



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

EMPLOYMENT, WORKPLACE RELATIONS, SMALL
BUSINESS AND EDUCATION LEGISLATION
COMMITTEE

**Reference: Occupational Health and Safety (Commonwealth
Employment) Amendment Bill 2000 and Safety, Rehabilitation and
Compensation and Other Legislation Amendment Bill 2000**

FRIDAY, 30 MARCH 2001

CANBERRA

BY AUTHORITY OF THE SENATE

WITNESSES

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|--|-----------|
| ANDERSON, Mr Alexander John Cairns, Assistant Secretary, Legal Policy Branch, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business..... | 22 |
| HERRINGTON, Ms Sharelle, Divisional Assistant Secretary, Communications Division, Communications Electrical and Plumbing Union..... | 2 |
| MANSFIELD, Mr William, Assistant Secretary, Australian Council of Trade Unions ... | 2 |
| ROWLING, Mr John, Assistant Secretary, Safety and Compensation Policy Branch, Department of Employment, Workplace Relations and Small Business | 22 |
| SWAILS, Mr Noel Arthur, Acting Chief Executive Officer, Comcare..... | 22 |
| VALLANCE, Dr Deborah Anne, National Occupational Health and Safety Coordinator, Australian Manufacturing Workers Union..... | 2 |

SENATE
EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS
AND EDUCATION LEGISLATION COMMITTEE

Friday, 30 March 2001

Members: Senator Tierney (*Chair*), Senator Carr (*Deputy Chair*), Senators Brandis, Collins, Ferris and Stott Despoja

Participating members: Senators Abetz, Allison, Boswell, Brown, Buckland, Calvert, George Campbell, Chapman, Coonan, Cooney, Crane, Crossin, Crowley, Eggleston, Faulkner, Ferguson, Gibbs, Gibson, Harradine, Harris, Hogg, Hutchins, Knowles, Lightfoot, Ludwig, Lundy, Mackay, Mason, McGauran, O'Brien, Payne, Schacht and Watson

Senators in attendance: Senators Carr, Collins and Tierney

Terms of reference for the inquiry:

Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2000 and Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000

Committee met at 9.06 a.m.

CHAIR—I declare open this public hearing of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. On 7 February 2001, the committee was asked by the Senate to inquire into the provisions of the [Occupational Health and Safety \(Commonwealth Employment\) Amendment Bill 2000](#) and the [Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000](#). The purpose of this amending legislation is to update and streamline provisions for the protection of the health and safety of Commonwealth employees in departments, statutory authorities and government business enterprises. The bills are also intended to improve the operation of the Commonwealth workers compensation scheme, at the same time ensuring that the act reflects the government's commitment to balancing the costs of work related injury with access to fair compensation and effective rehabilitation of injured workers.

The legislation before us adopts an approach to occupational health and safety that is effectively self-regulating at the enterprise level. It prescribes general duties of care in the establishment of occupational health and safety arrangements at workplaces, which involve employees in the development and implementation of those arrangements. Before we commence taking evidence today, I state on the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to the evidence provided. Parliamentary privilege refers to special rights and immunities attached to the parliament or its members and others necessary for the discharge of the parliamentary functions without obstruction or fear of prosecution. Any act by a person that operates to the disadvantage of a witness on account of evidence being given before the Senate or any of its committees is treated as a breach of privilege. I welcome all observers to this public hearing, and I welcome representatives from the Australian Council of Trade Unions.

[9.08 a.m.]

MANSFIELD, Mr William, Assistant Secretary, Australian Council of Trade Unions

HERRINGTON, Ms Sharelle, Divisional Assistant Secretary, Communications Division, Communications Electrical and Plumbing Union

VALLANCE, Dr Deborah Anne, National Occupational Health and Safety Coordinator, Australian Manufacturing Workers Union

Mr Mansfield—Ms Herrington and Dr Vallance appear on behalf of two of the organisations. Other organisations have made submissions to the Senate inquiry, and we encourage the inquiry to take account of those, particularly the submission made by the Community and Public Sector Union.

CHAIR—The committee has before it submission No. 2. Are there any changes you wish to make to the submission?

Mr Mansfield—No.

CHAIR—The committee prefers all evidence to be given in public, although at any time you may give any evidence, part of evidence or answers to any questions in camera. You may make the request and the committee will consider such a request. I must point out that such evidence can subsequently be made public by order of the Senate. I now invite you to make a brief opening statement, and then we will go to questions.

Mr Mansfield—We do not anticipate making a request to have anything other than a public submission. The ACTU and the organisations represented here today have made submissions to this inquiry. We endorse the points made in those submissions in relation to the two bills. I am sure the committee would be aware of the importance of workers compensation and occupational health and safety arrangements for employees in the Australian government employment area. The standards of workers compensation, the arrangements under which injuries are compensated and the processes by which individuals have access to workers compensation and rehabilitation are of considerable importance to individuals in the Australian government area.

Unions have made a significant contribution to improving the standards of occupational health and safety. In association with management, unions have introduced preventative strategies through their members' activities at workplace level and through the activities of officers of the unions, who have particular responsibilities in occupational health and safety matters. I believe unions can lay claim to being in part responsible for the success of the existing workers compensation and occupational health and safety arrangements in the Australian government employment area, which has a low incidence of injury and a low level of premiums. The activities of unions have made a significant contribution to date.

The submission of the ACTU and affiliate organisations seeks in many ways to reflect the values that the chair stated in his opening comments. Unions want a fair workers compensation system that recognises the environment within which employees of the Australian government work, the circumstances within which they undertake their responsibilities and the consequences of those in terms of the injuries that can occur. We seek fairness, and we seek reasonable standards. We seek to ensure that the representatives of employees in the Australian government employment area have a right to participate in the processes that achieve better prevention, lower levels of injury and lower premiums in the workers compensation area. We believe we can point to the contribution we have made in the past in that regard.

Basically, as you have seen from the submission, the ACTU and the affiliate organisations oppose the passage of the two bills as they are presently drafted. We point out that the consultation that has occurred to date in regard to the proposals in the two pieces of legislation in our view has been grossly inadequate. Broadly, firstly, there was a report to the SRCC and Comcare, which is known as the Corrs report. That is the basis from which many of the amendments that have been put forward in this legislation originated. The Corrs report was prepared by a legal firm and was commissioned essentially by Australian government agencies—Telstra, Australia Post, I think the Reserve Bank and Australian Defence Industries. It was prepared on behalf of employers and paid for by employers. It did not involve extensive or adequate consultation with representatives of employees, rather in our view it approached the issue of the changes that needed to be made to the occupational health and safety and workers compensation arrangements from the perspective of employers.

We did not accept at any point the conclusions of that report. The report itself is a confidential document which has never been able to be circulated to unions or the community at large and those groups in the community that are interested in this matter. The report has not been accepted or adopted in any way by the representatives of employees in the Australian government work area. In our view the Corrs report was the document which stimulated this most recent round of activity in relation to amendments to the workers compensation and occupational health and safety matters.

In addition to the Corrs report there were two other meetings involving representatives of Comcare and representatives of unions that discussed issues that might be the subject of legislative change. At neither of those meetings did the unions make any statement that they agreed with any particular proposition. The two meetings occurred roughly six weeks apart and in the order of 15 to 16 months ago. We did not consider those meetings to be in any respect adequate consultation on what is a very important matter to employees in the Australian government employment area. The bills themselves appeared with no further consultation from the minister's office, his department or other parties to this matter. In our view, the level of consultation on what is a very important matter to Australian government employees was grossly inadequate and in part is leading to the serious differences which the ACTU and affiliate unions have with this legislation.

We point out that in our view—and we have pointed this out in the submission of course—the performance of the Australian government employment occupational health and safety and workers compensation arrangements is already of a high standard and has been improving year by year. The costs of workers compensation in the Australian government employment area are the lowest in Australia. The injury rates affecting Australian government employees are low and are reducing year by year on a trend basis. There are occasional blips where you will get a slight increase on the previous year, but the overall trend is for a reduction in injury rates for Australian government employees.

The occupational health and safety arrangements work well at department and agency levels. I might just make an observation here. This morning I heard a report that the general manager in charge of the occupational health and safety area in Telstra, which is a major agency—probably the largest single agency covered by the Australian government employment occupational health and safety arrangements—observed only earlier this week in a meeting with both union and management representatives that the performance of Telstra in occupational health and safety was in no small regard related to the involvement of unions in the occupational health and safety arrangements in that organisation. His point was that the union movement—through its members at the workplace level and through its officers at the

state and national levels—kept management in Telstra up to the mark in terms of its occupational health and safety performance. He acknowledged that and made the point of saying that the involvement of unions was a significant factor in improving occupational health and safety standards in that agency.

In that connection, you will have noted, of course, that the legislation essentially seeks to delete reference to unions and their involvement in occupational health and safety pretty much throughout the legislation, except in situations where individuals make applications to have union officers given a role in particular situations. They have to make an application to Comcare. That application has to be on the prescribed form. It is valid for a period of 12 months, and the Comcare chief executive may accept that application. So we cannot understand or accept, in the circumstances of good standards of performance and improving standards of performance, why it is that the government seeks to remove unions and union members from an active role in promoting occupational health and safety standards. That issue, which the committee would understand, is a critical one in terms of employee interests.

In terms of the amendments to the Safety, Rehabilitation and Compensation Act, there are two particular areas where we are concerned, but our concerns go beyond these—firstly, the area of a definition of injury and disease and, secondly, the exclusion of management actions from an employee's entitlement to workers compensation. We believe that the current definition of injury and disease, which is a fundamental point in terms of an individual's entitlement to workers compensation, is both fair and workable. We are especially concerned over the potential for stress related conditions such as coronary disease and strokes to not be compensated if the amendments proposed in the legislation are allowed to proceed.

We believe that the new definition of injury and disease—which requires the disease to have made a material contribution to the injury suffered by the individual, which requires a close connection with employment (and there is a range of factors listed in the legislation which, amongst others, determine whether there is a close connection with employment) and which sets out that an entitlement to compensation is denied if the injury is a natural progression of a disease—is going to very severely limit the entitlement of individuals to compensation in situations where their work has quite clearly contributed to the injury which they have suffered.

We are also of the view that it is wrong to have in the legislation a denial of compensation where injuries have occurred, where damage has occurred to individuals, but it is not compensable because it is as a result of 'reasonable management actions'. In our view, the test of an individual's entitlement to workers compensation should be, firstly, has there been an injury; and, secondly, is it related to employment? Not whether you can go behind the injury, not whether you can go behind the damage and ask the question: is it reasonable that this individual has suffered this injury? What the legislation proposes is to further extend the range of exclusions that are already in the legislation in relation to reasonable management actions. We do not believe the provision should be there in the first place and we certainly strongly oppose the extension of that provision to other factors in relation to reasonable management actions.

In the occupational health and safety area, our major concern relates to the changing of the consultative processes. The existing consultative arrangements allow for unions and union members to be active in cooperation with management to bring about improved occupational health and safety standards in the Australian government employment area. The changes that are proposed essentially provide for employees to substitute for unions and union member involvement in occupational health and safety matters within departments and agencies. There

is no indication in the legislation of how those individual employees will be selected, how those individual employees will be responsible to their fellow employees in regard to occupational health and safety matters or how those individuals will be trained.

