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EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION
LEGISLATION COMMITTEE

Reference: OHS and SRC Legislation Amendment Bill 2006

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SENATE
EMPLOYMENT, WORKPLACE RELATIONS AND
EDUCATION LEGISLATION COMMITTEE

Friday, 21 April 2006

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

Substitute members: Senator Murray for Senator Stott Despoja

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

Senators in attendance: Senators Barnett, Marshall and Troeth

Terms of reference for the inquiry:

OHS and SRC Legislation Amendment Bill 2005

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Committee met at 9.01 am

CHAIR (Senator Troeth)—I declare open this inquiry into the OHS and SRC Legislation Amendment Bill 2005. On 1 March 2006, the Senate referred the bill to the Employment, Workplace Relations and Education Legislation Committee for inquiry. The committee is due to report on 10 May. The main amendment in this bill will ensure that all employers that obtain a self-insurance licence, under the Safety, Rehabilitation and Compensation Act 1988, including former Commonwealth authorities and those in competition with existing and current Commonwealth authorities, are automatically covered by the Occupational Health and Safety (Commonwealth Employment) Act 1991. The OHS obligations for these employers are currently provided by the different state and territory OHS laws. The bill also contains other amendments of a technical nature. These will have the effect of allowing Comcare to charge Commonwealth authorities an OHS contribution for the administration of the 1991 act and validating OHS contributions made by some licensees under the SRC Act in 2002-03. From submissions, the committee notes that it expects to hear concerns raised today relating to the consequences of businesses applying to self-insure under Comcare.

I remind all witnesses that in giving evidence they are protected by parliamentary privilege. Parliamentary privilege gives special rights and immunities to senators, members and those who appear before its committees. Parliament must function without obstruction and people must be able to give evidence to its committees without prejudice to themselves. Any act by any person which disadvantages a witness as a result of evidence given before the Senate or any of its committees may be regarded as a contempt and dealt with accordingly. These proceedings are public. The committee may agree to conduct part of the hearing in camera, if a witness so requests. I welcome any observers to this public hearing.

[9.03 am]

DENT, Mr Graham Anthony, Legal Adviser (External), National Council of Self Insurers Inc

HARRIS, Mr Peter Wesley, Deputy Chairperson, National Council of Self Insurers Inc

JAGER, Mr Peter Raymond, OHS Convenor, Self Insurers Association, Victoria

YOUNG, Mr Dean James, General Manager, Health & Safety - ANZ, Carter Holt Harvey

CHAIR—Welcome. The committee has before it your submission; are there any changes or additions you wish to make to it?

Mr Harris—No.

CHAIR—I now invite you to make brief opening statement before we begin our questions.

Mr Harris—The National Council of Self Insurers represents various state associations of self-insurers, so we are the peak body. We have approximately 240 full members. In addition, we have as associate members companies that are in the process of applying for self-insurance. Two of our members are self-insured under the Commonwealth as licensees and we have other associates and honorary solicitors. Our major objectives are to improve health and safety frameworks and workers comp frameworks for self-insurers in Australia, particularly in moving towards national consistency. Therefore, to progress towards national consistency from where we are today is a key objective of ours.

We notice that some submissions to this inquiry suggest that companies and self-insurers are looking for a soft option in terms of safety; that is not the case. Self-insurers are acutely accountable for the consequences of workplace injury, both financially and in other ways. If we were looking for a soft option, we would not be self-insurers in the first place. We are looking for a more efficient framework—not a softer framework—for health and safety.

To achieve that, as many of our members are national companies with a significant presence in multiple states, we would have a national business strategy and a national health and safety strategy. Currently, they can be compromised and diluted by having to comply with multiple state requirements, with our resources being diverted to keeping track of hundreds of state requirements—and we can speak more of the specific numbers—rather than being directed to improving safety. We are committed to improving safety outcomes. A safe business is productive and profitable and it is also good to work for. So it is good both for employees and for business.

We support the view of the Australian government and of other submissions that have been made that workers comp and OH&S should not be separated but should be integrated. Because one is an obvious consequence of the other, they should be linked together for accountability's sake. Integrating health and safety with workers comp is important. For some companies, we think that integration should be cross border and not just integrated at a state level, so we support choice for companies to move to a national framework. That will benefit not only business with regard to competitiveness but also employees with regard to fewer

injuries. For some businesses, depending on where they are located, the more suitable option will be to remain in a state scheme; but for others the far more equitable option will be to move to a national scheme.

We are pleased to note that our comments in relation to clause 4 of the amendment bill have been acknowledged and changes have been made to remove ambiguity. We are keen to see simplicity wherever possible so that there is clarity with what legislation applies. We are aware that state frameworks will still be in place and will still have some applicability, so we want clarity. We are keen to contribute to any further reviews as well as to the current review of the Commonwealth Health and Safety Act, to which we will be making further submissions. Thank you for the opportunity to be present today.

CHAIR—Does any other witness wish to add to those remarks? As no-one else wishes to do so, I thank you for your opening remarks. You have spoken of specific numbers you could give us in terms of difficulties your organisations have in complying with a number of state jurisdictions. Would you like to expand on those numbers?

Mr Harris—I will ask Dean Young to answer that question.

Mr Young—Carter Holt Harvey operates in several states—namely, Victoria, South Australia, Queensland and New South Wales. I looked at some of the manufacturing regulations and national and state codes of practice and advisory standards that we have to comply with to some extent and found that there are in excess of 406. Upon examining them further, I note that they are slightly different in some states. A good example would be Victoria, where there are very well defined regulations on confined space. However, in Western Australia, confined space is referred to in several sections of the regulations, so it is not covered by one consistent regulation. Therefore, you have to extract from the various components of the regulations what you need to do to comply. That makes it quite a challenging process.

Another good example is ‘fall from heights’. In Western Australia and the Northern Territory the requirement for fall protection applies to three or more metres, whereas in Victoria and New South Wales it applies to two metres or more. They are some simple examples that we can put to you where the importance of compliance becomes quite a complex matter in prevention of workplace injury. Therefore, we find it of concern that, because of the complex and significant number of regulations, sometimes in some areas resources are diverted to the monitoring of and the change in regulation rather than focused on getting on with the job of implementation and effectiveness at the coalface in order to prevent injury.

CHAIR—Have your members spoken to you often about this?

Mr Young—Yes. Whenever there is a change or a proposed change, a lot of interest is generated in trying to understand what it means and what level of compliance will be required, particularly how much deviation there will be from current practice within the company. I work for Carter Holt Harvey, but large multistate or international companies that I have worked for—like ICI, Orica and Amcor—usually work to internal standards. They are always very keen and interested to find out what changes to legislation in various states will

impact on business and how complex they will make implementation and management of safety in each of the jurisdictions in which they operate.

CHAIR—Are internal standards generally higher or lower than state standards?

Mr Young—At the moment in our case, the trend is to set our benchmark against Australian and New Zealand standards. In this particular case, ASNZS4801 is tagged to international standard ISO18001, which are trans-Tasman and internationally recognised health and safety standards. We work to those standards because they are recognised, consistent and good.

CHAIR—So, as a group, you are generally happy that safety standards would not be compromised by a move to the Commonwealth jurisdiction. You say that there are no soft options with this move. Are you generally satisfied that this does not mean a lowering in health and safety standards?

Mr Harris—We would not put forward that the Commonwealth health and safety act is perfect by any means, and we are very keen to participate in the review. However, the existing codes and regulations regarding various hazards and safety issues across the country are still in place and, under a general duty—I might ask Graham to add to this—we will still be judged. We would not dismantle current standards and frameworks merely because we might move from a scheme that has more prescription of certain hazards; therefore, we do not accept the position that such a move would create a gap.

Mr Young—Indeed, the businesses with which I have been associated try to work to the highest standard and not to the least standard, because logic would suggest that working to the least standard is a retrograde step. The objective would be to work to a higher standard and not to a lower standard.

Mr Dent—I would add that the legislation in all states and at the Commonwealth level regarding ‘general duty’ is almost the same in terms of language and effect. All legislation talks about ‘taking reasonable steps’ or ‘using reasonably practicable measures’ to ensure that the work place is safe and without risk to health. Where the detail differs, it becomes a question in the regulation and codes of practice, which is an attempt by states to codify what they see as appropriate approaches to addressing ‘general duty’. But, if you take away some of the detailed regulations, the obligation remains the same in every jurisdiction—that organisations, even absent a particular regulation or code of practice at the Commonwealth level, would be bound still to comply with the test of what is reasonably practicable and what is happening in industry. By default, that would be demonstrated by relevant state codes, regulations or what industries are doing. So there would be no diminution at of the legal onus on companies.

Mr Jager—When you want to run a policy out across the nation, it becomes a real issue. We find that we cannot have just one policy that will apply to all states, as each state must adjust that policy or those procedures to suit that state’s current legislation. That means not only additional cost, with people in each jurisdiction working on these policies, but also confusion. Certainly, the man on the floor doing the work will have the instruction and—whether he is in Victoria, Western Australia or wherever—will or should work by those rules. But those within the organisation at higher levels moving from state to state, including

perhaps the policy writers, need to unlearn what they have learned previously, because there is a new set of regulations to run by. This causes confusion, particularly in areas where people work across borders.

An example would be Victoria and New South Wales with Albury-Wodonga. You have contractors and other people working either side of the border, which creates issues. There is the red card/green card issue regarding induction required in the construction industry. Certainly, at one stage cards were accepted under a sweetheart deal. But now in some situations contractors, to be recognised, have to go through induction training twice, once on either side of the border. It is very cumbersome, costly and confusing.

Senator MARSHALL—You gave a couple of examples of different regulations for different issues across states. The first concerned working in a confined space and the second concerned protection from falling from heights. You have indicated that in Victoria the distance is two metres and in some other states and territories it is three metres and above. What will you apply? I would not have thought this would be a problem for you. You would just apply two metres across the board, wouldn't you?

Mr Harris—That is what we would do.

Mr Young—We would apply the more stringent standard and work to that—or, as has been the case with recent changes, it is not so much about the height but about the risk of working at a particular height. You may be putting yourself at risk working at 1.5 metres while doing certain jobs. It is about risk assessment. Moving to a less prescribed legislative framework puts the onus of responsibility on the employer to look at the risk in a broader picture rather than a narrow picture. Therefore, it is incumbent on the employer to say, 'Okay, what's the bigger risk and the bigger issues associated with doing a particular job working at a certain height?' As I said, it can be less than two metres.

Senator MARSHALL—That is right. You are required to do that in every instance, as I understand it. It is only at certain heights that the prescription kicks in and provides minimums. It does that because in the past employers have not applied that safety test, have they? That is why regulation is there, isn't it?

Mr Young—It can work in reverse as well. It can be an out in the sense that, rather than looking at the broader risk issues, they will apply the prescriptive and say, 'We did work at two metres and therefore we are okay.' The argument can then be, 'That's not acceptable, because you didn't take into consideration other risk issues associated with the job.' That is what I am saying—there is a greater onus or responsibility.

Senator MARSHALL—What do the Australian and New Zealand standards say about heights? You have indicated that they are good standards and that you want to apply them across self-insured companies. What do they say about heights?

Mr Dent—Those relevant standards that Mr Young referred to are management system standards. They provide the framework within which companies operate, but in certain areas they do not go into the detail of the prescriptive nature of what is required. I am not aware of any Australia or New Zealand standard that specifies requirements for work at height; that is picked up by codes of practice or regulations at state levels.

The problem really arises not when regulations or codes are performance based, such as requiring a risk assessment or recommending that work above a certain height might be protected, but when they are prescriptive. So you get to the example of confined space, which Mr Young mentioned earlier, where you may have a different prescriptive approach in different states. That means that a company cannot apply a national system and cannot simply say, 'We'll apply the more stringent,' because laws in a particular jurisdiction mandate that a particular approach must be followed and the company may have the view that that is not the best approach. That is where it becomes more complex when the law is prescriptive.

Mr Jager—Even the definition of 'confined space' changes across the states. Even defining whether it is a confined space or not is confusing.

Senator MARSHALL—Yes. But you will create your own definition company by company, won't you?

Mr Dent—The Commonwealth regulations have a specific section under 'confined spaces'. The benefit that offers is that companies have one standard national approach rather than having to try and juggle prescriptive requirements in different jurisdictions to deal with the same risk.

Mr Jager—And to be relying on Australian standards.

Senator MARSHALL—You opened by saying that having to comply with state requirements actually dilutes your health and safety approach. I must say that I am finding it difficult to grasp that, because if you pick the best standard and apply that across the board you would pick up all the standards, wouldn't you?

Mr Dent—Where standards are prescriptive, though, it is not possible to pick the best, because state laws can mandate: 'This is the way you shall do it.' It would be a breach of the regulation in that state to do it in a different way. Some laws are performance based, looking at the risk and the outcome, and require companies to meet minimum standards, which they can exceed; others say, 'This is the way you will do it.' Those laws present that problem because you cannot put in place a national system. In other areas, companies divert resources to try to identify the requirements. I have done work for clients in the past, and as a lawyer I am a beneficiary of the complexity of the laws, because, over and over again, we get lots of requests for advice on the same issue. Clients need to then study the laws in every jurisdiction. Sometimes they are quite detailed areas. For example, the question of a traffic management scheme for a company that does a lot of construction work requires analysis of regulations, Australian standards and codes of practice in every state. That was a matrix that ultimately ran to 400 pages, comparing the approach of the different standards in each jurisdiction to different issues. The company could then work through that and work out what national system it could put in place in order to comply in each jurisdiction. That is very costly and very expensive.

Senator MARSHALL—Yes. How many examples of that are there? I understand that the instance you gave could be complex. Obviously, if it is about road and traffic management issues, there is a whole range of new areas of regulation that, I guess, sit over the top of health and safety legislation. Of course, that would be difficult in any instance. There are not regulations for every issue. My understanding of the Victorian legislation is that the majority

of it is enabling rather than prescriptive legislation. The prescription comes into it when we have situations where it is determined that there is a procedure that has to be followed, and that is not something that someone has just decided; it is because of the dangerous nature of what is actually being regulated for. I am just trying to work out the extent of the problem.

Mr Dent—It happens in a wide range of issues. For example, even for working at heights, where the codes of practice are enabling, organisations still need to work through the process of looking at what the requirements are in each jurisdiction, because the way a code of practice works is that it provides an evidentiary basis for the authority to prosecute. So, if someone has departed from a code of practice, the onus of proof is on that person to demonstrate that the course of action that they adopted either equalled the standards applied in that code of practice or exceeded them. So an organisation still needs to go through the process, even with enabling or guiding codes, to make a comparison about what each code requires in each jurisdiction in order to be able to put in place a national framework.

Senator MARSHALL—If the work has to be done—and again I fail to understand, given what you said—you need to be aware of all those things at all times anyway.

Mr Dent—If you move to a Commonwealth scheme, where the Commonwealth regulator has prescribed a particular code of practice or regulation, then that is what you need to look at. Industry is also conscious of the general duty. Most large organisations will also take into account international practice and developments. That means that they look at one source in terms of their legal obligations and then they can look at large in terms of best practice and continue the development of their procedures, but they do not have to pay lawyers or consultants to analyse in detail up to eight jurisdictions.

Senator MARSHALL—That is no good; we cannot have that!

Mr Dent—I am a beneficiary of it.

Senator MARSHALL—Mr Harris, you said that companies will work to the higher standard. That is all right for people to say in a hearing. What assurances do we have? What is the requirement to do so?

Mr Harris—I think we have discussed already the general duty of care and the courts—perhaps I will again refer to Graham to add to this. We will be judged by information and common knowledge about hazards and risks, particularly in a prosecution context. Our primary concern is to reduce and avoid injuries—not through fear of prosecution but because that is a commitment self-insurers have—and we have a vested interest in doing so. When we are looking at a hazard, we would look at what is the best way of controlling, reducing or eliminating that hazard.

