOHNSTON—But you are in favour of using the external affairs power—that is, ILO and UN conventions and treaties—to determine the legal infrastructure of one of our most important domestic relationships, that is, employer-employee.

Dr Cooney—No. The position that we are putting is that that provides a jurisdictional basis for devising mechanisms appropriate to this country. If you look at convention 98—it is a very short convention—you will see it leaves a huge amount of discretion up to individual countries to adapt that mechanism to their circumstance. That is what countries have done. The United States has proceeded in one direction and New Zealand, the UK, the European Union and Japan and so forth in other directions. They have all got collective bargaining regimes, and they differ very much from each other. It is open to us to come up with an appropriate collective bargaining regime. Our view is that, alone, of all the industrialised countries in the world, we do not have a regime that enables employees, when they themselves choose, to say, 'We would like our employment to be regulated by collective agreement,' because it is possible for an employer to place new employees on an AWA which precludes that option.

Senator JOHNSTON—I am interested in this because you say that other countries have done it. I do not think there is another country in the world that is similar in any shape or form to the demographic population distribution and industrial layout of our country, yet you want to put a jurisdictional infrastructure in place as determined by the United Nations or the ILO. I find that very dangerous.

Dr Cooney—With respect, that is not what we have said. The particular regulatory form of collective bargaining is not determined by the United Nations or by the ILO; it is determined by the country. Can I point out that Australia has ratified that convention and has indicated its commitment to it, including in various ways, I take it, under the present government. So the commitment is there to it. The issue of the appropriate form of collective bargaining is one that this country should determine based on its local circumstances. As I have said, there is a diversity of options. Our point is that there is no right to collective bargaining in Australia. What makes this country different from every other industrialised country I do not understand, I am afraid.

Senator JOHNSTON—In your executive summary, you say that the system imposed by the bill is 'complex, punitive, one-sided and bureaucratic', yet you acknowledge at the same time that the current system would benefit from a comprehensive review. What do you see wrong with the current system?

Dr Cooney—We have pointed to a number of features in our submission. One of the things that we have pointed out is that, historically, the method of regulating workplace relations has been based on the conciliation and arbitration model. We say it is time to revisit that and consider, as we have suggested, forming another basis to rest the system on—one that would, we think, overcome some of the legal technicalities and the dispute orientation of that system to move towards an institution like, for example, the ACCC or ASIC, which would regulate workplaces on the basis of submissions from a large variety of stakeholders; so unions and employer groups, but also perhaps religious groups, for example.

People would be able to approach the commission and say, 'There is an issue across the country which we need to address in terms of work-family balance or workplace privacy or outworkers. We need to do this. Let us have a public discussion about this, an open and transparent process involving various stakeholders, and through that come up with new norms that can be applied. Our point is that the commission is already in fact doing this, as it has

shown in the family test case provision. It is coming up with norms that are flexible, not rigid. Anna has already explained the quite ingenious way that they have approached the family provisions case. We are looking to promote that kind of process but move away from the specific national dispute function, which has historically been attended by a lot of legal technicalities and so forth.

Senator JOHNSTON—I am obliged to you for that. Ms Chapman, thank you for your submission, which I found very interesting. You have put forward that the bill should be drafted to accord to same-sex paternity and maternity provisions. As a lawyer I find that in this setting—that is, an industrial relations amendment bill—such a radical approach that is not reflected in any award, any state act or any federal act is a mistake. Can I put that to you? I sympathise with your position, but I think to try to do it here undermines the importance of the issue, because it is in the margin. As a lawyer I am inclined to be a bit critical of you seeking to do it here and now.

Ms Chapman—I think you will find that there is quite extensive recognition of same-sex relationships at a state level. You will also find that in New Zealand there is recognition of same-sex relationships.

Senator JOHNSTON—I am loath to follow the New Zealanders, I have to confess.

Ms Chapman—Of course, you would be aware that there are provisions in the existing Workplace Relations Act which will be continued under the bill apparently that recognise that discrimination on the grounds of sexual preference is unlawful in terms of termination and content of agreements and so on.

Senator JOHNSTON—Absolutely.

Ms Chapman—I do not believe that it is a radical step for Australia. It is certainly not a radical step in an international context, although I would recognise that it is a big step for this government, which has shown an unpreparedness to recognise same-sex relationships. That puts the federal government alone in Australia.

Senator JOHNSTON—The states have not done it either.

Ms Chapman—The states do recognise same-sex relationships for a number of purposes.

Senator JOYCE—I have an issue that there has been a bit of conjecture about. I want to ask your opinion. It is a legal issue to do with proposed section 90G of the Workplace Relations Amendment (Work Choices) Bill with regard to public holidays. We know that on a public holiday they are ordinary hours or determined to be paid hours whether you go to work or not. Is there is a possibility that an employer could say on Christmas Day, 'If we don't work, you get paid, but we are working and we expect you to turn up. If you don't turn up you're not going to get paid for that day'? Is there an ability to get around that for Christmas Day, Good Friday and Anzac Day?

Dr Murray—I think your question is a very good one. It is not easy to answer, which is one of the problems that we are facing in this rushed situation. I think the answer is that the 38 ordinary hour averaging provision would basically permit the employer to request the employee to be at work any hour of the day or night on any day of the year at ordinary time. As I put in my submission, that includes 3 am on Christmas Day. Your only entitlement to pay

under the bill is for hours worked. So I guess if you refuse to go in on Christmas Day you do not receive pay under the bill. Probably it would not get to that, because you would be sacked, wouldn't you?

Senator JOYCE—I just wanted clarification. There is a lot of conjecture about what it actually means. I want to get to the bottom of what it means.

CHAIR—Senator Murray, you have eight minutes.

Senator MURRAY—Thank you. You think you are rushed; just look at it from our side of the house! Dr Murray, I am unashamedly of the view that work in our society has to be viewed from a social as well as an economic perspective. That means it has values attached to it. It is not about labour as a commodity. I noticed in your submission—it is captured well in your introduction—that you use a lot of value laden words. For instance, you refer to 'decent work', 'quality employment', 'modern', 'public', 'democratic' and 'participative'. I think you have emphasised that a system which does not attend to what I would describe as First World, liberal democratic values and principles with respect to those who are poorest, weakest and most disadvantaged in our society is a problem.

The government argues in contrast that this mechanism will produce jobs for those without jobs and will create meaning in the lives of people who are presently welfare dependent. I keep arguing, 'Where's the evidence? Where's the data? Where's the modelling that shows that?' I would like you to indicate whether, in your view, this onslaught on those who are weakest and most disadvantaged in our society is justified by the prospect of greater employment or more meaning through being in work rather than on welfare.

Dr Murray—I need to limit my answer to my area of expertise. I am not an economist, so I cannot address that point. I am speaking as an academic who has studied systems of labour regulation and had some regard for the economic outcomes—though I am not an expert in that field—and for the international norms and human rights regimes which inform my view of what a decent job is. My submission and that which Sean has spoken to are interconnected, because I say in my submission that as a society we need to make sure that the worst jobs are satisfactory, that we are not ashamed of them and that we are happy for people to be doing them—that is one thing I have addressed.

The problems in the bill actually have nothing to do with economics. The things that Anna spoke about do not cost businesses anything. Currently, dads have a right to one week at home with a new baby, and this year the commission said, 'Let's make it eight weeks.' That is not an additional cost of any great significance. The commission itself said that, but the employer groups said no. So there is no reason for these very mean-spirited, low-core standards.

A second and related point is that you do not lightly destroy the system that we have in Australia, which at the moment is public, transparent and participative and, in my view, feeds into the democratic values of our society. One of the things the bill does which has not been much remarked upon is to destroy our regulatory capacity to create labour standards through an institution. The government is now saying that market forces will generate standards. That might be true, but they are going to be sporadic and they will not be achieved through a rigorous, open, public process. I very much endorse what Sean has said. What can I say?

These are fundamental societal changes that, in my view, are occurring with too little consideration.

Senator MURRAY—One of the matters which has exercised my mind is the way in which the place of the award in our system is being diminished. Although 16 allowable matters will remain—access to the award is a safety net for those on certified agreements, above award rates or on individual agreements—as a reference point that connection is severed. It is apparent that for some industries the award does not matter at all, as the representative of the mining and metals industry said today. But for small business employees—for cleaners and those at the bottom end of our society doing important but low-paid jobs—the award protection is gone. I do not see the merit in that argument. I do not see, frankly, that there is a decent economic reason for it, but I do see that there is a social and probably an economic cost as a result of such action. In your view, how important have awards been for those who as low-paid workers are entitled to a decent work standard?

Dr Murray—They are very important, both in terms of the substantive provisions they contain and, more importantly perhaps, the structural role they have played in Australia. Awards have had the capacity to cover a workplace, if you like, before the worker gets there, so they can walk in and have the protection of the award if the employer is bound by it. Of course, in the state system, common-rule awards perform that function across the economy as a whole. I think your description of what is going to happen to the awards actually falls short of what is really going to happen to the awards. Ultimately, over time, not only is the connection severed with awards but you never go back. Once you have made a deal under the new system, the award will no longer be there in any shape or form. One way of looking at the bill is that it is going to strip away, over time—maybe five or 10 years—that old system totally and then you will be left with a much less regulated system.

I think it is important to realise that the vulnerable and low-paid have relied on these awards for the test case standards created by the commission, such as the ones Anna is talking about. I would be very interested to know from the mining industry if their workers have a right to request a second year of parental leave, if their workers have a right to request part-time work, if fathers working in the mining industry have a right to eight weeks at home with a new baby. I bet they do not. The commission has just this year created a new set of standards which will apply to every federal award employee—or they would have applied to federal award employees, except this bill is going to stop that happening. They are cutting-edge, innovative—as Anna said—modest, reasonable, cautious labour standards, but actually they are the best we have got in Australia. Not only the bottom end of the labour market but decent work across the labour market as a whole will be thrown into jeopardy by the bill.

Senator MURRAY—With respect to Senator Joyce's question on public holidays, one way to resolve that issue would simply be to put a line into the bill saying that any person who works on any public holiday must be paid penalty rates.

Dr Murray—It would have that effect, yes.

Dr Cooney—Subject to the constitutional complexities of the bill.

Senator SIEWERT—I would like to follow up on the issue of same-sex relationships. I am really pleased that it got raised, because we have had such a short time to look at things in

this week that it is one of the issues that have fallen through the cracks. My understanding is that same-sex relationships have been included in antiterror legislation.

Ms Chapman—I am not very familiar with the antiterrorism legislation, but, yes, that is my memory of the media reports.

Senator SIEWERT—Is it possible to draft up some amendments that we could propose to ensure that same-sex relationships are included in this bill?

Ms Chapman—I think that is very possible, yes.

Senator SIEWERT—Are you able to help us with that?

Ms Chapman—Yes. I would be happy to help you.

Senator SIEWERT—I would appreciate it. Just for the record: Western Australia now has quite good legislation on this.

Ms Chapman—Yes.

Senator SIEWERT—I would quickly like to follow up now on something I am particularly concerned about, which is the impacts on the vulnerable groups that have been listed previously and the impact on seeking employment, in particular the relationship with Welfare to Work. Are there specific amendments that you would suggest could be made to put in place better protection for the most vulnerable groups in our society that are going to be impacted upon by this legislation?

Dr Cooney—The difficulty with that is that the bill is so complex. It would require a major rewriting and reconsideration of the bill—and that is in fact what we are suggesting. We are saying this is the wrong way to proceed. The danger which I think we might be getting into with this kind of legislation is that it will be tinkered with as little problems come up. So we are going to keep going and going and it will become more complex and more micromanaging. I just think this is the wrong way to go, which is why we say: let us just step back, rethink this whole process and come up with a much simpler system, one that does have decent work and fair processes but that also respects party autonomy. I cannot answer your question, I am afraid, because of the enormous complexity of this legislation. No doubt something could be devised, but it would not be overnight.

CHAIR—That finishes our time for this session. Thank you very much for your appearance here today.

Proceedings suspended from 10.34 am to 10.49 am

ANDREWS, Mr Les, Acting Assistant Secretary, Wages and Conditions Policy Branch, Workplace Relations Policy Group, Department of Employment and Workplace Relations

BOHN, Mr David, Assistant Secretary, Legislation Reform Branch, Workplace Relations Legal Group, Department of Employment and Workplace Relations

CENTENERA, Ms Liesl Maria, Director, Legislation Reform Branch, Workplace Relations Legal Group, Department of Employment and Workplace Relations

CULLY, Mr Peter James, Assistant Secretary, Legislation Reform Branch, Workplace Relations Legal Group, Department of Employment and Workplace Relations

De SILVA, Mr David, Assistant Secretary, Legislation Reform Branch, Workplace Relations Legal Group, Department of Employment and Workplace Relations

JAMES, Ms Natalie, Assistant Secretary, Legislation Reform Branch, Workplace Relations Legal Group, Department of Employment and Workplace Relations

KEOGH, Ms Lucy, Director, Legislation Reform Branch, Workplace Relations Legal Group, Department of Employment and Workplace Relations

KOVACIC, Mr John, Group Manager, Workplace Relations Policy Group, Department of Employment and Workplace Relations

McDONOUGH, Ms Louise, Assistant Secretary, Workplace Relations Policy Group, Department of Employment and Workplace Relations

MERRYFULL, Ms Dianne Cheryl, Assistant Secretary, Legislation Reform Branch, Workplace Relations Legal Group, Department of Employment and Workplace

PRATT, Mr Finn, Deputy Secretary, Workplace Relations, Department of Employment and Workplace Relations

SMYTHE, Mr James, Chief Counsel, Workplace Relations Legal Group, Department of Employment and Workplace Relations

STEWART, Mr John, Director, Training and Skills Formation, Workplace Relations Policy Group, Department of Employment and Workplace Relations

CHAIR—I welcome back the Department of Employment and Workplace Relations. I am not expecting that you will wish to make a further opening statement, so we will probably proceed directly to questions. As you would imagine, over the last few days a number of issues have arisen which we would like to clarify with the department. I am proposing that we now do that. To open, there is one issue I would like to ask the department to clarify. During the last session, one of the academics from Melbourne University was asked by me about duress by an employer to an employee in the signing of an AWA. I indicated to the witness that, in my view, with the provisions of the act, it was not possible or legal for an employer to apply duress to an employee on the signing of an AWA. Could the department clarify that, put that on the record and, if possible, quote the requirements of the act?

Mr Smythe—You are correct. The bill specifically provides that a person shall not apply duress in connection with an AWA. The provision is proposed section 104(5), which states:

A person must not apply duress to an employer or employee in connection with an AWA.

That would include the signing of an AWA. That does not change the existing law.

CHAIR—I think the next section goes on to say: 'To avoid doubt ...'

Mr Smythe—That is the key point—to avoid doubt—which is an indication that it does not change the existing law. All it does is clarify that the existing law says that, in connection with taking on a new employee, the fact that that employee may be required to sign an AWA is not, by itself, duress.

CHAIR—Is that explained in the explanatory memorandum as well?

Ms James—That is correct.

CHAIR—I understand that that is sections 126(3) and 126(4). Is that correct?

Mr Smythe—That is correct.

CHAIR—Good. Thank you very much.

Senator JOHNSTON—I have got some extensive matters. Mr Pratt, why do we not have an index to this bill?

Mr Pratt—With bills of this sort, I understand it is not actually a convention to provide an index. At some stage, of course, there will be a reproduction of the new act. Typically, then, an index is provided.

Senator JOHNSTON—When is the reproduction, the reprint, likely to be?

Mr Pratt—I cannot say. I will just check with my colleagues as to what typically happens in that area.

Mr Smythe—I do not think I can predict when a reprint would be.

Senator JOHNSTON—Can I make the point that I have laboured here for five days now, grappling to come to terms with the various headings, and I have had to put up with some quite false and misleading statements made by various witnesses, only because I could not quickly flick to the appropriate piece of legislation that would reject the contention. We have sat here and listened to, I must say, a litany of false statements about this legislation and I would have liked to have been in a position to head some of these things off and to allay some of the fears. But, grappling through these various things, I have now got a table of contents produced from some other organisation. It would have been helpful, can I say.

I will take you to proposed section 103L. This is an area of very vexed discussion about the termination on 90 days written notice. Mr Shorten was one of the people who raised this matter. I accept all the provisions in that section. The allegation is that on 90 days notice a person reverts back to the Fair Pay Commission standard. I would like you to answer that for me as a first point. Secondly, 103M states:

An employer intending to terminate a workplace agreement under subsection 103L(2) may make undertakings ...

Why wouldn't we mandate undertakings in terms of good workplace relations? Why wouldn't we mandate that an employer issuing a 90-day notice should set out what the terms and conditions are going to be at the expiry of the 90 days?

Mr Pratt—That is certainly an option which is open to the government to consider, and it may have actually considered options along those lines during the policy development process.

Senator WONG—Excuse me, Mr Pratt: Senator Joyce and I are finding it difficult to hear you.

Senator JOHNSTON—I will repeat the question. In a nutshell, the question was: in the second line of 103M(1), why wouldn't we change the word 'may' to 'shall' ?

Mr Pratt—I think it is open to government to consider that option. In relation to the policy on this, one thing I would like to clarify is that there are two aspects to the process. It is correct that, for agreements which are struck under the Work Choices arrangement in the future, after the 90 days employees may fall back to the fair pay and conditions standard and any voluntary undertakings provided by the employer. It is also true, though, that agreements which are struck under the present system can only be terminated through an application to the Industrial Relations Commission and, if successful, the employees would fall back to the fair pay and conditions standard and relevant award conditions which continue to apply.