There is provision for elections where there is the contested ballot for determining who occupational health and safety representatives will be. It is proposed that those elections will be undertaken by management. We think the overall proposition in the legislation is basically unprincipled. It takes away from representative organisations—which have democratic processes and are responsible to employees generally in enterprises—their ability to represent their members on what is a very important matter of occupational health and safety in their agencies and departments. It is worthwhile noting that in the Australian government employment area and its agencies, more than 65 per cent of all employees are members of their relevant organisation. This is not a situation where we have only a small minority of members of unions. We have very substantial membership in the area, and our members expect us to be active in the area of occupational health and safety and workers compensation matters. This legislation is going to sideline us and marginalise us.

Our second area of concern in relation to the occupational health and safety matter is the withdrawal to the power of representative organisations to request an investigation, to undertake an appeal or to institute proceedings in occupational health and safety areas. We are also concerned about the substitution of civil for criminal proceedings in occupational health and safety breaches that occur in this area. Finally, we also have proposed two further amendments if it is thought that the legislation should proceed. We believe it should not. We believe that the legislation should be withdrawn, and there should be additional consultation with both the employers and the organisations representing employees in the Australian government employment area before the legislation proceeds. We do not believe it is, at this stage, of a nature that can be supported. Our view is it should be withdrawn and subject to further consultation. In that consultation, we would propose other amendments, and we would propose changes to the ones that have been put forward so far.

Senator JACINTA COLLINS—Going back to your comments about the Corrs report, we might ask the department or Comcare for a copy of that report. Would that report reside with Comcare?

Mr Mansfield—Comcare has the report. It was provided to Comcare by the agencies that commissioned it. As I said at the outset, it was commissioned by a range of employers, who went to the legal firm and had the report undertaken. It is a substantial report which in overall terms would probably be 200 pages in length. It was made available to members of the Safety, Rehabilitation and Compensation Commission, which includes me and Ms Herrington.

It was actually prepared before I went on the SRCC and I think the same is the case with Ms Herrington. It was made available, as were our other documents within the SRCC, on a confidential basis. Without any criticism of the SRCC, all the members of the commission have been made very much aware of their responsibilities to maintain confidentiality in relation to SRCC matters. It was pointed out to us that there are provisions in the Crimes Act which apply to people who breach confidentiality in these areas.

Senator JACINTA COLLINS—Are you aware of the rationale for why it needs to remain confidential?

Ms Herrington—The rationale given on my understanding is basically that the employers commissioned the document, it is their document and they do not wish it to be made public.

Senator JACINTA COLLINS—They do not wish it to be made public?

Ms Herrington—They were not willing to give the commission the capacity to distribute the document or to enter into extensive consultations around it.

Senator CARR—Was it prepared with the use of any public monies?

Mr Mansfield—The payment was made by the agencies which commissioned it, so obviously, yes, it is being prepared with public money.

Senator CARR—So it is a document prepared by public monies which is being kept from the public? Is that the proposition?

Mr Mansfield—The bottom line is that that is correct, yes.

Senator JACINTA COLLINS—The department will be able to correct me later if I am mischaracterising the impression that I was given in relation to this legislation. My understanding was that there was a fairly strong claim that the SRCC had recommended these changes. Can you comment on that, Mr Mansfield?

Mr Mansfield—A number of the changes have been discussed in the SRCC.

Senator JACINTA COLLINS—Is there a recommendation?

Mr Mansfield—There was an outcome of the SRCC deliberations. In those deliberations, people such as Ms Herrington and I were in a position where we felt we had to get what was the best outcome from a particular discussion. We accepted with reservations proposals that were made on the basis that they were the best outcomes that could be achieved. That was the situation within the SRCC. What has to be understood is the point that I was making before, that the SRCC proceedings are confidential. I am not there as an assistant secretary of the ACTU to negotiate these matters. I am there as a member of the SRCC with other responsibilities. This is not a negotiating forum we are talking about. It is a forum which is policy related and supervisory in regard to the broad area of workers compensation and occupational health and safety. I want to make it quite clear that so far as I am concerned, and I think I can speak for Ms Herrington, we do not support these particular recommendations in our capacities as officers of the ACTU and the CEPU.

Dr Vallance—I do not think that the SRCC was actually given this bill to look at or go through.

Mr Mansfield—Not at all.

Dr Vallance—There has been discussion for which people have been bound. In our organisation we have only had access to what has been the public record of those meetings which says, for instance, that the occupational health and safety act amendments had been discussed. That is the information that all our members receive in that circumstance. But this particular legislation was not discussed at the SRCC.

Senator JACINTA COLLINS—Dr Vallance and Mr Mansfield, we may well be able to assist, especially those outside of the process, by asking the department to clarify precisely the detail of the recommendations arising out of the SRCC.

Mr Mansfield—In relation to the definition of injury and disease, I have no recollection of the SRCC ever making a recommendation along the lines of the one that has been put in the legislation. There was discussion in relation to the issue of reasonable management actions. I have no recollection of the SRCC at any time I was at a meeting making recommendation in relation to reasonable management actions as per the provisions in this legislation.

In relation to the issue of representation in the occupational health and safety area, that was discussed within the SRCC and there was an outcome. It was not an outcome that I was comfortable with. It was not an outcome which, in normal circumstances, I would have agreed with. In the context of what the alternatives were, I gave it support at the time, but I am making it clear that it is not an outcome which I believe is either necessary or workable.

Senator JACINTA COLLINS—Was the outcome in relation to union representation essentially characterised as ‘we need to make these provisions consistent with the thrust of the Workplace Relations Act’?

Ms Herrington—Yes, it was. That was very clearly the comment that came across from the commission at the time. Those were the riding instructions that the commission was under. I would be fairly confident that, if you went back to the actual minutes of the meetings, both Mr Mansfield and I made it very clear that we did not endorse the proposals that dealt in particular with the role of the unions and the construction of health and safety arrangements.

Senator CARR—I raise a question in regard to the chairman’s comments about parliamentary privilege and the issues that arise before these committees. It is important for us, in examining legislation, to understand what the purpose of the legislation is, in the mind of those proposing it. Therefore, I put a proposition to you that you are entitled, to this committee, to provide whatever information you think is relevant to the terms of reference and that no action can be taken, under the Crimes Act or any other act, relating to any information that is provided to this committee. So the question of minutes, reports and such matters are questions for you to put to us. Obviously, we have other remedies as well in terms of the pursuit of these documents. But if you think they are relevant to our consideration of the merits of this bill, I draw that to your attention. It is a matter for you as to what we hear from you on these questions.

Mr Mansfield—Thanks, Senator Carr.

Senator JACINTA COLLINS—In terms of the substantive components of these bills—and you have alluded to this in part in relation to the comments in the reverse with respect to Telstra—are you aware of any employer complaints that the current consultative arrangements are burdensome?

Dr Vallance—The AMWU has recently renegotiated occupational health and safety agreements, which is part of the current act, which are proposed to be replaced by what are called safety management arrangements. We have recently negotiated those with the Department of Defence, ARPANSA, and the Sydney Airport Corporation. That has all been done in the last six months or so.

With respect to those negotiations and the arrangements that have come out of those, they have not been difficult negotiations; people have agreed. In fact, the Department of Defence, which is a major employer, is publishing in pamphlet form for all its employees the defence union agreement, because it establishes the arrangements whereby consultation will occur and how that would occur. That has all worked exceptionally well. There are always minor hitches, but overall, we just do not understand, because we have not had any difficulties.

Ms Herrington—Perhaps I could comment in relation to at least two of the larger agencies, Australia Post and Telstra. We have had an agreement now with Australia Post for a fair period of time that has not been renegotiated, basically on the basis that both parties feel that the consultative processes set out therein are working extremely well. At this point in time, there is no requirement to make any drastic changes in relation to that consultative process.

In relation to Telstra, there have been some hiccups, more, I think, because Telstra had the view that the existing health and safety agreement expired a number of years ago. They have not complied with the provisions of the existing legislation, which says that they must consult with unions in relation to developing their policy and that policy must include provisions for a health and safety agreement. That has been brought to their attention by the commission in the two preceding commission meetings. At this stage, I would have to say that has been addressed by the commission in its regulatory function, even though Telstra have admitted that they are probably in breach of the existing act.

I think the comment from the Telstra person concerned in this instance was really directed at the ongoing day-to-day consultative processes which do occur, which do actually have significant impact. In this instance, it was talking about call centre outcomes. It was talking about the health and safety standards that exist in Telstra which are superior in many instances to the health and safety standards existing in the private sector call industry, and that was very much the process. There is extensive consultation that happens at workplace levels within Telstra. There is extensive consultation that happens at a national level. There is probably a senior management view that the agreement does not exist although the actual consultative processes still continue to occur.

Mr Mansfield—In the time I have been a member of the SRCC—and that has been 18 months, two years—I have never seen a report from management of any of the departments or agencies which has drawn to the attention of the SRCC a concern that the existing arrangements are unworkable, onerous or are not achieving positive results. In terms of the reports that come to the meetings of the SRCC, I have not seen that. Neither have I had any contact from any representatives of management from agencies or departments in my capacity as an SRCC member to make the case that these provisions are difficult in terms of their application in practice or that they were not achieving good results. I would endorse the comments made by my colleagues.

I would like to clarify one other matter in relation to the issue of definition of injury and disease. I should make the point that there is a case which was determined not so long ago, the Birch case. In this case, the courts held that the consequences of individuals suffering injuries such as a stroke or a heart attack were such that it fell under the provisions of making the individual entitled to workers compensation under the Commonwealth legislation. That matter certainly has been discussed in the SRCC—I want to make that clear—but not to the point where the SRCC has said that it is unreasonable, unworkable or that they had to seek amendments to the legislation—not to my recollection anyhow.

Dr Vallance—Just to further reinforce the issue about why we are very unclear about why these proposed changes are being put forward, the Australian Defence Industries used to be covered totally by the Commonwealth occupational health and safety act and Comcare. With the privatisation process they are now covered by Comcare for the compo part, but their occupational health and safety arrangements now come under the Victorian legislation. The consultative arrangements at ADI under Comcare or Commonwealth occupational health and safety act have been so successful that management and unions have agreed to continue those same processes despite having a new law that they are under.

So under the Commonwealth occupational health and safety arrangements they worked well and the members and the health and safety representatives enjoyed the processes—we had the rights to deputy health and safety representatives, et cetera. That has been continued through a local arrangement even though the ADI is actually covered by the Victorian

Occupational Health and Safety Act, which does not have exactly the same consultative arrangements.

Senator JACINTA COLLINS—Dr Vallance, let me understand this properly. It leads to a question that I will then ask Mr Mansfield. Was ADI one of the employers involved in the Corrs report?

Dr Vallance—Yes.

Senator JACINTA COLLINS—Even if these measures supposedly arising from the Corrs report were successful, ADI is now covered under the Victorian act and has voluntarily agreed to maintain the provisions that this legislation will remove.

Dr Vallance—Yes.

Senator JACINTA COLLINS—Mr Mansfield, which issues in these bills does the Corrs report actually relate to? I am unclear. I gather it is not all.