Senator MARSHALL—I have never heard an employer not say that, though. You are required to say that. That is the law; that is your obligation.

Mr Harris—Yes, and we are committed to doing that. And why would we not be—we have the ultimate—

Senator MARSHALL—I understand, and that may be a very genuine commitment. Sorry, maybe you misunderstood my cynicism. It was not directed at you or any specific company.

But employers do say that. Why is it that, as I understand it, that in Victoria alone there were 43,719 workplace interventions last year by the inspectorate?

Mr Harris—We are not saying that there should not be inspectorate activity. We think the endgame is improving safety and reducing injuries. If we can do that through our best efforts, then doing that proactively is the most effective way. But we recognise that there are times for inspectorate involvement, prosecution and other forms of encouragement. So we are not shying away from that and we do not stand in the way of that activity. We noticed that in some of the submissions a comparison is drawn between the Commonwealth inspectorate and the state inspectorate of Victoria. We say that that is not a fair comparison; it should not be a comparison between we are talking about government prosecuting government. If you drew a comparison between Victorian government inspectors prosecuting the Victorian government, you would find a very different number to what is being stated. So it is not apples and apples. The inspectorate activity of Comcare will need to change as more private companies become part of that scheme.

Senator MARSHALL—The underlying accusation in those submissions is that you take yourself out of a thorough inspectorate process by moving to self-insurance. You say that that is not the case.

Mr Harris—That is not the case. Self-insurance brings extra scrutiny beyond the inspectorate activity because we voluntarily become involved in safety audits that are regularly reported to whichever regulator we are a part of. So, whether it is at the Commonwealth or state level, self-insurers are under far more scrutiny than average employers.

Mr Dent—In order to obtain their accreditation to self-insure, they need to go through regular audits that are far more detailed than an ordinary workplace inspection would entail.

Mr Jager—Senator, the numbers you raised before are true numbers. The result is terribly inadequate, as terrible as is the number of deaths in the workplace. But the question across the board is: how many of these involve self-insurer companies? Further to what Peter said about the business of us going through a safety map audit, as a self-insurer we have far more scrutiny than the company next door that is not a self-insurer. If a company does not want scrutiny it will not become a self-insurer, because it is not an easy way out.

In terms of taking the lower or higher standard we can use the example in Victoria a few years ago, where it was required to have a medical examination before getting a forklift truck licence. Over the years, that has disappeared. I work for Alcoa; we have companies in Victoria, New South Wales and Western Australia. We have a standard that says, 'We won't let people have any sort of licence to drive on the plant without a regular medical examination to ensure their level of fitness.' We will take the higher standard. The direction from our corporate organisation is that you look at the Alcoa standard and you look at the local standard and you accept the higher one. We are audited against that on a regular basis. Whilst we are happy to have the higher standard, it is some of the nitty-gritty detail, which is not necessarily of a higher standard across the states, which causes the confusion.

Senator BARNETT—Thank you for your submissions this morning and also for the comprehensive submission that is before us. Mr Young, with regard to the cost of compliance

you referred to the Carter Holt example of the cost of red tape and you mentioned 406 codes of practice.

Mr Young—Yes—regulations, codes of practice, advisory standards. There are a significant number.

Senator BARNETT—Obviously, as a person with a small business background, it is disturbing and concerning to note that. Do you have any other examples of the cost of compliance, and can you provide an estimate of the cost of compliance? I note that in your submission to the Productivity Commission in October 2003 you referred to some of the costs of compliance. Are there any other details or evidence you can put to the committee today in that regard, apart from your Carter Holt example?

Mr Harris—The position we are taking is that the ultimate cost is the cost of injuries. We have not focused on the administrative costs, even though they are not insignificant. Our position is that we would be better able to deploy our resources. We are not looking at this as a way of cutting our health and safety resources; we are looking at this as a way of getting a more effective implementation of safety and reducing injuries. For self-insurers especially, that reduces costs. The cost saving is in reducing injuries and reducing claims costs, which obviously is of benefit to employees as well.

Senator BARNETT—The ACTU says in its submission:

The ACTU contends that reducing compliance obligations on business will, in fact, run counter to the objectives of the Australian Safety and Compensation Council's National OHS Strategy to reduce occupational injury by 40% and fatalities by 20% by 2012. There is certainly no legitimate evidence to suggest that incidents of death, injury and disease have been reduced because a company's compliance obligations have been reduced.

What do you say to that?

Mr Dent—I will make a point before there is any further response to that, and that is that we submit there is no reduction in compliance obligations. In comparison with the penalties, there might be lower penalties in some states, but the compliance obligations under the Commonwealth act are just as onerous and of the same nature as under the state legislation.

Senator BARNETT—Okay.

Mr Harris—I am glad you made reference to the national OH&S strategy, because we would counter by saying that our position is that the multiplicity of regulations does get in the way of achieving those objectives. Allowing a speedier progress towards national consistency would better help us achieve the national health and safety objectives. One of the priorities under the national OH&S strategy which was supported by all stakeholders was to improve the capacity of business operators and workers to manage OH&S effectively. Four hundred and six regulations do not facilitate that. That is why we propose and support moves to streamline, not to save administrative costs but to get a better safety outcome for business and employees.

Mr Jager—As I said before, I think the confusion aspect is critical. If you look at the security-sensitive ammonium nitrate regulations which have come in state by state, PACIA, the Plastics and Chemical Industries Association, are really concerned about the different degree of regulations across the states. We have a situation where the ammonium nitrate can

be classified differently, the amount you can store is different from state to state, the transport of it is such that you can transport a certain amount in Victoria but you cannot take it into South Australia et cetera. Some national guidelines there, some national regulations, would streamline it and make it a lot safer. That is what it is about. The confusion is really dangerous.

Senator BARNETT—Yes, I can see your point there. Thank you for that very good analogy, Mr Jager. I am interested in your assessment of the impact on small business and micro-business compared to larger businesses and whether there is a different compliance burden. Many of the micro-businesses are operating across state borders. What is the impact? Is it going to make it easier or harder for them compared to big business and compared to business generally, or is it just going to make it more streamlined across the board? What is your view on that?

Mr Harris—The immediate impact will be more for those companies that move into the Commonwealth jurisdiction. But, over time, we would hope that having that choice will drive a speedier move towards national consistency, particularly in health and safety, which is what we are talking about here. In the short term, a smaller company that is working in multiple jurisdictions would still be faced with that complexity, but we would expect that over time that would reduce, as there is more incentive for the states and the Commonwealth scheme to become more aligned and to have a more level playing field in terms of the health and safety requirements.

Mr Jager—There is another aspect there too. A part of my job is to deal regularly with contractors, and some of these contractors are smaller organisations, although they do have branches in each state. Before we use them, we require them to go through a prequalification process to make sure they are up to a standard—we will not use them just out of the phonebook, as it were—so we are putting the acid on them in wanting them to comply with the regulations. Our insistence on this creates an issue, because a small company, of course, just does not have the personnel. Their answer is: ‘You’re with Alcoa. You can afford to have people looking at all these regulations. We just don’t have the time for that.’ And so you typically have a situation where a lot of the smaller companies are just not complying with the regulations simply because they do not have access to them or they do not have time.

Senator BARNETT—So you are saying that this will benefit those businesses?

Mr Jager—I believe so.

Mr Harris—Particularly those that work for larger companies such as self-insurers who have those standards and the expectation that that gap of resources capacity or capability of a small business will be partly filled by the primary contractor or employer that is engaging them.

Senator BARNETT—I want to ask you about the point you made earlier, Mr Harris, about inspections and enforcement and whether the Commonwealth has the ability to follow up and ensure that that happens. In the conclusion to the ACTU’s submission, they say:

The Commonwealth system has very limited capacity to inspect and enforce or penalise. By allowing more businesses into the system, Comcare’s capacity to ensure businesses comply with OHS standards will be further reduced.

The point you were making earlier is that you disagree with that view, but can you expand on that?

Mr Harris—I understand that the Commonwealth has its own inspectorate and also has arrangements with the various states to utilise their inspectorates. I would expect that, as the composition of employers that is covered by the Commonwealth changes, the Commonwealth will need to review its resourcing and its capacity to provide an effective inspectorate. That will change as state requirements have changed and their inspectorate resources have changed, but we do not think that that means progress should not happen, because there needs to be a change in resources.

Mr Dent—There is another aspect to that too. As Mr Harris mentioned earlier, Commonwealth authorities are self-insured and what is not recorded in those figures in the ACTU submission is the fact that all the Commonwealth authorities go through regular internal audits and external audits from Comcare in relation to their retention of the self-insurance status. They are very thorough start-to-finish audits of all their occupational health and safety obligations, with noncompliances identified and requirements for corrective action. That is far more comprehensive than random workplace inspections.

There is a reference here to 44,000 workplace interventions in Victoria, which Senator Marshall referred to previously. Obviously, occupational health and safety is a continuing improvement process. There is always something on a spectrum, from a very minor issue through to very major issues which ultimately result in prosecution, that can be addressed. With due respect to the City of Melbourne, if an inspector came in here they might well issue an improvement notice in respect of the cabling arrangements here, which present a tripping hazard. It can range from very minor matters through to very significant matters, and the number of workplace interventions does not indicate the real scope of the problem or the nature of enforcement activity.

Mr Young—Or the quality of the improvement that they are aiming for, because with a good safety management system you are trying to continually improve to prevent injury, and that is what a good safety management system will deliver rather than an inspection.

Mr Harris—What we are saying is: to try and judge the quality of a safety system on the number of inspections is a very crude and unsatisfactory way of making that judgment. As we have said, self-insurers' safety systems are scrutinised in many more and deeper ways than just through inspections. Also, the comparison is flawed, because we are talking about government inspecting government versus government inspecting private enterprise, so we think there are major flaws in the comparison that has been made.

CHAIR—Thank you very much for your appearance here today.

[09.41]

MARLES, Mr Richard, Assistant Secretary, Australian Council of Trade Unions

MULLINS, Mr Steve, Occupational Health and Safety Officer, Australian Council of Trade Unions

CHAIR—Welcome. Thank you for your submission. Are there any changes or additions you would like to make to that submission?

Mr Marles—No.

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

Mr Marles—Thank you for giving us this opportunity to present our submission to you. We oppose the OHS and SRC Legislation Amendment Bill 2005. I intend to make a brief statement outlining the thrust of that opposition and then my colleague Mr Mullins will go into some more detail about our submission.

The OHS and SRC Legislation Amendment Bill will have the effect, as you are well aware, of making those companies who are currently under the Comcare scheme, by virtue of a licence granted by the Minister for Employment and Workplace Relations, also be covered by the Commonwealth OH&S act. Combining the Commonwealth OH&S act with the Comcare scheme is, in our view, a building block in a much bigger edifice which is being constructed by the Commonwealth government—namely, the building of a national workers compensation and OH&S system for large companies in this country. Currently, if you are a competitor of a Commonwealth agency or a former Commonwealth agency then you are entitled to gain access to Comcare by the granting of a licence by the minister for workplace relations. There are many observers out there who are suggesting that that restriction may well be relaxed. That would mean that any self-insuring large multistate employer would gain access to the Comcare system and then, by virtue of this bill, also gain access to the Commonwealth OH&S act and the Commonwealth OH&S system.

If you look at the list of self-insurers which currently exist under the state systems, they encompass all the large companies in this country: all the major retailers, the major banks and the major transport companies. So it is easy to imagine that, if events transpire as I have described, a very large proportion of the economy would come under Comcare and, by virtue of this bill, come under the Commonwealth's OH&S act.

In essence, we have three problems with that grand plan. First of all, in our view, this is happening by stealth. There is nowhere near the debate going on about whether or not there ought to be a national OH&S and workers compensation system as there is, for example, about Work Choices. That is because the way in which this plan is being put in place is piecemeal—through this piece of legislation here and through other pieces of legislation elsewhere. So that is our first problem.

Our second problem is that, in our view, we are seeing the first steps towards a diminution of the Commonwealth workers compensation and OH&S systems, and Mr Mullins will take

you through that in a bit more detail. To the extent that we are seeing a reduction in the rights of workers under the Commonwealth OH&S act and under Comcare then you can expect, obviously, that we would be opposing this legislation vigorously.

Perhaps the most important aspect—and this is the third point—is that what we will see if this bill becomes law is companies going into a Commonwealth regime where there is already a dysfunctional enforcement agency in the form of the Safety, Rehabilitation and Compensation Commission. That it is dysfunctional in terms of enforcing and policing the Commonwealth OH&S act is not a matter of my opinion; it is a matter of public record, and I would refer you to pages 3 and 4 of our submission which set out the statistics and the woeful inadequacies which exist in terms of the policing of the Commonwealth OH&S act. In the immediate term, if this bill becomes law, we will see three companies, Linfox, K&S Transport and Optus—and in the future more companies—going from a state system where they are currently policed into a federal system where they are not. To take Linfox as an example, you have a situation—in terms of their OH&S obligations which arise under a variety of state laws around the country and which are properly policed and enforced and where those obligations are breached they are prosecuted—where Linfox will move into a jurisdiction by virtue of this bill where it will not be properly policed or properly enforced and, indeed, where prosecutions, if we go by past record, are highly unlikely, indeed such that Linfox can now feel a sense of confidence that if they breach their obligations under these laws they are not going to be subject to prosecution in the future. In other words, the guts of this is: if this bill ultimately becomes law it will be a law which is not enforced. For that reason it is bad law and that is why we oppose it and that is why we would be encouraging you in your report to also recommend to the Senate that it oppose it as well.

Mr Mullins—I would like to elaborate on the few key points in the ACTU submission and give further evidence as to why this bill should be rejected. Firstly, I would just like to make a correction. In the introduction I have stated that there are 1.8 million working people who are members of the Australian trade union movement. The figure should be 1.9 million, representing the recent increase in union membership as reported by the ABS.

The OHS and SRC Legislation Amendment Bill must be considered alongside the OHS (Commonwealth Employment) Act 1991 and its subsequent amendments in the 2005 amendment bill and the recently announced review of the 1991 act. Any changes to the Commonwealth OHS act will now not only affect Commonwealth employees but will mandatorily impact on workers of eligible corporations licensed to self-insure under Comcare. Unfortunately, the federal government is progressively stripping back workers' rights and protections under the Commonwealth OHS act with the 2005 amendment bill and the ACTU fears that it will continue to undermine workers' protections with this recently announced review.

The ACTU is not arguing that governments should not be allowed to review their legislation but has particular concern about this review as the overwhelming focus on reducing compliance obligations on business and diminishing the rights and protections and powers of health and safety reps. The issues paper asks whether designated work groups should be scrapped, whether unions should have restricted access to employees, whether health and safety reps should be sued by employers for conduct that it is disqualified, whether

health and safety reps should be restricted in the use of PINs or remove their right to use PINs and whether Comcare should reduce its role in investigating PINs.

Already gone under the OHS Commonwealth employment act, under the bill that is currently sitting in the Senate, are all references to trade unions—representing the federal government’s psychological slant at the moment. Where an employee representative is referenced—which is replacing the term ‘trade union’—they must be invited in by an employee. Where previously a union could make a request to Comcare to investigate a workplace, now an employee must invite the employee representative to initiate the investigation. This language is consistent throughout the bill and merely serves to set up more barriers to ensuring workplaces are healthy and safe and that employees can access their representation.

The concept of management arrangements has been introduced replacing OHS policies that were traditionally developed through a tripartite process. This removes the need for employers and government agencies to negotiate health and safety agreements with unions and employees. Agreements will be replaced by health and safety management arrangements to address consultation, training and risk management issues. The previously legislated frequency of OHS committee meetings, which was every three months, and the three-year time frame to keep OHS committee minutes, will now be decided by the management arrangements. In other words, they could be scrapped altogether. These are currently sitting in the Senate.

What it basically means is that employees who were covered by state and territory OH&S acts that provided for easy access to union representation, powerful health and safety representatives, PINs, strong enforcement measures and penalties will see them disappear into a standard system. The result will be low compliance by business and therefore higher injury and fatality rates.