Senator JOHNSTON—You are talking about part VI—awards and revocation of awards—are you not? One of the witnesses this morning said that on three months notice you can terminate an award agreement. I do not think that is right. I think she has confused the three months notice. The only way you can terminate or revoke an award is through the commission; is that correct?

Mr Pratt—The point I was making was that any certified agreement which has been struck under the current Workplace Relations Act can only be terminated, after 90 days notice, through application to the Industrial Relations Commission. As I said, there are procedures associated with that. And the employees covered by that certified agreement would fall back to the fair pay and conditions standard and the allowable award matters which apply.

Senator JOHNSTON—What section is that?

Mr Pratt—I will just confirm that.

Senator JOHNSTON—It might be division IX.

Mr Smythe—If we are talking about certified agreements that are presently in force, the bill deals with that at page 584, which is division 1 of part II of schedule 14. A different regime applies to the termination of existing agreements.

Senator JOHNSTON—Pre-reform certified agreements. Right, I am clear with that. Let us talk about awards. The proposition is that someone on an award can be terminated on three months notice.

Mr Bohn—The processes for terminating existing federal awards are, as you say, set out in part VI of the legislation.

Senator JOHNSTON—That is not a three-month notice?

Mr Bohn—That is not a three-month notice.

Senator JOHNSTON—You have to go to the commission and you have to do the simplified rationalisation process, don't you?

Mr Bohn—There are procedures in that part for terminating. It is a relatively limited range of circumstances. I am talking about existing federal awards. That is the question I understood you were asking.

Senator JOHNSTON—That is the question. I think we have clarified that. I am looking at section 124 of the transmission of business rules. The terms and conditions inherited by the new business proprietor turn on a 12-month period in which he can demand new terms and conditions from those employees. Is that the way I should read this?

Mr Smythe—At the end of the 12-month period a number of things might occur. I will invite my colleague Ms Centenera to explain those to you.

Ms Centenera—At the end of the 12 months, either the new employer's existing agreement, if it is capable of applying to the transferring employees, or an existing award, if it is capable of applying to them, will apply to them. In the absence of an award or an agreement, they will fall back to the standard. Post those 12 months, though, it is still open to the new employer to vary an agreement that on its terms would not apply to those transferring employees. It is still open to them to do so, but in the interim.

Senator JOHNSTON—Why wouldn't we mandate a notice to employees telling them that as of the acquisition of the business by the new employer?

Ms Centenera—There is a notice in—

Senator JOHNSTON—Good. I am pleased to hear that.

Ms Centenera—divison 8 of part VIAA, on page 336, and there is an equivalent provision for the transitional agreements in schedule 16. It specifies that there is a notice that transferring employees must receive that says how long the transmitted instrument is going to apply for and what is going to happen. The employer must give an indication of what is to happen at the end of the 12 months and they also have to identify any collective agreement that is capable of applying to them, amongst other things.

Senator JOHNSTON—Thank you; that is good. That is an answer that I would have liked to have been able to flick to.

Senator BARNETT—There has been some discussion this week with regard to sick leave, the requirements for medical certificates and allegations that they are more demanding and onerous than the current arrangements. I would like to ask whether there is any change to the current arrangements with regard to the provision and requirement for medical certificates and what extra protections there are for employees. I specifically refer you to section 93N.

Mr Bohn—As I understand it, broadly speaking there are three types of arrangements under awards as they exist at the moment: a requirement for a medical certificate after a certain amount of sick leave has been taken, the possibility of either a sick leave certificate or a statutory declaration as a way of satisfying the evidential requirement, and the category that

reflects what is in the legislation now. What I am saying is there is no universal standard. But what is in the legislation reflects a reasonable proportion of award terms.

Ms McDonough—The bill was actually modelled on the existing schedule 1A of the Workplace Relations Act, which provides minimum entitlements for some Victorian workers, and it also reflects elements of the conciliated position in the family provisions case in relation to personal carers leave.

Senator BARNETT—But you have a further provision, subclause (5)—is that right?

Mr Bohn—Yes, that is new.

Senator BARNETT—That is the question I asked. So subclause (5) is a new section which is a further protection for employees. Is that correct?

Mr Bohn—Yes. It is not a provision that is generally included in awards at the moment.

Senator BARNETT—There has been some discussion and debate this week about annual leave and the cashing out thereof and the change to the current arrangements. I would like you to advise what changes there are to the current arrangements. Secondly, can you provide any examples of union or other agreements where cashing out has been provided?

Mr Bohn—Perhaps I can help you with the first part of the question about what is in the legislation. The current legislation does not impose any minimum or maximum amount of leave that is able to be cashed out. It is part of the global no disadvantage test—and you do it just by making an agreement; it is a one-step process. This legislation provides that (a) you can only cash out up to two weeks of your entitlement and (b) it is a two-step process. The first stage is that there has to be an agreement that permits cashing out to occur—it does not make it occur but permits it to occur—and the second stage is that on an individual-by-individual basis the employee has to provide a written request to the employer to take advantage of that possibility.

Ms McDonough—In relation to examples of agreements, a number of agreements already provide for cashing out of annual leave. I do not have with me the proportion of agreements that provide it but I have an example. The name of the agreement is the AAS Enterprise Agreement; it is AG836367 at clause 6.11, referring to the cashing out of annual leave. It says:

Following ratification of this agreement, employees will have a time period of 8 weeks in which to elect to cash out some or all of their Annual Leave entitlement which is in excess of 20 days.

Senator BARNETT—Are you happy to table that?

Ms McDonough—Yes.

Senator BARNETT—Thank you. Is cashing out allowable under the current arrangements?

Mr Bohn—Yes.

Senator BARNETT—There was a comment in a discussion earlier this week that people could go to jail, including if they include prohibited provisions in agreements. Is that correct?

Mr Smythe—No, it is not correct. The bill provides a prohibition on anyone seeking to include prohibited content in an agreement. That is at section 101M. That section provides

that it is a civil remedy provision. If you turn to section 105D, it provides penalties for breach of a civil penalty provision. The breach of that particular provision attracts a civil penalty of 60 penalty units for a natural person or five times that amount for a body corporate. There is nothing in this bill that provides for the jailing of a person for breaching that section. I will go further and draw your attention—

Senator MARSHALL—What if you do not pay the civil penalty?

Mr Smythe—I am coming to that, Senator Marshall. I am sure you would be aware of section—

Senator MARSHALL—We are getting too familiar with each other, Mr Smyth, I can tell!

Mr Smythe—Do not go there, Senator!

CHAIR—Patience, Senator Marshall!

Senator WONG—How much is 60 penalty units currently?

Mr Smythe—Sixty penalty units equate to $6,600. A penalty unit is $110. You will find that in the Crimes Act, Senator Wong. I was going to go on to say that you would be aware of section 350 of the Workplace Relations Act as it is presently enacted. Section 350 provides:

In spite of the provisions of any other law, a court may not direct that a person shall serve a sentence of imprisonment in default of the payment of a fine or other pecuniary penalty imposed under this Act ...

This bill does not propose to amend section 350, so you simply cannot be jailed for breaching a civil penalty provision.

Senator MARSHALL—I wonder whether you are able to provide a list to the committee of any criminal penalties that are provided in the bill? I understand your answer to that specific question, but the bill does provide for some criminal penalties.

Mr Smythe—There are some provisions in the bill, as there are in the current Workplace Relations Act, which provide for imprisonment.

Senator MARSHALL—Without our going through each clause one by one, would you be able to provide us with a list?

Mr Smythe—We can provide that, yes.

Senator BARNETT—There has been some discussion about the 38-hour week and the averaging provision across 12 months. Has the department discussed options to respond to comments this week about making that perhaps more fair or in the public interest?

Mr Pratt—Yes. Consistent with Senator Abetz's discussion at the recent Senate estimates hearings, the government has indicated that it will review the aspects of the bill that relate to the averaging over the 12-month period. It will look at it with a view to identifying any unintended consequences and, if there are any, it will look at options to rectify those. So, yes, we are considering those things.

Senator WONG—When are we going to get that? Before this committee rises—which is today?

Mr Pratt—I cannot commit the government to a time frame on that.

Senator BARNETT—I will let Senator Wong ask further about that if she wishes to. I want to raise the issue of paid maternity or paternity leave. Again, this was raised yesterday. What differences or changes are there to the arrangements that we have at the moment and those that are proposed, if any?

Ms McDonough—Is that in relation to both parental leave and paid mat leave?

Senator BARNETT—Yes.

Ms McDonough—Parental leave will become one of the minimum conditions of employment in the Australian fair pay and conditions standard. It is one element of the standard that has already been prescribed in federal legislation as it currently is. It will have the same extent of application as the existing schedule 14 of the act. The new provisions will differ from the existing legislative provisions in relation to parental leave that are currently in schedule 14 of the act and division 2 of the workplace relations regulations in a number of ways. They will include special maternity leave for women who are ill prior to the birth of a child; include transfer to safe job provisions; extend eligibility to eligible casual employees; allow employees to start parental leave up to six weeks prior to the expected date of birth or placement of an adopted baby; and set out details about adoption leave in legislation rather than regulation. What they essentially do is pick up the more generous elements of the existing award standard in this area and some elements of schedule 1A for Victoria.

Paid maternity leave continues to be a matter that can be negotiated at the workplace. As it is part of parental leave, it is no longer an allowable matter under the Work Choices legislation. The government's position in relation to paid maternity leave is that it already has been successfully negotiated in agreements.

Senator BARNETT—They are arrangements made between the employer and employee, primarily.

Ms McDonough—That is right. In relation to comments about the absence of a paid maternity scheme not employer funded, the government did respond in its 2004 budget in the context of that debate with the introduction of the universal maternity payment.

Mr Bohn—Can I supplement that with one further point. Although parental leave will no longer be an allowable matter, it will be preserved including to the extent that those preserved terms are more generous where there is a paid component that would remain available to employees.

Mr Kovacic—To add to some of the comments that Ms McDonough made: in relation to the spread of maternity leave through agreement making, data from the department's workplace agreement database indicates that between March 1997 and June 2005 employee coverage under current certified agreements increased for paid maternity or primary carers leave from five per cent to 41 per cent of employees.

Senator BARNETT—Can you provide any evidence to the committee that demonstrates the results of the industrial relations reform in New Zealand? There have been allegations that real wages and productivity actually decreased. Do you have evidence to contradict that view? Can you provide the committee with that evidence.

Mr Kovacic—In terms of a comparison with the New Zealand situation and, indeed, the Australian situation, I am aware of suggestions that there were reductions in wage levels for New Zealand employees following the introduction of the Employment Contracts Act in New Zealand. One of the points that I would make in that regard is that there are a number of differences between the arrangements that were introduced in New Zealand and those that are implemented through the Work Choices legislation. They go primarily to the protections that are provided to employees under Work Choices to their existing wages. In particular, I would highlight that, for wages operating under Work Choices, minimum award and classification wages will, firstly, be set and adjusted by the Australian Fair Pay Commission. My understanding is that in New Zealand the minimum wage is adjusted by the relevant labour minister following submissions from various stakeholders. The wages that will be guaranteed or protected under the new fair pay and conditions standard are those that currently exist in awards and have been adjusted to reflect the increase in the 2005 safety net review. An employee will not be able to be paid less than that particular wage level as of day one under the Work Choices system. Indeed, if they enter into an agreement, given that those wages are protected via the fair pay and conditions standard, the agreement will not be able to provide wages less than the relevant award and wage classification wage.

Similarly, in terms of certain award conditions such as overtime and weekend penalty rates, again there is protection for employees of those particular conditions in that, if it is the intention through an agreement for those to be varied, the agreement needs to either expressly indicate how those provisions are to be modified or, alternatively, if they are to be removed, ensure that employees are fully aware of the provisions of the agreement. There is a range of remedies, including setting aside or varying of agreements, compensation or injunctive relief, which will be available against any employer who lodges an agreement without obtaining employee approval or who also engages in false or misleading conduct, coercion or duress during the agreement-making process.

Senator BARNETT—I would like to put my last question on AWAs and the results since 1996 on notice. What is the latest evidence of wage rates under AWAs compared with those on collective agreements and those on awards? Also, what is the categorisation of those on higher salaries versus middle and lower salaries? There has been some debate about that and we would appreciate it if those answers could be provided to the committee.

Mr Kovacic—We are able to provide some information at the moment. We will not be able to provide comprehensive information.

CHAIR—But just for the issues that Senator Barnett mentioned that would be good. Thank you.

Senator NASH—Firstly, can you advise what safeguards are contained within the bill or whether there are any other factors that would prevent a company splitting into several entities of fewer than 100 employees?

Mr Kovacic—There are no safeguards in the bill in respect of that issue.

Senator NASH—Are there any other factors that would—

Mr Kovacic—The government believes that the transaction costs of splitting to avoid unfair dismissal remedies would outweigh the benefit of doing so and therefore it is not necessary to do it.

Senator WONG—Not necessary?

Mr Kovacic—It is not necessary to provide a protection because the transaction costs would militate against that sort of conduct occurring.

Senator NASH—I have a question also on the medical certificates. Can you assure me that it will not apply to circumstances—and I am talking purely about rural and regional from my perspective—where an employee cannot access a medical practitioner or, indeed, there may be a medical practitioner in the town but the employee is not able to get in to see them? What will be the requirement then when there is no access or no availability of a medical practitioner to provide the medical certificate?

Mr Bohn—The requirement to provide a medical certificate does not apply in circumstances where the employee is not able to provide it because of circumstances beyond their control. One of those circumstances would be where there is no doctor available.

Senator NASH—That was quite loose and I just wanted to make sure that that would be taken into account.

Senator WONG—I just want to follow up on a couple of the things which were raised in that last issue. On the provision to which you have referred, Mr Bohn, relating to circumstances beyond control, is there anything in the legislation which might look at the worker's economic capacity to pay for a doctor's visit?

Mr Bohn—No, there is not.

Senator WONG—Just take me to that provision again.

Mr Bohn—It is proposed section 93N, which is on page 117 of the bill.

Senator WONG—I cannot recall who said this; it may have been Ms McDonough. Someone said that the sick leave provision essentially meant no change to a number of people's existing entitlements. Is it the case that in a range of awards there are provisions which deal with the obtaining of a medical certificate? For example, one that I have seen in quite a number of awards is that you get a certain number of days sick leave before you would have to go and see a doctor to get a medical certificate. So there are a range of matters where the employer's right to require the obtaining of a medical certificate is altered or ameliorated by the award.

Mr Bohn—If I can just address the first part before we go on to what is in awards, what I said was that there are a range of types of provisions in awards and they broadly break up into three types. One of those three types is broadly reflective of what is in the legislation. I did not say that there would be no change.

Senator WONG—In relation to the other two types, they are not what you call 'preserved'. I want to come to the use of the word 'preserved' because I would suggest that preserved is simply a word in the legislation and not actually the effect in law given the weight given to an AWA in ousting those provisions. The provisions in awards which limit the

right of an employer to demand a medical certificate on every occasion are not preserved in this bill.

Mr Bohn—Where the preserved term is more generous, it is preserved. What 'more generous' means is to be detailed in regulations, but the intention is that that test will be based on the quantum of the entitlement. So if there is a higher number of days entitlement to personal carers leave in the award than under the standard then the standard would apply. In circumstances where it is not more generous, or is equally generous, then it would be the standard that would apply.

Senator WONG—What about an award provision that says an employee can take the first four days of their yearly sick leave allocation but any time from the fifth day they are required to get a medical certificate? The actual quantum of sick leave remains the same. One might argue that that is a more generous provision in terms of having to see a doctor. Is that notionally preserved under this bill or not?

Mr Bohn—The term is notionally preserved, but whether it applies to a particular employee—

Senator WONG—What you mean by 'the term'?

Mr Bohn—I am saying that the term is not physically removed from the award, but whether it applies to a particular employee will depend on whether the quantum of their entitlement is more or less than the preserved term.

Senator WONG—I understand that. What I am asking about is the same amount of entitlements and different conditions for access. Is that regarded as more or less beneficial under this bill?

Mr Bohn—The legislation, under the regulations, will provide that it turns on the quantum. So if the quantum is the same or less then it will be the standard that applies.

Senator WONG—So ease of access is not relevant?

Mr Bohn—Not to the calculation of the more generous test, no.

Senator WONG—Did you want to add to that, Ms McDonough?

Ms McDonough—You had a question about the incidence in awards of existing requirements for medical certificates.

Senator WONG—And the amelioration of them.

Ms McDonough—Sorry?

Senator WONG—The amelioration of the requirements. In other words, if you have multiple days sick leave you might have to get a medical certificate or you are entitled to the first four days before you have to get it—that sort of thing.

Ms McDonough—From the searches that we have done of awards, there is a variety of arrangements that apply in this respect.

Senator WONG—As opposed to anecdotal evidence, have you collated any study about the actual conditions of sick leave that Australians work under to find out what number of awards and what proportion of employees would have this sort of entitlement?

Ms McDonough—No, we have not.

Senator WONG—So what you are about to tell me is a bit more anecdotal searching that the department has done to try and find differences?

Ms McDonough—It is not anecdotal; they are examples of award provisions.

Senator WONG—On the annual leave provision you read out, there are two points I wanted to clarify with you. Firstly, the cashing-out is only in excess of 20 days?

Ms McDonough—In that particular example, that is right. But there are other examples—

Senator WONG—But this is the one you chose to put up, so I am going to ask you about this.

Ms McDonough—That is fine.

Senator WONG—What is the provision in the bill? How much can you cash out?

Ms McDonough—You can cash out up to two weeks per year.

Senator WONG—What about the next part, which I do not know that you read out—that an amount of leave equal to that which is cashed out must be booked during the next 12 months? What do you understand that to mean?