Mr Mansfield—It would be most, if not all, Senator Collins. If we could go through the key proposals. I do not think the definition of injury and disease is included—quite frankly, I have not looked at the Corrs report for quite a few months. It is really a document which was more relevant a couple of years ago. In my recollection the issue of reasonable management actions was not included. Consultation processes were covered in the Corrs report and covered in a way which broadly reflects the thrust of the occupational health and safety proposals in terms of consultation.

Senator JACINTA COLLINS—Did it include any discussion of evidence supporting the need for these changes?

Mr Mansfield—In my recollection it did not. I cannot recall that the Corrs report included the proposals for the substitution of civil for criminal proceedings. Our colleagues from Comcare may well have a better recollection of these matters than I do. There is certainly a degree of similarity between a number of the recommendations in the Corrs report and a number of the proposed amendments, but it is not entirely a reflection of that report.

Senator JACINTA COLLINS—Mr Mansfield, later today I will ask Comcare and/or the department for a copy of that report and for a copy of the minutes associated with the SRCC's discussions around those reports. Can I ask you to take on notice—I think you may prefer at least to be able to consider your position here, given that the protection exists under parliamentary privilege in relation to your situation—whether, if we are unsuccessful, you wish to provide those documents separately. I am not asking you to give them to me now. It is easier if I can get them directly from the department or Comcare and that leaves you in a better position too. The committee members are left in the situation where we have assertions that there is a need for these changes recommended by the SRCC, but at this point in time we have no indication of the scope of those considerations or indeed the backing that supported those considerations.

Senator CARR—I indicate to Senator Collins that it would obviously be better if the department were to provide these documents. Clearly, as I have indicated, there are other remedies through the chamber, which we may have to pursue if they are not provided. However, we do indicate to you again that there are options available, in terms of requests from this committee, for you to provide the documents if those measures fail. I put this proposition to you on the basis that these clearly are pivotal documents in consideration of the government's intentions for this quite serious change to the legislative framework. Obviously, if there were substantive reasons why these documents should remain private, clearly we

would want to know what they were, but I do not think it could be said that this committee would seek to publish documents that ought remain private if there are good reasons for that to occur. Are you aware of any good reason as to why these should remain private, in terms of the documents themselves, as distinct from responsibilities you might have to other boards?

Mr Mansfield—In terms of the Corrs report, I personally do not see any good reason why that could not be made available to the committee. In terms of the minutes of the SRCC, obviously in terms of the entitlements of bodies such as a committee of the Senate, to receive minutes of a statutory body, provided that was usual practice, I personally would have no objection to the minutes going to the committee—no objection whatsoever—but I am not aware of the normal practice in these matters. I would hope that, provided there is no legal restraint on either of those documents coming to the committee, Comcare would be quite willing to make them available.

Senator CARR—Thank you, Mr Mansfield. I can see no legal constraint for this parliament receiving documents from statutory authorities. There may be other issues that need to be considered, and that is obviously a question we would examine, but if you cannot see any other explanation of why these documents are being kept private, I guess we will have to ask the department. I understand that your position is that there are no other substantive issues in those documents that you are aware of that would justify those documents being kept from the parliament.

Mr Mansfield—Not to my knowledge. Could I make a point, though, in relation to both the Corrs report and the SRCC activity? Those issues are certainly relevant to what we are talking about here this morning, but in no way do they substitute for or overcome the argument we are making regarding lack of consultation on these matters. Our argument goes to, firstly, the legislation being put into the parliament without a proper process of discussion and consultation between the minister and the minister's department and, certainly, unions representing employees. I am not aware of just how extensive the consultations were with employers. They may well have been much more extensive than the opportunities provided to unions to consult on these matters.

We certainly do not regard the two meetings we had with Comcare whereby we went over a number of issues—not long meetings; I think they would have been about two hours on each occasion—as being a substitute for proper consultation. In a way, they were a lead-up to the issues that may well have been included in legislation. To me, the normal practice after those meetings would have been for a proposal to come back to unions and employers and for there to have been another opportunity for people to express their views on how adequate those proposals were in achieving fairness and good process in the area of workers compensation and occupational health and safety. That was not the way it was handled.

Senator JACINTA COLLINS—The process that you have just gone through is the normal process, is it not? That is the normal process for a piece of legislation if consultation is not occurring in the appropriate way.

Mr Mansfield—One would think so in these important matters, yes. You would actually have the draft legislation put forward and you would have an opportunity to comment on the drafts in a way which allowed amendments to be made to take account of the substance of those consultations. That was not the way it was handled.

Senator JACINTA COLLINS—In part, the rationale for our questions about the SRCC is that an interpretation of how the situation has been described is that adequate consultation occurred because of the tripartism of the SRCC. This is why we want to get to the bottom of

what exactly occurred at that level. I am sorry if we are focusing on it to that extent but I think it is important that that comes out.

Mr Mansfield—The make-up of the SRCC is such that there are two representatives that come from broadly employee backgrounds. They are Ms Herrington and I. The SRCC is a body of some eight or nine in total. I certainly do not consider the SRCC to be in any real sense tripartite. I do not consider it to be a balanced forum for considering the interests of employees and employers. It is no substitute for proper consultation which should occur in matters such as this. When you are in a forum such as that, the opportunities for making changes to proposals that are put forward are quite limited.

Dr Vallance—I think it is important, in the context of occupational health and safety and workers compensation, to note that consultation is not just a democratic right; it is also essential to good outcomes. Many pieces of research and publications from government bureaucracies and occupational health and safety authorities, overseas and in Australia, note that for good health and safety outcomes at the workplace level consultation, direct involvement and representative structures are essential. This goes back to the Robens committee report in 1972 in the UK on which all our legislation in this area is based. We are not just talking about the right to be consulted for democracy; we are also talking about the right to be consulted for good occupational health and safety outcomes.

The Australian Workplace Industrial Relations Survey of 1995 quite clearly showed this. Research conducted by Worksafe Australia clearly shows this. Publications produced by relevant authorities clearly show this. I refer also to the consultative work that Comcare did, in a very important area in the Commonwealth in terms of stress, at the departments of tax and social security levels. All of those issues involved consultative forums and input from people. It is essential that that occurs. Research shows that good consultation is improved when you have the employees' representative organisations involved—that is, unions. In fact, the Worksafe research clearly shows that, if you have got unions backing members of health and safety committees, you will have lower workers compensation claims than if you do not.

Mr Mansfield—With respect to what appears to be a key issue, as to whether or not this is a recommendation of the SRCC, I will give you my recollection of the discussion that took place at the SRCC in relation to representation of unions in occupational health and safety matters. We had the Corrs report, which in part says that unions have a privileged position in occupational health and safety representation. They are broadly the words in the Corrs report. The observation was made in relation to the current legislation. We mentioned before that the legislation was being described in the context in part of the way in which the Workplace Relations Act is currently framed. When we had the discussion in the SRCC, it appeared quite clear that a majority of SRCC members were going to be in favour of a position which removed unions from the consultative process in relation to occupational health and safety. This was my assessment.

What we succeeded in the SRCC achieving was, as I recollect it, an outcome whereby if one union member in an agency or department stated, 'I want the union to be represented in occupational health and safety consultation,' then the union would be represented. I took that outcome to be that, whatever legislation eventuated, that would make a provision for an agency like, say, Telstra, in terms of its occupational health and safety arrangements and consultation arrangements. So that if one union member indicated to Telstra that he or she wanted the union to be directly involved in consultation and occupational health and safety, that would be the outcome.

As far as I was concerned, following that discussion in the SRCC, I was comfortable—despite the underlying approach that was being taken to recast the legislation to talk about employees rather than unions—that because you could have a situation where one employee of Telstra could put up their hand and say, ‘I want the union to be involved in this consultation,’ whether it be at national level or at state level or at workplace level, and that would be the way it would be put into practice. That is the outcome that I understood SRCC to adopt in its discussions. Maybe that is of some help in terms of understanding where the SRCC was coming from. I would certainly make it clear that the legislation, as it is written, does not reflect the way in which the SRCC finally settled on this issue of representation in occupational health and safety matters.

Senator JACINTA COLLINS—Mr Mansfield, I want to highlight exactly that point. My understanding is that, whilst removing the current role of unions, amendments will permit employees the right to be represented in consultations with their employer by an employee association that has the principal purpose of protecting and promoting the industrial interests of members in the workplace. However, that representation cannot be by a union official unless there is no workplace representative in the workplace. Is that the case?

Mr Mansfield—Yes, right.

Senator JACINTA COLLINS—So in a sense an employer can act to exclude the union by establishing some other workplace representative through a process they, under these arrangements, would control.

Mr Mansfield—That is how I read the legislation, yes.

Ms Herrington—Senator, I would like to make a couple of comments to assist in clarification of the role of the SRCC. The discussions that Bill was referring to actually were around what the SRCC called their principles of regulation. They were principles that were put in a document that referred to the licence conditions for the licensed authorities. They were never seen and never discussed as the outcome that was to be taken and used in legislation in terms of the overall impact on the complete sector that is the Australian government sector—agencies included. It was really at that point limited to discussions with the agencies that were licensed. It was those licensed authorities that actually basically funded the Corrs report. That was where that came from. That was a particular instance put in place to deal with issues that the employers felt they had in relation to consultation. It was not seen as a panacea or any other mechanism that was to be instituted in the act or the legislation overall.

In terms of discussions at the SRCC, there were some general discussions about issues that needed to be addressed in legislation. The SRCC never saw a copy of any draft legislation, whether it dealt with the health and safety perspective or the compensation perspective. We were not privy to those discussions from the department at all. There were some very general discussions—yes, we had to address the age 65 issue in relation to compensation and yes, we should address the hearing loss issue in relation to compensation. Those types of discussions were certainly had. Yes, there were some general understandings put forward that went to the department, but that was the extent of any consultation if you could call it that.

Senator JACINTA COLLINS—Aside from all of that process, would you agree with the proposition that the definition as it is currently posed would be the toughest test in Australia?

Ms Herrington—We did look at this question and it is very clearly the toughest that is proposed of all the jurisdictions in existence. Victoria is the only jurisdiction that actually goes to the extent of listing factors in terms of a significant contributing factor. None of the

other jurisdictions go to that extent. South Australia talks about a substantial cause, which relates to stress. Western Australia requires employment to be a contributing factor and to have contributed to a significant degree—that is for disease only. Queensland requires a significant contributing factor. Tasmania requires it to be to a substantial degree. The Northern Territory requires that it materially contributed to. Those are the phrases used, but it is really left for the courts to determine precisely in the circumstances of each individual case what that means. Only Victoria goes to the extent of limiting any factors. None of the jurisdictions go to the extent of adding an additional exclusion in relation to natural progression of a disease, and that is of substantial concern to the unions.

We see that as a mechanism really to only increase the costs of the scheme and to cause real problems for any individual to establish an entitlement for compensation. It will be a wonderful area for the medico/legal consultants to become involved in. I suggest that the scheme costs will go up substantially in relation to medical and legal costs if that amendment goes through. The only people who will suffer from that amendment will be the individuals who will find it much too complex an issue and much too costly to ever go to the trouble of trying to establish that there is no natural progression in the disease which has been contributed to by their work.

Dr Vallance—I want to draw people back to what workers compensation legislation is about. It is no fault legislation. It is legislation that balances, as you said in the opening remarks, the costs versus fair compensation. The changes that have occurred in most other jurisdictions have occurred at times when costs are blowing out, when there are significant unfunded liabilities and claims rates are going up. We have none of those preconditions in the Commonwealth at the moment. I thought it was important to make that point.