On page 2 or 3 of our submission, we say:

The consequences of the changes to Australia’s OHS and workers’ compensation systems will compound over time.

- The financial pool in the state systems will reduce, increasing premiums for remaining businesses in the state schemes and increasing pressure on workers’ entitlements.
- More workers will be exposed to Comcare’s low cap on pain and suffering damages;

The maximum cap for Comcare’s common law damages relating to suing an employer for negligence has not increased from \$110,000 since 1988. A letter from our consulting actuaries indicates that if this limit had increased it would now be \$180,000 if it was in line with the consumer price index of all capital cities or \$208,000 if it was in line with the Australian average weekly earnings.

Furthermore, our submission says that there will be reduced percentage assessments for the most common injuries and low lump sums available for permanent impairment. The recent guidelines that have been introduced by Comcare to assess permanent impairments have increased the threshold on injured workers to access that compensation and have introduced a threshold of 10 per cent of whole person impairment rather than a 10 per cent impairment based on the part of his or her body injured. In other words, injured workers getting the most

common injuries, such as spinal injuries, are going to find it more difficult to access compensation under Comcare. This will impact on businesses joining the Comcare system.

The Comcare system also has a poor dispute resolutions procedure. Comcare should have an independent intermediate body to review claim disputes, similar to that used in Victoria and New South Wales. Furthermore, our submission states that ‘the stripped back Commonwealth OHS Act will isolate workers by restricting their access to information and representation’.

To briefly give our position on how important having an OH&S representative in the workplace is, a health and safety representative has the power to investigate workplaces, can be present at interviews between an employer and an inspector, can access information held by the employer relating to potential or actual hazards, has the right under some legislation to be consulted, can issue provisional improvement notices, can order that work should cease in the event of immediate threat or danger, can receive information from the inspector and can participate in the resolution of health and safety issues. International research has shown that strong OH&S representatives with legislated powers improve workplace health and safety. However, under the federal government’s review of the OH&S act, the powers and duties of the OH&S representative are under threat.

Basically, what is being proposed here by this bill will create an absurd situation whereby employees in one workplace will be subject to different OH&S acts. Businesses will be able to choose which legal system they are covered by. It is like a motorist choosing which road rules he or she can be covered by. On this matter alone, the bill should be referred to the Law Reform Commission so it can investigate the underlying principle of allowing user choice legislation.

Referring to the figures that were provided in the comparative performance monitoring report on the difference between Comcare enforcement and WorkSafe Victoria enforcement, to extrapolate that out we could look at the number of inspectors per employee. In Victoria, there is one inspector for every 8,914 employees. In Comcare, there is one inspector for every 17,875 employees.

The number of interventions in Victoria is one intervention for every 48 employees. In Comcare it is one for every 1,167 employees. The number of PIN notices issued by Victoria is one for every 168 employees. Under Comcare, it is one for every 16,823. These are disturbing statistics. There is no indication that Comcare will improve those statistics. As more businesses join the Comcare scheme, more and more employees will be subject to these very poor enforcement and inspection regimes under Comcare.

We referred to a number of tragic workplace incidents where Victoria has investigated and Comcare has not taken out a prosecution. Under an MOU with the Victoria government and Comcare, Victoria will inspect and investigate incidents on behalf of Comcare; however, they do not have the power to prosecute. On one occasion in 2004 an Australia Post employee took her postie bike out on a daily run and, because there was a lack of training, inadequate maintenance and poor safety checks of the bike’s condition, her front wheel exploded. This resulted in her falling and colliding with an oncoming truck.

On another occasion in 2001 at the CSIRO Animal Health Laboratories, nitrogen gas was allowed to build up in a room, causing the tragic death of an employee. This was because of poor maintenance of the airconditioning unit, faults in the monitoring system, no procedures in place to respond to low oxygen levels, failure to stop access to the room when the oxygen alarm sounded, and new documentation procedures to enter a liquid nitrogen room, among other things. We have advice that, if the employer was subject to the Victorian O&HS act, a prosecution would most likely have been pursued against those employers; however, Comcare failed to prosecute those employers for what are obvious and serious breaches of the act.

Furthermore, the finance sector is concerned that there will be an increase in violent robberies because of decreased compliance and prosecutions that have seen significant upgrades in bank security where prosecutions were brought by the union. For example, the ANZ upgraded their bank security by \$40 million after the Finance Sector Union prosecuted them. I would just like to reiterate that enforcement of occupational health and safety laws and other related legislation sends a powerful and effective message to employers that the failure to abide by occupational health and safety laws has serious consequences. Comcare has a very poor track record and this spells danger for employees and businesses joining Comcare.

To conclude, I think the bill is putting the cart before the horse. As evidence, Comcare enforcement penalties and prosecutions are inadequate. At the moment the Commonwealth occupational health and safety act is under review but the government is asking business to sign up to an act that may change. This is not providing any certainty to business, let alone to the employees who will suffer the injuries and fatalities. This particular bill represents another step in the federal government's moves to strip workers of their protections and we oppose this bill.

CHAIR—Thank you. You stated that the workers compensation financial pool in the state systems will decrease and result in increasing premiums for remaining businesses in the state schemes and increasing pressure on workers' entitlements. Are you aware of the Productivity Commission's 2004 report on occupational health and safety and workers compensation which commissioned actuarial analysis which showed that the effect of businesses leaving the state and territory workers compensation schemes was unlikely to be significant?

Mr Mullins—I am aware of the Productivity Commission's report. I disagree with that analysis. If there was a situation where a significant number of businesses leave the state schemes for Comcare, there will be increased financial pressure on those state schemes. It is just inevitable. I do not see how that conclusion can be drawn.

Mr Marles—And certainly the state of Victoria is pretty clear on the issue. It is on that basis that they are challenging Optus's move into the federal system. Optus was not self-insured within the Victorian system and therefore was a premier player moving out of the system, and the result and effect of that was a key part in Victoria taking the position that it did. So there you have got a jurisdiction very clear about the effect of it.

CHAIR—As you have mentioned Optus, I understand that Optus premiums made up only one tenth of one per cent of the Victorian WorkCover premium pool.

Mr Mullins—It is still \$1.5 million that the Victorian system no longer has.

CHAIR—Yes, but in terms of the actual percentage of the pool.

Mr Mullins—Times that by eight, for each system. Also, this is only the very beginning of what we have suggested is going to happen, where you strip back the OHS act, there is low enforcement, voluntary or self-regulation and voluntary compliance for businesses. Large multistate employers are going to see this as a great opportunity to escape their obligations under the state acts and they will join Comcare. Within five to 10 years we are going to look back and say, ‘What has happened to our systems?’

CHAIR—So that is your hypothesis, as compared to the Productivity Commission’s prediction?

Mr Mullins—Absolutely.

CHAIR—You also mentioned the degree of permanent impairment and the assessment processes for that. Comcare have recently adopted a new guide to the assessment of that which is based on the more up-to-date American Medical Association guide fifth edition. Are you aware that Queensland, New South Wales, the Northern Territory, Tasmania and Victoria as well as New Zealand base their assessment guides on the fourth and fifth editions of the American Medical Association guide? In other words, it is the same assessment process.

Mr Mullins—What this does represent is a change, more difficult criteria, for workers under the Comcare system to access workers compensation. So we are comparing what existed under the first edition to what is now existing under the second edition. It is making it more difficult for employees who have suffered common injuries and have a permanent impairment to access workers compensation.

CHAIR—But if the states are working on the same assessment level, wouldn’t it also be more difficult for workers in those states?

Mr Mullins—That is not what we are discussing here. What we are discussing are the changes to Comcare.

Mr Marles—Senator, the difficulty in comparing workers compensation systems is that what they are is a package. You are identifying one isolated part of a package and asking about it as between the Commonwealth jurisdiction and the state jurisdictions. I stand to be corrected but I am pretty sure that the permanent impairment lump sum payments that are available under the Australian jurisdictions that you described—I am not sure about the case in New Zealand—are more generous than what would be paid under Comcare. So in circumstances where the Comcare lump sum permanent impairment payments are already meagre, the introduction of this assessment, which reduces access to that meagre amount, further reduces the entitlement that you would get there. I am saying that you have to take it as an entire package. You may say it is consistent with what is going on in the states, but what is being paid by the Commonwealth is not consistent with what is going on in the states.

CHAIR—But, with respect, if they are all basing it on the same assessment guide, that would be the same, would it not?

Mr Marles—If they are paying the same amount, which they are not.

CHAIR—It says that they have recently adopted a new guide and that that is what they will be paying.

Mr Marles—But you understand my point, don't you?

CHAIR—Yes, I do understand your point, but I hope you understand my point too.

Mr Marles—Yes, I understand your point. You are saying that you are taking the AMA guidelines and that they should be the basis of assessing entitlement to a lump sum permanent impairment payment from the system. My point is this: that payment, the actual amount that you get, is less in the Commonwealth than what it would be in the other Australian jurisdictions. So if you are going to adopt a system, albeit a system which is in operation in the other states, which is less generous in terms of access then you further magnify the inadequacy of those permanent impairment payments up front. The only point that we are making here is the point I made at the outset: what we are seeing are the first steps down the road of reducing the OH&S act—which you have not asked about but which Steve took you through—and also reducing the benefits that are paid from the Comcare system. And there can be no doubt that the adoption of that guide will see a reduction in the amount of money which is paid to workers through this system.

CHAIR—In your view.

Mr Marles—No, not in my view at all; as a matter of fact. And, I think, in your view.

CHAIR—You also said that compliance obligations under the OH&S act are poor. You are aware that the maximum criminal penalty that a number of Commonwealth employers can face for a breach of their duty of care which causes death or serious injury is nearly \$500,000, which is one of the highest penalties for OH&S breaches in Australia.

Mr Mullins—Unfortunately Comcare is unlikely to enforce that penalty.

CHAIR—How do you know that?

Mr Marles—In 2003-04 not a single person was prosecuted. You have got a jurisdiction covering more than a quarter of a million people, and in 2003-04 there was not a single prosecution. So it does not matter what the penalty is. It is actually irrelevant. That in a sense is the point of our submission, because you are going to bring a whole lot of people under a set of laws which are simply not enforced. It does not really matter what they say; if they are not enforced, what is the point?

CHAIR—Nevertheless, the compliance framework is there for that to happen.

Mr Marles—No. In fact our submission is exactly that the compliance framework is not there for that to happen.

CHAIR—But you agree that that is the maximum penalty.

Mr Marles—In the act.

CHAIR—In the act. So the framework is there.

Mr Marles—No. What you are describing is what the law says. The framework, which is a function of executive government, which is about the enforcement of that law, in our submission is not there. So it does not matter what the law says; there is no-one—or not many people—there to enforce it, such that not a single prosecution occurred in 2003-04. We are talking about a system that many tens of thousands of employees are going to come under as soon as this bill becomes law, and there is no proposal out there to increase the 16 Comcare

inspectors who are currently in place. As I said at the outset, Linfox and Optus, for example, now operate under a system of law which is policed, which is enforced, where prosecutions do occur, and they are going to go into the wild west, where there is no enforcement, no policing and prosecutions do not occur. It is bad law for that reason.

CHAIR—That is another point that I would like to take you up on. Your submission states that Comcare has 16 investigators. Is that correct?

Mr Marles—Yes.

CHAIR—That is staff investigators for 2003-04. Comcare currently has access to 268 investigators, which is made up of 22 Comcare staff investigators, 199 inspectors from state and territory OHS authorities and 47 skilled and qualified people from a panel of private sector organisations. So to take that base level of 16 investigators is surely misleading.

Mr Mullins—Not at all, because we have advice that in fact Comcare has only utilised Victoria's inspectorate about a dozen times in the past five years. They can claim to have access to that inspectorate, but it is not used.

Mr Marles—As to whether or not it is misleading: with respect, in our submission we refer to the exact facts that you have described. We acknowledge what the Commonwealth says—that it accesses state officials in this sense. We acknowledge the facts of what you have said, so in that sense I think it is not fair to describe the submission as misleading.

CHAIR—You mentioned the less than a dozen times in the past five years. During that period, out of a total of 43 investigations that Comcare requested the Victorian WorkCover Authority to undertake as part of the MOU arrangements, 28 were undertaken and 15 were refused by the VWA. Are you aware of that?

Mr Mullins—No.

Mr Marles—No.

CHAIR—Those 15 investigations that were refused were subsequently undertaken by members of Comcare's panel of private sector consultant investigators and Comcare staff investigators. Are you aware of that?

Mr Mullins—All I can say to that is that I have no understanding or no knowledge of the reasons why they refused to—

CHAIR—I am not arguing with the refusal; I am just saying—

Mr Mullins—I know, but there may be reasons why they have referred it back to Comcare investigators to take up. I think it is not something that we can really discuss in this context.

CHAIR—No, but nevertheless, in comparison to your statement that it was less than one dozen times that the Victorian inspectors were used, the fact is that 28 investigations were undertaken in that time.

Mr Mullins—That is still a significantly low, poor number of investigations compare to the VWA's own investigations of their own workplaces. Twenty-eight is nothing.

CHAIR—But it is four times the original number that you gave.

Mr Mullins—In the comparative performance monitoring report it is reported that Victoria's WorkSafe undertook 43,719 investigations. Compare that to Comcare's 245. If you add another 28 to that, that is fine, but that is nothing. It is a very poor comparison. I do not see any indication from the federal government that they will improve that number of investigations by their own system, yet they are opening up to corporations that are currently covered by Victoria's WorkSafe. That sends chills down my spine.

CHAIR—In the current financial year, six new Comcare staff investigators have been appointed, with a further one to be appointed in May this year and, by 1 July 2006, an additional four Comcare staff investigators will be appointed. That represents an increase of 68.8 per cent of Comcare staff investigators in the 12 months to July this year.

Mr Mullins—Off a very low base.

CHAIR—I agree, off a low base but, nevertheless, it is an increase.

Mr Mullins—Just to take up that point, to equal the number of inspectors that WorkSafe has, on the basis of the number of employees that Comcare covers, they would need to have 112 inspectors on their books—not just 16 or 22—to match the inspectors per employee under Victoria's WorkSafe. They are not doing that. That is what they need to do now—wait until more businesses join Comcare.

Mr Marles—That figure of 112 is before you take into account the additional employees who will come under Comcare through Optus, Linfox and K and S Transport and, as Steve says, any other employers who seek a licence in the future.

Senator MARSHALL—We heard earlier this morning from the National Council of Self Insurers which put to us that if employers who wished to self-insure were seeking the soft option they would not self-insure, they would remain under the state systems, and that the number of workplace inspections is not an appropriate measure of their occupational health and safety commitment, because there are quite onerous internal audits and processes that go along with self insurance. Can you comment on that proposition put to us by the self-insurers?

Mr Marles—We would not say that the number of inspections or interventions is the complete measure of OH&S performance. That is not what we say, but we do say it is a pretty good indicator. It does say something. You get some information from that. It simply is not right to say that self-insurers are 10 times safer than companies which are not self-insured. It varies but, looking at the interventions which occur through Comcare, relative to Victoria's WorkSafe, at times it takes into account proportions 10 times less. At other times, it is more. There is no way that a self-insurer out there will argue that it is 10 times safer than anywhere else, such that it would warrant less intervention by whoever is the regulatory authority. It is too dismissive to simply say: this is a crude measurement; therefore, we should put it aside and not take any account of it. That is clearly not right.

Senator MARSHALL—The National Council of Self Insurers also raised the issue of different regulations across different states which apply different standards—in many cases, prescribed standards—and for companies that work at a national level, it actually dilutes their ability to take a national approach and get an appropriate standard that would apply across their companies because of the need to comply with some of those individual state regulations. I think they put the number at slightly in excess of 400 different state regulations

which needed to be complied with, which made life difficult for them. How do you respond to that argument that this leads to a more efficient introduction and application of occupational health and safety policy?