Ms McDonough—As I understand it, it would mean that, if you do cash out a week's leave, for example, in the previous year, you would need to be able to take a week's leave in the following year.

Senator WONG—So it is a one-for-one type arrangement?

Ms McDonough—In that situation, yes.

Senator WONG—Do you know, in the context of that agreement, whether there was a problem with accrued annual leave or anything like that?

Ms McDonough—I do not. The reason I have that particular clause with me is that I understand that, through the course of this week's proceedings, the finance sector union representative was objecting to the concept of cashing out of annual leave.

Senator WONG—So you thought it would be appropriate to show something that they were party to; is that what you are suggesting?

Senator JOHNSTON—Absolutely!

Senator WONG—Is that a political decision by you, Ms McDonough? Was that something asked of you by the department?

CHAIR—That question is out of order, Senator.

Senator WONG—Was that an issue about which you were asked to get advice by the minister's office?

Ms McDonough—No, it was not. It was something that I initiated.

Senator WONG—Can we go back to the sick leave issue. Of the three categories, you have people on the current federal legislative standard, then you would have people with a range of award provisions and then you would have people on a range of agreement

provisions—certified agreements or AWAs. Are they the three categories to which you are referring, Mr Bohn?

Mr Bohn—No, I was talking about the medical certificate rules. There were three types, broadly speaking, in awards.

Senator WONG—Can you just clarify what you mean?

Mr Bohn—I have to say that I am actually relying on the evidence largely of the ACTU on this. There are provisions in awards that, broadly speaking, reflect the access requirement under the bill. The employer can decide to request a medical certificate. There are provisions in awards which allow the evidentiary requirement to be met either through a medical certificate or through a statutory declaration. There are provisions which, I suppose, have a requirement that a medical certificate is not required before a certain number of days of leave is accessed.

Senator WONG—The department and the government have no idea how many people fall into category 2 or category 3, or in each of the categories?

Mr Bohn—I am not aware of that.

Senator WONG—So, for people in the third category, clause 93N would be an increase in the requirements under which they operate in order to access sick leave?

Mr Bohn—For employees who are currently covered by awards, that would be right.

Senator WONG—They would have to get medical certificates and be subject to that restriction in a way they are not currently?

Mr Bohn—The requirements of the standard would apply, yes.

Senator WONG—I am just asking you to confirm my understanding that if there are—

Mr Bohn—If the award provides differently from the standard then, yes, that would be the case.

Senator WONG—So, upon passage of this bill, a certain proportion of Australians will be required to get medical certificates for sick leave when they previously did not?

Senator BARNETT—Chair, I raise a point of order. The senator is saying that they are required to get sick leave certificates—

Senator MARSHALL—What is your point of order, actually?

Senator BARNETT—The point of order is—

Senator WONG—You do not like the question?

Senator BARNETT—that the employee and the employer—

CHAIR—We will have that discussion between Senator Wong and the officer.

Mr Bohn—I will confirm that that was the point I was about to make. The legislation provides that the employer may request that.

Senator WONG—So the employer may request that. Let us do it that way, if it makes people happier, because making Senator Barnett happy is one of my life's ambitions. Employers who currently employ people in the third category: are we ad idem there?

Mr Bohn—Yes.

Senator WONG—They would have greater rights to require medical certificates to be obtained under this provision?

Mr Bohn—Yes.

Senator WONG—So as a result of the passage of this bill they will be able to demand medical certificates that they would not be able to under the current award provisions?

Mr Bohn—Subject to all those qualifications about 'more generous' et cetera, that is right.

Senator MARSHALL—Just so I am absolutely clear, if the employer requests a medical certificate to authenticate a sick leave absence, every employee would be required to provide one?

Mr Bohn—No. Those employees that will be subject to the standard requirement would be required to do that. Employees who currently have more generous award terms or those employees who are covered by current agreements—

Senator MARSHALL—But you said that that only applied to—

Senator WONG—The quantum.

Senator MARSHALL—the quantum—the amount of sick leave.

Mr Bohn—'More generous'? Yes, it does.

Senator MARSHALL—But then you were not able to define what 'more generous' is. You told us that 'more generous' was about the amount of sick leave.

Mr Bohn—That is right.

Senator MARSHALL—We are talking about individual absences. Let us say that is equal across the board.

Mr Bohn—Okay.

Senator MARSHALL—I am not worried about that; I understand that side of it. I am talking about authorisation for a sick leave absence. Is it the case now that, if required by an employer to provide a medical certificate to authenticate a sick leave absence, every employee is required to do so?

Mr Bohn—No.

Senator MARSHALL—We had better start again, then. Explain to me how that is going to work.

Mr Bohn—Maybe I misunderstood your question. I took you to be asking whether the current position under awards and agreements is that an employer can request a medical certificate.

Senator MARSHALL—I know that is the case in some cases, and I know it is not the case in others.

Mr Bohn—No. I took you to be asking whether that is the case for everybody at the moment, and I was saying no. Sorry; I misunderstood your question.

CHAIR—To make this process clearer, could you rephrase your question in such a way that Mr Bohn is able to understand it.

Mr Bohn—My apologies, Senator. I misunderstood your question.

Senator MARSHALL—Let us go to section 93N. Is the impact of that that, if you have a day off sick and your employer wants you to authenticate that, he or she can ask for a medical certificate and you need to provide it for every day? Does that apply to every employee?

Mr Bohn—Yes, but I qualify that by saying that is the case where the standard applies to them. If you come into the system and there is a current agreement that applies to you that has a different obligation, the standard does not apply to that employee. But where the standard applies, the answer to your question is yes.

Senator WONG—I thought we had dealt with this. Maybe I misunderstood you, but I thought you indicated that the standard would apply unless there was a more generous agreement in terms of quantum, not in terms of access—

Mr Bohn—'More generous'—

Senator WONG—I want to finish the question, because I want to be clear about this. I thought you indicated to us that the standard provision in 93N would apply unless there was a more generous provision that otherwise applied under an AWA or an agreement. But you indicated to me that a more generous provision is one that relates to a greater quantum of leave, not to easier access to leave.

Mr Bohn—That is right, but the 'more generous' concept is relevant in relation to terms in an award. I am sorry if I was not clear about that.

Senator WONG—Okay. So where are we, then? Let us focus on the rights of employers, because that may be an easier way of dealing with it. If an award says the employer can ask for a sick leave certificate after an employee's fifth non-consecutive or cumulative day of absence in any one year, would an employee of that employer have their rights in terms of sick leave altered by this standard?

Mr Bohn—Leaving aside 'more generous'—which I assume we are—the answer to that is yes.

Senator WONG—Right. The employer would have a new right in relation to being able to request a medical certificate for every single day.

Mr Bohn—Yes.

Senator WONG—Can we go to this issue of 'preserved'—the term that people keep using? I just want to make sure that we understand what we mean by that. Do I understand correctly that when the department is utilising the phrase 'preserved' what they are in fact referring to is award provisions which will continue to operate only if they are not removed by an AWA, certified agreement or greenfields agreement et cetera?

Mr Bohn—Yes.

Senator WONG—Could the department confirm—and I think we have had this discussion—that all that would be required under this legislation is an AWA that explicitly removed all other conditions of employment other than those set out in the agreement?

Mr Bohn—Someone else might be best placed to answer that.

Mr Kovacic—'Preserved' applies to those existing award conditions that are also covered off in the Australian fair pay and conditions standard. For instance, in the discussion you have just been having with Mr Bohn around the sick leave issue, if an existing award provision were more generous than what is provided for in the standard, that particular award provision would be preserved for both current and new employees who will be employed under the particular award.

There is a second component of preserved award conditions. They are those issues such as long service leave and notice of termination where existing award provisions will be preserved for employees—both new and current award-reliant employees employed under the relevant award—into the future.

Senator WONG—Hang on: on that, can they be contracted out of?

Mr Kovacic—The answer that was given a moment ago in terms of—

Senator WONG—No, the second category to which you just referred.

Mr Kovacic—For agreement-making purposes, the benchmark is the Australian fair pay and conditions standard.

Senator WONG—Correct. My only point is this: other than the Australian fair pay and conditions standard, which has a legislative base, when you use 'preserved' in relation to more generous award provisions, what you actually mean is they will operate provided that they are not removed by an applicable AWA?

Mr Kovacic—If they apply to both current and future award-reliant employees, in terms of an agreement, the requirement is that the agreement complies with the fair pay and conditions standard, as legislated.

Senator WONG—But not the so-called preserved award provisions?

Mr Kovacic—That is correct.

Senator WONG—Right. And it is perfectly legal under this legislation for an employer to give a new employee—I will have the discussion about ongoing employees later—an AWA that says, 'This is your AWA.' It has the four minimum conditions plus the ordinary minimum rate, and an explicit clause saying, 'This agreement contemplates and removes all entitlement to redundancy pay, penalty rates, shift allowance and overtime.' Is that correct or not?

Mr Kovacic—If the agreement included the provision that expressly provided for the removal of those provisions and it complied with the fair pay and conditions standard, that would be okay.

Senator WONG—That would be 'okay'—that is a moral position. It would be legal?

Mr Kovacic—Sorry, yes, legal.

Mr Pratt—They could offer that agreement to the potential employee.

Senator WONG—And it is also perfectly legal under this legislation for an employer to give to a new employee—and I am sure Mr Smythe and I will have the discussion about the duress provision later in relation to existing employees—the sort of agreement I have

described to Mr Kovacic and tell them, 'That is a condition of your employment. If you do not sign this, you will not get the job'?

Mr Pratt—That is correct. They can offer an agreement of that sort as a condition of employment.

Senator WONG—I turn now to the issue of constitutional coverage. Has the department considered the submissions of the 151 academics and the separate submission of Professor Andrew Stewart? To whom do I address these questions—presumably you, Mr Smythe?

Mr Smythe—To me and Ms James on my right. We are aware of those submissions. I think they were made yesterday. To say that we have considered them might be overstating it.

Senator WONG—You are doing better than we are. We are often in the situation of considering submissions as they come in and as we are asking questions in this inquiry. Professor Stewart suggests first, and I want to confirm this is the case, that employers who fall within these categories within the jurisdictional bounds of this legislation which are obviously constitutional—trading, financial and foreign corporations, Commonwealth agencies, territories, employers, Victoria et cetera:

... will have no choice as to whether to "opt in" to the new federal system.

Is that correct?

Mr Smythe—That is correct.

Senator WONG—This follows on from a question Senator Joyce asked earlier, and I might be pre-empting him, but perhaps you can tell me why the government has chosen not to rely on the industrial affairs power. Why are you relying on 51(xx) instead of 51(xxxv)?

Mr Smythe—I cannot answer why the government chooses a particular constitutional power; that is a matter for the government.

Senator WONG—Why is this legislation drawn up predicated on the corporations power, not on the industrial disputation power?

Mr Smythe—That is a matter for the government—

Senator WONG—I would have thought that is a legal decision, not a policy decision.

CHAIR—I would say it is a policy position.

Senator WONG—Can you offer no indication as to why that choice was made?

Mr Smythe—As the chair has said, what the government chooses as its constitutional underpinnings for the laws it chooses to make is a policy decision.

Senator WONG—The use of 51(xxxv) would require the finding of an interstate industrial dispute to ground the jurisdiction; correct?

Mr Smythe—In most circumstances, yes.

Senator WONG—I ask you to refer to the top part of page 3 of Professor Stewart's submission, which relates to the interpretation of the term 'trading corporation'. Section 4AB essentially relates to, as I understand it, what the definition of 'trading corporation' would encompass and, therefore, entities that would be brought into the legislation whether or not they wanted to. He uses the example of a not-for-profit body, such as a local council:

... and a range of community organisations qualify, on the basis that they have "significant" trading activities.

Is that the intent of the coverage of the legislation?

Mr Smythe—I would not disagree with his analysis.

Senator WONG—Would you disagree with his suggestion that the jurisdictional bounds on that basis is vulnerable to a narrow High Court determination as to what constitutes 'trading corporation'?

Mr Smythe—I am sorry; I am not sure I understand your question.

Senator WONG—He says:

But the scope of the new regime is vulnerable here to the High Court choosing at some point to adopt a stricter view of what constitutes a trading corporation.

Mr Smythe—Any constitutional underpinning is always vulnerable to a change of view by the High Court as to what the bounds of the constitutional power are.

Senator WONG—Correct—

Mr Smythe—So the answer to your question is yes.

Senator WONG—but the government has chosen to rely on 51(xx).

Mr Smythe—At any time, the High Court could change what it understands 51(xxxv) to mean as well. I do not really understand the point you are making.

Senator WONG—He makes this point:

Even on the existing test there will be not-for-profit bodies who will be left unclear as whether they are in or out of the federal system. Indeed they may potentially be in at one time and out at another, as their activities change!

Do you disagree with that?

Mr Smythe—No, I do not. I think, in the implementation of a new system based on a totally new constitutional head of power, at the margins there may be some uncertainty. I think that is an inevitable consequence of a new regime.

Senator WONG—I am trying to get some sense of what the lack of clarity there would be. Could a community organisation incorporated under state law that is found to be trading be potentially covered by the system?

Mr Smythe—I am a little reluctant to talk about hypotheticals, but that is a possibility.

Senator WONG—The point on which I think you agreed with Professor Stewart is that they might not be in the system if, for example, they change their activities in any one year so that they were not actually trading.

Mr Smythe—That is theoretically possible, although it is difficult to imagine an organisation changing its activities to a sufficient degree to move them either in or out of being regarded as trading. I do not imagine that they would take such a decision lightly and, were they to do so, they would probably take into account the effect that might have on their employment regulation affairs.

Senator WONG—With respect, Mr Smythe, I think you are assuming a lot from some of the community organisations I have been involved with. I am not sure that they would have the constitutional bounds of the Commonwealth in terms of their activities high on their list of priorities.

Mr Smythe—I suspect that, with the profile being given to this exercise, they will be on notice that there is an issue.

Senator WONG—I think we are assuming that a lot more people understand this than in fact do. The trading corporation issue would potentially cover entities incorporated under state law—so states' associations acts, for example, as opposed to the Corporations Law?

Mr Smythe—Yes.

Senator WONG—Would various charitable organisations which may engage in fundraising activities be covered or not?

Mr Smythe—Again, I am reluctant to give an opinion about hypotheticals; but, if a body is incorporated at law and it engages in trading activities, it will be covered.

Senator WONG—I think the problem, Mr Smythe, is that you might be appropriately reluctant to indicate, but the Senate is being asked to pass legislation which quite dramatically changes industrial relations—the regulation of work and employment—in this country and to pass an act which represents a very significant jurisdictional shift for the Commonwealth. I would have thought that people, certainly my constituents in South Australia, would like to know whether community organisations which are registered as incorporated associations under state legislation will in fact be covered, because, as you have indicated up front, that is not an opt-in arrangement. These incorporated bodies do not have a choice of which system they are under. Is that right?

Mr Smythe—That is correct. I indicated a few moments ago that, with the introduction of a new regime like this, there would inevitably be some uncertainty at the margins, but there is uncertainty at the moment as to which system you are in. I think my colleague Ms James has some examples of the sorts of areas in which, under the current CA based system, employers and employees do not know which system they are in—state or federal.

Senator WONG—But isn't one of the issues there that an industrial tribunal makes certain agreements and there might be an argument about different awards, but you are talking about an employer who is possibly a not-for-profit incorporated association under state law, who engages in some trading activity and who suddenly finds, without doing anything, that they are in this new federal regime.

Mr Smythe—That is possible. I imagine that there will be test cases and the law will become settled.

Senator WONG—How long will that take?

Mr Smythe—I have no idea.

Senator WONG—The sort of test case you are talking about is a constitutional case before the High Court. This is not a matter that could be determined in any other jurisdiction, is it?

Mr Smythe—That is correct.

Senator WONG—How is an incorporated body in South Australia that is a not-for-profit organisation but does some trading going to determine whether it is supposed to be in or out? It is hardly going to have the money to go before the High Court to find out.

Mr Smythe—I would imagine that they would seek some legal advice about their situation.

Senator WONG—So the advice of the government to charitable organisations who trade is to seek legal advice about whether they are in fact covered?

Mr Smythe—I think that would be a sensible thing to do.

CHAIR—Senator Wong, this is the last question for you at the moment.

Senator WONG—I have a lot more on this.

CHAIR—We will have another session.

Senator WONG—I understand that. I am suggesting that it might be better for me to—

CHAIR—Senator Murray has been waiting patiently.

Senator WONG—Yes. I am suggesting that it might be better to go to Senator Murray now.

CHAIR—And I will, thank you. Senator Murray, you have 15 minutes.

Senator MURRAY—Mr Pratt, have you had a team from your department monitoring these hearings and reading at least the main submissions?

Mr Pratt—Yes, to the extent possible.

Senator MURRAY—Arising out of that, will you have a set of amendments that come to mind, particularly technical amendments?

Mr Pratt—There are a range of amendments which the department is considering.

Senator MURRAY—Before the committee finalises its report at close of business on Monday, would you be able to provide it with an indication of which areas you are considering and will be addressing?

Mr Pratt—I cannot commit to that. I am happy to take that on notice and consult with the minister.

Senator MURRAY—We would appreciate it because it would help us know whether areas we think are defective are being addressed by you.

Mr Pratt—We will ask the minister.

Senator MURRAY—Thank you. Moving to whichever of your panel deals with the 38 ordinary hour week, if that is to be averaged over a year, is it possible that an employer could require an employee to work on a public holiday for ordinary pay without penalty rates?

Mr De Silva—Yes, it is possible for an employee to be required to work on a public holiday. The guarantee that is provided is that they will be paid their basic rate. The issue of penalty rates would be covered by an applicable award or agreement.