Senator JACINTA COLLINS—It is a very important point.

Mr Mansfield—It would be worthwhile to make some inquiries about the issue of exclusion of entitlement to compensation because of reasonable management actions. I am not aware of any other jurisdiction which has the range of exclusions that are proposed in the current bills.

Senator JACINTA COLLINS—Going back to two other issues. How on earth will the courts interpret this notion of close connection?

Mr Mansfield—There is some provision in the bill which supposedly sets out some of the issues that determine close connection, but I agree that it is going to be a difficult task for the courts. We suggest that the way in which the bill is providing for determining whether an individual's injury brought about in part through a disease is compensable will make it a feast for the lawyers and famine for the individuals who have been injured. You can look at issues like duration of employment, particular tasks involved in the employment and any medical predisposition of the employee to the ailment or the aggravation of the ailment. This is no fault legislation which in broad terms should take employees as they are found and not ask the question whether an employee was medically predisposed to a particular injury or disease.

Senator JACINTA COLLINS—This predisposition component, this is brave new world stuff: are we going to start DNA testing workers?

Dr Vallance—Even if one did, as the people who have discovered and looked at the human genome would know, in fact, it is not a predictor of disease. It is such a huge area: what does it mean? The interpretation of that is—

Senator JACINTA COLLINS—Dr Vallance, the veracity of these things, yes, is open to question. But we all know employers do use psych testing and they will use DNA testing if that can be relevant to bolstering a legal argument about a workers access to compensation.

Dr Vallance—Of course they will use it; I am just pointing out that it is an absurd thing because even though those people who are the most knowledgeable on this would say, ‘We’ve discovered a gene for this, but heaven’s knows! What does that mean for the individual? Sorry, we don’t know.’

Senator JACINTA COLLINS—But these arguments under these sorts of scenarios will occur in the courts, one medical witness versus another medical witness; it is a minefield. The reason I wanted to highlight those two points was that it had been suggested to me that, in one sense, we had had a win over the last occasion these matters were before the Senate when the government was now no longer pursuing the significant connection test. I think it is pretty clear, from the evidence that has been put to us, that the new definition is essentially a wolf in sheep’s clothing. Would you argue against that suggestion?

Mr Mansfield—I personally would not; others behind me might. In relation to two of the other tests about close connection, one test is the activities of the employee not related to employment. The other issue is other matters affecting the employee’s health. This is a hydra in terms of the issues that might be used to deny an individual entitlement to workers compensation.

Senator JACINTA COLLINS—How many workers covered under these acts would be working part time?

Mr Mansfield—My understanding is that there are about 210,000 workers in total covered by the legislation. Of those, I would estimate approximately 20 per cent would be part-time workers which would make it about 40,000.

Senator JACINTA COLLINS—I have sought this myself from the department and will hear further later, but are you aware of any assurance that the proposals about income, other than income related to the Commonwealth employment, not be taken into account? I have a quite serious concern about part-time workers within the Commonwealth becoming injured and their payments from other employment affecting their entitlement in the future in compensation. Have you had any assurance that the measures in these bills that touch that area will not affect employees who had two jobs prior to their injury?

Ms Herrington—No, there have been no assurances given in relation to that at all.

Senator JACINTA COLLINS—I have a couple of other technical issues that I want your clarification on. Can you explain your concern with the provisions relating to Crown immunity?

Ms Herrington—Perhaps I could endeavour to address that. The issue with Crown immunity is basically that the shield of the Crown is being partially lifted in this instance in relation to Commonwealth government departments. It has already been lifted in relation to the government business enterprise type of groups—Telstra and Australia Post, NDC, Vision Stream, that grouping. The partial lifting of the shield in effect means that an individual can be sued or prosecuted for breach of the legislation but the organisation or the people responsible in the organisation, the officers of the department, retain immunity.

Our concern is fundamentally that you are setting up a process where the people who have control of the resources, the people and the processes in that department are not the ones who

are subject to any sort of penalty. In essence they are very similar to a corporate situation, to the directors of the company, the ones who have the fundamental responsibility.

The closest you will get to a penalty in these instances is for them to be named in parliament, which perhaps career-wise is not a particularly good move. But that is not very helpful in any other way in terms of actually influencing the actions of the department, particularly in terms of health and safety. It is a question of the use of the penalty provisions to influence action rather than simply to penalise someone because someone has been injured. It is the fundamental issue that you are actually trying to address the risk that is out there, and for that to happen effectively, you have to be able to influence the actions of the management of the organisation. And the way this is structured by only partially lifting the shield of the Crown, we see that as not addressing the fundamental issue.

Senator JACINTA COLLINS—What alternative would you propose?

Dr Vallance—You would have things similar to those in other jurisdictions where you actually have it as the officers of the organisation, so it is able to actually prosecute those because of their role as the CEO or whatever. In the current situation, the CEO could get away with it, but the middle manager or the direct-line supervisor could actually incur a fine or a penalty, and that person will have less control than the CEO. So you use wording similar to that in, for instance, section 52 of the Victorian Occupational Health and Safety Act. There are other examples as well. In that way, you are actually targeting those people who control the organisation as well as those who do the wrong thing. It is also in the Queensland act as well. There are many other ways of doing it.

Senator JACINTA COLLINS—Dr Vallance, on page 10 of your submission there is a suggestion that the federal court have a jurisdiction under sections 77A and 77B. Can you explain why you are proposing that?

Dr Vallance—We have put that in because legal advice suggests that that is how it should be. I am sorry, but I am not qualified to go into the detail about that. I can get you a copy of the advice. I am happy to do that, but I am sorry, I am not a lawyer.

Ms Herrington—In essence, fundamental to that is to say if that is where the civil penalty sits, then that is where the criminal penalty should also sit, in terms of having a jurisdiction that understands the totality of the legislation and the practices that go on within the various organisations. It is simply saying that, rather than splitting the jurisdictions, have one jurisdiction which is totally responsible for all of the penalties, so that you get consistency, if you like, in terms of the judicial interpretation, but also in terms of the actual penalties that they will give.

Senator JACINTA COLLINS—I actually think that this is another area relevant to the test. According to your submission, the ACTU does not support the amendment altering the making of ‘a wilful and false representation that he or she did not suffer ... from that disease,’ saying that it provides a much tougher test than ‘the employee knowingly and falsely represented.’ Are you saying that somebody who has knowingly and falsely represented a fact should be entitled to compensation?

Ms Herrington—I think what we are saying is that there is actually a difference between the two tests. I think the assumption is that the tests are the same, but in fact they are not. The ‘knowingly’ covers the situation where an individual negligently fails to advise, or mistakenly advises. It is not the issue of actual fraud. Nobody is saying if someone intends to defraud that that should entitle them to compensation—clearly not. But there is a distinction between the

two tests and at the moment the ‘wilful’ one really looks at the intent issue which is, ‘Do you intend to fraud?’

Senator JACINTA COLLINS—What are the provisions in other states?

Ms Herrington—I think, from memory, the majority are around the wilful rather than the knowingly, but I would have to provide information on that.

Senator JACINTA COLLINS—Do you believe that the indexation of payments will be fair—the proposals in here?

Ms Herrington—We are a little unclear because we are not sure from the legislation what they are intending to index it to.

Senator JACINTA COLLINS—There has been a suggestion of the ABS wage-cost index.

Ms Herrington—I would have to verify what that was, to be quite honest. It says simply at the moment ‘the prescribed index’.

Mr Mansfield—We would like better assurances on what the index will be before we could give you a response as to whether it would be fair.

Senator JACINTA COLLINS—Are there any implications in relation to this legislation regarding Australia’s international commitments?

Dr Vallance—Unfortunately, we have not signed the ILO conventions, but there are ILO conventions. The Occupational Health and Safety Convention No. 155 talks about representation, workers’ rights, et cetera. This would potentially put us in breach.

Senator JACINTA COLLINS—This would make it more difficult for us to address the issues that Australia has in relation to signing that convention?

Mr Mansfield—Yes. In terms of not including representative organisations as part of the process, it goes against the spirit of that convention at the very least.

Senator JACINTA COLLINS—It reinforces the problems that already exist with respect to the Workplace Relations Act?

Mr Mansfield—Yes.

CHAIR—Mr Mansfield, you mentioned, when you were referring to levels of membership in the Commonwealth Public Service unions, that they were substantial. Could you be a little more specific?

Mr Mansfield—Our estimation is that the membership levels of unions in the Australian government employment area, and that includes the Commonwealth Public Service—

CHAIR—No, I am talking about the Commonwealth. This bill relates to the Commonwealth.

Mr Mansfield—It does, yes, but when you say it relates to the Commonwealth, it also relates to agencies such as Telstra and Australia Post.

CHAIR—That is fine.

Mr Mansfield—That is the point I was making. If I take the total employment area and then give you an estimate of what the level of union membership in that area is, our view is that it would be in the region of 60 per cent plus of all employees in the Commonwealth employment area. That is taking into account Australia Post, which has a relatively high level of union membership, Australian Defence Industries, which has a relatively high level of

union membership, Telstra, which has a relatively high level of union membership, and the Australian government departments.

The level of union membership in some of those areas is not as high today as it was perhaps 10 years ago. In part, that is because of the changes in the workplace relations legislation, which have done certain things to the entitlement of unions to enter workplaces. In part, it is because of the withdrawal of payroll deductions which has been undertaken in the Australian Public Service area. Departments no longer agree to automatically withdraw union membership fees from employees' wages and pay them to unions. All of these actions have reduced union membership. We would still be of the view that, if you took the 200,000-odd people who are covered by this legislation, in the order of 60 per cent, or 120,000, are union members.

CHAIR—I have some figures from the parliament. I suppose it is a matter of definition as to what we are including and what we are not including.

Mr Mansfield—It may be, Chair, yes.

CHAIR—It is headed 'Government administration and defence', which is a total employment group of 340,700 people as at—

Mr Mansfield—Not too many service people are members of unions, Chair.

CHAIR—I am talking about people who are on the public payroll.

Senator CARR—You are talking about the Army. What about the soldiers?

CHAIR—Mr Mansfield did refer to those as well. We are talking about August 1999 figures.

Mr Mansfield—On the administration side, I would be happy for them to be included, but I would not be happy to include service personnel, members of the Army, the defence forces as such.

Senator JACINTA COLLINS—Are they under these acts?

Dr Vallance—Yes.

Mr Mansfield—Yes, they are.

CHAIR—Well, they should be included.

Mr Mansfield—There is no entitlement as I understand it for serving personnel—Army, Navy, Air Force—to go on strike or be members of registered trade unions.

CHAIR—Actually, there is no requirement for anyone to be a member of a trade union.

Mr Mansfield—It is entitlement, not requirement.

Dr Vallance—We work in the Department of Defence where we cover the employees in that department. We sit on committees effectively consulting and participating in consultation processes with 'Lieutenant Wing Commander So and So', for example, last week. We consult with the ADF and the Department of Defence and they are part of our consultative processes. That process is very good.