Mr Marles—First of all, the way in which OH&S acts work—not only the Commonwealth OH&S act but also all the state OH&S acts—is that these acts reference a whole range of guidance material which exists in the form of health and safety standards and codes. Even if you are to be covered by one jurisdiction with one set of references, there will still be many codes and standards that you need to abide by. So it is a little disingenuous to talk about hundreds of different codes, because the truth is that the way in which OH&S legislation is set up generally is that it references almost any guidance material out there which informs people about what is best practice health and safety in a particular workplace. I make that point up front. Would it be better if there were greater national consistency of OH&S regulation? Of course it would be better. We are certainly not saying that it is good that there are differences in that sense.

We accept the argument that, if you have a standard for hearing that a Western Australian's ears are just as sensitive as a South Australian's ears, so it does not make much sense to have different hearing-level standards in those two different states. But identifying the problem and then saying, 'We will jump, therefore, at any solution,' is itself a very crude way to go about things. This is not a good solution to a problem that all of us identify. It is a good solution for the employers, because they will put themselves in a jurisdiction which is simply not policed. But we—meaning the states, local governments and the Commonwealth—need to walk down this path together to come up with one harmonised system of state and national standards and codes, and perhaps more consistent laws. But it needs to be a cooperative effort between the states and the Commonwealth not, by stealth, a grab of power by the Commonwealth government away from the states, which is absolutely being done, against the will of the states. That will not be conducive to better OH&S performance across the country.

Senator MARSHALL—The self-insurers also indicated that where there are different standards they will work to the higher standard across the board. Does the act or the current occupational health and safety framework actually require that to happen? I suppose it is all right to have an assurance that people work to the higher standard, but how is that enforced in the current legislation?

Mr Marles—It would not be. If there is a standard for noise, given that is the example I have used, what was the National Occupational Health and Safety Commission—which is now the Australian Safety and Compensation Council—declares standards, so there is a nationally declared standard around noise. That is an attempt to try to create a consistency across the country. If Western Australia modifies that standard and adopts it with particular changes so that there are different, in effect, regulations which apply in Western Australia to, say, South Australia, which might adopt it in total then there is no overarching legal regime which requires an employer employing in both South Australia and Western Australia to take the highest amount. If they say they will comply with the higher standard, that is well and good, but there is no legal enforcement of that.

Senator MARSHALL—You talked about the use of Victorian inspectors, and the examples you gave us included your view that there would have been prosecutions if the

Victorian inspector had complete responsibility or if those incidents were under their jurisdiction. Do you know whether the Victorian inspectors actually recommend a prosecution when they hand over? Could you explain how they do hand over and interact with the Comcare arrangement?

Mr Mullins—You will have to ask the VWA and Comcare that question, but I do know that it is not necessarily a case of recommending. The VWA provide them with the evidence and the investigation report and Comcare pursues it from there. That is my understanding of how it works. Perhaps the submission did say the VWA recommended Comcare. That perhaps is not necessarily the case, but you would have to check that with the VWA.

Senator MARSHALL—What is the current arrangement? In the examples you used, the individuals concerned in the incidents were unhappy that their cases were investigated but no further action seemed to be taken. Is there a mechanism whereby people can appeal against that or question why a prosecution was not progressed? I can ask the department about that later on today, but I was just wondering whether you are aware of that.

Mr Mullins—Perhaps that is a question for the department.

Senator BARNETT—Based on your evidence to date, it seems that you paint a pretty dim picture of the future under this legislation. You put up three main reasons, Mr Marles—that there has been no national debate, that there will be a reduction in the rights of workers and that there will be a lack of enforcement without an adequate policing regime. We do not appear to have been swamped with submissions opposing the legislation, and I just checked and noted that we have not had any submissions from state governments opposing the bill. Do you have any view as to why that would be?

Mr Marles—The first point is that it has not been aired. I think it is happening by stealth. This is an inquiry about a bill which, in its narrow sense, is simply about extending the Commonwealth OH&S act so that those companies that have a licence or that will get a licence will be covered by Comcare. Seen in that narrow context, it may not leap out at you that this is anything concerning. But when you ask observers about why we are seeing various changes and when you look at all the building blocks that are being built, there is no-one up there who is under any illusion that what is actually going on here is that, by stealth, we are seeing a national OH&S and workers compensation system being built without debate. That is why you do not have a flood of people here talking to you about it.

We have put this to the Minister for Employment and Workplace Relations. I guess I stand to be corrected on this, but I am pretty sure his answer was that, no, there were no plans to create a national OH&S system at the moment. In fact, that is exactly what is going on. In a sense, our challenge to the government is that, if that is what it is about, why don't they come out with a single overarching piece of legislation which actually does bring in place a national OH&S and workers comp scheme so that we can have the debate and so that you will get a flood of people here giving you submissions about that idea.

Senator BARNETT—You have argued about how many inspections, enforcement arrangements, penalties and so forth there have been under the Victorian system, and I put that view to the National Council of Self Insurers this morning. I am not sure if you were there to hear their response that they did not agree that the system would limit the capacity to enforce

and ensure high standards under the proposed arrangements. They said that it was not fair to compare the number of inspections because the audit compliance arrangements under the self-insurance regime were different. I do not know if you heard their arguments, but do you have a response to their arguments?

Mr Marles—Yes. One of the last things they said was that you also have to take into account that what we have in Comcare is largely government inspection of government, which is a different dynamic to government inspection of private companies. That is exactly the point, isn't it? What this bill is about is actually applying the Commonwealth OH&S system to a whole lot of private companies, and what you have in place is an inspectorate that is not geared up to do that kind of thing. That is exactly the point. That they would say that it is a crude measurement—and, in a sense, this is the answer that I gave to Senator Marshall—and therefore we should simply discard this information as almost irrelevant is utterly ridiculous in our view. These figures are so startling that, in all good conscience, you could not make a report about this legislation without referring to them. The single most important thing about this particular bill is how startling these figures are. They do provide useful information, but I agree with the point that the dynamic currently in place in Comcare is not geared to the regulation of private companies who, under this bill, will become regulated by Commonwealth law.

Senator BARNETT—The self-insurers argue that it will avoid and remove confusion and reduce the compliance arrangements, thus bringing in a more effective regime—which will assist in achieving the objectives of reducing deaths, reducing injuries and so on. I know you would support those objectives. But you disagree with their views?

Mr Marles—This is throwing out the baby with the bathwater. What you have is a group of people who have come up here and said to you, 'There is a multiplicity of regulation in this country, and we need a simpler regime.' They have identified a problem that we all agree exists. To that extent, we agree.

Senator BARNETT—So you do agree with that?

Mr Marles—We agree with that. But to then say that the solution to that problem is to have everyone covered by a system where there is no enforcement of the law at all and that this is somehow going to give rise to greater OH&S performance is utterly absurd. It is absurd. What we are talking about here is not the right solution to the problem. In fact, the right solution to the problem is for this government to invest more in the ASCC, which it is not doing; to invest more in cooperative efforts between the states and the federal government to come up with better uniform codes and standards around OH&S in this country; and to come up with more harmonised laws—and the COAG process has started us down that path. Really, there is contempt in this process. You have a COAG decision taken by the Prime Minister and the premiers to try and harmonise the OH&S laws absolutely to deal with this problem of the multiplicity of regulation, but on the other hand—over here, where no-one is looking—there is this kind of grab for power from the state governments so that they set up their own system, which ultimately may well encompass more than half the economy. That is an outrage, really.

In fact, the point you made at the start is the pertinent point. How many people are making submissions here? This little building block is the critical piece in the puzzle which leads to the building of a national OH&S and workers comp system. It is an outrage, in a sense, that this is happening without there being lots of submissions, and there are not lots of submissions because this is happening by stealth.

Mr Mullins—I will just refer to a point that I made earlier. There are claims that this will give more certainty and assurance to business. How can that possibly be the case when we do not even know what the new Commonwealth OH&S act is going to look like? It is under review. It has also been amended and is sitting in the Senate half done. That to me says that there is no certainty about what is going to happen. I think the government asking business to join in, when there is no understanding of what is actually going to be in the act, is a ridiculous position to take.

Senator BARNETT—Thank you for that. Mr Mullins, I just want to pick up on the first point in your last comment, to see if there is common ground between you, the self-insurers and others. Do we have common ground in that the current arrangements, as they stand, with eight OH&S regimes around the country, bring complexity and confusion? Do you agree that those current arrangements are inadequate and in need of reform? It sounds like we do, but I want to clarify that.

Mr Marles—Let me be clear about what our position is. It is not our view that the very existence of eight systems necessarily is bad and that that is the wrong way to go. That is absolutely not our view. In our view it would be simpler and more efficient to keep OH&S law at the state level of government. In that sense, that is not common ground with what is being said. Where there is some common ground is that we do accept, in terms of the standards and codes which have been declared around the states, that there is variance and there is work to be done in developing greater consistency. To an extent that can happen in the OH&S laws which exist as well. The point is that there is a process under way to try and bring about a greater consistency, a greater degree of harmonisation amongst those regulations such that there will be a single standard for noise, as an example, around the country.

Senator BARNETT—You agree that there is a need for that?

Mr Marles—Yes, I do, absolutely. We are on the record saying that previously. But this bill and what this bill is part of is absolutely not the answer, nor is it the answer to get rid of the state OH&S acts. One thing needs to be said about this in order to make a comparison with industrial relations regulation. The industrial relations power in the Constitution was always uncomfortably positioned between the state and the federal levels of government, which means that a duality of systems has developed over the last hundred years. In the state of New South Wales there have been two systems: a state system and a federal system, operating side by side with some private companies being covered by one and others being covered by another.

OH&S it is not like that. With the exception of the Commonwealth jurisdiction, which in its origin applied simply to the Commonwealth Public Service, every private company was regulated by state law. That is very different to industrial relations. What we are seeing here is a change in that. If this bill goes through, for the first time we will have Optus, Linfox and

K&S Transport being regulated at a Commonwealth level. That, in fact, creates confusion. That, in fact, makes it harder, in terms of public policy in this country, than simply keeping OH&S at the state tier of government. So the answer to the multiplicity of regulations is not to suddenly split the tiers; it is, in fact, to make the tiers consistent. That is why it needs to be a cooperative effort, which is absolutely not what this government is doing.

Senator BARNETT—I have a last question. Mr Mullins, I just want to touch base with you on your first comment, where you wanted to correct the record about 1.8 million members of the Australian trade union movement. It is now 1.9 million members?

Mr Mullins—It is over 1.9 million, according to the ABS.

Senator BARNETT—Sure. Regarding the private sector workforce, I just want to check whether that proportion has gone up or down.

Mr Mullins—Richard may be able to answer that.

Mr Marles—I do not know the answer to that question.

Senator BARNETT—You do not know the answer?

Mr Marles—Not specifically. You are asking a question about union density. To be honest, I am not sure what is happening with union density. In a sense, we can answer it: there will not be much change, be it up or down. But, as Mr Mullins has said, we are saying that there has been an increase in the absolute number of people joining trade unions. In fact, since last May, when a range of other government policies was announced, we have seen that happen in a very rapid way.

CHAIR—Thank you very much for appearing before us today.

Proceedings suspended from 10.32 am to 10.52 am

BODKIN, Mr William (Bill) George, National Industrial Officer, Construction and General Division, Construction, Forestry, Mining and Energy Union

CHAIR—Welcome. Thank you for your submission. Are there any changes or additions you wish to make to it?

Mr Bodkin—No.

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

Mr Bodkin—Firstly, I would like to thank the committee for providing the union with the opportunity to appear today. In general, the CFMEU supports the submission of the ACTU in this matter. We believe that the proposed changes give rise to particular problems in the building and construction industry. It is mainly for that reason that we have put in a submission of our own.

I suppose the best way to describe the particular problems of the industry in relation to OH&S would be to refer to the final report of the Cole royal commission—that is, the first Cole commission—into the building and construction industry. The commissioner issued a number of reports, including volume 6, titled ‘Reform—occupational health and safety’. The commissioner raised a number of issues. One appears at page 7 of volume 6:

The occupational health and safety performance of the building and construction industry is unacceptable. The powerful competitive forces in the industry too often work against occupational health and safety. The industry strives to complete projects on budget and on time. Too often safety is neglected.

The commissioner went on, at page 11 of his report, to deal with some of the relevant statistics in the industry:

They show that between 1994 and 2000 about 50 building and construction workers have been killed at, or as a consequence of, their work each year; that building and construction workers are more than twice as likely to be killed at work than the all industries Australian average; and that the incidence rate of serious injury in the building and construction industry is about 50 per cent higher than the all industries Australian average.

The commissioner went on to say:

Building and construction is one of the most dangerous industries in Australia ... its unsatisfactory performance relative to industry generally seems to be intractable.

At page 83 the commissioner said:

There is persuasive support for the view that the extent of compliance with occupational health and safety obligations is strongly influenced by a reasonable expectation of the likelihood of being inspected, prosecuted, convicted and having a meaningful penalty imposed. The presence of occupational health and safety inspectors is important. While this is primarily a matter for the States and Territories, the Commonwealth can provide funds for more inspectors by means of a system of tied grants.

Against this background of an industry where much has been said about lawlessness—and in particular there has been a great deal of lawlessness in relation to occupational health and safety requirements—the royal commissioner found:

... the extent of compliance with occupational health and safety obligations is strongly influenced by a reasonable expectation of the likelihood of being inspected, prosecuted, convicted and having a meaningful penalty imposed.

In the union's view, the proposed changes that are before the parliament are likely to bring about a reduction in inspections and prosecutions in the building and construction industry. The Comcare enforcement policy itself states:

... one of the hallmarks of the Commonwealth jurisdiction is that voluntary compliance will be encouraged to the greatest possible extent.

That sentiment flows throughout the Comcare enforcement policy. Unfortunately, in the building and construction industry, the idea of voluntary compliance simply will not work. I suppose I could present a litany of the complaints, tragedies and deaths that occur on a regular basis in the building and construction industry, but I will provide you with just three examples. Last year, WorkSafe Victoria carried out a blitz on formwork companies in the building and construction industry in this state. The blitz was carried out between September and December, and it targeted small and medium commercial jobs as well as housing and civil construction. WorkSafe found that one-third of sites visited breached OH&S regulations on formwork. Thirty-four inspectors conducted 141 visits involving 132 companies during this blitz. To find that one-third of sites visited during that blitz breached OH&S regulations on formwork is some indication of the state of compliance with OH&S regulations in that state.

In the previous year, there was a safety blitz carried out jointly in Australia and New Zealand targeting fall prevention in the construction industry. In our industry, one of the greatest killers is falls from heights. The state authorities and the trans-Tasman authorities carried out a blitz and they found then that about half the sites visited had workers exposed to risk of falling from heights. This campaign was carried out across Australia and New Zealand for a period of four months.

More than 130 inspectors on both sides of the Tasman visited 1,350 housing and small scale commercial sites to target the biggest killer in the construction industry in both countries, which is falls from heights. They detected 760 instances of non-compliance with OH&S falls prevention requirements during this campaign and 580 notices were issued relating to the lack of adequate fall prevention measures. As part of that, the visiting inspectors gave practical guidance on how to comply with fall prevention regulations to supervisors and those with a duty of care. Here is another instance of a kind of blitz being carried out by state inspectors which found a level of non-compliance with the relevant regulations of about 50 per cent.

Finally—and this is a very recent incident; it happened this year—a young teenager fell to his death while working with a particular roofing company. Three weeks after that death occurred, WorkCover was called to a site where workers for an associated company were working without proper fall protection. WorkCover had been alerted by a concerned resident. The workers were wearing harnesses, but there were no anchorage points to secure the lanyards while they worked near the roof's edge. Fortunately, in this case no-one was injured, but WorkCover took a prosecution to the court and the builder was fined \$90,000, plus \$10,000 court costs, after pleading guilty to OH&S breaches. The judge found that the company had been negligent in supervising the safety systems of its subcontractor. This is a

very recent matter. As I mentioned, I could present a whole litany of cases and examples like this to demonstrate the particular problems we have in the building and construction industry.