Senator MURRAY—If the award or agreement does not apply, are you telling me that a worker could be required to work on Christmas Day at ordinary rates of pay?

Mr De Silva—If there were no applicable award or agreement and the employee was just covered by the standard and there was no other contract of employment that provided what they would be paid on a public holiday, they would be guaranteed the basic rate of pay. That is correct.

Senator MURRAY—So the only way to remedy that in law is to require that any person who works on a public holiday be entitled to penalty rates—that is correct, isn't it?

Mr De Silva—I am sorry, I did not hear your question.

Senator MURRAY—The only way to remedy that would be to amend the law to require that anybody who works on a public holiday would be required to be paid penalty rates.

Mr De Silva—Or if they enter into an agreement and that agreement provides for those rates on a public holiday.

Senator MURRAY—I do not want anyone to slip through the cracks, so if you do not move that amendment I will and you can tell the people of Australia, or rather the government can, because it is not your fault, why they want people to be poorly paid on a public holiday. Moving to the issue of a stable income week by week, that already happens for seasonal workers, but I am talking about the general population, this averaging process could enable a situation to arise where people are paid far more for one pay period than in another pay period. That is possible, isn't it, on this 38 hour averaging basis?

Mr Pratt—It is not the government's intention with the Work Choices bill that that be the case.

Senator MURRAY—But it is the case as the bill is currently designed, isn't it?

Mr Pratt—The bill as currently designed could allow that but that is not the government's policy intention.

Senator MURRAY—That is good. If I interpret that to mean you are going to amend it, I am delighted. Turning to the general principles that surround the Work Choices bill, I want to refer to agreement making. In all cases, I am referring to new agreements after the Work Choices bill has been passed. Dealing with individual agreements first, a common law individual agreement enforceable in the courts and not registered under the act would still have to comply with the minimum wage and the five standard conditions. That is correct, isn't it?

Ms James—Proposed section 89A deals with the interaction between the Australian fair pay and conditions standard and agreements. What it—

Senator MURRAY—I do not need detail; I just want to know whether that is correct. But a common law agreement—in all cases, of course, I am talking about it being under the federal act—on that basis would not default to any award provision, would it? I am talking about a new common law agreement.

Ms James—What do you mean when you say 'default', Senator?

Senator MURRAY—Default is well understood on your side of the table and on mine. It means that, in the event of an agreement being silent, by default if you want to refer to a provision you go to that award. The question is: if a new common law agreement applies, does it default to an existing award or is it just governed by the minimum wage and the five conditions?

Ms James—If the award on its terms bound the employer in question, then that award would apply.

Senator MURRAY—A new award or the existing award?

Ms James—Any award.

Senator MURRAY—So are you telling me that the 16 allowable matters will apply to a common law agreement?

Ms James—Yes.

Senator MURRAY—Turning to new AWAs, do the same terms apply? Does a newer AWA simply have to comply with the minimum wage and the five standard conditions?

Ms James—That is correct.

Senator MURRAY—And the same conditions apply for the award? If there is no provision in those five minimum conditions and the minimum wage covered by the AWA then, by default, they will refer to be applicable award?

Ms James—The award will not apply in that case, although the protected award conditions provisions do impose requirements on the employer with respect to certain elements of the award not applying. But if the protected award conditions provisions are complied with—in other words, if those award conditions are expressly modified by the AWA—then the AWA will prevail over the award and the award will not operate.

Senator MURRAY—So could you get greater potential protection from a new common law individual agreement than you would from a new AWA under this bill? You would get more conditions that apply?

Ms James—It is an unusual situation, or it is not really comparing apples with apples, in that most common law agreements are well above award conditions. They are usually in areas covering managers or professionals. So, while in theory my answer before was correct about the award applying, it is not usually relevant.

Senator MURRAY—That is not true. Some 38 per cent of all agreements are common law. Most of those are individual and many are verbal. Generally speaking, the variance is on hours of work and wages and the remaining conditions will, by default, refer to the award. It is just not true that they only apply to supervisors or specialists or professionals. You know that and I know that.

Ms James—I did say they only applied in that way. I said that that is quite common. Of course everyone does have a common law contract of employment; not everyone has a written contract of employment. And so, in a sense, 100 per cent of people could fall into that category.

Mr Kovacic—Senator, it is possible that some of the unregistered agreements that you refer to may, in fact, be overaward agreements that might be settled on an informal basis at the workplace level and are not formally registered with industrial tribunals.

Senator MURRAY—The new certified agreements do not have to refer to an award in any sense, but they may. But they do have to comply with the minimum wage and the five conditions. That is correct, isn't it?

Mr Pratt—And unless they expressly rule out the preserved conditions they have to comply with those.

Senator MURRAY—But that is a transitional arrangement, isn't it?

Mr Kovacic—No. If an agreement is silent on those protected award conditions, such as public holidays, penalty rates et cetera, they are automatically read into the agreement.

Senator MURRAY—The certified agreements are restricted in the number of matters that they may cover, as they are at present. That is true, isn't it?

Mr Kovacic—That is correct.

Senator MURRAY—Distinguish for me, if you would, the collective agreement which is a common law agreement, in other words which is not registered. The only requirement in that circumstance in law would be that you comply with the five minimum standards and the minimum wage. That is true, isn't it?

Mr Pratt—It is the same as for the AWA: if there was a conflict about the conditions that applied, then the fair pay conditions standard and the relevant award provisions would apply.

Senator MURRAY—You are telling me that the law requires that a collective common-law agreement which is not registered must comply with the relevant award?

Mr Pratt—Yes.

Senator MURRAY—And over and above that, of course, a collective common-law agreement is able to cover any matter it wishes. That is true, isn't it? There is no prohibited matter in there.

Mr Smythe—I am sorry, could you repeat the question?

Senator MURRAY—A collective common-law agreement—in other words, one that is not registered—is not restricted as to the matters it can cover, is it?

Mr Smythe—I am not familiar with the concept of a collective common-law agreement. Outside the statutory construct you cannot have legally enforceable collective agreements.

Senator MURRAY—They already apply. As you know, there are certified agreements and additionally to that are memorandums between the parties that cover those areas which are not permitted under law to be covered. That already applies—contractual arrangements between the parties which are a collective agreement and are enforceable at common law.

Mr Smythe—I do not think a collective agreement is enforceable at common law. I can take that on notice and come back to you, but my understanding is that they are not.

Senator MURRAY—What, then, is the legal status of those memorandums between a registered organisation and an employer which deal with matters outside the certified agreement?

Mr Smythe—I do not think they are legally enforceable, but I will come back to you before the end of the day on that.

Senator MURRAY—Thank you. Regarding the issue of a legal entitlement to a written statement of employment status and to pay or hours records, does the bill change, decrease or improve the circumstances with respect to that? If you do not know the answer, I am happy to take it on notice.

Mr Smythe—We will take that on notice.

Senator MURRAY—As to the issues raised by HREOC yesterday, I do not have the time for you to give a considered answer or to explore them all, but their submission was very precise. With respect to their specific recommendations, where they are not policy matters, I wonder if you could indicate that their understanding of the way the law will operate is accurate—I do not need a reply now; you may take it on notice—and whether their suggestions for changing the legislation would improve matters. I accept at the outset that you cannot deal with policy matters, but you could respond to those matters which you consider outside the policy range.

Mr Pratt—We will examine those questions on notice.

Senator MURRAY—Thank you. The point has been made that there is no right to collectively bargain in this bill. In that context, does it overturn an existing right to collectively bargain in the present act or is it your opinion that the right to collectively bargain has always been optional under the Workplace Relations Act?

Mr Smythe—I do not think there is any provision of the current act which provides a right to collectively bargain. It certainly facilitates collective bargaining, but, then, the bill does that as well. In answer to your question, I do not think that the bill changes the status quo in terms of rights or capacity to collectively bargain.

Mr Pratt—Clearly, it envisages that collective bargaining will be possible through the types of agreements which are possible under the bill.

Senator MURRAY—Yes. In my view it is a shortcoming of the present act, but I disagree with the government on that. I turn to the issue of wage-setting processes. The question of duress has been a thorny one for the present act and I think it is going to be thorny in the future. Essentially, we are in a situation where, when there is one-to-one bargaining, it is one person's word against another's. You can get a very marked distance between the power of the employer and the employee in some circumstances. Now and again that is reversed, and the power of the employee is quite strong. The act and the bill do not really address the issue of how you get over the inability of people to put and prove a case of duress. The only possibility you might have introduced would have been the reverse onus of proof. Was that considered in your policy discussions? I do not want to know what the outcome was; I just want to know whether it was considered.

Mr Pratt—I do not recall whether or not we considered a reverse onus of proof option on duress. Essentially, we are only in a position to talk about the policy which the government has articulated through the Work Choices documentation and the bill.

Senator MURRAY—Have you had sight of the answer to a question on notice given to us today by the National Farmers Federation which indicates the jurisdictional coverage of the agricultural industry before and after the introduction of Work Choices?

Mr Pratt—I have not seen that. I will check with my colleagues.

CHAIR—What answer is that exactly?

Senator MURRAY—It came through in an email from the secretariat to all of us, and it was a reply to a question on notice. It is headed 'Jurisdictional coverage of agricultural industry before and after the introduction of the Work Choices system.' I will ask you this on notice, as I do not have much time. I will ask the secretariat to forward it to you and I ask you to indicate, on notice, whether you disagree or agree with their general overall judgment as to the number of farming businesses which will remain under the state jurisdiction after the passage of the bill. I will give you an example. In New South Wales, they believe that the state jurisdiction after Work Choices will still be 20 per cent of all farming businesses. In Queensland they believe it will be 90 per cent of all farming businesses; in Tasmania, 15 per cent; in South Australia, 25 per cent; in Western Australia, 25 per cent; and in Victoria, Northern Territory and ACT, obviously, zero. So a very high number of businesses will be left in the state system after the Work Choices bill. The importance of that assessment for us is if you could then provide an estimate, an extrapolation, of numbers of businesses you think will remain in the state system following the passage of this bill.

Mr Pratt—If possible, we will attempt to make the assessment that you have asked for. However, I do not think it is appropriate for us to go as far as speculating as to what the numbers might be into the future after a five-year period. I can say that safely because we simply would not have the data to do that rigorously.

Senator MURRAY—I will give you one other figure, which you probably picked up if you had a team listening. The Restaurant and Catering Industry Association said that a net 29 per cent of restaurant and catering businesses will remain under the state system after the passage of the Work Choices bill. I want to know from your department if you think that is a reasonable estimate and prognosis.

Mr Pratt—We will have a look at that on notice and we will let you know what we think such a number might be if we can do that. I have to say though that quite often on things like that we might rely on an organisation of that sort to get that data.

Mr Kovacic—Also, it depends on what sources of data the organisations themselves may be relying on. It may be information that they have collected from their members, which may not be publicly available through ABS statistics et cetera.

Senator MURRAY—What I am really looking for is whether you disagree. You might not know, and I accept that, but if you disagree we need to know. That is really the point.

Senator JOYCE—I am going to start with an example. I refer to proposed section 90G, provisions affecting what hours count as hours worked. I will go through an example because

I think it elucidates it. Say I work at a supermarket. I note that Good Friday is a gazetted holiday; therefore, if the supermarket is not open I will get paid for it in any case. Then the supermarket informs me that they are opening and everybody will be going to work on Good Friday and I decide that I am going to spend it at home with my family. Will I get paid or could I be open to being dismissed?

Mr De Silva—If you have been requested or are required to attend work and you do not, you would not get paid. It would not be any different from now. If your award provides that you will get the day off or if your agreement says that you will get the day off, that is fine.

Senator JOYCE—What I am trying to flesh out is the power of having something as a gazetted holiday. I can understand why intensive care nurses and doctors would go to work but I am talking about supermarkets, bottle shops et cetera.

Mr Bohn—The gazettal of a public holiday of itself does not entitle a person to a day off. The gazettal of a public holiday is then something that various other things hook into, such as awards or agreements, which provide for days off or penalty rates for working on those days and so forth.

Senator JOYCE—I just want to be clear about this. Just having it as a gazetted public holiday does not mean that on Good Friday every bottle shop and hotel and supermarket can go out there trading?

Mr Bohn—That would be subject to trading hours legislation. That is not the effect of the public holidays legislation.

Senator JOYCE—Would it be possible to draft this legislation through section 51(xxxv), as opposed to section 51(xx), of part V of the Constitution?

Mr Smythe—The present act is largely predicated on section 51(xxxv) of the Constitution conciliation and arbitration power but the government has chosen to move towards a unified system, and using section 51(xx) is an easier way of doing that because, using section 51(xxxv), everything is based on the settlement of industrial disputes.

Senator WONG—You could not answer that question when I asked you, Mr Smythe. I thought you said that that was a policy question.

Senator JOYCE—Proposed section 95A(2) certainly gives a clear example of a related entity test and how you can avail yourself of this legislation as a related entity to another organisation. I am going to give you an example. If I had an organisation with 100 employees and I was about to employ another five—so I set up a service trust to employ the next five—would I therefore be exempt for the 105 employees under the unfair dismissal laws because I had five people employed under a service trust and the other 100 employed under my other corporation?

Mr Smythe—I am not familiar with that aspect of the law. I suspect that you would probably be excluded.

Senator JOYCE—Can you give an opinion as to whether local government authorities are constitutional corporations?

Mr Smythe—I had a discussion with Senator Wong earlier about this. In some cases they will be. If they are engaged in trading or financial activities then they will be constitutional corporations.

Senator JOYCE—On negotiations to leave, I note that the employee must write requesting to cash out annual leave beyond 20 days. But for leave of between 10 and 20 days, can that be cashed out only by the employee giving written notice, or can the employer make the suggestion?

Mr Bohn—Was the question whether you can cash out less than 20 days?

Senator JOYCE—I want to know the process that applies for between 10 and 20 days. Is it by inference of the employee giving written notice, or can the employer suggest it?

Mr Bohn—Twenty days is the maximum. For any cashing out—for one day, 15 days or 20 days—it is the same process.

Senator JOYCE—The employee has to?

Mr Bohn—Yes.

Senator JOYCE—Section 90U states that the federal minimum wage could be expressed as an actual monetary amount or as a method for calculating a monetary amount. This matter was brought up by the disabilities group. The National Party are concerned that this wording would imply that only one method will apply. If this interpretation is correct, it would undermine the Australian Industrial Relations Commission's recent decision to allow disability supported employment services to select from a range of authorised wage assessment methods. Can you confirm whether 'a method' will be interpreted as only one method?

Mr De Silva—Subsection (2) of 90U says 'include a rate' or 'include a method'. The EM makes it clear that it can be a single rate or a number of rates; it can be a single method or a number of methods. The EM is quite clear on that, just to avoid that doubt. The subsection says 'include'. It does not preclude other ways of specifying a monetary amount per hour.

Senator JOYCE—Is that a yes or a no?

Mr De Silva—No. I do not think how they have approached that is correct.

Senator JOYCE—I turn to 93M(5) and your statement 'beyond control'. I will give a couple of examples, so I can understand this. If there is no doctor in your town, that would be beyond your control. What about if the doctor in your town were booked out? Would that be beyond your control?

Mr Bohn—That is beyond your control, yes.

Senator JOYCE—If you are too sick to get to the doctor, that is also beyond your control?

Mr Bohn—Yes—for example, if you have been taken to hospital or something like that, you would not be able to attend a doctor and get a medical certificate.

Senator JOYCE—Through your department, do you have any other examples of situations that would be beyond your control, so we can clearly flesh out what that means?

Mr Bohn—Do we have a list or something like that?

Senator JOYCE—No, other examples. For instance, if the doctor is not a bulk-billing doctor and is charging an excessive amount for you to go to see them, is that beyond your control?

Mr Bohn—My view would be no, Senator. In answer to your question as to whether we have another series of examples, I do not have a series of examples with me.

Senator JOYCE—In relation to duress and coercion, can you give an example of what you would deem to be duress with regard to AWAs and the signing of AWAs?

Mr Smythe—Duress is a concept which is reasonably settled at law. I do not have the precise case law terminology before me, but effectively it involves the overriding of a person's will by illegitimate means. I think that is the commonly understood definition of what duress involves.

Senator JOYCE—Duress is not to be interpreted in the signing of an AWA. If someone offers you an AWA, that is not a duress mechanism.

Mr Smythe—No, if someone says, 'You can't have this job unless you sign an AWA,' the bill quite clearly says that is not duress.

Senator JOYCE—I have heard that, currently, an award mechanism applies to only 20 per cent of the Australian work force and that 15 per cent of that 20 per cent are covered by multiple awards in any case. Is that your interpretation of the situation? There are a large number of people on AWAs, enterprise bargaining agreements, salaries. What portion of the total work force do you think this will have a direct effect on?

Mr Pratt—The government thinks that up to 85 per cent of the Australian work force will be covered by the Work Choices bill. In relation to awards, you are correct. Our figures indicate that about 20 per cent of employees are award reliant.

Senator JOYCE—And 15 per cent of that 20 per cent are on above award wages? They are not getting paid the award; they are getting paid above the award currently?

Mr Pratt—Anecdotally that is so. We are under the impression that many people are on above award payments, but I will see if we have something definitive.

Mr Andrews—Approximately 40 per cent—double—would be on individual unregistered agreements which include above award payments.

Senator WONG—Can I clarify that? I did not understand that. I think the question was about award only coverage being 20 per cent—

Mr Andrews—That is correct.

Senator WONG—And you confirm that. Was the 40 per cent figure in addition to that, not 40 per cent of the 20 per cent?

Mr Andrews—No, it is in addition.

Senator JOYCE—On the Australian Fair Pay Commission: is there, or not, a maximum review period? What is the interpretation of the review period with the Fair Pay Commission?