CHAIR—We are getting a little bit off on a tangent here. We are talking about the actual union level of membership; what you have been referring to is the unions' rights to be consulted. Would it be correct to say that in the Commonwealth Public Service the union level of membership has been dropping at about a rate of two percentage points a year over the last 10 years?

Mr Mansfield—I would not think it was correct to say over the last 10 years. Certainly, I would not deny the reduction in union membership in the Commonwealth Public Service. I would very much relate that to the actions of your government in terms of the Workplace Relations Act, in terms of the withdrawal of payroll deductions, in terms of issues such as the inability of union officers to enter workplaces—

CHAIR—Or people not wanting to be members of unions any more; that could be another interpretation. If we could stay on the point—

Senator CARR—Let him answer the question.

CHAIR—I want him to stay on the point that I am asking, not wander off on to other things.

Mr Mansfield—I am staying on the point.

CHAIR—In relation to these figures of 340,000 people that we have in this pool—which is very substantial, even if it does not include absolutely everyone in your definition—over the last eight years, that union membership level has fallen. In 1993 it was 56.4 per cent; by 1995, around the time of the change of government, it was 50 per cent; and it has now dropped to 41.2 per cent. We have a declining trend, according to this, where now a minority of public servants are members of unions. Do you agree with that proposition, or do you have any alternative figures or evidence that you could provide the committee?

Mr Mansfield—I am happy to provide figures to you of what we consider membership to be in Telstra—

CHAIR—Take the Commonwealth public servants and all its agencies, what do you believe is the level of union membership as a percentage of the workforce?

Mr Mansfield—I would remain with my figure: 60 per cent plus. That is the figure if you take the Commonwealth Public Service and all of its agencies. That is the figure that we have put on the record here this morning. I do not step back from that. I make another point: I would challenge anybody to do a survey of the whole of the Commonwealth Public Service, including people who are not members of unions, and ask the question: are you comfortable with unions and their representatives being actively involved in occupational health and safety matters on behalf of employees in the Australian government employment area? I would challenge anyone to do that survey. If we got an outcome from that survey which was less than 60 per cent of those who were surveyed saying, 'Yes, I am comfortable,' I would donate \$1,000 to the parliamentary retirement fund for former parliamentarians. That is how comfortable I would be.

CHAIR—Can we move from hypotheticals to real figures?

Dr Vallance—Could I just clarify—

CHAIR—Sorry, I am asking a question.

Dr Vallance—I was going to answer the question.

CHAIR—With the 60 per cent figure, if we take your figure and go back parallel to my figures for 1993, what would the figure have been then?

Mr Mansfield—The figure would probably have been 70 per cent plus at that time, because there has been a loss of union membership. I would attribute that loss to a whole range of factors not entirely related to the actions of your government but—

CHAIR—Including the growing irrelevance of unions in this country. That is what is happening right across the whole spectrum. On your figures, you are still dropping at a rate of somewhere around two per cent.

Mr Mansfield—We can have a constructive exchange of views here or we can shout at each other. If you use phrases such as ‘the growing irrelevance of unions’, there is going to be some shouting from this side.

CHAIR—If the officers at the table stop interrupting me while I am asking questions, it would be useful.

Dr Vallance—Senator, I think it is also important to note that when you are talking about health and safety—this is a point I made earlier but I will reiterate it—despite any government or anybody’s ideological position or thinking whether unions are irrelevant or not, the academic research shows that even in countries like the United States, where the level of unionisation was 15 per cent, actively involving unions in occupational health and safety processes in workplaces and consultation improves the occupational health and safety outcomes. I think it would be really important that this government notes that, in fact, that is the role that workplace representatives have and that we are about getting occupational health and safety outcomes. It is not an adversary situation; it is about working together to get good occupational health and safety outcomes and decrease our toll. That is what we are on about.

CHAIR—In terms of the Commonwealth Public Service, do you think it is particularly difficult to get the Commonwealth Public Service and its agencies to keep up the standard of occupational health and safety?

Mr Mansfield—It is something that you have to work at all the time. There is no question that if there is not a constant attention to proper standards, we will find that occupational health and safety outcomes are deteriorating rather than improving. It is like anything that is done by people who are responsible in this area. We know what happens if we take our eye of the ball and we do not constantly address the issues that affect poor standards. We have had situations in the Australian government employment area of occupational overuse syndrome, or RSI as it used to be called, which was a very expensive deterioration in standards in times gone by. We have had difficulties with stress claims. Do not let us give the impression by the way that stress is simply an Australian Public Service phenomena; it is an international trend of a growing problem. I suggest you read the attachment to our submission in that regard. It is not really just an Australian issue; it is an issue in the United States, Europe, and the UK and in this country. We are stressed because of a whole range of factors. Workload, organisational change and job insecurity are becoming major issues affecting the health of employees. Unless we address these issues—

CHAIR—We are getting a little off the point, Mr Mansfield. We are talking about the way in which the Commonwealth government authorities meet their responsibilities in this area. How would you characterise what has happened over the last 50 years with occupational health and safety issues in the Commonwealth government?

Mr Mansfield—In the Commonwealth government area I think there has been a constant effort to improve our standards of performance, and they have borne fruit. I think the activities of the SRCC and Comcare over the last 10 years or so—that is broadly our area of experience in the Commonwealth Public Service area particularly, although I can go back a bit further—there has been an improvement in our performance. I have been a union official for a number of years. I can remember back to the Commonwealth Public Service area and

Telstra, where we used to claim danger money for certain situations. That would be absolutely unacceptable today because our emphasis is on prevention, not paying people—

CHAIR—There is a change in the whole culture.

Mr Mansfield—There is a change in the culture, and that has been done in a cooperative way between unions and management.

CHAIR—Why we are having this difficulty is that I ask a specific question and you keep going on about a whole range of other things. I would just like you to focus on the questions I am asking. Why is there a need for unions to initiate occupational health and safety committees when it is set down in the legislation that it is an employer responsibility?

Mr Mansfield—In part because unions represent employees in the agencies and departments.

CHAIR—About half of them. I know we are differing on different issues.

Mr Mansfield—Whether it is half or not, it is a bit like asking: how many people are members of automobile associations in, say, the state of Victoria? Do governments ignore the automobile association because they only represent, say, half of all drivers and car owners in the state of Victoria? No, they do not because they recognise that they represent a very substantial proportion of people who are interested in that area in the state of Victoria or elsewhere. I would say that unions represent certainly 60 per cent plus of employees in the Australian government employment area. That is a very substantial proportion—

CHAIR—My figure is 40 per cent, but let us split the difference and say it is half. It is not really an issue of the representative percentage in terms of this question; it is a question of why it should be initiated by the union and not by the employer, given that the employer is the Commonwealth government or its various authorities.

Mr Mansfield—Regrettably, in a number of cases employers have their eye on other outcomes. I could refer to employers who are more concerned with what the bottom-line profit is going to be at the end of the year, how they organise their staff to achieve that outcome, what their service standards in their area of operation might be and how they achieve those service standards than with what the occupational health and safety outcomes are for particular groups of employees at a particular time.

It requires people outside the employer to highlight the fact that occupational health and safety standards are not up to the level that is required. Part of the answer, therefore, is to establish a committee to look at problems and solutions in a particular area. The employer, for good reasons or bad—in many cases bad reasons—has not got a focus on that particular matter. That is why you need an outside body to be entitled to say to the employer, ‘We want a committee established in a particular area to deal with problems that we can see occurring.’

CHAIR—That brings me to the final question, because I do not think you have explained why the removal of specific references to unions in the new legislation will reduce your opportunity to influence employer decisions. For example, Telstra, one of the statutory authorities, does value union input into occupational health and safety policy. That will continue whatever the new legislation says.

Mr Mansfield—Not necessarily, Chair.

CHAIR—They are doing it, anyway.

Mr Mansfield—The way in which the legislation is framed requires individuals, in a number of areas, to seek the involvement of unions. As Senator Collins pointed out earlier,

where there is an existing workplace representative, as per the legislation, the unions do not have an entitlement to be there at all. Union officers do not have an entitlement to be involved in the consultations that are set out in the legislation. We would make a very strong point to you that the provisions of this legislation exclude unions where we do not believe they should be excluded. They should be incorporated in the consultation process, not excluded as is proposed in this legislation. We do not accept that the provisions made in this bill give adequate or fair voice to unions on behalf of their members to speak in the area of occupational health and safety. So we would make the argument to you that the existing legislation is the appropriate way to deal with these matters, not the proposals in the bill.

CHAIR—Thank you very much for appearing this morning.

Proceedings suspended from 10.38 a.m. to 10.56 a.m.

ANDERSON, Mr Alexander John Cairns, Assistant Secretary, Legal Policy Branch, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

ROWLING, Mr John, Assistant Secretary, Safety and Compensation Policy Branch, Department of Employment, Workplace Relations and Small Business

SWAILS, Mr Noel Arthur, Acting Chief Executive Officer, Comcare

CHAIR—I welcome officers of the Department of Employment, Workplace Relations and Small Business. The committee has before it submission No. 6, are there any changes you wish to make to it?

Mr Rowling—No, Senator.

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

Mr Rowling—We do not intend to make a particularly long statement. I just want to indicate that originally Mr Barry Leahy had been listed to appear today as well. Unfortunately, he has the flu and has been unable to come.

Senator JACINTA COLLINS—We will start with the previous discussion before the committee today. Can the committee have a copy of the Corrs report?

Mr Swails—The Corrs report was a report which was made available to the Safety, Rehabilitation and Compensation Commission. I would wish to consult the chairman of the commission on the question of release of the report.

Senator CARR—Does that mean yes?

CHAIR—No, it means he is going to consult with the chairman?

Senator CARR—Sorry, Mr Swails, you were going to consult, but that does not necessarily give me much satisfaction as to what the intention of the department is. Is there any reason why the department would not wish to release the report?

Mr Swails—I am not speaking on behalf of the department.

Senator CARR—Sorry, Comcare. Is there any reason why it should not be released?

Mr Swails—In the sense that it was a report which was presented essentially to the SRCC, I think it appropriate that I consult with the Chairman of the SRCC as to whether there is any consideration that he would wish to bring to bear in relation to the release of the report.

Senator CARR—But you do not see any particular reason why it should not be released, do you?

Mr Swails—Like Mr Mansfield, it is some time since I have looked at the report because it dates back to 1998. But I will undertake to take up with the chairman the question of providing the committee with a copy of the report.

Senator CARR—How long do you think that consultation would take?

Mr Swails—As the chairman is overseas at the moment, it will not be just a simple matter of my ringing him up today. But I will undertake to do that as soon as possible.

Senator JACINTA COLLINS—We do not report until 24 May. Do you know how long he is overseas for?

Mr Swails—I believe that he is back at the end of next week.

Senator JACINTA COLLINS—Does the department have a copy of the Corrs report?

Mr Rowling—I have certainly never seen the Corrs report.

Senator JACINTA COLLINS—That was not my question.

Mr Rowling—I am not aware that the department has a copy of the Corrs report.

Senator JACINTA COLLINS—Would you take it on notice?

Mr Rowling—Yes.

Senator JACINTA COLLINS—Chair, we are in a reasonably awkward situation at the moment without Mr Leahy here or perhaps somebody who might have full knowledge of all of the circumstances in relation to these two pieces of legislation. But I will persevere to the best we are able.

CHAIR—You are always welcome to put questions on notice, Senator.