We are deeply concerned about this proposal, which would seem to allow companies to opt out of the current state systems and to go into a regime which in our view is nowhere near as strict in its inspection and enforcement arrangements. We understand that under self insurance employers are responsible for handling and paying for all their employees' claims for work related fatality, injury and illness, rather than paying premiums to insurers to take on those responsibilities. We are aware that to self insure employers must meet certain requirements, including prudential standards, OH&S performance and claims management capability. In some jurisdictions, there is also a requirement that the employer has a minimum number of employees in that jurisdiction. In the past and presently, some employers operating across different jurisdictions have attempted to obtain a single self insurance licence under the Comcare scheme.

But there are legitimate concerns about the ability of employers to meet all claims in all circumstances in the future. Some claims may not arise until years to come, and in our industry we can have no confidence that particular companies will be around in years to come to meet those claims. Sudden spectacular failures by companies are well known in the building and construction industry. No doubt those companies would have met the prudential requirements of Comcare, but in the event that companies do collapse our concern is: who is going to pay the workers their compensation claims? It is well known that when companies collapse a lot of claims that for various reasons have not been made do come to light. Who is going to pay if there is a spectacular collapse? If there is another massive claim like the Hardie one some years in the future and the particular company has failed, who is going to pay the workers' claims? I think that is a very serious concern.

Of course it is not just self-insurance. This proposal would allow companies to manage their own claims, and the degree of non-compliance under the current arrangements has been estimated at 30 per cent. A figure of 30 per cent was put to the Cole commission and nobody disagreed with that. If you are looking at 30 per cent noncompliance with workers compensation and OH&S matters at present, what is going to be the situation if companies are allowed to go into a voluntary type scheme?

Another concern of ours is that, potentially, two separate systems of OH&S regulation could apply to a single building site if a self-insurer engages contractors who are covered by the relevant state OH&S laws. You could have a building site engaging dozens of contractors, with perhaps the major contractor covered by the Comcare system and other contractors covered by the state system. On one building site—and these sites are notorious for safety problems—you could have two different regimes. It is just a recipe for confusion.

Employees of self-insurers that operate in multiple jurisdictions could be performing work at places other than their normal employer's workplace, and when they go to the other workplace they could be covered by a state regime. That is another recipe for confusion. It is all very well for companies to seek nationally consistent OH&S arrangements where the corporation operates in multiple jurisdictions, but it has to be remembered that the workers themselves may continue to be covered by multiple jurisdictions and therefore there could be confusion in the workers' minds. So these are some of the problems that we see.

In particular, we support the view of the ACTU that the financial pool in the state systems will reduce under these proposals, which would increase premiums on remaining businesses in the state schemes. It seems to us that more workers would be exposed to a lower cap on pain and suffering damages. And we are very concerned about the capacity of Comcare to inspect workplaces and to enforce the laws.

We do believe that reforms are needed. For a number of years the CFMEU campaigned for substantial reforms to the workers compensation system in our industry. Our principal objective had been the creation of a single national construction industry workers compensation scheme based on an industry levy system—I emphasise: an industry levy system. But the realities of the dual and federal legislative systems caused us to concentrate our efforts on reforming the existing state systems, in particular to bring about further harmonisation of the state systems. Nevertheless, even within the state systems, we think that for our industry the most appropriate form would be a levy system which would cover both contract of service employees and persons performing work, regardless of their employment status, in the industry.

One of the great problems we have in the industry is the distinction or pseudo distinction between employees and contractors, with great problems arising when people who are not insured are injured at work and it is subsequently found that they are employees and not contractors. Along with that, we believe there should be the creation of an industry injury database for the dual purpose of compensating injured workers and identifying areas for workplace health and safety intervention.

In conclusion, we think the current proposals, if they really take effect in the building and construction industry, will be a recipe for disaster. There will be greater confusion and less compliance than there already is. That is why our submission is that there be no changes to the present acts at this time and that a lot more consideration be given to the special needs of the building and construction industry. Thank you.

CHAIR—You may have heard my earlier remarks to the ACTU when in their submission—which you have said you agree with and support—they said that Comcare has 16 investigators. I indicated to them that Comcare also has access to another 268 investigators, made up on their own staff investigators, 199 inspectors from state and territory OHS authorities and 47 skilled and qualified people from a panel of private sector organisations. Would you agree that that multilayering investigation authority would give Comcare a great deal more clout than just their own inspectors?

Mr Bodkin—What the fact that there are 100-odd inspectors in the state systems indicates to me is that the state systems have an adequate force to carry out inspections. If Comcare has got to try and call on that force, the question in my mind is: why are we trying to expand the coverage of Comcare? Why does Comcare need to borrow, as it were, experienced inspectors from the state system?

CHAIR—I guess it is making use of resources that are already there, in that sense.

Mr Bodkin—Yes, but it seems to me that this is just further fragmentation in building up Comcare particularly. Our concern is about having Comcare in the private sector. Comcare, no doubt, does an excellent job in the public sector, but to allow private sector employers to

come into the hitherto mainly public sector scheme raises all sorts of problems. It is a fragmentation. We have to accept the reality of the state systems—the expertise that they have built up and, in fact, the numbers of experienced inspectors they have. We should not try and chip away at that but build up the state systems and harmonise them. I cannot say that I am terribly impressed with the idea that Comcare may have 16 inspectors of its own but it can call upon hundreds from the states. Why not leave the responsibility with the states?

CHAIR—I expect that we would have to differ on that. But you would agree that the investigation itself is the important point—that cases are investigated?

Mr Bodkin—That cases are investigated and followed through. It is not sufficient to just investigate them.

CHAIR—Yes, and the follow-through.

Mr Bodkin—Yes.

CHAIR—I understand that in some states, particularly New South Wales, there is a mandated role for unions in OH&S.

Mr Bodkin—Yes.

CHAIR—For instance, New South Wales provides unions with the right to initiate prosecutions against employers for breaches of the OHS act.

Mr Bodkin—Yes.

CHAIR—And if the prosecution is successful then the unions are entitled to receive half of any fine that is imposed?

Mr Bodkin—Yes.

CHAIR—Once again in New South Wales, employees cannot be held liable for any breaches of the act; the responsibility is entirely on employers?

Mr Bodkin—I do not know if employees are entirely excused from any duty.

CHAIR—But nevertheless the principal responsibility falls on employers?

Mr Bodkin—Yes.

CHAIR—So therefore the proposed legislation is taking away the power of the unions, in your view; it is taking away the position of the unions, if you like, if they have a mandated place in state jurisdictions?

Mr Bodkin—Yes. I do not think there is any doubt about that. But on the other hand, in the building and construction industry in every state, the union has been quite a potent force in policing OH&S laws and bringing breaches to the attention of the relevant authorities. Of course, carrying out a prosecution costs the union money, and the fact that the union may in some states receive some portion of penalties is hardly a profit making venture. I agree that the effect of these changes could reduce the proactive role of the union in relation to OH&S.

CHAIR—Nevertheless, the ACTU still has three positions on the Australian Safety and Compensation Council, doesn't it, so the union power would be maintained in that sense?

Mr Bodkin—I think that is a different situation to having people on the ground. To ensure that OH&S regulations are obeyed you must have people on the ground. It is very fine to have representatives at higher levels, but the action takes place on the sites and that is where we need people.

CHAIR—I think that employees will still retain the right to nominate to be represented by an employee representative.

Mr Bodkin—Yes.

CHAIR—So they will still have that right?

Mr Bodkin—They will still have that right, but there are all sorts of pressures on employees. If you reduce the proactive role of the unions I think safety will inevitably decline on these sites.

CHAIR—I would like to pick up on one of your other comments, about employees of a corporation working under different jurisdictions. If a self-insured corporation under Comcare can gain coverage under the Occupational Health and Safety (Commonwealth Employment) Act then that would mean that all the employees of that corporation would be covered by the same jurisdiction, regardless, and there would be no discrimination based on their geographical location. Are you aware of that?

Mr Bodkin—Yes, I am aware of that, but what I was trying to say was that in the industry there is a transient workforce.

CHAIR—Yes, I understand that.

Mr Bodkin—Employees go from job to job and change employers quite frequently, compared with industry generally. So in the course of one year, say, an employee could work for three months on four different jobs.

CHAIR—For the same corporation or a different corporation?

Mr Bodkin—For different corporations—say, for one corporation under the Commonwealth regime and for others under the state regimes. That is the type of problem we see.

Senator MARSHALL—You have raised an issue of concern about self-regulation and voluntary compliance. You gave us an outline of the state of occupational health and safety in the building industry and you used many of former Commissioner Cole's words to justify that. I do not think any of that is in dispute. It is a very dangerous industry and it is full of non-compliance. Yet I suspect that, if we were to go to the websites of some of the big builders, they would have a very strong occupational health and safety message. They would use words like 'occupational health and safety' and 'the safety of our employees is put above all else'. They would have lots of internal policies and procedures; they would have lots of courses; they would talk about it and they would present, publicly, that health and safety was at the forefront of their business. Yet the evidence is there, and identified by former Commissioner Cole himself, that what may be said publicly and what may be demonstrated with reams and reams of policies, procedures and practices makes no difference unless occupational health and safety standards are applied on the ground and are policed. The

evidence in the building industry is that they are not policed by companies. They are only policed by an external inspectorate. Would you agree with that?

Mr Bodkin—I would.

Senator MARSHALL—So we have a situation where, for the reasons that were outlined by previous witnesses today, a national builder will say: ‘It’s difficult to comply with different regulations and different standards in different states. Having those different state regimes, and some of the complexities that may go with that, is actually an impediment to our applying good occupational health and safety practices on the ground.’ Therefore, it does not appear to me that a nice simple system that allows the building industry to self-regulate and to voluntarily comply would work. In fact it appears to me that that would be the soft option and, indeed, an option to remove the obligation to comply, because there is very little compliance now. What would you say to that, in terms of your experience with builders that work across a multistate jurisdiction?

Mr Bodkin—There are certainly reputable builders who do their best but, as you say, often these policies do not translate into appropriate action at site level. There have been many assertions made to various inquiries—to the Productivity Commission, for example—that it is much more expensive and much more difficult for a corporation that operates across various jurisdictions to comply. I do not know whether there has been a great deal of empirical evidence put forward in support of those assertions. It appears to this union, anyway, that companies would simply use the proposed changes to opt out of the state systems to get into a less regulated and more voluntary type system and that, at the end of the day, the noncompliance that we currently see in the state systems would be even worse under Comcare.

Senator MARSHALL—What would be the motivation for a multijurisdictional builder to move into Comcare?

Mr Bodkin—There would be several motivations. Obviously, it would be simpler for them. The regulation impact statement makes the point that across the jurisdictions the principles are generally the same. It is in some of the details that you get the differences in the various states. I am very wary of the assertions and claims that the so-called differences are the reason that a large company operating in various states would want to move to a single system. It seems to us that the real reason would be to get into a cheaper system. In some states, such as New South Wales and Victoria, they would see the construction union being sidelined to a certain extent, because the rights we have under some of the state systems do not exist under the federal system. I think these are the sorts of advantages that they may see. They may feel that they have the expertise within their own ranks to do a good job in relation to OH&S without the interference of third parties, as it were. I think these are the sorts of things they are looking at.

Senator MARSHALL—Have you ever heard a company or industry say that occupational health and safety is not their number one priority?

Mr Bodkin—I cannot say that I have known anyone to shout it from the rooftops but, if you look at their performance, you would have to reach that conclusion.

Senator MARSHALL—I made the point to previous witnesses that of course employers will say that the proof is whether it is implemented on the ground, and yet your industry, as you indicate, accounted for 13 per cent of all fatalities and 9.2 per cent of all injuries over the six-year period from June 2000. That is an average of 49 deaths and 14,286 injuries per annum—a shocking record by any standard and one identified by Commissioner Cole. Surely there has to be a greater test to demonstrate compliance than having a documented process that would meet internal Comcare audit procedures. Cannot compliance only be tested by external evaluation rather than self-assessment?

Mr Bodkin—That is our whole point. We need the experience. We need the third party. We need the external police, as it were—the inspectors. We believe that there is a pool of experienced inspectors in the state systems and in the union itself—officials of the union and our health and safety experts. This is needed in the industry. If you take that away or reduce it, the rate of accidents will go up.

Senator MARSHALL—I just want to take you to and explore for a moment the point that you made in your submission about the confusion that may arise. As I understand it—and I think Senator Troeth indicated this in her questioning too—if a company is covered by Comcare, that coverage applies to all the employees of that company regardless of where they are working. So, on a building site, if the principal builder, for instance, was a self-insurer under Comcare, the direct employees of that builder on that site would be covered by Comcare and the chance of smaller contractors being self-insurers is probably fairly remote. It is not impossible under the legislation, but let us assume for the sake of the argument they remain in the state system.

We will have people working on the same equipment, on the same scaffolding, on the same building site, under the same conditions and with the same temporary wiring but there will be a different test applied to what standards would apply on that job. The practical aspect of that is this. If a state WorkCover inspector came in and said, ‘There is not appropriate fall protection here; this is what I want to happen,’ that standard or that decision would only apply to those employees under the state system. Yet the employees would not be obliged to respond to that order. Would that be the case?

Mr Bodkin—That would appear to be the case. It would apply to some employees and not to others who were on the same site and doing the same work.

Senator MARSHALL—Clearly, we could have two different standards applying to the same job being performed by two different people.

Mr Bodkin—Two different standards.

Senator MARSHALL—Where is the efficiency in that?

Mr Bodkin—It is an inefficiency. It is not an efficiency at all.

Senator MARSHALL—What will that lead to? Generally I would have thought that would lead to confusion and potentially disputation about people being required to work at different levels of safety.

Mr Bodkin—That, and as well the contractors under the state system are asking: ‘Why should we obey? Why should we take any notice of what the state inspector says when the

main contractor does not have to do it? Why should we do it? You will have non-compliance there. It is bad enough now. If you fragment it that way, so that there are two standards on the one project—and one is a lesser standard than the other—the companies that are covered by the more stringent standard are going to ask, ‘Why should we obey the law?’ They are under a different law. Why should they do it? All they are interested in is getting the job done as quickly as possible at the lowest cost. They will be asking, ‘Why should we be required to take any notice of the state inspector?’

Senator BARNETT—Mr Bodkin, thanks for your submission. Can I ask you this upfront: do you think the standards under Comcare are significantly lower than the standards under the state jurisdictions?

Mr Bodkin—Let me say this. Admittedly our experience under Comcare is quite limited, but it does appear to us—and I think the ACTU has done an analysis—that there are significant differences.

Senator BARNETT—I am just picking up on your response to Senator Marshall. You made it quite clear that in your view the standards and the outcomes flowing from the Comcare regime are significantly lower than those under a state jurisdiction. You did not name the state jurisdiction, but you said that it was the case under the state regime.

Mr Bodkin—That is our view, yes.

Senator BARNETT—All right. Do you think we should be looking at outcomes in terms of the numbers of injuries and deaths and reducing those as the key ingredient in any assessment or do you think we should be focused on the number of inspections made and the number of inspectors in each jurisdiction? Based on the submissions from you and the ACTU this morning, and reading the other submissions here, it appears that people do think that. Do you think we should be focusing on the process—the number of inspectors and inspections—or the actual outcomes in terms of injuries and deaths and so on? What is the criterion that you would use?

Mr Bodkin—We think that there is a direct relationship between the two. The fewer inspections that are carried out and the less stringent the proactive enforcement of the regulations, the greater will be the actual number of casualties at the end of the day.