Mr Pratt—The bill indicates that the Fair Pay Commission will make its first decision in the spring of 2006 and thereafter it is up to the Fair Pay Commission to decide the frequency of the decisions it makes.

Senator JOYCE—Could the Fair Pay Commission have a review and just deem that no changes need be made?

Mr Pratt—That would be my expectation as to how the Fair Pay Commission would work. If it were to come to that decision it would be open to it to have a review and decide that nothing would change. It would also be open to it to make very regular reviews and decide that there would be adjustments on an ongoing basis. It is up to the Fair Pay Commission how it would do that.

Senator SIEWERT—I want to follow up on the section on waivers and the ability when you are looking at AWAs for employers to get employees to give up their rights to the provision of an information statement and a copy of the agreement. Does section 104(5) concerning duress and coercion apply to that provision?

Ms Keogh—Section 104 does deal with those situations. Section 104(5) states:

A person must not apply duress to an employer or employee in connection with an AWA.

So as part of the making of an AWA involves the consideration period and the possible waiver of the consideration period, that would be in connection with an AWA.

Senator SIEWERT—So are you saying that it would cover using duress as well to get somebody to waive their rights?

Ms Keogh—Yes. It is a prohibition against applying duress in relation to the waiver of a consideration period.

Senator SIEWERT—Can you explain to me why the waiver provisions are there?

Ms Keogh—To allow the parties to agree to speed up the agreement-making process.

Senator SIEWERT—I cannot understand why somebody would give up or even be required to give up having a copy of the agreement.

Ms Keogh—The waiver does not apply to receiving a copy of the agreement.

Senator SIEWERT—It is just the seven days?

Ms Keogh—It only applies to the seven days.

Senator SIEWERT—How does that apply to young people and how is it going to be applied with young people in having their parent or guardian's consent? How will that apply, or will it be able to be applied, in a situation with a young person, somebody below 18?

Mr Pratt—Is your question: will a young person under 18 be able to waive their requirement to have a parent or responsible adult endorse their AWA?

Senator SIEWERT—Yes.

Ms Keogh—Yes, they would.

Senator SIEWERT—Let me get this right. A young person below 18 will be able to waive their right to a seven-day review without their guardian or parent's consent?

Ms Keogh—The bill provides for approval of the agreement of an AWA to be undertaken with the consent, if you like, of an appropriate adult when a person is 18 or under but it does not provide for the signing of a waiver to be undertaken with that consent.

Senator SIEWERT—So they can sign a waiver to waive their right for the seven days. How is that going to operate if you are below 18 when you then need your parents' approval?

Senator MARSHALL—Not your parents.

Senator SIEWERT—Or guardian.

Senator MARSHALL—Or an appropriate person.

Senator SIEWERT—An appropriate person.

Ms Keogh—I would suggest that the appropriate adult would not need to give consent to the approval of the agreement if they had the view that the waiver had been conducted inappropriately.

Senator SIEWERT—That is putting a lot of stress on the—

Senator MARSHALL—It defeats the purpose.

Senator SIEWERT—Exactly. It defeats the purpose.

Senator MARSHALL—Can I follow up on that waiver. You say it follows from 104(5):

A person must not apply duress to an employer or employee in connection with an AWA.

Does it logically follow that (6) then applies too, that duress is not about making the signing of an AWA a matter of duress? Can the same then be applied to the signing of a waiver? Can a waiver be required to be signed? It seems logical to me that if you are using that same clause to give you the protection, why doesn't it logically follow that the waiver can also be a condition?

Mr Smythe—The term in section 104(6)—and I think we had this discussion at the estimates hearing—is intended to apply to the engagement of employees.

Senator MARSHALL—Yes, but we are talking about signing the waiver. You are relying on 104 to say that people cannot apply duress to get you to sign a waiver. So why doesn't it necessarily follow that duress would not be making it a condition of employment that you sign a waiver, if you are relying on that clause?

Senator JOHNSTON—That will be in relation to an AWA.

Mr Smythe—What subsection (6) does is say that merely because the employer says you must have an AWA to have this job, that is not duress. That is all it does. So in terms of waiver it just would not have any application.

Senator SIEWERT—Why?

Mr Smythe—Because that is not what it says.

Senator SIEWERT—Moving on to the OEA and the lodging of agreements, it is my understanding that agreements will not be checked once they are lodged with the OEA. That is correct, isn't it?

Mr Pratt—That is not correct. The OEA will not vet agreements in the way it does now as part of an approval process but the OEA will, over time, vet samples of agreements, it will audit agreements—and I believe there was a fair bit of discussion on this at the estimates hearing, where the OEA testified to that effect.

Senator SIEWERT—How regularly will they be checked?

Mr Pratt—That is something which I do not know but I could refer you to that estimates hearing transcript. I must admit I did not hear all of it, but my impression is the OEA will undertake regular audits of AWAs and collective agreements as part of its ongoing responsibility.

Senator SIEWERT—I will follow that up. I would like to move on to orders against industrial action and take you through a couple of specific examples. That is probably the best way for me to handle it. I am talking about orders currently being discretionary, as I understand, under section 127 of the act and that they will be mandatory under these new provisions under section 107G(1).

I would first like to put this scenario to you: if my union notifies of a legitimate bargaining period and my employer becomes a negotiating party and then my employer locks us out for a day and emails us saying that he or she does not want to reach an agreement and he or she then applies to the commission for a suspension of my union's bargaining period, the commission would have to suspend my union's bargaining period. Is that correct?

Ms Merryfull—Sorry?

Senator SIEWERT—I will go through it again. If my union notifies of a legitimate bargaining period and my employer becomes a negotiating party. My employer then locks us out for a day and emails us saying that he or she does not want to reach an agreement. He or she applies to the commission for the suspension of my union's bargaining period. The commission would then have to suspend my union's bargaining period—is that correct?

Ms Merryfull—The grounds for suspension are, as you say, set out in section 107G. I am not sure what grounds you would be referring to. What grounds would there be?

Senator SIEWERT—For example, if the employer stopped paying the employees and they decided that they needed to take action about it, and if they had a meeting and demanded that the employer pay and they refused and so they decided to stop work until they started paying them again, by stopping work in support of their demand that they be paid in accordance with the agreement do they then breach section 110? In other words, if a union or a group of workers took action because they were not being paid, is it possible that the commission would then be required to force those people to suspend their action and go back to work?

Ms Merryfull—There are two different concepts there. Sorry, I am not trying to be difficult. If the employer has locked out the employees—correctly, in accordance with the act—then the employees do not get paid for the period that they are locked out. If the employees are engaged in protected industrial action then they do not get paid for the periods of the industrial action. That is protected industrial action. In relation to unprotected industrial

action that is not associated with a bargaining period, if people were taking unprotected industrial action then section 110 allows for orders to be made.

Senator SIEWERT—Yes. Sorry, I do realise there are two different concepts there.

Senator MARSHALL—Can I just ask something about that. The way I read it there are grounds where the commission must be required to terminate a bargaining period if, indeed, one of the parties states that they are no longer trying to genuinely reach an agreement. Isn't that the case? The first example that Senator Siewert gave was that, if a union has notified of a bargaining period and the employer says that they are no longer genuinely trying to reach an agreement, the commission must terminate the bargaining period. Is that true?

Mr Pratt—In this instance they would be taking industrial action—

Senator MARSHALL—No. Let us put the industrial action to one side for the moment. We are talking about bargaining periods because it flows from there. Protected industrial action flows from having a bargaining period in the first place, so let us just deal with the first step.

Ms Merryfull—I think the situation you are suggesting is that a party could engineer by their own conduct the grounds for a suspension or termination of a bargaining period. Is that what you are suggesting?

Senator SIEWERT—Yes.

Senator MARSHALL—Doesn't 107G(2)(b) simply say that one of the reasons for the commission having to terminate a bargaining period is that one of the parties is not genuinely trying to reach an agreement with the other negotiating party? If you cannot have a bargaining period then you cannot take legal protected industrial action. If one of the parties says, 'I don't actually want to reach an agreement,' there is no provision to take industrial action. Isn't that the natural consequence of that?

Ms Merryfull—That has been previously brought to my attention.

Senator MARSHALL—Then you should have an answer for us.

CHAIR—Order, Senator Marshall!

Senator MARSHALL—Do you have an answer for us?

Mr Pratt—Ms Merryfull is not in a position to pre-empt any decisions the government might want to take about amendments.

Senator MARSHALL—I am not asking about that. I am talking about the bill we are inquiring into now.

Ms Merryfull—What I am saying to you is—

Senator MARSHALL—You have been incredibly unhelpful about what your future amendments might be, so let us deal with what is in front of us.

CHAIR—Ms Merryfull is attempting to answer the question, and I ask her to go on with doing that.

Ms Merryfull—What I am saying is that that has been brought to my attention and I am having a look at that particular part.

Senator WONG—Is that a matter before government at this stage?

Ms Merryfull—I cannot go any further than saying that that has been brought to our attention and I have got that under consideration.

Senator MARSHALL—Who is responsible for drafting this?

Senator WONG—This is the Senate inquiry into legislation that is going to before the parliament fairly soon. I appreciate that you cannot give evidence as to what political decision the government has made, but whether or not the government is considering amendments is relevant to how we handle this bill and to these questions. Is this a matter about which the government is considering amendments or is it an issue that you at your level are considering?

Mr Pratt—Without trying to be unhelpful, it is not open to us to talk about things we may or may not be discussing with the minister.

Senator WONG—That is not what I am asking. The situation we have is that through questioning at estimates we found an unintended consequence of the bill. Goodness knows how many others we have not been able to stumble across in the course of questioning! The minister comes in and indicates that the government is going to be amending that. I appreciate that you cannot give evidence today about what the precise terms of that amendment is, because that is a matter the government has yet to determine. Is that correct?

Mr Pratt—That is correct.

Senator WONG—But on this issue either we can press the point that Senators Siewert and Marshall are making or you can indicate to us that that is a matter the government is considering. If you did that, that would obviate some of the questioning. If you are saying to us, 'We cannot tell you about that'—

Mr Pratt—Ms Merryfull has said that this issue has been recently drawn to her attention and she is having a look at it. Beyond that, whether or not we think there may be an issue with the bill—and I do not know that at this stage—and, if that was the case, whether or not the government would choose to make an amendment, I do not know.

Senator MARSHALL—You are not seriously saying to me that you do not know what this means, are you?

CHAIR—I do not think the officer is, but I think she is saying that it is being considered.

Senator MARSHALL—Then tell me what the effect of this clause is. That is my question.

Ms Merryfull—What I am saying is that Senator Siewert put a scenario which suggested that a person could engineer by their own conduct the grounds for a suspension in those circumstances. I am saying that that has been brought to my attention before today.

Senator MARSHALL—Let us go one step further. This is not about engineering. I am now asking another question. How do you get to have a bargaining period if one person says, 'I do not genuinely want to reach agreement with the other negotiating party'? Is there an ability to establish a bargaining period? If you cannot establish a bargaining period, you cannot take industrial action—isn't that the case? Explain to me whether that is what this means.

Ms Merryfull—Currently, a negotiating party can end a bargaining period. An initiator can end it by saying, 'I do not want to continue to conduct negotiations.'

Senator MARSHALL—Yes, but it says that 'the commission must by order suspend or terminate a bargaining period for the following reasons'. One of the reasons is that the party is not genuinely trying to reach an agreement with the other party.

Ms Merryfull—Before organising or taking industrial action—

Senator MARSHALL—So it comes down to basic fairness and the ability to negotiate. If one party says, 'I refuse to negotiate and don't want to reach an agreement with you,' how does the other party ever get to the point of having a bargaining period and ever being allowed to take protected industrial action to force the issue?

Ms Merryfull—I will read the whole provision. One of the circumstances concerns a negotiating party that has organised or taken, or is proposing to take, industrial action to support or advance claims in respect of the agreement and whether they are not genuinely trying to reach agreement before taking the industrial action or whether a party that is attempting to take industrial action is not genuinely trying to reach agreement. You have to read the first bit of 2 before the second part.

Senator MARSHALL—So my problem is not there, but Senator Siewert's is. If someone engineers that proposal we can terminate the bargaining period.

Ms Merryfull—As I have said—and I am not trying to be unhelpful—that has been brought to my attention and I am having a look at that.

Senator MARSHALL—When will we know? We are required to report on this inquiry on Tuesday.

CHAIR—There may well be some issues raised within this committee that may or may not be able to be resolved by the time the committee reports.

Senator MARSHALL—Then the Senate has failed in its obligation to properly investigate this bill.

CHAIR—Not necessarily.

Senator WONG—How are they going to be resolved?

CHAIR—They may well be resolved by decision of the government or by debate within the Senate.

Senator MARSHALL—Do we have any more scheduled hearings?

CHAIR—No, we do not.

Senator WONG—Then how are we supposed to look at the new bill, if there are going to be amendments?

CHAIR—I am sure that if you consider this to be an important issue you will be making recommendations along the lines that you wish to follow. There are many issues which have come up during the Senate hearings which may or may not be resolved by the time the committee reports. Those matters will be considered further in debate in the Senate. I regard

this as a perfectly healthy process. Senator Siewert, do you have any more questions before we close for lunch in five minutes time?

Senator SIEWERT—Yes, I do. I want to go on to the second example I was using, where the employer has ceased to pay the employees and they withdraw their labour. My understanding is that the commission is then required to send them back to work.

Ms Merryfull—If unprotected industrial action is occurring, then the commission is required to make an order that the unprotected industrial action stop or not occur. The bill—and another of my colleagues can answer this—has a range of provisions to do with dispute resolution so that if people have a dispute with their employer there are a range of ways to handle that. I put to you that the position of the government is that people should not stop work.

Senator SIEWERT—Even if they are not being paid?

Ms Merryfull—If they were not being paid then that would be a breach of the relevant industrial instrument and the employees or their union would take steps to require them to be paid. There are legal steps that can be taken to require them to be paid.

Senator SIEWERT—I want to quickly move to outworkers. We said that we were going to be talking about that.

CHAIR—Senator Wong, did you have a point on the first issue?

Senator WONG—Yes, on the issue that we were just discussing. I appreciate that this has been raised with you. Is it the intention that 107G(2)(b) would allow an employer to contrive the circumstances which would lead to a mandatory suspension or termination of a bargaining period?

Mr Pratt—The answer is no.

Senator MURRAY—Then it is clear that the bill as drafted is unclear and the intention of the government should be carried through by making an amendment which makes it clear that a contrived arrangement of that sort cannot occur.

CHAIR—Have we concluded discussion on that particular issue?

Senator SIEWERT—We have raised the issue of outworkers—

CHAIR—I think quite a few senators have questions on outworkers.

Senator SIEWERT—So maybe we will leave that till after lunch.

CHAIR—Yes. I am happy to call the lunch break now. It is obvious to the department that there will be at least another hour of questions from senators. We will see how that goes. Certainly, if I call the lunch break now, we will resume at 1.30 for at least one further hour.

Senator MURRAY—Madam Chair, I give my apologies. As a fly in, fly out worker I suspect I will not be able to make this afternoon because I will have to fly out.

CHAIR—Indeed. Senator Murray has also asked about the questions on notice. I think that most of the questions on notice from this morning are for information that will be more or less readily available, but we would like the information to be provided.

Mr Pratt—Any questions that we can answer this afternoon we will do so.

CHAIR—Thank you.

Mr Pratt—The team will be available—can I suggest until 2.30 as a maximum?

CHAIR—Thank you very much.

Senator WONG—No, that is not acceptable.

Senator JOHNSTON—Why not?

Senator WONG—Are you saying that we are going to close the hearing at 2.30? Is that the suggestion?

Mr Pratt—That is my proposal.

Senator WONG—I am not happy with that. That was not the discussion that occurred in the committee.

CHAIR—Is there a particular reason why the department cannot proceed beyond 2.30?

Senator MARSHALL—Apart from the obvious.

Mr Pratt—There is a range of operational reasons why the department has other things that it needs to be doing in connection with—

Senator MARSHALL—This is an over 600-page bill, and we have already demonstrated that you do not completely understand it or that you are unable to answer some aspects for us. We have only just started to touch the surface and it is most inappropriate that the department is not here for at least the time that we were scheduled to be here today, which was until at least 4.15.

Senator MURRAY—Madam Chair, on a point of order, may I suggest that the department has real issues with its full panoply of people, which is 12, and that after 2.30 they might leave senior people behind so that others can go off and do the work, if that is necessary.

Mr Pratt—I would like to point out that the schedule we have has the department going through until 12.45.

CHAIR—That is correct.

Mr Pratt—The department has, of course, made plans to do other things after that period. We are in the hands of the committee in that sense, but we do not have endless resources to spend here.

CHAIR—In that case, we will now adjourn for lunch and I will discuss it further with the department over lunch.

Senator MARSHALL—There was an agreement between the parties in the committee yesterday that we would go to 4.15. We have an enormous amount of questions. We acknowledge that we will have to put some on notice, but some are crucial for us to be able to write a proper report. This committee is inquiring into this bill and the department is an essential witness to enable us to do that job properly, and if they are not going to make themselves available this afternoon, as inadequate as that amount of time is, it really puts us in an impossible situation.

Senator WONG—It appears that the discussion within the committee was not communicated to you, Mr Pratt. Is that what I understand?

Mr Pratt—We have operated on the basis of the program that was given to us.

Senator WONG—Senator Marshall has just indicated the discussion which occurred yesterday within the committee. I am asking whether the department was aware of that.

Mr Pratt—I am unaware of that discussion.

CHAIR—We are now wasting the time that is left to us, no matter how long or short that is. We are wasting the lunch break. I will consider that further over the lunch break and we will reconvene 1.30.