Senator JACINTA COLLINS—That is what I was about to say. I am at least pleased that we have a report back date of later in May, because a number of issues may well need to be dealt with on notice. Could officers of the department appraise the committee of the consultation process that has occurred in the lead-up to these bills and in response to the Senate's consideration of the earlier piece of legislation dealing with the definition of injury and disease?

Mr Rowling—The consultation process has broadly been built through the SRCC, which is a tripartite body. To a large extent the advice—

CHAIR—Sorry, Mr Rowling, if I could ask you not to speak in acronyms and give the full title for *Hansard* record as a general principle.

Mr Rowling—Sorry.

Senator JACINTA COLLINS—Health and safety without acronyms, that will be fun. It will not be easy, Chair.

Mr Rowling—The Safety, Rehabilitation and Compensation Commission, which is the overarching body in relation to this area, is a tripartite body. We in the government have relied on the advice of the commission. The views of the various representatives of the commission have been known in forming both the policy and legislative responses in this regard. On top of that, there were a number of short meetings, as Mr Mansfield referred to, with the unions back in August-September 1999 on the workplace arrangements currently reflected in the Occupational Health and Safety (Commonwealth Employment) Amendment Bill.

Senator JACINTA COLLINS—In those discussions did the unions have access to a legislative draft?

Mr Rowling—Basically it was dealt with in a set of policy discussions, as I understand it, within the commission and that advice provided to the minister. It was then developed into legislation. It has not been a normal practice to refer that legislation back to the commission for their personal reading.

Senator JACINTA COLLINS—It has not been the normal practice?

Mr Rowling—No.

Senator JACINTA COLLINS—What do you believe is the normal practice?

Mr Rowling—Normal practice is that the commission provides the policy advice and the government develops its position in relation to that. It develops the legislation and brings it forward to parliament.

Senator JACINTA COLLINS—I can think of a few pieces of legislation that, as I understand it, are with unions at the moment through the normal process. Why would this not be in a similar situation?

Mr Rowling—Basically the minister has decided that he wanted to bring forward the legislation to parliament.

Senator JACINTA COLLINS—So the minister decided not to consult?

Mr Rowling—I think the general position was that the views of all the parties were well known through the advice from the commission. The relative views of both the ACTU and employers were known on the legislation and that largely no additional knowledge would be gained from further consultation.

Senator CARR—So who actually has seen the legislation prior to its introduction?

Mr Rowling—The department, the minister and staff of Comcare who have assisted and facilitated the development of the legislation.

Senator CARR—Did any employer association or organisation see it?

Mr Rowling—No.

Senator CARR—There has been no consultation outside of the Public Service?

Mr Rowling—In the context of the legislation?

Senator CARR—In terms of the legislation itself.

Mr Rowling—In the context of the legislation, no.

Senator JACINTA COLLINS—Going back to how the SRCC informed the minister and the department on these issues, can you provide the committee with a copy of all relevant SRCC recommendations relating to the amendments proposed in these bills?

Mr Rowling—I would have to take advice from the minister because the advice of the commission was to the minister.

Senator JACINTA COLLINS—Why would you need to do that?

Mr Rowling—It was advice to the minister.

Senator JACINTA COLLINS—Sorry, SRCC recommendations are advice to the minister?

Mr Rowling—The commission's recommendations were to the minister in relation to these matters, so I would want to seek the minister's advice on that.

Senator JACINTA COLLINS—Why is the commission making recommendations that way? Why can they not make public recommendations? What is the structure of the commission such that it has the role of privately advising the minister?

Mr Rowling—As I understand it, the commission is a body that is responsible to the minister. The minister sought advice from the commission in relation to these matters, and the commission provided that advice to the minister.

Senator JACINTA COLLINS—Does the SRCC report to the parliament?

Mr Swails—It does prepare an annual report to the parliament.

Senator CARR—Is there any reason why the parliament would not be entitled to see what its recommendations were on a piece of quite significant legislation? Mr Swails, are you thinking about the answer or are you not wishing to answer?

Mr Rowling—I would go back to my earlier comment that I would like to seek the advice of the minister. Part of that advice I would be seeking is whether he would be prepared to allow the provision of a summary table which would show the SRCC's consideration of these issues at the time, what it decided and what advice it gave, and including whether there was any views expressed by various parties in the SRCC in support or against the advice being provided.

Senator CARR—What we would be interested in is the decisions of the SRCC as distinct from what you think are the opinions of individuals within the organisation. We have already heard from people that have participated in some of those board meetings about the nature of the discussions but we are interested to know what formal recommendations have been made on this legislation. Mr Swails, as an officer of Comcare, can you tell me why it is that these opinions could not be made known to the parliament or do we have to wait until the annual report's hearings and ask the officers from the organisation to appear and ask them directly?

Mr Swails—There are, of course, decisions arising from meetings of the Safety, Rehabilitation and Compensation Commission and there would be documentation of those decisions. As I am to approach the chairman in relation to the issue of the Corrs report, it may well be appropriate that I also raise with him the question of disclosure of the commission's decisions on these matters.

Senator CARR—Mr Swails, perhaps you could draw to the attention of the SRCC chairman the powers of this committee in regard to Senate estimates and the opportunities that present to us in terms of the examination of annual reports at any time. It may well be necessary for the chairman to come and talk to us through that process. It might be helpful for him in making the decisions about these matters.

Mr Swails—I am not foreclosing the question—

Senator CARR—I understand precisely what you are saying to me but I am also very concerned at this approach that has been taken by the officers about consulting with a minister who is not known to be too keen on consulting with the parliament.

Senator JACINTA COLLINS—I think it goes beyond that, Senator Carr. I would like to hear a good reason why the minister has any role in determining whether formal decisions of the SRCC can be made available to this committee.

Senator CARR—I am sorry that I am so soft on these matters, Senator Collins.

Mr Swails—If I may say so, I think we are talking about two separate documents.

Senator JACINTA COLLINS—I am not talking about a document. I want to see what formal decisions the SRCC has made in relation to all matters associated with amendments in these bills. I am not after a document. You can remove them from a document, if that is necessary.

Mr Swails—I am prepared to consult with the chairman of the commission as to whether the terms of those decisions can be made available.

Senator JACINTA COLLINS—Mr Swails, I appreciate your position. What I am asking the department is: why cannot it make available to this committee the formal

recommendations that the SRCC has made in these matters which the department claims are the basis for these bills?

Senator CARR—And the only consultative mechanism that appears to have been instituted.

Mr Anderson—If I could comment that one of the primary statutory functions of the Safety, Rehabilitation and Compensation Commission is to advise the minister about anything relating to the operation of the Safety, Rehabilitation and Compensation Act 1988 or the commission's functions and powers—

Senator JACINTA COLLINS—Mr Anderson, I am not after the minister's advice.

CHAIR—Order! Senator Collins, let the officer finish.

Mr Anderson—That advice is to be provided by the commission to the minister. As I understand it, that advice can be provided in a number of ways. It may take the form of a decision of the commission, which is communicated to the minister, or it may be comments on issues that the commission has discussed which might reflect, for the minister's information, the views of members of the commission. I understand Mr Rowling to have foreshadowed that the department will propose to the minister that we provide what would be most useful to the committee in terms of information about decisions and other advice taken into consideration by ministers in formulating this legislation. But, because it is policy advice to the minister, we would need to consult the minister about that in the same way that we would talk to the minister about any questions going to policy advice.

CHAIR—And the senators understand that.

Mr Anderson—Mr Swails will similarly consult the chair of the commission about the advice given by the commission, if there are any factors the chair might wish the committee to take into consideration in relation to its request.

Senator JACINTA COLLINS—Mr Anderson, you have not answered my question.

CHAIR—Order, Senator! I know you do appreciate the way the processes within government work and the way advice to a minister works, and you know what the officers can and cannot provide. You have already been told that they will consult with the chair of the commission. Perhaps it would be useful if we do not keep going around in circles, and you cut to the chase on the questions you want to ask.

Senator JACINTA COLLINS—Chair, if you would actually wait for the question, you might see that that has occurred.

CHAIR—I am talking about the questions we have had to this point in time.

Senator CARR—There might be a few more as a result of that intervention, I would have thought. That is most unhelpful.

Senator JACINTA COLLINS—Mr Anderson, I have not asked for what advice the SRCC may have provided to the minister under their statutory role. What I have asked for is all formal recommendations or decisions of the SRCC that pertain to matters associated with the amendments in these two bills. Is there any reason why formal recommendations of the SRCC cannot now be made available to this committee?

Mr Anderson—I am not aware of any reason at this point in time, but prudence dictates that the views of those to whom the advice has been provided and by whom it has been given should be sought.

Senator JACINTA COLLINS—Why prudence?

Mr Anderson—Because I did not give the advice or receive the advice, I do not know that there might not be considerations that the chair of the commission or the minister might wish to have taken into consideration in relation to the provision of information about the formal recommendations.

Senator JACINTA COLLINS—Let me say it again: I am not after the advice. I am asking is there is any reason why a formal decision of the SRCC cannot be made to this committee now. Mr Swails understands what I mean. I am talking about what reason could there possibly be for formal decisions of the SRCC not to be made available to this committee. We are not talking about advice to the minister; we are talking about formal decisions of the SRCC.

Mr Anderson—I do not have anything to add to my previous answer.

Senator JACINTA COLLINS—Then I will ask again: will you please provide the committee now with all formal decisions of the SRCC that relate to the amendments in these two pieces of proposed legislation?

CHAIR—The officer has said that he has nothing to add.

Senator JACINTA COLLINS—You are not in the position to do that?

Mr Rowling—As a department, we would not necessarily have all the decisions of the SRCC. What the minister has is the advice from the SRCC.

Senator JACINTA COLLINS—Again, you are talking about the advice to the minister, and I am not asking for that. I am asking to see what formal recommendations the SRCC has made that are relevant to these bills. Given that the minister claims that the SRCC's recommendations are the basis for these two bills, why would the department not have them?

Mr Rowling—We do not have access automatically to the SRCC's decisions and minutes. They are matters for the commission and for the members of the commission. What we have is what they have provided to the minister in response to the minister's request for advice. We just do not have access to all the considerations of the SRCC on all matters.

CHAIR—Perhaps, Senator, it would save the time of the committee if you put these questions to the chairman of that group.

Senator JACINTA COLLINS—The chairman of the SRCC?

CHAIR—Yes, to stop our going round in circles, that would be very useful.

Senator JACINTA COLLINS—I would be quite happy to be able to talk to the Chairman of the SRCC. Are you proposing that we have him appear before we report?

CHAIR—No, I said put the questions on notice to him.

Senator JACINTA COLLINS—Are we able to put them on notice to him through this avenue or would we need to call estimates?

Senator CARR—Perhaps we could suggest this: Mr Swails is prepared to take these matters up with the chairman.

CHAIR—Yes, he said that.

Senator CARR—I have also foreshadowed that it may be necessary to speak directly to the chairman through the annual reports process. But it may well be that we could do it formally through this committee since we have some weeks before we report. It may be

necessary to get direct advice from the chairman if we are not able to get the documentation, the advice in writing, from the commission that we have been seeking.