Senator BARNETT—The National Council of Self Insurers put to us this morning that you are not actually comparing apples with apples when you make that assessment. You say that making more inspections is the best way to go in terms of getting fewer injuries and fewer deaths; they say you are comparing apples with oranges. They say that their self insurance regime is a different type of regime. It has audit and compliance arrangements and other stringent criteria to ensure that the outcomes are improved in terms of injury and death.

Mr Bodkin—I could not accept that some regime of audit and compliance would be more effective than having people on the ground visiting building sites to see if the scaffolding was properly erected or to see if there were proper fall prevention measures in place—and the numerous other day-to-day things that have to be done on a construction site to try and keep it reasonably safe. I could not agree with that proposition.

Senator BARNETT—Okay. It seems like you have a diametrically opposed view to theirs. They say that it will remove the confusion and streamline the compliance arrangements and you say there will be greater confusion and less compliance.

Mr Bodkin—Yes.

Senator BARNETT—Going back to one of the points you made in the earlier part of your submission, you said that philosophically, or as a policy decision, your union supported the merits of a single national system—a levy system.

Mr Bodkin—Yes.

Senator BARNETT—A levy system. So that is not a single national system across the board for occupational health and safety or workers' compensation?

Mr Bodkin—When we speak about a national system, we are talking about a national system in the building and construction industry based on a national levy. That was our position, but we realised that the reality is that we have state jurisdictions. We also recognised the efforts being made by the states to harmonise the systems. As such, we thought that perhaps we should pursue that within the state systems. In other words, we would retain the state systems, seek to have them further harmonised and seek to have a levy system for the building industry so that everyone—whether they be employees, genuine contractors, pseudo contractors or whatever—would be covered and the whole scheme would be properly funded. That has been one of the problems: you have 30 per cent non-compliance.

One of the classic examples given to the royal commission was a medium-size building company which had taken out a workers' compensation insurance policy for one worker at \$1 and was issued with a certificate from the insurance company for that. That is an extreme example, but there are many examples I can give where companies have understated the number of employees they have in order to pay lower premiums. This is a problem that has permeated the industry for many years.

Senator BARNETT—I am trying to clarify the position of your union. Do you support a national single system? Does that support only apply to levies or does it apply to the regime in toto?

Mr Bodkin—If we are looking at the building industry again, it could apply in toto. At one time, we did see merit in that. The principles would be the same as those that apply under the current state systems.

Senator BARNETT—I think you also said in your earlier presentation that reforms are needed?

Mr Bodkin—Yes.

Senator BARNETT—Can you identify the problems with the current arrangements?

Mr Bodkin—In one phrase, mainly lack of compliance by a significant number of participants in our industry. If you reduce the external regulatory regime, whether it be the inspectors or even the union, for that matter, we believe that that lack of compliance will further deteriorate. It would increase.

Senator BARNETT—What about the view that we have eight separate jurisdictions, with different terms and conditions in each jurisdiction. Do you see that arrangement in need of reform?

Mr Bodkin—Are you referring to the differences between the state systems?

Senator BARNETT—Yes.

Mr Bodkin—As I mentioned earlier, we think that these have been overstressed and perhaps exaggerated by some parties. The basic principles are there; it is in the detail where the differences arise. Frankly, that is not a great problem for the union, but I can understand that some national companies may see that as a problem. Whether it actually costs them money is hard to say because, as I mentioned, I am not aware of any empirical evidence that has ever been put forward to support that assertion that it is more cost effective to replace that multisystem with a single system.

CHAIR—Thank you for appearing before us today.

Mr Bodkin—Thank you.

[11.44 am]

THOMAS, Mr Andrew George, Industrial Officer, Australian Rail, Tram and Bus Industry Union

CHAIR—Welcome. Thank you for your submission. Are there any changes or additions to it?

Mr Thomas—No.

CHAIR—I invite you to make a brief opening statement before we begin our questions.

Mr Thomas—The RTBU appreciates this opportunity to address the committee on an important piece of legislation. The bill before the committee has the potential to significantly impact on the capacity of our members to protect and advance their occupational health and safety rights in the workplace; therefore, having a deleterious effect on occupational health and safety outcomes.

Members of the RTBU work across the rail, tram and bus industry. They work in a variety of jobs, performing a diverse range of functions under many circumstances and conditions. The industry is known for a number of occupational health and safety dangers. Accidents involving trains, trams and buses receive significant attention. Whilst the incidence of those types of accidents, such as Waterfall or Glenbrook, may be low, certainly the consequences of them are very serious. Further, there are other forms of work. One is shunting—that is, being involved in the movement of wagons and trains. It is regarded as a very high-risk activity.

A recent report by the Australian Transport Safety Bureau noted that, between 2000 and 2005, there were three fatalities in shunting accidents and nine serious injuries, including major loss of limb. At the same time, it is an industry that involves operating heavy vehicles, undertaking work associated with infrastructure maintenance or simply dealing with the public on a continual basis. It is an unfortunate fact that, working on a railway station in major capital cities at 11 o'clock on a Saturday night, can present safety problems for employees.

For those reasons, amongst others, the RTBU seeks to scrutinise very carefully any proposal that may impact on the occupational health and safety of the industry and, in our view, this bill does that. This bill, in essence, seeks to mandate that employers who become licensed to self-insure under Comcare are covered by the Occupational Health and Safety (Commonwealth Employment) Act 1991.

Page 4 of our submission indicates that there is a capacity for a number of employers in the rail industry to self-insure. It would be fair to say that any freight rail operator in Australia, on the basis that they compete with Pacific National—Pacific National previously being the National Rail Corporation—would be entitled to seek a licence to self-insure. I acknowledge that does not mean they will get a licence, but they would be eligible to apply. We acknowledge that currently the jurisdiction of the federal government to have this self-insurance program is under challenge in the High Court. I guess that will take its time. In our view, the same situation would also apply to interstate passenger operations, simply because trains such as the *Indian Pacific* and the *Ghan* are owned and operated by the Australian

National Railways Commission, which was in fact an authority of the federal government. Indeed, Pacific National, as noted in our submission, is already self-employed, that being Pacific National (ACT) Pty Ltd, which is the old National Rail Corporation. Much of the foundation is there for large slices of the rail industry to seek self-insurance and, if this bill is successful, by virtue of that they will come under the OH&S (Commonwealth Employment) Act. That to us is the major fundamental change with this bill. The capacity to self insure, as we understand it, is already there. The bill affects that capacity only to the extent that it places people under the Commonwealth bill.

To the extent that corporations can and do choose to self-insure under Comcare, the RTBU fears that, relative to the current occupational health and safety laws, legal protections and rights of our members directly involved will diminish. In other words, the application of the OH&S act and its operation will leave our members worse off than is currently the case. The RTBU submission provides two examples of where this is the situation. Firstly, at pages 5 to 6 we seek to show that the removal of unions from the role of occupational health and safety reps—and, it follows, from occupation health and safety committees—as proposed by the federal government is a retrograde step. This is done by identifying the effective elements for worker representation as illustrated in the United Kingdom Health and Safety Executive report and comparing them with the federal government's position on occupational health and safety reps. Secondly, at page 6, we in effect support the position of the ACTU on the abysmal record of compliance at the federal level.

Since the lodgement of the submission, something further has happened that fortifies our position adopted in the submission. On 4 April, the Minister for Employment and Workplace Relations announced a review of the current Commonwealth occupational health and safety act. Whilst submissions are invited, the review is an internal one conducted by the department behind closed doors. Public participation is limited, unlike the various reviews of OH&S laws that have been conducted by the states—and I refer you in particular to the Victorian and South Australian reviews which were undertaken by a person appointed by the governments of those states to do so. Submissions were taken and reports were published. Upon that basis, the governments of those states entered into a process to look at their OH&S laws.

On past experience, the RTBU has no confidence that this government will initiate, let alone encourage, public debate on a review of the OH&S act. We say 'on past experience' because a couple of years ago the Department of Employment and Workplace Relations and the Attorney-General's Department sought to review privacy laws with respect to employee records. The RTBU made a submission, the department said thank you and we never heard from them again. In fact, I do not think anybody has heard from them again. It sort of evaporated into the ether. The only subsequent action appeared in the Work Choices legislation—another testimony to consultation—where the government put more restrictions on the ability of a union to police awards and agreements and to ensure that they are being properly followed by employers.

Further, in our submission, the accompanying issues paper to this review process makes it abundantly clear that the government intends an outcome that further limits the capacity of employees to influence occupational health and safety in the workplace. I will give one example. There is a litany of them, but we do not have all day. The issues paper makes the

bald-faced statement that it is not the role of an OH&S rep to undertake risk management; that, apparently, is the preserve of management—end of story. On the other hand, Professor Neil Gunningham from the National Research Centre for Occupational Health and Safety Regulation at ANU, in a working paper on best practice for rail safety regulations, begs to differ. Professor Gunningham says:

Numerous commentators, from the time of the Cullen Report onwards—

the Cullen report was a report into one of the serious rail accidents in the UK—

have argued that workers and their representatives, have an important contribution to make to the identification and abatement of hazards. There is a strong precedent for worker participation in risk assessment processes in both Europe and Australia, and even the US, which traditionally has not given statutory recognition to worker participation, has now embraced such involvement. Not only has this been an integral feature of many OHS regimes but it is also an important feature of International Labour Organisation Convention No 174 on the *Prevention of Major Industrial Accidents*.

He goes on to emphasise the role of workers in occupational health and safety. He quite logically says:

Workers have the most direct interest in safety of any party: it is their lives and limbs that are at risk when the law fails to protect them.

But, apparently, according to the issues paper, it is none of their business; it is management's concern. On that basis you could understand why we are very skeptical as to what occupational health and safety laws are likely to look like under the current federal government.

In our written submission we go on to critique the ostensible reasons given by the government in support of this bill. The reasons for the grounds, in our view—and they are set out in the submission; I will not reiterate them—lack credibility and simply cannot be accepted. In summary, the position of the RTBU is that acts such as Work Choices, the inappropriately named Building and Construction Industry and Construction Improvement Bill and the tying of money to universities on the grounds of pushing individual contracts are part of a broader political agenda that has a major impact on the rights of employees in the workplace. This bill is no different. For those reasons, we would seek that the committee recommends that the Senate rejects the bill.

CHAIR—Thank you. You stated in your submission, and I think you also said it just a moment ago, that the bill seeks to remove the right of union representatives and reinforce managerial prerogative. The bill does not remove the role of health and safety representatives?

Mr Thomas—No, it does not.

CHAIR—No—it simply provides employees with choice.

Mr Thomas—I think there is a current bill before the Senate—

CHAIR—The other bill: the Commonwealth employment bill.

Mr Thomas—Yes. What I am saying is that if you combine this bill with the two other bills—one going to the removal of unions from the occupational health and safety committees and reps, and the other overriding the industrial manslaughter bill in the ACT—that is, in

effect, the outcome. We have no doubt that those bills will go through—there is nothing to stop them—and the government has not indicated that they will not. That combined with this review will have that effect.

CHAIR—But surely any employee who is elected as the employees' choice would have a self-interest in maintaining health and safety standards?

Mr Thomas—I take that to be the case. There is a difference between what the employee's interest is, what the employee would like to do and what the employee will be able to do. As mentioned in the health and safety executive report in the UK, unless you have autonomous worker representatives and workers who feel free and able to express themselves without fear or favour, occupational health and safety is problematic. If that is the case, why does this government wish to remove unions from being involved in occupational health and safety?

CHAIR—Nevertheless, the fact is that employees will still have the right to choose a representative to be involved in those discussions.

Mr Thomas—Yes, they will, but, as somebody mentioned recently about the right to join a union, it is like being able to join a golf club but never being able to play. There is far more to it than merely having the right to appoint a worker representative who turns up to a meeting, sits in the corner and is ignored. Why? Because you have neither the confidence, the training nor the legislative backing to effectively undertake your role.

CHAIR—Also, I would like to ask your view on some of the matters involved with a business seeking a licence to self-insure. First of all, the minister has to grant a declaration for the business to seek a licence. Whether or not he decides to grant that application, there are various considerations to be taken into account: the likely impact on employees of the applicant, the likely impact on the applicant, the likely impact on the integrity of the Commonwealth workers compensation scheme and the likely impact on the operation of the state and territory schemes. If a business is successful in securing a declaration then it must apply to the safety, rehabilitation and compensation council for a licence to self-insure. I understand that the ACTU has representatives on that council.

Mr Thomas—The ACTU has representatives on the ASCC. I do not think the ASCC grants a licence to self-insure.

CHAIR—Sorry—that was what I was endeavouring to clarify. So those are two different councils?

Mr Thomas—Yes, to my knowledge.

CHAIR—Nevertheless, in order to be successful—that is, to get that licence—a business must demonstrate that it can comply with very strict prudential requirements and that it has on operation an appropriate health and safety management plan.

Mr Thomas—It has to satisfy the minister of those requirements, yes. But, once again, it is all done behind closed doors. Why isn't it out in the open? If the minister wants to be satisfied then it should be put it on the table that for X, Y and Z reasons the minister is satisfied. He should not just put out a bland statement which says, 'I am satisfied.'

CHAIR—But the minister is accountable too. The minister is accountable to parliament for the correct operation of those guidelines and criteria, when all is said and done.

Mr Thomas—That may well be the case, but he turns up in the parliament and he has a majority. It is political. We do not kid ourselves that it is not. They want companies to self-insure. They do.

CHAIR—Nevertheless, there is a program of checks and balances throughout that system which would mean that only companies which were able to encompass those requirements would be able to self-insure. Would you agree?

Mr Thomas—Yes. The self-insurance is one thing. This bill does not go to the self-insurance. This bill goes to the occupational health and safety act. To be honest with you, it would not matter to me or to this union if the most stringent provisions in the world were there for the purposes of self-insurance. That is a separate issue. Our reason for being here is the fact that in self-insuring you would come under the OH&S act, whether or not you liked it. Even the Productivity Commission could not go that far.

CHAIR—What is your reason for believing that the OH&S regime at a Commonwealth level is lax compared to the state and territory jurisdictions?

Mr Thomas—I give two examples within the submission itself. I do not want to go into a chapter and verse comparison. The first one is the role of the employee reps, as I have said. The second one is the compliance rate, and we relied on material from the ACTU. There are others that you can quote. On the issue of provisional improvement notices or prohibition notices, I am aware that there is some capacity under the federal legislation for that—albeit, I suspect, not for much longer, if the outcome of the review follows the path we think it will.

CHAIR—That is your forecast, but you cannot necessarily say that that is going to happen.

Mr Thomas—I would like to put a dollar on it!

CHAIR—We are not a betting committee, Mr Thomas.

Mr Thomas—I understand that. That was made in jest. We have our views. We will await the outcome.

CHAIR—But that is your view, rather than a projection.

Mr Thomas—Yes. It is a conclusion we draw from the tenor of the discussion paper. Following past discussion papers, it has been true to form. Then again, it might end up like the privacy report and float off into the ether as well. We do not know.

Senator MARSHALL—Thank you, Mr Thomas, for your very comprehensive and, I might say, compelling submission and presentation today which were well argued and well set out, so I will not revisit any of those issues. I want to talk briefly about the issue of the introduction of dual systems into an area. I worked in your industry at one time and it was once one with, primarily, direct employees of the organisation. It is now very different, with contractors who do operations, maintenance and all sorts of different activities. An issue that has been raised previously is that there could be some companies that come under Comcare and others that remain in the state system that work in the same rail system on the same vehicles doing potentially different jobs, because the application goes with the person not their geographical area. That has never happened before. While there are different systems in each state there has not been confusion at a state level because there is a single system within the state. So this seems to me to have the potential to introduce two systems working side by

side in the one organisation. I am interested to know your views on the sorts of confusion, inefficiency and inconsistency of application of occupational health and safety standards and procedures from the introduction of two systems.