Proceedings suspended from 12.47 pm to 1.32 pm

CHAIR—Mr Pratt, I understand you have a proposal to put to the committee.

Mr Pratt—In the interests of attempting to help the committee as much as possible, I propose that we might run through till three o'clock. We will need a few minutes right at the end to set a few things straight. We have a little bit of follow-up from a number of answers earlier on. But, in return, the committee might help us out by giving us an indication of the sorts of areas that it would like to focus on so that we can send those people who are not needed back, as per Senator Murray's proposal.

CHAIR—Senator Marshall, how does that strike you?

Senator MARSHALL—I do not think that it is long enough. I think that we should go with what we had agreed yesterday and go through until 4.15. Having said that, we want to cover a whole range of areas and I am probably not in a position right now, without any notice, to try to define that. But we may be able to do that over the next half-hour or so with the assistance of Senator Wong.

CHAIR—Thank you. Senator Nash, do you have any more areas that you wish to cover?

Senator NASH—Only very briefly, just on the medical certificate. It is just a very brief question.

CHAIR—Senator Johnston?

Senator JOHNSTON—I have questions on outworkers. I want to discuss the three ACROD amendments with you, which relate to the definition of 'disability' in the act, the federal minimum wage, proposed sections 101B and 116 and the greenfields agreement.

CHAIR—In that case, it makes it a little clearer but we still do not know what the opposition are proposing. Perhaps, Senator Marshall, when it becomes obvious you might let us know. I have allowed each group of senators to have a go up until now. Senator Johnston, I think it is our turn.

Senator JOHNSTON—Ms Centenera, thank you very much for section 129. I have read the really fine print at the bottom of proposed section 126, and that helps me as to my problem. What concerns me with respect to this notice is that we use very precise language—which is very good—but, putting myself in the position of an employee, I hope that we do not anticipate that the employee is expected to know what the transmitted instrument is, when we

tell him or her how long they have got until there is a new regime—the transmission period, if you follow me. What I am looking to do is to have you understand that, when a person whose business has been sold, which he or she has worked for for a long time, gets a notice like this, I would like them to be able to understand where they stand in the scheme of things. I would like it to be a little bit more readable, if you follow me.

For instance, at G in subsection 3 of 129 it says: 'identify any collective agreements or award that binds'. I think just naming the award is not terribly helpful for the person. I think you need to actually show them a web site or tell them in detail. I know these awards go on for pages, but there needs to be more than simply saying, 'This is covered by the shop distributors award,' if you follow me. That was all I had on that. I do not think that is terribly derogatory of the terms and conditions. Can you tell me what it means at F by 'the source for the terms and conditions'. What does it mean by 'set out the source'?

Ms Centenera—Whether it is going to be the standard, whether they intend a new collective agreement or whether they intend for people to be covered by the award.

Senator JOHNSTON—That did not strike me. I had an idea that that is what it meant but it did not strike me as being obvious. I thought the source of the terms and conditions might have been bound up in the agreement for sale, if you follow me. I think it needs to be easily digested. I have said enough about that. It probably applies to some of the other notices, particularly the three-month notice and other things.

Mr Pratt, we had the outworkers in, as you probably read. I have to say that it gets a bit tedious when I know that this committee and the state governments have for years and years been desperate to try and fix this outworker industry. We still have people coming along and saying they are less than $5 an hour and they are working exotically long hours. I cannot remember the section, but I want the one relating to workplace inspectors.

Mr Bohn—It is on page 60 of the bill.

Senator JOHNSTON—Thank you. I will come back to the definition of 'outworker' in a minute. What I want to do is not only to mandate the reporting of the workplace inspectors through our system with a paper trail but also to mandate the reporting by Commonwealth workplace inspectors to the state instrumentalities and officers et cetera. I think we need to start drawing a line in the sand with outworkers and start mandating a few reporting conditions right across the board so that we can say that we have told the states. When these unions and their witnesses come along with these horror stories and then tell us that the amendments in New South Wales, for instance, came along in July this year, it gets a bit frustrating for us. I would like to see the Commonwealth lead a little bit on this subject. The other section I think is section 86(4). Bear with me; I did these the other day. That is not right. I think it is section 89.

Mr Pratt—Page 64, Senator? 86A(4) seems to cover the issue that you are talking about.

Senator JOHNSTON—That is it. 86A(4) is exactly the one I am talking about. We put that in there to mandate the report to state workplace inspectors also.

Mr Pratt—In other words, a federal workplace inspector would disclose information to a state inspector?

Senator JOHNSTON—Precisely. When he comes across an outworker situation that clearly requires action, I think we need to bring the states in too so that everybody who has a responsibility in this area is involved. Given that terms and conditions and awards may change from state to state, I think we should lead the field and have a paper trail showing that we have reported this to the state.

Mr Pratt—We will take that up with the minister.

Senator JOHNSTON—It is just a thought. I am sure there are a lot of technical issues surrounding these things. Is there an outworker award? I am worried about situations where there is no award.

Mr Pratt—As I understand it, there is an outworker award.

Senator JOHNSTON—The way I read 101B is that, regardless of whether it is a workplace agreement or whether the person is an award employee, the matters set out in 3(a) through to (i) are taken to be incorporated in the terms and conditions of employment.

Mr Smythe—That is intended to be the case.

Senator JOHNSTON—I think we have gone very close to achieving our intentions. What concerns me is that in this form we have separated out outworker conditions, which suggests to me that some of the matters in (a) through to (g) and (i)—leaving out (h) for the moment, which is outworking conditions—may not be there. Can you assure me that, for instance, rest breaks, incentive based payments and bonuses, penalty rates—all of those things—are deemed to be in an outworker's award or workplace agreement?

Mr Smythe—No, I cannot assure you of that.

Senator JOHNSTON—Explain to me how that happens.

Mr Pratt—The government's policy intention here is that all existing protections which are currently available for outworkers through current arrangements will be maintained into the future and that these protections will be read into agreements, if people are covered by agreements in the future, including AWAs.

Senator JOHNSTON—Hang on; you missed me on that.

Mr Pratt—I am talking about all of the protections which currently exist for outworkers through their existing award arrangements in the states and so forth.

Senator MARSHALL—Does that include restrictions or conditions on contracting, because that is a non-allowable matter?

Mr Bohn—That non-allowable matter is not intended to cut across the allowable matter in 116(1)(m), I think it is.

Senator JOHNSTON—That was my next question. Does that clarify that for you?

Senator MARSHALL—If they deliver.

Senator JOHNSTON—Okay. That is good. I am glad you are happy on that basis—as happy as you can be.

Senator MARSHALL—That is one of the many issues with outwork.

Senator JOHNSTON—That answers my situation. In 116(1)(m), you have used two expressions. Bear with me while I find this section. This act is very hard to—

Senator MARSHALL—Just while you are looking, does the overriding of state deeming laws leave outworkers vulnerable to being excluded from the protections of the bill?

Mr Smythe—Some state deeming laws would be overridden by the terms of this bill and some would not. Whether that meets the policy intention of preserving all current outworker protections is a matter which the government is considering.

Senator MARSHALL—What about section 101B, which expressly facilitates opting out of protected award conditions? Will that also exclude opting out for outworker protections?

Mr Smythe—The bill does not reflect the government's policy intention in that regard. Protected conditions for outworkers will not be able to be excluded by agreement. The bill will be amended to that effect.

Senator MARSHALL—Thank you for that. Are you familiar with the Fair Wear submission that was made to the committee on Wednesday?

Mr Smythe—Not the detail of it.

Senator MARSHALL—Their submission identifies as many of the problems that they could identify in the short time that they have had the bill. They have identified what they see as the problems and also ways to fix them. Without trying to undercut Senator Johnston, I would be happy if you would formally respond to the committee on that submission and advise us which areas of concern are problems and how you intend to overcome them or which of the areas are not problems that you do not intend to change, and why.

Mr Pratt—I suspect we would need to take that on notice to do it justice. But I can reiterate the message I was giving before, and that is that the unique provisions that currently provide special protections for outworkers are going to be retained in the new system. What is there now will be retained in the new system. That is the policy intention, and we will be working to ensure the bill provides for that.

Senator SIEWERT—Can I follow up on that one? For anything, therefore, that undermines those provisions—and it is fairly clear from the Fair Wear submission that there are things that do—your intention is to amend the bill to deal with that?

Mr Pratt—Our intention is to ensure that the government's policy that the unique protections which currently exist for outworkers continue under the new system.

Senator SIEWERT—My understanding of the Fair Wear submission is that that will require amendments to the current bill because the provisions do not meet the intent that you have just stated.

Mr Pratt—Where that is necessary, we will make amendments.

Senator JOHNSTON—Can you tell me why we have in section 116 allowable award matters and protected award conditions? What is the difference between those two?

Mr Kovacic—Protected award conditions are award conditions concerning which, if they are to be expressly modified or removed through an agreement—whether that is a collective agreement or an individual agreement—the agreement needs to expressly indicate how those

conditions are to be either modified or removed. If there is no specific or explicit reference in the agreement, those provisions are automatically read into the award. That is what it means for them to be protected award conditions. Allowable award matters are the matters that can be dealt with in awards. It is a list which provides guidance on those matters which can be dealt with in awards.

Senator MARSHALL—Doesn't that leave us with the situation that people can actually opt out? Putting all the argy-bargy to one side, this is a group of the most exploited and most vulnerable workers in our community. No-one can convince me that their having to make the decision not to opt out is genuine bargaining in these circumstances. No-one in their right mind would do so if they had a choice. The reality, especially in these circumstances, is that they will not have a choice. They should not be able to opt out of outworkers' legislative protection or anything provided as protection in the bill. They should not be able to opt out. An outworker should not be placed in a position where they may be confronted with an AWA which enables their employer to opt out of those obligations.

Mr Smythe—The amendment that I foreshadowed a moment ago would do that. It would not permit outworkers to opt out of the protected award conditions. Unlike other workers who can opt out, outworkers would not be able to.

Mr Kovacic—I apologise. I understood the question to be a general question rather than outworker specific.

Senator MARSHALL—Maybe I was unclear.

Senator JOHNSTON—I understand what each of them say, but why do they need to be different? If you have a reversion to protected award conditions, why wouldn't allowable award conditions be those? What is in the allowable award conditions that is different? I note that allowable hours of work, in 116, is different.

Mr Kovacic—It is designed to ensure that in a bargaining context where there are existing award conditions and where it is proposed to either modify or remove them, a degree of protection is provided there for employees so that they are completely aware that the agreement that is being offered, discussed or negotiated seeks to vary those provisions. If you look at the provisions that are protected, you will see that they primarily impact on weekly take-home pay. There is a very clear policy desire to protect those in a bargaining context so that employees are fully aware of what is occurring in respect of penalty rates and allowances—those protected award conditions—in a bargaining context.

Senator JOHNSTON—One is in a heading context of what can be talked about; the other is a minimum quantification of what remains.

Mr Kovacic—It is intended to provide a degree of protection around those conditions.

Senator JOHNSTON—With respect to redundancy, 14 employees and fewer in the circumstances of whatever that section is—and I have not got it with me—

Mr Pratt—Is this question specific to outworkers or general?

Senator JOHNSTON—I think it is specific to outworkers. What is the section on redundancy?

Mr Bohn—I think it is section 116(4).

Senator JOHNSTON—That is right. The point is that, if you have 14 workers or fewer, in circumstances set out you do not have to pay redundancy. Isn't there a problem with outworkers on that basis? We are going to get shops where there are 14 employees.

Mr Kovacic—This provision is designed to reinstate the position that applied before March 2004, when the Industrial Relations Commission made a decision to remove the exemption for businesses employing fewer than 15 employees from the redundancy provisions. It is really directed at, as I said, reinstating the position that applied beforehand. In terms of its particular application to outworker situations, there was, to the best of my knowledge, when the exemption previously existed no exemption in respect of outworkers—

Senator JOHNSTON—I understand that. The history I think is an unhappy one, and I am looking to try and do something here that separates out the running sore of a problem that is outworkers. I would have thought one of the things we could do is to say that, if you have 14 outworkers or fewer, you still have to pay redundancy.

Mr Kovacic—I think that is a matter that we would have to take on notice.

Senator JOHNSTON—I am sure you would. But I am interested to know whether you see any problems. I dare say that the legitimate and adhering section of the industry will complain that we are punishing them for the wrongdoing of some, but I am concerned that we need to draw a line in the sand, as I say, with regard to outworkers.

Mr Kovacic—I was just informed, as you were speaking, that, where that entitlement previously existed, the intention is to retain that exemption.

Senator MARSHALL—Isn't it currently the case that all outworkers are actually entitled to redundancy? The clothing trades award for years has provided that, and it has provided for redundancy for businesses with fewer than 15 employees. My proposition to you is that every outworker is entitled to redundancy under the award. Are you saying that that entitlement will be maintained?

Mr Stewart—Yes, the exemption from redundancy pay for small business employees that was created by the Industrial Relations Commission in 1984 was removed under the clothing trades award in the early nineties. So when the AIRC made the decision in March 2004 to remove the exemption across all awards, the pre-existing exemption had been removed under the clothing trades award. The government's policy, which is embodied in the Workplace Relations Amendment (Small Business Employment Protection) Bill, is that small business entitlements that existed prior to the AIRC's decision in 2004 will not be disturbed by that small business employment protection bill. The intention is that the provisions of the small business employment protection bill will be embodied and reflected in the Work Choices bill. Summing up, any entitlement that existed before 2004 of small business employees covered by the clothing trades award will not be disturbed by the Work Choices bill.

Senator MARSHALL—So outworkers under the Work Choices bill will still be entitled to redundancy provisions, no matter how large or small the employer is?

Mr Stewart—The entitlement of outworkers who are covered by the clothing trades award—which is an award which I specifically know of that had the exemption removed in

the nineties—will continue and will not be disturbed by the Work Choices bill. Equally, anyone who has a pre-March 2004 entitlement will not have their entitlement disturbed.

Senator MARSHALL—And they will not be able, given what Mr Smythe said earlier, to opt out of that with an individual contract?

Mr Stewart—I do not know of those provisions in the bill.

Senator JOHNSTON—They will not be able to opt out?

Mr Pratt—That is correct.

Senator MARSHALL—The union has really played a major inspection and enforcement role in the outworkers industry that goes to right of entry powers and other issues. I wonder whether they will be maintained in respect of outworkers.

Mr Cully—In respect of right of entry under the award provisions or generally?

Senator MARSHALL—I suspect they do it under the award provisions at the moment, but I am not 100 per cent sure of that.

Mr Cully—Certainly, I am aware that the TCFU submission raised the issue of the Victorian Outworkers (Improved Protection) Act. I can inform the committee that that act will be excluded from the 'covering the field' provisions of this bill so that it will continue to operate.

Senator MARSHALL—That goes to the question of enforcement powers as well?

Mr Cully—Yes.

Ms James—In fact, having had a second look at it, we do not consider that the 'covering the field' provisions—that is, section 7C—override that Victorian outworkers act at all.

Senator WONG—They would override the deeming provisions in industrial laws?

Ms James—As currently drafted that would be the case, yes.

Senator MARSHALL—Thank you.

Senator JOHNSTON—I want to go over the ACROD matters. In section 90U(2) it states:

(b) specification of a method for calculating a monetary amount per hour.

Dr Baker wanted to know whether there can be more than one calculating method for classes of employees as set out in 90S(b). He was of the view that it was unclear that there could be different methods of calculating the monetary amount depending on the different disability types.

Mr De Silva—There can be more than one.

Senator JOHNSTON—Did you watch the evidence, Mr De Silva?

Mr De Silva—I do not believe I saw that, no.

Senator JOHNSTON—I think we assured him, but I am pleased to hear you say that. With respect to the phase-in of the federal minimum wage—is that what FMW stands for?

Mr De Silva—Yes.

Senator JOHNSTON—and the existing awards, how does that work out? I do not have his submission in front of me but there was an overlap issue. How do we resolve that?

Mr De Silva—What do you mean by the phasing in of the FMW?

Senator JOHNSTON—I am not sure that I precisely understand it but he said, 'How is the system to work when there are existing awards in place for people who are disabled in the face of the FMW?'

Mr De Silva—Do you mean to allow for phasing in of rates of pay based on capacity?

Senator JOHNSTON—Yes. How does that work so that he can read the *Hansard* and be assured?

Mr De Silva—There is actually a reg-making power that provides the AFPC to allow for that to happen.

Senator JOHNSTON—A regulation making power. So it will be in the regs.

Senator NASH—Just broadly, what consideration has been given to the type of access to information that would be available under the new system? I can imagine there would be many employers and employees wanting to access information through a transition period. What consideration has been given to that by the department?

Mr Kovacic—We are currently in the process of developing the details of an education strategy to assist employers and employees to understand their rights and obligations and the impact of the legislation on them. That is yet to be settled. It will certainly look at a range of possible means of getting information out to interested parties. For instance, we would anticipate that there would be a range of seminars that would be conducted for interested parties and there may be material in the way of fact sheets focused on a particular issue or, alternatively, information booklets that will be available presumably in hard copy and possibly also via the internet. Similarly, there will be information and advice available both from the Office of the Employment Advocate and from the Office of Workplace Services, which is part of the department, and that would go to particular issues, such as the impact of the changes in rates of pay and some of those detailed issues as well as the broader implications in terms of existing agreements and those issues. So there will be range of sources. As I said initially, we are working through the details of that education strategy, if I can describe it that way.

Senator WONG—Are there any more taxpayer funded adverts?

Senator NASH—I think it is my time for questions.

Senator WONG—It is on the topic. Are there any more advertisements?