Senator JACINTA COLLINS—I am quite happy to take the chair's advice to put these issues on notice to the Chairman of the SRCC but I am astounded that the department, in proposing that this legislation is supported by the SRCC, is not in the position—not necessarily immediately but at least in the position to go back to the department—to provide for us fairly quickly what formal recommendations actually exist.

Mr Rowling—That may well occur, but I would still need the minister's concurrence as the advice was actually to the minister.

Senator CARR—Perhaps we will just evaluate your response when you have had a chance to think about it. We do not have to end the hearings of this particular legislation inquiry today. We may need to reconvene the committee to examine those matters.

Senator JACINTA COLLINS—Before you take this matter to the minister, let it be clear that I am not asking for the SRCC's advice to the minister. I am asking for what formal decisions the SRCC has made in relation to these matters.

CHAIR—You have said that about three times. It is on the record. Can we move on?

Senator JACINTA COLLINS—Yes. Now I will ask questions in relation to the SRCC's advice to the minister and, from their previous comments, the department will obviously need to take these questions on notice. What was the nature of the advice to the minister? What areas did it cover? Was the advice requested from the department or was it forwarded unprompted? And can we have a copy of that advice?

Senator CARR—Just for the *Hansard* record, I would like to record that the officers are nodding. I take it those questions will be taken on notice.

Mr Rowling—We will take them on notice.

Senator CARR—Thank you.

Senator JACINTA COLLINS—How do the Commonwealth statistics in relation to successful prosecutions compare with state prosecutions expressed as a percentage of workplace accidents?

Mr Anderson—Senator, we have consulted briefly on the information available to us and we have limited information about state prosecutions particularly in relation to numbers of workplace accidents generally. We would be able to provide some information about Commonwealth prosecutions at this hearing. But if you were particularly interested in comparative aspects then we would need to take that on notice and make inquiries of the state authorities.

Senator JACINTA COLLINS—Provide what you can and then take on notice what you are unable to provide.

Mr Anderson—Yes.

Mr Swails—With respect to prosecutions under the Commonwealth OH&S act, there have been nine prosecutions since the inception of the act and eight of those have been successful. All of those prosecutions have been against government business enterprises, given that the shield of the crown limits the scope of prosecutions.

Senator JACINTA COLLINS—You may have to take this on notice too: when we look at a comparison with the state statistics, do the states have similar enforcement and penalty provisions to the Commonwealth act?

Mr Anderson—We would say the arrangements have a broad degree of similarity. Are there particular aspects where you would be interested to hear a comparative analysis?

Senator JACINTA COLLINS—I am sorry?

Mr Anderson—We would say that there are broad similarities in the arrangements for enforcement between the Commonwealth and state legislation. Are there particular aspects of the approach to enforcement where you would like to hear a more detailed comparative analysis?

Senator JACINTA COLLINS—Yes. When you provide us with the comparative statistics, you might like to consider whether differences in the system are the explanation for why there are state-Commonwealth differences. Given that you do not have that data immediately, perhaps you should take that on notice as well.

Mr Anderson—Yes.

Senator JACINTA COLLINS—Given that to date it appears the most significant policy rationale for this legislation—available to this committee—has been to make this legislation consistent with the policy directive of the Workplace Relations Act, I ask whether the research conducted under the AWIRS survey in 1995 has been taken into account in determining the government's stated aim of providing a more direct relationship between employer and employee and sidelining in this particular area the proven importance of the role of unions.

Mr Rowling—I would have to say that we have not specifically taken into account the research of AWIRS. The development of the legislation has been based on a number of factors relating to maintaining consistency with federal government policy, maintaining consistency with other jurisdictions in a range of areas, and maintaining the integrity of the existing workers compensation scheme in situations where we believe there may be some developments, particularly through judicial interpretation, which has resulted in shifts away from the original intention of the legislation.

Senator JACINTA COLLINS—How does the performance of Comcare demonstrate a need for legislation to maintain the integrity of the system? I thought Comcare's performance in recent years was outstanding and perhaps the best in the field.

Mr Rowling—The scheme is a very good scheme; its performance is at the highest level. What we are seeking to do is to maintain it at those levels by making adjustments before difficulties emerge.

Senator JACINTA COLLINS—What difficulties are you anticipating that would require the Commonwealth government to introduce definitions of injury and disease that are perhaps the most severe in all jurisdictions in Australia?

Mr Rowling—We are not sure that we would accept that they are the most severe of all definitions in Australia; we think we are actually putting in place definitions that are broadly compatible with what the other jurisdictions are doing. In some cases, they are not going as far as some of the arrangements that, in particular, the larger jurisdictions of New South Wales and Queensland have got in place.

Senator CARR—That is quite contrary to what we have just been told, and you sat through the evidence. In what areas would you say that the evidence previously presented to us was wrong?

Mr Rowling—I do not think I would want to suggest that the evidence was wrong. I think our submission from about page 49 on starts to go into some detail about the various definitional issues. Perhaps I could just go to that area. What we have attempted in our submission from about page 40 on, first of all, is to give an indication from the second reading speech as to what the original intentions were when Minister Howe introduced the legislation. Then we actually set out in table 4, for example, the various definitions of injury and disease and the comparisons. Basically, in our mind it suggests that we are not doing more than aligning the legislation with the jurisdictions. We are not going further than that and not as far as that.

Senator CARR—What would interest me is that if you could have a look at the *Hansard* from the previous set of witnesses, have a look at the claims they are making—which is quite contrary to what you have just said—and give us the rebuttal of where you see to be the areas where they have been demonstrably incorrect in the evidence they presented to us. There is a sharp demarcation here between what you are saying and what the previous expert witnesses have put to us.

Mr Rowling—I recognise that.

Senator JACINTA COLLINS—Mr Rowling, why is it then, having heard that evidence and having heard claims in relation to quite specific matters as to how those issues are addressed in other jurisdictions, you are not in a position now to respond and say, ‘No, we can indicate that the predisposition test, for instance, exists in this jurisdiction or that jurisdiction. We can indicate the policy rationale behind why we have chosen to go for the wilful and false representation issue and the test behind that, contrary to the evidence by the unions that that is much tougher than any of the other jurisdictions’? Why can’t you give us those rationales now?

Mr Rowling—With regard to the specific question on wilful test, the actual test in the legislation as drafted is being put in there on the advice of the parliamentary draftsmen and, as I understand it, reflects the normal tests that the Commonwealth puts into its legislation.

Senator CARR—But it is not what the test is in any other jurisdiction.

Senator JACINTA COLLINS—In health and safety. So the opinion of parliamentary draftsmen, given that this is dealing with technical matters associated with health and safety, might not be the prevailing opinion that the parliament should rely on.

Mr Anderson—That change reflects the commencement of the Criminal Code (Theft, Fraud, Bribery and Related Offences) Act 2000, which changes the way in which the element of intention, the mental element, for fraud matters is to be expressed in Commonwealth legislation. It is not intended to result in any policy change. It is not an expression of a policy change.

Senator CARR—That might be the case, Mr Anderson, that it is not your intention to have a policy change, but it would appear—on the evidence presented to this committee and certainly my understanding of the evidence—that there is a substantial policy change. What I would like to know is where this effect can be measured in any other jurisdiction? That is the point of my question, which you have agreed to take on notice. I accept that you may have all sorts of considerations here and that is why I want you to give a detailed response to it. It is

quite a damning piece of evidence that we received this morning. You ought to be entitled to respond to it.

Senator JACINTA COLLINS—That was only one area.

Senator CARR—I want all of them, including the question of the enforcement mechanisms where you are actually seeking to split the court arrangements, as I understood the evidence this morning.

Senator JACINTA COLLINS—Further on that, where else do we see the matter specified in section 5(3A)? Your evidence is that these measures are broadly consistent with law across other jurisdictions in Australia. Where else do we see specified the matters proposed in section 5(3A)?

Mr Anderson—We can give you a detailed examination of the list of factors in other jurisdictions. The New South Wales legislation similarly has a list of examples of matters to be taken into account in determining whether—

Senator JACINTA COLLINS—Are they the same matters?

Mr Anderson—No. It is not exactly the same wording, so we can give you a clause by clause.

Senator CARR—It is not just a question of having two lists. What I am interested in is the policy implications and whether or not it is much more difficult for injured workers to get some sort of justice out of the proposed regime that you are now suggesting this parliament accept. That is the substantive question here: what impact will it have for people who are actually injured as a result of undertaking work?

Senator JACINTA COLLINS—Whilst we are dealing with the issue of the evidence that was before us previously, the issue of the establishment of a health and safety representative, precluding someone's representation by the union—you heard that evidence? What is the department's response?

Mr Rowling—It depends on what we heard, because we heard a number of suggestions about the health and safety representative arrangements. What is being proposed in this legislation basically enables a wider representation of employees as health and safety representatives.

Senator JACINTA COLLINS—Let me go back to the specific points so that we do not go into it too broadly here. What I put to the previous witnesses—and, in fact, they said that they dealt with this in the SRCC—was that, while removing the current role for unions, these amendments will permit employees the right to be represented in consultations with their employer by an employee association that has a principal purpose of protecting and promoting industrial interests of its members in a workplace. That was the position they thought that they had been left with. However, as we understand this legislation, that representation cannot be the case unless there is no workplace representative at the workplace. Is that an accurate understanding of these amendments or not?

Mr Rowling—It is not how we would characterise the amendments. That basically will be putting in place a set of arrangements to enable the continuation of health and safety representatives and health and safety committees in a situation where employers and employees work directly to establish the health and safety committees. If an employee who is a member of the union wishes to have the union involvement, they can seek the union involvement with protections around seeking that involvement.

Senator JACINTA COLLINS—The unions are telling us that they are reading these bills in a way which means that—if there is a workplace representative in place under these proposed arrangements, regardless of the desire of a worker with respect to the union—they will be excluded. Are they wrong? If so, please convince us.

Mr Anderson—The relevant one is item 30 of schedule 1 to the Occupational Health and Safety (Commonwealth Employment) Amendment Bill 2000, which inserts new section 16A entitled ‘Development of safety management arrangements’ and new section 16B entitled ‘Certificate for representative association involved in consultations’. On page 9 of the bill, subsection (3) of new section 16A states:

Alternatively, the employee may request representation in the consultations by:—

Presumably for the purpose of developing safety management arrangements. It then goes on to say:

- (a) an officer or an employee of the employee’s representative association; or
- (b) a person authorised under the rules of such an association;

if there is no workplace association representative at the employee’s workplace.

That term is proposed to be defined under section 5 of the act. If you were to look at page 5 of the bill, item 13 states:

... ‘workplace association representative’ means an employee at a workplace who is authorised by a representative association to represent the association in that workplace.

The question is not whether there is a health and safety representative. The question is: is there is a workplace association representative? So if a union does not authorise any of its members—

Senator CARR—Tea club, social club—what are we talking about here?

Senator JACINTA COLLINS—They have a definition down there of a representative association.

Mr Anderson—It has to be an association with the principal purpose of protecting and promoting the industrial interests of its members.

Senator CARR—That could be anything.

Senator JACINTA COLLINS—It also means that, if you have one union’s workplace representative in place, it precludes a member of another union nominating that their union represent them, doesn’t it?

Mr Anderson—Only if the employee would be eligible for membership of that other union.

Senator JACINTA COLLINS—Where does it say that?