Mr Thomas—Clearly, having two systems working side by side has the potential for total and utter confusion. I must say that in the 20 years that I have been in this union I have not heard employers complain about the fact that they are covered by different occupational health and safety regimes in different states. That is not to say that they do not have some problems; they may. But it appears none of them took the opportunity to tell this committee about them. There is the potential for employees, like on a building site, who work side by side working for different companies being covered by different occupational health and safety regimes. If you have what they now call a common-user terminal, where the terminal may be used by more than one rail operator, and there is an accident with one company in that terminal one day and in comes Comcare and then the same type of accident the next day and in comes WorkCover—this is hypothetical but it is possible—you could get two investigations or two possible outcomes. That would be unfortunate and probably inefficient.

At the end of the day, our basis with these matters is: what is going to provide the safest system and safest workplace for our members? That is No. 1. Issues about whether it is state or federal, or all federal, or a bit in between are more procedural matters. I know Senator Barnett was talking about this before. Let us face it, for most people this legislation will not remove the fact that we have a bit of an alphabet soup—and in some respects what it really does is add a few more letters to it. It does not diminish any jurisdiction at all.

Senator BARNETT—You mentioned the High Court case and its impact on the constitutionality of federal law. I did not quite follow that. Can you give us any further detail so we can follow that up with the department?

Mr Thomas—Yes. It is my understanding that the minister granted Optus a licence to self-insure. The Victorian government took that matter to the Federal Court. I think it is on the basis of whether they have the power to do this. The Victorian government lost that matter in the Federal Court and it has been appealed to the High Court. Where it is sitting in the High Court is unknown to me.

Senator BARNETT—That is fine. We will follow up with the department on that and get some further advice. I want to get your views on the department's submission, where they say:

Amendments proposed in the Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2005 will also provide employees with expanded opportunities for direct involvement in the design and supervision of the occupational health and safety programs in their workplaces. These changes will promote a closer partnership between employees and employers in the improvement of safety outcomes in their workplaces.

I am trying to assess your response to that submission and why you disagree with it.

Mr Thomas—I think I did respond to that, in our submission, at page 7. In the third paragraph, I state:

Finally, the Department of Employment and Workplace Relations asserts that the changes on the Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2005 will “provide

employees with expanded opportunities for direct involvement in the design and supervision of the occupational health and safety programs in their workplaces.” Like the Commonwealth’s claim on compliance costs, the Department simply makes it and lets it hang. The Department for some reason doesn’t see the need to meet the obvious retort—how? Further, when compared to the criteria devised by the UK Health and Safety Executive on the prerequisites for effective OHS representation, this statement by the Department can only be considered as absurd and mere propaganda.

That is our reply. They just make the statement. There is nowhere where they say that, by removing the right of an employee to have union representation and independence and strength behind them, and by allowing the employer far more involvement in the selection of OHS reps and OHS committees and allowing the employer far more effective control over those committees, somehow you can draw the conclusion that it will provide employees with expanded opportunities for direct involvement. It stands to reason that, as we say, it is a statement that cannot under any circumstances be sustained. If that is what they wanted, why are the government removing the right of a union to be involved in an OHS committee, when all of the literature in the place says that, if you want effective OHS committees, you must have workers that can act autonomously through their union? We think we know why, but that is another thing.

Senator BARNETT—That is fine. We can put that to the department later today. I would like to put to you a question that I put to Mr Bodkin, about the outcomes being the most important thing in terms of injuries and deaths and so on, whereas to date the submissions we have had, from the union sector at least, seem to be very focused on the number of inspections and enforcement measures that have taken place rather than on the outcomes. Do you want to respond to that?

Mr Thomas—I would agree with Mr Bodkin that there is a relationship between the role of compliance and OHS outcomes in terms of lower rates of accidents and illnesses in the workplace. It is a bit like saying, in a sense, that if you think you are going to get caught doing something then the chances of you doing it are less. You could have a whole philosophical argument about that, but regular inspections in the workplace would be far more conducive to occupational health and safety outcomes than no inspections. That is not only intuitive but I think studies would bear that out.

CHAIR—Thank you very much.

[12.22 pm]

DAVIS, Ms Janette, General Manager, OHS Act Policy and Support, Comcare

DOLAN, Mr Martin Nicholas, Acting Chief Executive Officer, Comcare

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

LIS, Mr Henry, Principal Government Lawyer, Workplace Relations Legal Group, Department of Employment and Workplace Relations

MERRYFUL, Ms Diane Cheryl, Assistant Secretary, Safety and Compensation Policy Branch, Workplace Relations Policy Group, Department of Employment and Workplace Relations

CHAIR—Welcome. Thank you for your submission. Are there any changes or additions you wish to make?

Mr Kovacic—No.

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

Mr Kovacic—The department welcomes the opportunity to assist the committee with its inquiry into the OHS and SRC Legislation Amendment Bill 2005. The main aim of the bill is to implement the government's response to a recommendation of the Productivity Commission in its report *National workers' compensation and occupational health and safety frameworks* of March 2004. That recommendation was that employers who are licensed to self-insure under the Australian Government's workers compensation scheme should be able to be covered by the Australian Government's occupational health and safety regime.

The Productivity Commission said that this would increase administrative savings for multistate firms and enable greater coordination between the workers compensation and occupational health and safety regimes. The Productivity Commission also said that operating under an OHS regime and a workers compensation scheme with the same jurisdictional coverage, and with related administrations, would enable improved data monitoring, feedback and reform. The government not only supports that view but, more importantly, considers that the bill would produce better health and safety outcomes for employees, particularly as the time and resources currently expended in dealing with overlapping jurisdictional issues can be devoted to improving health and safety at the workplace.

The amendments would mean that employers licensed in the Commonwealth jurisdiction would be placed in the same position as employers operating in the states and territories—that is, having compensation and OHS arrangements governed by the same jurisdiction. These amendments will also address an anomaly that has existed since the licensing arrangements were inserted in the Safety, Rehabilitation and Compensation Act in 1992 to enable former Commonwealth authorities to remain covered by the Commonwealth's workers compensation scheme.

Some submissions to this committee have asserted that the government has not substantiated its arguments about the compliance costs of the application of multiple

occupational health and safety regimes. The committee's attention is drawn to the most recent findings of the Productivity Commission and, before it, of the Industry Commission. Those findings are clear and unequivocal about the significant compliance burdens, costs and efficiencies of the application of multiple occupational health and safety and workers compensation schemes to multistate employers. The strong support expressed for the amendments by licensees is also an indication of the compliance costs that flow from the application of multiple occupational health and safety regimes to those self-insurers.

A number of submissions have also stated that the amendments would open a safety gap because of insufficient inspectors, inadequate penalty levels and no prosecution rates. These assertions are unfounded. Firstly, the comparative figures quoted of Commonwealth and state inspections are not an accurate reflection of the number of inspectors who inspect workplaces in the Commonwealth's jurisdiction—and Comcare can provide members of the committee with further information on their inspectoral capacity. Secondly, the level of penalties in the Commonwealth was substantially increased by amendments introduced in 2004. The relatively small number of prosecutions under the act to date reflects the fact that, until the 2004 amendments, only government business enterprises could be prosecuted for a breach of the act and criminal prosecutions were the only sanctions available. That meant that most employers and employees covered by the act—that is, Commonwealth government departments and authorities and their employees—could not be subject to proceedings. However, the 2004 amendments have rectified that situation and removed the shield of the Crown as far as possible. Now civil proceedings can be brought against the Commonwealth and Commonwealth authorities where there has been a breach of the OHS act. The amendments in 2004 also introduced innovative sanctions for breaches of the act, including injunctions and enforceable undertakings. As a result of those amendments, the enforcement regime under the act is now much more robust.

Unions have also submitted that, as a result of amendments in another bill currently before the parliament, this bill will lead to unions being prevented from involvement in occupational health and safety in private sector workplaces. The suggestion seems to be that this is inconsistent with what is provided by state and territory OHS legislation. That is simply not the case. No other jurisdiction in Australia legislates for a primary or protected role for trade unions in the area of occupational health and safety as does the Commonwealth act. That bill will simply bring Commonwealth legislation into line with other jurisdictions. It is important to note that, at the request of their members, unions will still be able to participate fully in occupational health and safety issues.

As for the concerns expressed this morning by Mr Bodkin from the CFMEU regarding occupational health and safety in the building and construction industry, the department would highlight that the government also has accepted the finding of the Cole royal commission into the building and construction industry that the occupational health and safe record of that industry is unacceptable. It is for that very reason that the government has appointed the Federal Safety Commissioner and established the Office of the Federal Safety Commission to work as a catalyst for improving occupational health and safety performance in that industry. That particular approach utilises the fact that the Australian government is a significant purchaser of construction services to drive further improvements in occupational health and

safety performance in the industry. In terms of the impact of this bill on the building and construction industry, it is worth noting that at this stage no self-insurers are drawn from the construction industry.

Because the Commonwealth and states now have very similar regulation on occupational health and safety issues, the government has decided that section 4 of the Commonwealth occupational health and safety act should be amended by this bill. Section 4 allows state and territory OHS laws to apply concurrently with Commonwealth laws. As the Commonwealth and state regulations are similar but not identical, this has led to unnecessary complexity and uncertainty. This amendment will exclude the operation of state occupational health and safety laws from applying to employment covered by the act, except where they are specifically prescribed by Commonwealth regulations. In doing so, this amendment will place employers and employees covered by the Commonwealth act in the same position as those employers and employees operating in the states and territories—that is, having one integrated system of laws applying to them.

The amendments in this bill cannot be regarded as a takeover by Commonwealth or state occupational health and safety schemes. The bill does not interfere with how state and territory workers compensation and occupational health and safety schemes apply in those jurisdictions. Those schemes will continue to apply in the same way as they do to employers and employees covered by the law in their particular jurisdictions. More specifically, only corporations licensed under the Safety Rehabilitation and Compensation Act will come under the Commonwealth occupational health and safety act as a result of these amendments. At this time, seven licensed corporations are covered by the Commonwealth Occupational Health and Safety (Commonwealth Employment) Act. These corporations employ approximately 21,500 employees. That concludes our opening statement.

CHAIR—Thank you. Does anyone wish to add to those remarks?

Mr Dolan—At this point, I have just a short comment. I did not feel that, on behalf of Comcare, I could leave standing on the record the words ‘dysfunctional’ and ‘abysmal’ based on some partial information drawn from one report. Comcare is responsible for overseeing the occupational health and safety of what is a safe jurisdiction. The figures that have been quoted do not include, for example, that there were zero deaths in the same period. I do not recognise that numbers of inspectors were available at a time when prosecutions and other intervention capacities of the organisation were much more restricted, as Mr Kovacic said. There appears to have been little recognition that we already run a complex jurisdiction where, while we have predominantly white-collar workers, there is a range of blue-collar and similar arrangements. We have the particular issues of the Defence Force, the Quarantine and Inspection Service and the Rail Track Corporation. We are responsible for running a complex occupational health and safety jurisdiction safely. I would like that noted for the record.

CHAIR—Yes. I had intended to ask you to give us the whole picture, particularly with the way your own inspectors interact with state and territory operators and the way you use a private panel of investigators.

Mr Dolan—I am happy to provide that information in response to a question.

CHAIR—Thank you. Would you mind doing that now?

Mr Dolan—The focus of some previous statements has been on our capacity to use state-based inspectors. While we point out that, by various arrangements, we have access to the services of approximately 200 state-based inspectors, they are not at the core of the system we operate. We currently have 22 staff investigators; by 1 July, we should be up to 27. Having that 27 as part of our core Comcare staff means that we will have the same level of inspectors and investigators to employees covered as do comparable jurisdictions.

In addition, we have access to a range of specialist private sector capacity in a panel that is currently of the order of 47 people with a range of different skills and things, with five people to be appointed shortly. So we are looking at a mix. We have not drawn extensively on the states and territories for two reasons. The first is, as I think has already been pointed out, that sometimes they are not available because of quite understandable other priorities for those jurisdictions; and, secondly—I am reluctant to say this but I feel in the circumstances I must—we have not found always that the quality of the investigations and reports we have received by that arrangement have met the standards we are comfortable with. So we have been building our own capacity and we have been making sure that we have the capacity to draw on expertise from the private sector to meet our continuing obligations and to grow towards the possibility that the legislative proposal will be passed.

CHAIR—Thank you. Mr Kovacic, also several statements have been made that, because of this legislation, standards of health and safety will necessarily fall for the companies that join this regime. What is your comment in response to that?

Mr Kovacic—There is no evidence to support that assertion. From the government's perspective, it is extremely committed to improvement in terms of occupational health and safety performance. There are a number of initiatives that the government has taken which clearly demonstrate its commitment to that, and the establishment of the Australian Safety Compensation Council is one of those. Indeed, in terms of the provisions of this bill, there is, as Mr Dolan has indicated, nothing to suggest that the performance of the Commonwealth occupational health and safety scheme is worse than that of state schemes. The evidence suggests that it is better than the performance of many state and territory jurisdictions. There is no reason to assert or to suggest that that is going to change or in any way be diminished by the passage of this legislation.

Senator MARSHALL—You know what they say about self praise, don't you? Maybe better views are those expressed by the end users of the system. I am certainly interested in what they had to say. You said to us—and I will summarise, and if you think I am putting words into your mouth let me know—that the lack of prosecutions so far should not be seen as a lack of intent to prosecute; it is simply that you had restrictions placed upon you and you had no ability to prosecute. Is that a fair assessment of what you said?

Mr Kovacic—That is correct.

Senator MARSHALL—How many cases did you want to prosecute but lacked the ability to do so?

Mr Dolan—The system we operate—even before we had our additional powers—is one where our emphasis has always been on a systemic approach and on dealing with issues as they arise. We have always had a limited power to prosecute government business enterprises

and related organisations, and we have certainly given serious consideration at various times to doing that. I have not been in the organisation long term and so I am probably not in a position to comment based on history as to individual circumstances where we may have wished to prosecute and did not. I am not sure whether Ms Davis could offer any further comments on that.

Ms Davis—It would be impossible to say, because now we can take civil or criminal action in response to a finding of a breach of the legislation or regulations. Prior to September 2004, there would have been quite a number of investigation reports that did find a breach. In fact, it is rare for us to not find a breach in a report. You could look back over the past 15 years and point to a lot of investigation outcomes where you could say we could have taken action. But whether at the time we would have made the decision to pursue court related enforcement action as opposed to one of the other remedies we have in the suite of options I could not say.

I can say that in relation to one of the examples that the ACTU mentioned we did not have the power. They talked about the fatality at the CSIRO laboratory and cited that as an example where WorkCover Victoria recommended we prosecute and we declined to do so. That is a clear example of a case where we did not have the legislative power to take action, because that involved a Commonwealth department. The other example they mentioned is actually an investigation that is continuing, so I am not sure why they would be stating that a recommendation has been made in relation to that.

Senator MARSHALL—So is the answer to my question one? Quite frankly, I do not find it acceptable that Mr Kovacic can rely on the statement that the lack of prosecutions should not be seen as an unwillingness to prosecute and that the issue was your restricted ability to prosecute but not back that up with any evidence of how many. That is what I want to ask. It either was not a lack of willingness, or it was.

Mr Kovacic—As Ms Davis has indicated, it is hypothetical in the sense that, if I can use the vernacular, you play with the cards that you are dealt. In terms of the legislation that operated up until 2004, that provided limited circumstances in which Comcare could initiate prosecutions. The environment in which Comcare was operating and its capacity to prosecute would have influenced the way that it approached particular matters and potential breaches of the occupational health and safety legislation.

Senator MARSHALL—What do you think would be the increase?

Mr Kovacic—As Ms Davis said, it is impossible to say how many may have been prosecuted at the time, because the reality at the stage was that the legislation did not provide that sort of scope.

Senator MARSHALL—I thought you were relying on something, that there might have been some evidence to back up the statement you were making. What sort of growth do you expect in prosecutions?

Mr Kovacic—Could I just make this point?

Senator MARSHALL—But you were responding to the position that there is a lack of prosecutions.