Mr Pratt—The government has not taken any decisions to run another advertising campaign.

Senator NASH—Will that include access points? There are going to be a lot of things that arise in the immediacy of the moment which might need person-to-person access. Would that be under consideration as well?

Mr Kovacic—I think that is something we would think might be part of the strategy. In particular, the Office of Workplace Services is a potentially good avenue for dealing with

those sorts of issues. Indeed, quite often with internet sites what we have is a mailbox, for want of a better description, which provides individuals with the opportunity to ask questions on a specific issue and a response is provided back to that individual on that particular issue.

Senator NASH—Thank you. Was any consideration given to allowing allied health professionals to write medical certificates? It just seems, in streamlining the process, that not only medical practitioners but also perhaps allied health professionals could be considered.

Mr Bohn—This might not get to the point, I am not sure, but the definition of 'medical practitioner' in the act refers to practitioners registered under state or territory legislation. So that would pick up other registered professionals such as chiropractors and the like.

Senator NASH—That does answer the question, thank you.

Senator SIEWERT—If under current awards there is something that later on the minister decides is prohibited content, what happens?

Ms James—Are you asking about awards or agreements?

Senator SIEWERT—Let us start with agreements. If there is a current agreement in place and it contains something that is subsequently decided to be prohibited content, what happens to that agreement? What is the process?

Ms James—The current act is structured quite differently from the bill on this point. There are a range of provisions in the current act that can result in the content of agreements being void. For example, if a provision requires or permits the breach of the freedom of association provision, it is an objectionable provision, it is void and can be removed by the Employment Advocate. One of the other areas is 170LT and 170LU. There are certain content requirements of agreements, certain things that must be contained in agreements, such as dispute settlement procedures and certain things that must not be contained in agreements, such as discriminatory provisions.

There is another content requirement, which is colloquially known as the 'matters pertaining' requirement. This is a threshold jurisdictional requirement in the current act in 170LI. If an agreement that has been certified contains non-pertaining matters then arguably, under the current law, that agreement is void. There has been quite a lot of litigation around the matters pertaining area, more in relation to taking protected action in support of such clauses rather than the question about certification itself. That content requirement is separate from the others in that with the other content requirements the provision itself would be void. I think this is right. But there is no doubt that the agreement itself would be valid. One of the reasons that we have taken the approach in the bill of setting out in the regulations a list of matters that are prohibited is to avoid the uncertainty that can arise from matters being prohibited or, in the case of the current act, not pertaining and the effect that that might have on the validity of the agreement as a whole. It is not a good thing for there to be doubt about the validity of agreements in that respect. So the way the bill is set up is so that if something is listed in the prohibited content list in the regulations—and the government has advised what those matters would be in the WorkChoices booklet—then those matters will be void, however, the agreement itself will be valid.

Senator JOHNSTON—Clause 101F is like an excision cause, so that if on a disallowable instrument, that is the regulations, the minister was to rule something as prohibited, the agreement is only void to the extent of the prohibition. Is that correct?

Ms James—That is correct.

Senator SIEWERT—So that would just take out that section of an existing agreement?

Ms James—That is correct, although I should point out that this is for agreements made in the new system. It does not apply to federal agreements currently in place.

Senator SIEWERT—So it would not apply?

Ms James—The actual clause in a new system agreement?

Senator SIEWERT—Yes.

Ms James—That is correct.

Senator SIEWERT—What will happen to those agreements that already exist if they do happen to contain something that is then listed as prohibited content?

Ms James—Nothing. They will continue to operate under the current rules.

Senator SIEWERT—Will they continue to operate with those sections of that agreement not being void?

Ms James—That is correct, although there is one exception to that, which is clauses that prohibit or restrict the offering of AWAs during the life of the agreement. The bill does make them void in agreements that were made pre the commencement of this act.

Senator JOHNSTON—But isn't that simply subject to 170LI?

Ms James—I do not know that there is any law on whether such a clause pertains to the employment relationship or not. It is a clause that the government considers to be contrary to the object of the act—in particular, allowing parties to choose the form of agreement that best suits them at the workplace. That is why that sort of clause is going to be prohibited retrospectively.

Senator JOHNSTON—I think what Senator Siewert was asking was: an existing agreement that contains prohibited material now is going to end up where? I would have thought that that would be rather like Electrolux.

Ms James—Firstly, we are talking about prohibited content based on a current act's rules. If it is a non-pertaining matter then there could be some doubts about it, although I should point out that it will depend on when the agreement was certified, because there are some provisions in the act that validate agreements that contain non-pertaining matters that were made and certified before the High Court Electrolux decision.

Senator JOHNSTON—All right; it is pretty messy.

Ms James—It is not simple, sorry.

Senator MARSHALL—I just have one last question, or maybe two, on outworkers. Just to clarify, Mr Cully, you told me about the protection of the Victorian legislation. I am just

wondering about the other states. I assume that at the time you meant generally state legislation but I had better be absolutely clear.

Mr Cully—I was referring specifically to the Victorian Outworkers (Improved Protection) Act. The TCFU submission made reference to amendments that were moved to the right of entry bill when that bill was before the Senate. Certainly the Victorian Outworkers (Improved Protection) Act will not be excluded by this bill.

Senator MARSHALL—What about the other states' acts that act in a similar way to Victoria? Why aren't they going to be protected?

Ms James—The way that proposed section 7C is currently structured is that it will exclude the operation of state industrial relations acts that currently exist. So outworker protections in state industrial relations acts, as the bill is currently drafted, will be excluded. However, with regard to outworker protections that are in outworker specific acts, like the Victorian one—and I think there is also such an act in New South Wales that operates in conjunction with the New South Wales IR act—such standalone acts will not be overridden because they are not generally applying acts and they are not one of the listed IR acts. I note that Professor Stewart pointed out that this seemed anomalous, and I think that the department would agree that it seems anomalous on this point.

Senator MARSHALL—What I am asking is: are you going to fix it?

Mr Smythe—I think I indicated earlier that it is something that is under consideration.

Senator MARSHALL—Okay. I just want to go back to some questions that Senator Joyce was asking earlier, and I just want to take it another step because I do not think you got to the final point. Talking about rosters and public holidays, if someone is on the fair pay minimum—I assume that what we are talking about is the fair pay minimum standard—there is no restriction on the employer's ability to roster any hours?

Mr Bohn—The standard does not contain any limitation.

Senator MARSHALL—So if the employer wanted you to work on a public holiday, they are entitled to roster you to work on a public holiday?

Mr Bohn—Yes.

Mr Kovacic—Subject to any award provisions—

Mr Bohn—Just on the standard.

Senator MARSHALL—We are talking about the fair pay standard. I think everyone is clear on that. If you do not turn up for work on a public holiday because being rostered on the public holiday did not suit you, is not turning up for work according to your roster an unlawful reason for termination?

Mr Bohn—I would like to take advice on that.

Ms Centenera—No, there is nothing specific in the unlawful termination provisions that would pick that up.

Senator MARSHALL—So, if you did not turn up for work on a public holiday, you could be sacked for it?

Ms Centenera—Assuming there was not another prohibited reason, like you had to look after a sick child or something like that.

Senator MARSHALL—I meant if you simply did not want to work the public holiday. Senator Barnett asked Professor Peetz this question yesterday:

> Do you stand by your statement that a boss can sack you for chewing gum?

Professor Peetz said:

> Chewing gum is not a discriminatory reason covered by the unlawful termination provisions.

Is that the case?

Ms Centenera—Yes, assuming another prohibited reason does not apply.

Senator MARSHALL—We are talking about chewing gum only.

Ms Centenera—Yes, that is correct.

Mr Pratt—Excuse me; I am not sure that this is within the scope of the inquiry.

Senator MARSHALL—It was a question that was allowed yesterday. I am asking you about unlawful termination, which clearly is within the scope. He then went on and said:

> Therefore, if you are in a firm with fewer than 100 employees, you could be sacked for chewing gum.

That is the case, isn't it?

CHAIR—That is venturing into unfair dismissal territory, I believe.

Senator MARSHALL—So we are absolutely clear—you can only not be terminated if the reason is unlawful, and chewing gum is not an unlawful reason for being terminated. That is the case. We have established that, haven't we? Is there any dispute from anyone here?

Senator JOHNSTON—Surely it depends on a whole host of variables—

Senator MARSHALL—No, it does not.

Senator JOHNSTON—If it is a food producing workplace, chewing gum may well be a sackable offence.

Senator MARSHALL—We have just established that it is wherever it is. I want to go on to duress.

Mr Pratt—If that is considered something which is not covered by unlawful termination, you could also potentially speculate that someone making too much money for the company is not covered by unlawful termination and they could be terminated for that reason.

Senator MARSHALL—Indeed.

Mr Pratt—It strikes me as ridiculous.

Senator MARSHALL—That is exactly the point I want to make. Apart from the defined unlawful matters, there is no reason that you cannot be terminated. I thank you for assisting my point. Let me go on.

Mr Pratt—Do you actually believe that employers would terminate people for chewing gum?

Senator WONG—Let us not argue, Mr Pratt.

Senator MARSHALL—Please do not argue with me; you will have the opportunity to answer my question.

CHAIR—Excuse me, Senator Marshall, I do not believe that Mr Pratt was arguing.

Senator WONG—I think saying 'Do you believe' was an argumentative piece of evidence.

Mr Pratt—It is a genuine question.

Senator WONG—I did not realise we were here to answer your questions.

Senator MARSHALL—I am happy to answer it.

CHAIR—Senator Wong, that is very disrespectful. Senator Marshall, will you please proceed with your questioning.

Senator MARSHALL—I am happy to answer the question. An employer in a company with less than 100 employees is free to dismiss an employee for any reason except an unlawful reason, and there is a strict definition of what unlawful reasons are. That takes me to the practical application of duress. The act gives employees with existing AWAs the ability not to come under duress or coercion—which one was it?

Mr Smythe—For AWAs it is duress.

Senator MARSHALL—That would be a prohibited reason—it would be an unlawful termination if duress was applied, if you were sacked for not signing an AWA.

Mr Smythe—That is specifically prohibited.

Senator MARSHALL—Isn't the practical implication of the fact that you can be sacked for any other reason in reality the ability for an employer to apply duress? It would have to be a fairly stupid employer that would say to someone, 'I'm sacking you for a prohibited reason,' when we know you can be sacked for any other reason—chewing gum, for instance, or, as Mr Pratt helped me out with, even making too much money for the company.

Mr Smythe—In respect of the unlawful termination provisions, there is a kind of reverse onus situation, which I will get my colleague Ms Centenera to explain.

Senator MARSHALL—But it is only in the terms of those prohibited reasons which go to discrimination, isn't it?

Mr Smythe—Yes, but the example you gave was an example of sacking someone because they refused to sign an AWA, which is one of those prohibited reasons. In those circumstances, there are protections against an employer contriving another fanciful reason when they really want to sack them for signing an AWA.

Senator MARSHALL—Thank you—I want to go there and explore that. Who is going to answer that question?

Ms Centenera—On reverse onus?

Senator MARSHALL—Yes.

Ms Centenera—In section 170CQ of the current act, and it is not proposed to be amended—

Senator MARSHALL—What page was that?

Ms Centenera—It is in the current act, not in the bill. I will read it. It says that in any proceedings that relate to 170CK, which is about proscribed reasons, which include the filing of an AWA et cetera:

(a) it is not necessary for the employee to prove that the termination was for a proscribed reason; but

(b) it is a defence in the proceedings if the employer proves that the termination was for a reason or reasons that do not include a proscribed reason (other than a proscribed reason to which subsection 170CK(3) or (4) applies).

Senator MARSHALL—In what jurisdiction would the employee have to initiate action?

Ms Centenera—It would be before the AIRC.

Senator MARSHALL—Yes, and I think, Mr Smythe, if my memory serves me correctly, you advised us in estimates that the average cost of an unlawful termination claim was $30,000.

Mr Smythe—I did not advise you of any figure in Senate estimates.

Senator MARSHALL—Who did?

Mr Kovacic—I mentioned those figures.

Senator MARSHALL—So that is still the case?

Mr Kovacic—The figures that I mentioned, yes.

Senator MARSHALL—It is probably easier and speedier if I circulate some copies. I am not sure who the relevant person is, but I want to take you to a letter that we have received from some constituents. They have asked for this to be brought up, so there is no difficulty.

Senator WONG—Is this the franchising one?

Senator MARSHALL—Yes, franchising. It goes to the Work Choices bill. It is very brief, so I will read through it very quickly, and the relevant people will have a copy. Chair, I should give you a copy too.

CHAIR—Yes, thank you.

Senator MARSHALL—It says:

We were franchises conducting business at Shellharbour. The National Franchisor is Lenard's Pty Limited.

We have issued proceedings out of the Industrial Relations Commission of New South Wales seeking relief on the basis the franchise arrangements are an unfair contract within the meaning of the New South Wales *Industrial Relations Act 1996*. Those proceedings are pending.

Our solicitors have advised us that as the Bill currently stands, our rights to maintain an unfair contract claim against the franchisor company (and others) will be abolished when the Bill becomes law. That is, we are advised that, currently, there are no transitional provisions, which would protect our rights in respect.

Can you explain to us if that is the case and why that is the case? What protections will these people be offered under the Work Choices bill?

Ms James—I will qualify my answer by saying this is not a lot of detailed information—

Senator MARSHALL—The principle about their rights being abolished?

Ms James—I gather that we are talking about franchise agreements which are not employment contracts or employment sorts of instruments.

Senator WONG—I have to say that I assumed from reading this that they were accessing the unfair contracts provisions within the New South Wales legislation.

Ms James—I think the unfair contracts provisions in the New South Wales legislation apply to both employment and non-employment contracts. The bill, when it excludes laws in proposed section 7C, only excludes those laws as far as they would otherwise apply in relation to an employee or an employer.

Senator MARSHALL—So you are saying that in terms of unfair contracts this bill does not take away any rights that they have under current jurisdictions?

Ms James—It would exclude the operation of the unfair contracts laws in the New South Wales IR Act to the extent that they are operating with respect to employers and employees but not to the extent that they are operating with respect to parties in a different sort of relationship.

Senator MARSHALL—If you have any further information on that, you may commit that to writing if you think that could be of some assistance to the committee.

Ms James—I will reflect on it later on and make sure that the advice I have given the committee is accurate.

Senator MARSHALL—Thank you.

CHAIR—I just have one question in relation to Dr Peetz that I would like to clear up. Apparently Dr Peetz—and this is a question to the department—claimed on the *AM* program that chewing gum could be used as an operational reason by a firm with more than 100 employees to escape an unfair dismissal claim.

Senator MARSHALL—I do not think he said that. That is not the evidence he gave us yesterday.

Senator WONG—If your ruling is—

CHAIR—This was this morning, Senator Marshall.

Senator WONG—On a point of order, Chair: as I understood it, your ruling was that unfair dismissal issues were outside the purview of the inquiry.

CHAIR—Yes.

Senator WONG—Therefore, questions on that were not appropriate. So I ask, giving your ruling in relation to Senator Marshall's question, how the question you are asking could possibly be in order.

CHAIR—Yes, I will withdraw my question, Senator Wong, but I assure you I shall seek advice on that and raise it in debate in the Senate.

Senator WONG—We would have been happy to inquire into these aspects.

Senator MARSHALL—We have already established that you can be sacked for chewing gum, making too much money or any other reason.

Senator WONG—In relation to your answer to Senator Marshall, you are referring to the reference to employment generally et cetera that permeates clause 7C?

Ms James—Yes, clause 7C(1) expressly says that—

Senator WONG—I just wanted to check the basis of that.

Ms James—In clause 7C(1)(d), where it specifically talks about these sorts of laws, it talks about setting up—

Senator WONG—Contracts of employment?

Ms James—Yes.

Senator WONG—I meant generally clause 7C and the various provisions. I want to ask a question about maternity leave and the clause 94R(5) wording, particularly the subclause. As I understand it, this clause is intended to give effect to the guarantee of right of return for women returning after having a child. Is that correct? Is it you that I am asking, Mr Bohn?

Mr Bohn—Yes, it is.

Senator WONG—Clause 94R is intended to give effect to the guarantee of right of return after maternity leave. Is that correct?

Mr Bohn—Yes.

Senator WONG—Subclause (5) applies if the former position no longer exists. Do I understand the words that appear after that to mean that the offer of work is conditional upon the circumstances set out thereafter—that is, that the employee is qualified and able to work for her employer in another position?

Mr Bohn—That is what the provision says.

Senator WONG—So, if an employer argued, 'The position no longer exists and, I am sorry, but you are not qualified for any of the other positions that are in existence,' what rights would the employee have?

Mr Bohn—On that interpretation, that provision would not apply.

Senator WONG—In other words, she would not have a right of return?

Mr Bohn—Yes, that is what the provision says.

Senator WONG—Sorry, that was a lawyer's answer. 'The provision would not apply' means that she would not have a right of return under that section?

Mr Bohn—Yes.

Senator WONG—In those circumstances, would that putative dismissal be an unlawful dismissal?

Ms Centenera—It is one of the clause 176—

Senator WONG—I understand it is to do with family responsibilities, but if there is a specific provision in the so-called return to work guarantee that essentially says that the guarantee is subject to you being qualified and able to work for the employer in another position, surely you could not then make an unlawful dismissal claim if the employer relied on that? Mr Smythe, everyone is very quiet. Can you answer this?

Mr Smythe—I will take the question on notice.

Senator WONG—You will take the question on notice for the department?

Mr Smythe—Yes.

Senator WONG—So the department cannot explain to me whether or not there would be any rights under the unlawful dismissal provisions for a person who did not get the guaranteed return to work for the reasons we have outlined? I just want to clarify what has been taken on notice.

Mr Smythe—That is the question that has been taken on notice.

Senator WONG—Can I ask why, in the explanatory memorandum at paragraph 663 on page 130, it is phrased in mandatory language? It says:

... the employer must employ her in whichever of those positions is nearest in status and remuneration ...

I am a little unclear as to why that mandatory language is not repeated in clause 94R(5). In other words, what I am putting to you, Mr Bohn, is that the way the guarantee of right of return is described in the explanatory memorandum is not reflected in the section.

Senator JOHNSTON—What is the provision in the explanatory memorandum?

Senator WONG—It is clause 94R.

Senator JOHNSTON—Yes, but where is it in the explanatory memorandum?

Senator WONG—It is in paragraph 663.

Mr Bohn—The wording of subsection 94R(5) talks about the employee being entitled to return, so I would say that it is like a mandatory type requirement.

Senator WONG—I thought you and I had just agreed that the entitlement is subject to the employer having a position for which the employee is qualified and able.

Mr Bohn—That is right. Paragraph 663 is also worded in a way that, if that qualification is met, the employer must employ.

Senator WONG—So we have a situation where the right of return is conditioned on the employer determining that the employee is qualified and able to work for the employer, and the department has taken on notice the question of whether or not an employer's unreasonable determination in those circumstances is actually something that could be taken under 170CK. Is that right?

Mr Bohn—We are taking that on notice.

Senator WONG—Mr Pratt, you have indicated that a number of issues will be amended, including the outworkers provision and the averaging of hours. Can you indicate at this stage what other areas in the bill the government has indicated an intention to amend?

Mr Pratt—The main remaining area is in relation to unilateral termination and when a notice can be made. The intention is that, as per the WorkChoices booklet, that will only be possible after the nominal expiry date of the agreement.

Senator WONG—This is in relation to the employer unilaterally terminating a nominally expired agreement?

Mr Pratt—That is correct.

Senator WONG—Is there anything more?

Mr Pratt—There is just a point of clarification. On the hours, we have indicated that we are going to look at that and the government is examining that. There is a nuance there.

Senator WONG—Perhaps I should be clear. Could you summarise for me the areas where the government is considering amendments to the bill to better reflect its intentions?

Mr Pratt—Protections for outworkers; when a notice of termination can be given after the nominal expiry date of an agreement; and, as indicated by Senator Abetz at the recent estimates hearing and reiterated during the course of this week, the averaging of hours issue.

Senator WONG—That is it—those three things. Is it the case that in some states, including, I understand, Queensland—I did not know this, I have to say, until this inquiry—there are provisions which provide for casuals having a 23 per cent loading?

Mr Kovacic—My understanding is that there are some awards that provide casual loadings below the 20 per cent and there are, similarly, some awards that provide casual loadings above the 20 per cent that is being included for the fair pay and conditions standard.

Senator WONG—I beg your pardon?

Mr Kovacic—There are some awards which provide casual loadings which are below 20 per cent and there are some awards which, equally, provide casual loadings which are above 20 per cent. And the 20 per cent is included as the casual loading, the default rate, in the Australian fair pay and conditions standard.

Senator WONG—So if I were a Queensland employee on a casual loading in excess of the 20 per cent, that is not protected under section 90N?

Mr De Silva—No. If you were a casual employee in Queensland and your award provided that your loading was 23 per cent, that 23 per cent would come across into a preserved Australian pay and classifications scale.

Senator WONG—Subject to the employer indicating to me that I was to sign an AWA which removed that.

Mr Bohn—Twenty per cent is the default loading for agreement making, yes.

Senator WONG—Could someone explain to me what is envisaged to happen with junior rates of pay under 90ZE?

Mr De Silva—On the form commencement day, if there is an award which provides that a junior employee gets a percentage of the adult rate, a conversion will be done and a dollar amount will be assigned to the age of that employee. So, if it says that a 16-year-old gets a certain percentage of the adult rate, a dollar amount will be drawn from that, and that will be the guaranteed rate that that junior will get under the preserved APCS.

Senator WONG—But as a dollar amount, not expressed as a proportion of the adult wage?

Mr De Silva—That is correct.

Senator WONG—So, if the adult rate rises, the preserved junior rate would only be retained in terms of dollar amount; it would not rise on the basis—

Mr De Silva—If the AFPC decided to just adjust the adult rate and did not touch any of the junior rates, that is correct.

Senator WONG—So junior rates of pay are subject to the discretion of the AFPC?

Mr De Silva—The AFPC has the power to adjust all rates, including junior rates.

Senator WONG—But the preservation of junior rates under that section is only a preservation of the dollar amount, not at a relativity amount—not as a proportion of the adult wage?

Mr De Silva—That is correct.

Senator WONG—Mr Kovacic, earlier this week you talked about young people getting bargaining agents to assist them in AWAs, and I think you made reference to the possibility of a union. A union can only be the bargaining agent for one of its own members, can it not, in an AWA negotiation? It cannot represent a nonmember. I think it is proposed section 97.

Ms Keogh—That is correct.

Senator WONG—So a young person could only go to a union for representation if they were a member?

Ms Keogh—That is correct.

Senator WONG—I am unclear as to the scope of proposed section 44O, 'State authorities may be restrained from dealing with matter that is before the Commission'. Would that section permit the full bench to prevent a state tribunal from dealing with a wage claim? It is actually a genuine question; I do not understand the scope of the question.

Mr Smythe—The section I think mirrors the provisions in the present act. It says that if it appears to a full bench that a state industrial authority is dealing with, or is about to deal with, a matter that is the subject of a proceeding before the commission. As the commission will not have wage cases before it anymore, it will be difficult to imagine circumstances in which they could restrain a state commission from dealing with a wage case.

Senator WONG—Going to 96D, I think these are the provisions that may be the subject of amendment. Is that right, Mr Pratt? No, not the greenfields; you are only looking at unilateral determination.

Mr Pratt—That is what I was talking about before, Senator.

Senator WONG—To confirm, it is called an agreement but essentially it is a unilateral determination, isn't it, by the employer? They are not actually negotiating with anyone?

Mr Smythe—That is correct.

Senator WONG—So why are we calling it an agreement?

Ms James—It is a description of how the instrument operates. It operates as an agreement made under the act.

Senator WONG—But it is actually simply a unilateral determination, the employer just saying, 'This is what I am going to pay,' before they even have employees to talk to—correct?

Ms James—Yes.

Mr Smythe—It is contained in a whole raft of provisions that deal with agreements. It is not in any way supposed to be some sort of trickery.

Senator WONG—My suggestion is that at least with the others there is a perception that there is actually another party with which you nominally agree. Looking at section 95B, do we have a definition of what a new business, new project or new undertaking would include?

Mr Smythe—There is no definition.

Senator WONG—How will that operate? This is a provision that I think we agree relates to the right of the employer to make a unilateral determination, subject only to the Australian fair pay and conditions standards, as to the terms and conditions of employment of employees. What restrictions are there from an existing employer making a greenfields agreement in relation to a new activity on the same premises?

Ms Keogh—The new business definition is confined in two ways. On the one hand there must be, as you have just said, a new business, a new project or a new undertaking that the employer proposes to establish and in application the agreement must be made before the employment of any persons whose employment will be subject to the agreement.

Senator WONG—Yes, I understand that, Ms Keogh.

Ms Keogh—An example of how the new business, new project or new undertaking might work is that an automotive component manufacturer—and an example of how far it will not extend—

Senator WONG—What are you reading from in the example of where it will not extend? I am not trying to find out what is in your notes. Is this in the EM or in a public document, or is this internal briefing?

Ms Keogh—This is internal briefing.

Senator WONG—The point about that is: how is the court, the public and the Senate supposed to determine what this means? It is not in the act.

Ms Keogh—There is a case called the Brunel case. The new business definition is a kind of codification of what the commission decided in the Brunel case.

Senator WONG—So project or undertaking as well?

Ms Keogh—Yes.

Senator WONG—You wanted to give me the example of a component manufacturer, I think.

Ms Keogh—I was going to give you an example of how far the scope would not extend. An automotive component manufacturer would not be able to make a greenfields agreement simply because it won a new contract to supply, for example, Mitsubishi with parts to be manufactured at the same facility that it operates.

Senator WONG—Why is that not a new project?

Ms Keogh—It goes back to what I said earlier. The employees would be current employees, so the two operate together.

Senator WONG—Sure, I understood that. But the point I was making is that, if the component manufacturer decided to go into a new area of production—I am not very good on cars, but let us say they had been doing mufflers and then they did something else—then arguably that is a new project or a new undertaking and they could make a greenfields agreement with themselves in respect of employees who were to be employed in that new area.

Ms Keogh—That is correct.

Senator WONG—I want to briefly touch on lodgment procedures. Other than the general provisions relating to coercion et cetera, is any mechanism envisaged to ensure that the signatures that are referred to in section 98C of the legislation, which relates to the approval of an AWA, are genuine?

Ms Keogh—There is nothing in the legislation to do that; however, there is an intention that signed documents are kept by the employer.

Senator WONG—Can I just stop you there? Where is the intention? Is it in the act?

Ms Keogh—There is an intention to make regulations.

Senator WONG—Do we have a list of the various things that are intended to be in regulations that the committee can be provided with? It might obviate some argument on the Senate floor if there are going to be amendments on issues.

Senator Johnston interjecting—

Senator WONG—Senator Johnston says: 'We'll let you know. It's a matter for the government.'

CHAIR—He did preface that with, 'It is a matter for the government.'

Senator WONG—'It is a matter for the government. We will let you know.' That is probably indicative of the way this matter is proceeding.

Senator JOHNSTON—A lot of things are going to be in regulations.

Senator WONG—Yes. And perhaps, instead of taking up the time, you could have asked the minister that question.

Mr Bohn—The answer to your question is that the department does not have such a list at this point.

Senator WONG—Thank you. So there is an intention to require by regulation or a possibility—I do not want to verbal you—that there may be regulations to require an employer to keep the AWA.

Ms Keogh—Yes, to keep a signed copy of any workplace agreement for a specified period. If a workplace agreement has not been approved and that comes to light, there is a remedy under section 105E on page 208.

Senator WONG—Do you mean 105F?

Ms Keogh—A, B and C mean that a party to the agreement could go to the court and, if that agreement has not been properly approved, the court can vary the agreement, void the agreement or give compensation.

Senator WONG—Okay, but there is nothing in the bill that requires anyone in any public position, whether it be the Australian Fair Pay Commission or the OEA or anyone else, to ensure that a signature on an AWA is genuine or that there has been informed consent.

Ms Keogh—That is correct.

Senator WONG—And the only remedy would be an application before either the Federal Court or the Federal Magistrates Court.

Ms Keogh—Either the Federal Magistrates Court or the Federal Court.

Senator WONG—So, if the document has been falsified or they have just been told to sign and they did not know what it was—for example, if it was a non-English-speaking background person—the bill requires that that employee take legal action to demonstrate that?

Ms Keogh—The employee could. If the employee was a member of a union, the union could. Or, alternatively, they could make a complaint to a workplace inspector and a workplace inspector could bring such an action.

Mr JOHNSON—The document also has to be witnessed.

Ms Keogh—Yes, an AWA document would have to be witnessed.

Senator WONG—But there is no requirement that they cannot be witnessed by the employer.

Senator JOHNSTON—So it would be forging and uttering, if it was a false signature, wouldn't it?

Senator WONG—Informed consent was the other basis of the question. Is there any restriction on the employer being a witness?

Ms Keogh—No, not in the legislation.

Senator WONG—Is that another matter there may be regulations on?

Ms Keogh—I am not sure. I would only add that the witnessing requirements reflect those in the current act.

Senator WONG—We can have a whole argument about the no disadvantage test and the fact that there is a different approval process, but let us not go there—we have not got much time and I am sure you have better things to do than argue with me about that.

Mr Smythe, you and I had a brief discussion and you indicated to me that section 104(6) was intended to reflect the current law. I understand there is case law on this. I also understand it has been an issue of some discussion before the committee. If it is the case that 104(6) is intended to not permit the transfer of an existing employee onto an AWA, why is it that 104(6) does not make that clear by inserting words such as 'prospective employee'?

Mr Smythe—I agree that the words are ambiguous.

Senator WONG—You agree?

Mr Smythe—I agree that they are ambiguous.

Senator WONG—Thank you.

Mr Smythe—I indicated earlier that the intention of the government was that it should apply only to new employees.

Senator WONG—Is the government contemplating amendments in relation to that subsection?

Mr Smythe—That is a matter for the government.

Senator WONG—So you would agree—and I think it was Professor Stuart who said the same thing—that there is some ambiguity in the scope of 104(6) insofar as it applies to existing employees?

Mr Smythe—There is ambiguity, but I have said now a number of times that the intention behind the provision is that it only apply to new employees. That is why the words 'to avoid doubt' appear at the beginning of the subsection. That is to avoid any doubt that may exist that that is the existing law.

Senator WONG—You cannot have it both ways, Mr Smythe: you cannot tell me that you think it is ambiguous and say, 'But it says "to avoid doubt" at the beginning of the ambiguous provision.'

Mr Smythe—That is what ambiguity is all about.

Senator WONG—I want to quickly refer to superannuation. Could you confirm whether employers who make contributions to superannuation funds under the terms of an existing state agreement or state award will be able to continue to pay that superannuation in those terms, or would that breach the superannuation guarantee act regarding choice of funds when these awards and agreements are converted to preserved state agreements or notional agreements preserving state awards?

Mr Bohn—The interaction of the amendments in this bill with superannuation legislation is something that will be dealt with in consequential amendments, which will be made, as you are aware, through regulations.

Senator WONG—So this is another set of regulations to come?

Mr Bohn—Yes.

Senator WONG—What is the intention of the amendments on unilateral termination? Is that only in relation to when that can occur, Mr Pratt?

Mr Pratt—The intention is to make it clear that, as set out in the *WorkChoices* booklet, the notice can only be made by either the employer or the employees after the nominal expiry date. That is the amendment which is being considered.

Senator WONG—What does it mean that the majority of employees have to decide? Is there anything that is going to be required in order for that decision—this is for a consent termination?

Mr Pratt—Could you ask that question again.

Senator WONG—As I understand it, there are two ways in which you can unilaterally terminate. There is a seven-day notice of consent to terminate and a 90-day notice for unilateral termination.

Ms Keogh—There are actually three ways in which you can terminate. One is that you can terminate an agreement by approval, whereby the majority of employees vote to terminate the agreement, and then there are two forms of unilateral termination.

CHAIR—The time for asking questions has expired. Mr Pratt, I think you wished to make a short statement.

Mr Pratt—Yes, we have two people who want to make very short statements.

Mr Bohn—I would like to take the opportunity to correct an answer I gave earlier to Senator Joyce. Senator Joyce was canvassing with me what would happen in circumstances where an employee was not able to pay to attend a doctor, and I indicated that I did not think that would be caught by the exception of circumstances beyond the employee's control. After reflection over lunch—when things are always clearer—I would now like to point out that, although all the circumstances are relevant, if the sole reason that the employee was not able to attend a doctor to get a medical certificate was financial then, in my view, that would fall within that exception.

Senator WONG—Is there any suggestion that the bill is going to be amended to reflect that? I mean, that is your opinion, isn't it?

Mr Bohn—Yes, it is my opinion.

Senator WONG—But there is no suggestion that the bill is going to be amended to reflect that?

CHAIR—I think we have had the question and we have had the answer. We need to let matters rest there for the moment. Is there any other officer who wants to make a statement?

Ms Keogh—It has just been pointed out to me that currently under the WR Act—in relation to Senator Wong's question about witnessing an AWA and whether an employer could witness an AWA—Workplace Relations Regulation 30ZQ, which it is intended to virtually replicate, provides that the other party to the AWA cannot be the witness.

Senator WONG—But another employee or a manager who is not the actual employer could be the witness under that regulation?

Ms Keogh—Another employee is not the employer. It might be more questionable as to whether a manager would not be acting for the employer.

Senator WONG—If they were not the legal employer.

Ms Keogh—Yes.

Ms James—Regarding a few points that have come up over the past few days or via people's submissions, some submitters—including the joint state governments—have put the case that, if an employer lodges an agreement that has not been approved, employees will not be able to get underpayments in relation to that agreement. There are provisions in the act, in particular in proposed section 105J, which give the court quite broad powers, and there are some other provisions around there as well to provide compensation and, as Ms Keogh was saying before, to vary the agreement or void the agreement. Essentially, that suite of remedies is designed to enable the court to put employees in the position that they would have been in but for the non-approved agreement having come into operation. So there are a broad range of remedies there.

A few submissions have pointed out provisions and made comments that they are incredibly broad in relation to the commission's powers. In particular, the AWU talked about proposed section 44L, which is about the minister's ability to seek review of decisions under the act—

Senator MARSHALL—Could I just make a point there?

CHAIR—Yes.

Senator MARSHALL—If you are going to respond to some of the submissions, that should have been done at the beginning so we had an opportunity to actually question those responses. It should not have been left to the last two minutes when there is no opportunity to talk about it.

CHAIR—Please listen to Ms James.

Ms James—I am trying to assist the committee here because I can understand there might be some confusion. There are a range of provisions that were in part VI of the act that have now been shifted to division 3A of part 2 of the bill. They include section 44 L, which is essentially existing section 109, and there are some others there as well. So, in relation to people's ability to navigate the bill, if you are looking for the general powers of the commission then division 3A is the place to go. Many of those provisions—in fact almost all of them—are based on existing powers. Most of them are not new. Page 44 is where that commences.

CHAIR—Thank you for that information. I thank Mr Pratt and the officers of the department for being here.

Committee adjourned at 3.00 pm