Mr Kovacic—The point that was made was that the legislative regime in terms of the capacity for Comcare to prosecute changed in 2004. Up until then there was a very limited capacity for Comcare to initiate prosecutions. It is a recognition that the data that is referred to in some of the submissions from other parties to the committee's inquiry is premised on a scenario that no longer exists. It is not an accurate reflection of Comcare's capacity at this point in time, post the amendments in 2004, to initiate prosecutions.

Senator MARSHALL—I do not want to get hung up on this particular issue. We do not have a lot of time. You were responding to criticisms that Comcare does not prosecute and you were putting to me, or the committee, that the low level of prosecutions should not be seen as unwillingness but just that you had a restricted ability to do that. I thought you might be able to demonstrate what the level of prosecutions might have been if you had an unrestricted ability. You now say that you have the unrestricted ability. We cannot go back prior to that and make a judgment about that. We had one example, anyway. What level of prosecutions do you expect from now on?

Mr Dolan—At this point we are looking very seriously at six or seven prosecutions. Those should come to fruition over the next three to six months.

Ms Davis—That is for events that have occurred since September 2004. There are another three or four cases where we are looking at accepting an enforceable undertaking as an alternative to us taking action. When we say prosecution, I should clarify that we are talking about civil proceedings as opposed to criminal prosecutions. We do not make that decision. The Director of Public Prosecutions makes a decision on criminal prosecutions.

Senator MARSHALL—The six prosecutions that you are considering at the moment are the totality. How many of those are able to be prosecuted now because of the clarification of your powers?

Ms Davis—Those six that we have in mind are all ones that involve bodies that we could not take any action against prior to September 2004.

Senator MARSHALL—Ms Davis, I think you indicated that a previous witness had said—or it was one example that you used—that the Victorian inspectors had recommended criminal prosecutions. I am not sure they said that. It was actually in response to a question that I asked, which you might be able to clarify. When you have the Victorian inspectors do their investigation, do they report to you with a recommendation on what action should be taken?

Ms Davis—Not generally, no. An investigator will make findings and recommendations in an investigation report. Findings may be that there has been a breach, and they will particularise what sections of the legislation or regulations have been breached. Normally, the recommendations in an investigation report will be directed towards what sort of remedial action the employer should take to prevent a similar breach. It is incredibly rare. Sometimes an investigator will discuss with Comcare in the course of finalising a report what sort of enforcement action in their view might be appropriate, but I cannot recall an instance where an investigator has written in a report 'and I recommend somebody be prosecuted'.

Senator MARSHALL—Even in the CSIRO case? I thought you indicated earlier that that did come with a recommendation.

Ms Davis—No. If I pulled out that investigation report, I do not think you would find anything in that report that said ‘and I recommend action be taken’. If the investigator who conducted that investigation had written that then it would have been a pretty clear demonstration that they did not understand the legislation that they were operating under, because it would not have even been in prospect. It is a power that does not exist.

They may have anecdotally said, ‘If this happened in Victoria, we would prosecute,’ but they definitely could not and would not have made a recommendation to us that we take action. The legislation does provide that Comcare or an investigator can be the one to institute proceedings. But, as I said, in practice it may come up in conversation but investigators do not take the step of actually recommending how we should exercise our discretion.

Senator MARSHALL—Mr Kovacic, in your opening presentation you talked about a number of the efficiencies and reasons why the Productivity Commission suggested to go down this path. Was the improvement in occupational health and safety outcomes one of their reasons?

Ms Merryfull—Sorry, Senator Marshall, what was the question?

Senator MARSHALL—Did the Productivity Commission suggest that the ability for people to be covered by this regime for their occupational health and safety needs would lead to an improved occupational health and safety outcome?

Ms Merryfull—Issues that the Productivity Commission identified as arising from the multiplicity of regimes included inadequate coverage because of gaps in coverage due to that multiplicity, increased risk of errors and mistakes and difficulties in employers identifying appropriate standards with mobile workforces. They suggested that greater and more consistent information could be fed back to the employer about how things were working if they did not have the multiplicity of regimes. All of that would lead to an improved outcome not only for occupational health and safety, Senator, but also for the compliance costs that we talked about before and for the attention that is spent on jurisdictional difficulties that could otherwise be spent on more productive outcomes.

Senator MARSHALL—That is probably where I want to go now, because I think Mr Kovacic also indicated that, as a result of some of those efficiencies that were identified in the Productivity Commission, the resources could be steered towards improving an occupational health and safety outcome on the ground. Can you point me to the place in the legislation where that follows?

Mr Kovacic—I think it follows on from what Ms Merryfull was saying. In essence, the Productivity Commission recognised that improved occupation health and safety performance and also improved performance in terms of workers compensation are very much integrated. If you look at how the schemes operate in all of the state and territory jurisdictions, they are very closely integrated across all the jurisdictions. Similarly, this bill puts in place an arrangement that applies across the board for those organisations that are covered under the federal workers compensation scheme.

It follows to the extent that, by reducing complexity and confusion as to what laws actually apply in respect of occupational health and safety, there is a greater understanding of obligations and requirements of that legislation. It is much easier to deal with one set of rules,

if I can put it that way, as opposed to potentially eight or nine different sets of rules or at the moment the two sets of rules that potentially apply in Commonwealth workplaces that might be in a state or territory jurisdiction.

Reducing complexity and confusion is likely to lead to more consistent outcomes across the board, to more consistent policies and to a more consistent understanding by both managers and employees in organisations that are covered by the Commonwealth scheme as to their obligations. That is likely to lead to improvements not only as a result of greater efficiency but also as a result of potential reductions in injury rates which will have not only obvious productivity benefits but also obvious human benefits.

Senator MARSHALL—So you cannot point me to any relevant place in the legislation?

Mr Kovacic—In essence, the legislation itself is about creating an integrated system of workers compensation and occupational health and safety. It is about extending the application of the Commonwealth occupational health and safety scheme to self-insurers and to a number of other authorities that are covered under the Comcare workers compensation scheme.

Senator MARSHALL—So when you put to the committee that the efficiencies gained at one end will then be concentrated at achieving an improved occupational health and safety outcome, that is really wishful thinking. That is all that is, isn't it?

Mr Kovacic—No, Senator. Certainly some of the anecdotal evidence that we are hearing from some of the self-insurers under the Commonwealth scheme suggests that there are not only cost-efficiencies but also indications that injury rates are starting to decline as a result of having to deal with one set of rules as opposed to seven or eight different sets of rules. There is no reason to suggest that that would not flow across to occupational health and safety as well.

Senator MARSHALL—Will those figures, once they become more than anecdotal evidence, be available for people to see?

Mr Kovacic—I would presume so, although the reporting obligations of self-insurers and the monitoring of their performance are things that the Safety, Rehabilitation and Compensation Commission is responsible for.

Senator MARSHALL—But is that information accessible to the public?

Mr Dolan—No. That information will be collected by us and will be reported. There is a requirement on licensees to provide a range of information about their compliance with the legislative framework, and that is the sort of information we make publicly available.

Senator MARSHALL—A number of the previous witnesses have referred to Commissioner Cole's inquiry into the building and construction industry, and the ACTU actually put a quote from the Cole commission report in their submission:

There is persuasive support for the view that the extent of compliance with occupational health and safety obligations is strongly influenced by a reasonable expectation of the likelihood of being inspected, prosecuted, convicted and having a meaningful penalty imposed. The presence of occupational health and safety inspectors is important.

Do you agree with that view?

Mr Dolan—Yes.

Senator MARSHALL—We also received evidence from the ACTU that, if you look at the ratio of the number of employees covered by this scheme and the number of inspectors, then you see that, to meet the same ratio in Victoria, the number needed is 112. I think that is what they said. When do you expect to get there?

Mr Dolan—I am not sure where that number came from. As I think I said in response to Senator Troeth, the recruitment and training campaign we have got in place to build our inspectorial workforce will take us to the same sort of proportions as the state jurisdictions have by 1 July.

Senator MARSHALL—Do you dispute the number of 112? That was without Optus and the new employers joining us, I understand.

Mr Dolan—Part of the difficulty is getting a precise fix on the number of employees. The figures that have been cited are 2003-04 figures. There has been a shift in all jurisdictions in the number of employees under coverage. So we are talking some margin for error, but a move from 22 investigators to end up with 27 investigators takes us to the point where, in round terms, we would have one inspector for every 9,000 employees we are responsible for. In the case of Victoria, based on those 2003-04 figures, they have one inspector available for every 8,900 employees. So the recruitment and training campaign we have got brings us into a very similar ballpark.

Senator MARSHALL—So you believe you will be at the same ratio soon?

Mr Dolan—Yes.

Senator MARSHALL—I might redo those figures myself at a later time. You also mentioned that you are unsatisfied with some of the reports you are getting from the Victorian inspectors. Can expand on that a little?

Ms Davis—Part of the problem that we experience relates to the fact that we approach investigations quite differently. You even see it with the terminology. The states refer to ‘inspectors’ and we refer to ‘investigations’ and ‘investigation reports’. A lot of the inspectors that do work for us from the states are used to walking into a workplace, spotting hazards—things like cabling, as was mentioned before—writing a notice and leaving, whereas, when we require an investigation report to be done, it is quite a comprehensive forensic examination in response to an incident: what went wrong; who was responsible; what are the elements of the legislation; what are the elements of an offence; what should have been done; what was reasonably practicable; was it done; and, if not, why not?

So we are often provided with a resource that does not necessarily have the same sort of background and experience in the type of report that we expect to be able to produce to provide to an employer. The other issue can be about their familiarity with our legislation. It is really hard for the state authorities to keep their inspectors completely up to date with our legislation and it is hard for us as well to keep them trained. They are the main issues: just the difficulty of somebody who works in a state trying to do some work for us, the writing skills and being able to articulate and prove elements of offences rather than just asserting that and writing notices.

Senator MARSHALL—Your investigations are in response to an incident?

Ms Davis—We do both reactive and proactive. We do reactive investigations when we are notified of an incident but we also run proactive programs, which are more like the way the state authorities generally operate, where we will decide to do a targeted campaign to assess compliance with particular operations.

Senator MARSHALL—What is the break-up of resources for responsive and proactive?

Ms Davis—As an example, in the last financial year we had—

Senator MARSHALL—It might be easier if you do it as a percentage: would you do 20 per cent—

Ms Davis—Around 50 per cent.

Senator MARSHALL—It would be fifty-fifty?

Ms Davis—Yes. We select it each year depending on statistics and what we think is most hazardous at the time, in terms of employer or industry. That is how we select our targets for targeting investigations. It is based on the nature of a risk and the employer history.

Senator MARSHALL—Thank you.

Senator BARNETT—Mr Thomas referred to a Victorian government and Optus Federal Court decision which has been appealed to the High Court and the potential for that to impact on the Commonwealth's constitutional basis to proceed with this legislation. Do you have any observations you wish to make about that legal process?

Mr Kovacic—That particular challenge is to the minister's capacity under the Safety, Rehabilitation and Compensation Act to issue a declaration that a organisation is eligible to apply for self-insurance to the Safety, Rehabilitation and Compensation Commission. In terms of its impact on this particular legislation, I do not think that it has any significant impact. That is confirmed by one of my legal colleagues.

Mr Lis—I can add for the record that that High Court challenge is due to be heard on 1 August this year.

Senator BARNETT—Thank you. There has been some debate with regard to the view put on page 3 of your submission that there will be expanded opportunities for employees to be involved in the OH&S programs. Mr Thomas has disputed that particular view from the department. Can you respond to that contrary opinion?

Mr Kovacic—At the moment, in terms of the requirements for the election of employee occupational health and safety representatives, the process is in essence mandated to the relevant trade union in a workplace. They are the body that seeks nominations and puts forward nominations for election as occupational health and safety representatives. The intent of the separate bill which is currently before the parliament is indeed to open up that process to all employees so that potentially all employees are able to be involved in the occupational health and safety process and to seek election as a delegate. In that way, rather than the current narrow arrangements for the election of occupational health and safety representatives, it is to make it more representative by giving all employees the opportunity to participate in that process.

Senator BARNETT—There were some very vigorous views put by the union movement this morning about the number of inspectors and specifically about the lack of the Commonwealth's ability to have the capacity to inspect and enforce and impose various penalties compared to, say, the Victorian arrangements that the ACTU referred to in their submission. You have touched on it in your opening submission. Can you provide any further evidence in your response to that allegation and advise the committee about the benefits of focusing on outcomes in terms of injuries and deaths and so on compared to the process?

Mr Kovavic—My opening remarks, and certainly some of the responses from Mr Dolan to questions from the committee, would reinforce the point that clearly the legislative framework relating to the capacity of Comcare to initiate prosecutions has changed significantly as a result of amendments in 2004. As Mr Dolan mentioned a moment ago, in terms of the inspectorial capacity of Comcare to investigate matters relating to occupational health and safety issues, it is comparable to the arrangements in the state and territory jurisdictions. Indeed, the comments by Ms Davis relating to proactive and reactive inspections are also significant and worth reiterating. I think that they are adequate in terms of the issues that have been raised and, clearly, demonstrate that there is the capacity both from a legislative perspective and also from a personnel perspective, if I can put it that way, to ensure organisations covered by the occupational health and safety regime are held accountable for their performance.

Mr Dolan—It is probably important for context to understand that part of the process that the Safety, Rehabilitation and Compensation Commission undertakes before granting a licence is to satisfy themselves that the applicant has the capacity to meet the standards set by the commission for occupational health and safety of employees. To achieve that the commission has requested that we undertake detailed audits before they make a decision of the OH&S systems of applicants for licences so at the point where a licence application is approved by commission Comcare already has a fairly detailed knowledge of the OHS capacity including reporting and monitoring capacity of licensees. That is the sort of basis towards which this legislation is moving.

Senator BARNETT—Concerning the arguments put this morning that in some cases you might have two systems operating on the one workplace, what you say to that?

Mr Kovavic—That situation is what this bill seeks to address in respect of those organisations covered by the Commonwealth Compensation Scheme. With regard to some of the suggestions that were made by Mr Bodkin on behalf of the CFMEU, there are a number of initiatives that I would point to. At a broad national level the government has established the Australian Safety and Compensation Council as a vehicle to pursue greater national consistency for both workers compensation and occupational health and safety and it is to be hoped that the commission will be successful in pursuing that objective. I think that there are also provisions in the current occupational health and safety Commonwealth employment legislation which deal with the interaction of contractors on premises operated by an employer covered by the occupational health and safety scheme which diminish the capacity for that, and I will ask one of my colleagues to provide a bit more detail.

Mr Lis—The act currently contains provisions dealing with contractors. In particular it extends an employer's duty of care owed to an employee also to a contractor where the employer has control over the workplace.

Mr Kovavic—With regard to the building and construction industry the point I would make in response to Mr Bodkin is that the issue is hypothetical at this stage. Of the seven self-insurers that are covered by the Comcare scheme none are drawn from the construction industry.

Senator BARNETT—That is noted and I think that was noted earlier as well. Finally, I am not sure whether you were here when I asked the ACTU about their membership. They had said that their membership had increased from 1.8 million to 1.9 million. I asked whether that was an increase or a decrease as a proportion of the total workforce in the country and they said they were not sure. I have sought clarification on that and I can advise that the ABS statistics of 28 March show that there was a decrease from August 2004 to August 2005, from 22.7 per cent to 22.4 per cent of the total workforce. Over the same period it decreased from 17.4 per cent to 16.8 per cent of the private sector workforce. I just bring that to your attention and to the committee's attention.

CHAIR—Thank you. I thank witnesses very much for their attendance here today.

Mr Dolan—I would like to make a clarification. My colleagues have pointed out that I may not have made clear what I was comparing various figures to. The comparison between the Commonwealth's ratio of investigators to employees was a comparison, in terms of numbers, with the Victorian jurisdiction specifically, although my remarks generally were about the jurisdictions as a whole.

CHAIR—Thank you for that.

Committee adjourned at 1.06 pm