Mr Anderson—On page 6 of the bill, it provides that an association is a representative association in relation to a designated work group at a particular workplace, and that feeds back into the trigger of when an employee can request the involvement of an association.

Senator CARR—Is this to do with the commission or any other form?

Mr Anderson—An employee is a member of the association and qualified for membership because of their work.

Senator JACINTA COLLINS—If you then go back to 3 on page 9, it says, ‘no workplace association representative at the employee’s workplace’. There seems to be an inconsistency between your amendments.

Mr Anderson—It may be correct, Senator, that, if there is an employee authorised by one representative association, that will cover the effect you suggested.

Senator JACINTA COLLINS—Is in a workplace? So then the unions are correct in their concerns?

Mr Anderson—I am not certain of that at this point in time and would seek to take on notice whether I can provide any clarification on that issue.

Senator JACINTA COLLINS—It is a pretty serious issue because the stated policy intention, and as you have reinforced today, is to provide for wider participation, but the way these amendments seem to read, it would actually have an exclusionary effect.

Mr Anderson—It would not exclude representation. Whatever practices an employer, with employees and representatives may choose to adopt—

Senator JACINTA COLLINS—But the tea club could preclude a worker from representation of their choice if there is some other representative organisation represented under the definitions we went to in page 5. I mean, these are not registered organisations. These representative associations: When? How are they established? By whom? We heard evidence this morning that they are actually established by the employer.

Can I ask—and this is in part directed to the Chair as well—whether it might be convenient for us to wait until Mr Leahy is available? I am asking if it would be convenient for the department as well, but it might be more appropriate next week for us to have a session, around the parliamentary sittings, when Mr Leahy would be available?

Mr Rowling—Mr Leahy, from next week will be the CEO of Comcare. He will be available but not as the representative of the department’s position.

Senator JACINTA COLLINS—Yes.

Senator CARR—When would you have officers available who perhaps have a full grasp of the department’s position?

Mr Rowling—Senator, I think we do have a full grasp of the department’s position. We heard the ACTU’s evidence this morning. We are being asked questions relating to that evidence and we are now trying to clarify. We will, to the best of our ability, clarify either here in the hearing today or through questions on notice.

Senator CARR—Mr Rowling, I appreciate the difficulties you are in, in that regard, but as a committee we are also at a disadvantage in not being able to get clear answers to quite fundamental questions which seem to have profound effects. The proposition we have put to you, I believe, has quite profound effects for the capacity of workers to be represented in this process.

What concerns me is that the bill seems to suggest that terms of the workers’ representation are at the discretion of the employer. These are not necessarily registered organisations that we would expect in industrial law in this country. They may be any institution or body that the employer sees fit as appropriate to represent workers. Can you show me in the bill where my interpretation is incorrect?

Mr Anderson—Yes. I regret that I was unable to provide this explanation before but believe I can now provide an explanation to your satisfaction. Suppose that there is a club

which is an association of employees with a principal purpose of protecting and promoting the industrial interests of its members. If an employee in the workplace is a member of that club and the club authorises a workplace association representative, then that employee will not be able to involve a member of any other representative association; but if the employee is not a member of that club, then the association will not be a representative association in relation to that employee.

Senator CARR—So you are saying that under this bill—and you will show me the clause—one worker, which is what Mr Mansfield put to us, could bring the AMWU, for instance, into ADI if he felt it necessary to do that? Is that what you are saying to me, Mr Anderson?

Mr Anderson—Yes. If one employee is a member of the AMWU and is qualified for membership of the AMWU because of the work they usually perform—it is a public fact that the AMWU is an association of employees with the necessary principal purpose—and if it is the case that the AMWU has not authorised any employee at that employee's workplace to represent the AMWU in the workplace, then that employee may request representation by an officer or employee of the AMWU or any other person authorised under AMWU rules.

Senator CARR—Can you show me what particular clause I would be able to draw that interpretation from?

Mr Anderson—Yes. On page 5 of the bill, item 14, which inserts a new subsection (2A). The pertinent paragraph is paragraph (b), which states:

... the employee is a member of the association and is qualified for membership because of the work the employee usually performs as an employee of the employer.

It is that subsection, rather than the following subsection to which I had previously referred in error.

Senator JACINTA COLLINS—But that still does not get us around the problems on page 9.

Mr Anderson—What is the problem on page 9?

Senator JACINTA COLLINS—The problem on page 9 is that it says:

... if there is no workplace association representative at the employee's workplace.

Mr Anderson—In relation to the employee who wishes AMWU involvement, we are questioning whether they can request representation. When we come to the term 'workplace association representative', the meaning of that term for the particular employee is governed by the definition of 'workplace association representative', which in turn refers to 'representative association'. That definition is applied in relation to that specific employee.

Senator CARR—Mr Anderson, I am particularly concerned when I see the terms 'to avoid doubt' in legislation. If the department is starting from the proposition that it thinks there is some doubt, then I think we are entitled to be quite anxious as to the interpretations that might be placed upon these clauses by a court of law.

Mr Anderson—The doubt that is removed by subsection 4 is the issue of whether a particular representative association may claim a monopoly role in consultations about the development of safety management arrangements because of a request by a member. Nothing in the preceding subsections would give any representative association a monopoly role, but subsection 4 is to spell out so that all involved can be clear that a right for an employee to involve an external representative does not diminish the rights of any other employee.

Senator CARR—Your contention is that this bill does not exclude trade union officials. Is that what you are saying to me?

Mr Anderson—It provides reasonably clear rights for involvement.

Senator CARR—For trade union officials? Did I get that clear, Mr Anderson? You are nodding. Again, I draw your attention to the *Hansard*. Is it possible to get a clear statement on that?

Mr Anderson—Not every union official in the world can walk in—

Senator CARR—No, I am not asking you—

Mr Anderson—And an employee cannot ask for any union official in the world.. If an employee is a member of an association which is a representative association, and also a member of another association which is a representative association, the employee will not necessarily be able to—they may well not be able to—request representation by one of those if there is already representation by the other.

CHAIR—By agreement, we have decided that we will call another session of this hearing next week. It will probably be at about a quarter to one or a quarter past one next Wednesday and that will be negotiated on Mr Leahy's availability, but I do have some questions to ask before we finish here today. Will these changes reduce workplace safety? Is that a really valid claim about the bill, in your view?

Mr Rowling—The intention of the arrangements is to enhance the workplace safety arrangements in the workplace. As was described earlier in discussions, there has been a steady fall in the representation of union membership in the workplace. What we are seeking to do is to provide wider participation. We are seeking to do that because we believe that the current arrangements in terms of health and safety reps and health and safety committees are working well and that they make a substantial contribution to health and safety in the workplace.

CHAIR—What do you think of the criticisms of the bills that they are based on claims that the Commonwealth arrangements are currently performing well?

Mr Rowling—Basically, the current schemes and performance of the Commonwealth schemes in health and safety are quite good and, as we heard earlier, in comparison with other schemes, are extremely good. But what we are reaching is a situation where there are fewer and fewer opportunities for employees to participate in the health and safety arrangements in the workplace. We are really just seeking to maintain the excellent performance by providing the opportunities for all employees to participate in those arrangements with their employers.

CHAIR—Mr Anderson would probably be best person to answer this question: why is it appropriate to set up a regime of fewer criminal penalties and more civil penalties under the proposed arrangements?

Mr Anderson—Senator, the bill introduces a regime of civil penalties without significantly diminishing the scope for criminal prosecutions in more serious cases. The most significant advantage of civil penalties is the capacity to run proceedings, seeking a penalty, where appropriate, because of the burden of proof being on the balance of proof rather than being beyond reasonable doubt. Particularly in the case of alleged victimisation of employees because of their pursuit of rights under legislation, a civil jurisdiction has the advantage that reinstatement of the employee can be ordered in addition to penalties.

CHAIR—Thank you. I was wondering if you could clarify something that came out of Mr Mansfield's evidence relating to the level of union membership within the Commonwealth Public Service and its associated agencies. You might recall that there was some dispute as to the figure that I have of 41.2 per cent membership in a workforce of 340,700. Mr Mansfield claims it is 60 per cent. I may well be missing a group of workers, but if someone who has some expertise in statistics wants to get that percentage from 40 up to 60, they would need a hell of a big group of people—a huge rate of union membership—to push it up that high when working from a base of 340,000 people. Do you have a more accurate view on what that rate of membership is for the Commonwealth Public Service and all its agencies?

Mr Rowling—We listened to the discussion with some interest. Our estimates are that union membership in Australian government employment is somewhere between 40 per cent and 50 per cent.

Senator JACINTA COLLINS—Is that including soldiers?

Mr Rowling—The Australia defence forces cannot be members of unions.

Senator JACINTA COLLINS—That is right; that is why I am asking if your figures are including that or not.

CHAIR—I am glad you brought that up, Senator, because I do now have the figures for Defence. There are 20,500 out of a total of 340,000. As I was saying before, for that to make a significant difference is quite difficult. But actually there are 5,100 members within that 20,000 and 15,000—

Senator JACINTA COLLINS—Is that active servicemen?

CHAIR—It might not be active servicemen. It might be people who are caterers and that sort of thing. So about a quarter are union members in that field. Given the low base of the number compared with the total Commonwealth Public Service, that is not going to affect the balance very much either. So we are sitting at somewhere between 40 per cent and 50 per cent.

Mr Rowling—Basically, we estimate that it will be about 50/50.

CHAIR—Can you understand how Mr Mansfield can get a figure of 60 per cent?

Mr Rowling—No.

CHAIR—Fanciful thinking, perhaps?

Senator CARR—Come on!

CHAIR—The stats are not there. These are Australian government figures.

Senator JACINTA COLLINS—Are there union members in the Commonwealth Public Service who do not advise their employer that they are union members? I know that in retail, for instance, there is a proportion of the union membership that deliberately keeps their membership confidential. The union has procedures to ensure that.

Mr Rowling—The short answer is that employers do not always know, and will not always know, whether people are members of unions or not. That is a matter between the employee and the association.

CHAIR—On the figures I have, between 1993 to 1999, union membership was dropping at about 2 percentage points per year. Does that accord with your figures, or do you have any other figures on that?

Mr Rowling—We have an understanding that the trend is down. We would not necessarily know in fine detail the rate at which the trend is down.

Senator JACINTA COLLINS—Can I just mention that other issue on notice?

CHAIR—Yes.

Senator JACINTA COLLINS—Mr Swails, in terms of the matters that you are taking to the chair of the SRCC, can you add to that the relevant minutes? As I understand it, the unions have sought to have recorded their views on a number of issues in the minutes to get a true and correct record of the union position on certain matters, and it would be of use to the committee if he would consider whether that could be made available to us as well. There is not much use doing that if it is never made available to anyone in the real world.

Mr Swails—I will take that up in the same way as I take up the other two matters.

Mr Rowling—Senator, before we adjourn, can we clarify whether there are going to be any questions in relation to the ICNA Act amendments?

Senator CARR—The bill itself?

Mr Rowling—The bill itself, because we actually have people here to answer questions if there were going to be questions. We do not necessarily want to bring them back next week if there are not going to be questions.

CHAIR—The purpose next week was to provide the opportunity for Mr Leahy to answer questions. I am not too sure how many extra public servants we would require at that time. It is perhaps something we could negotiate between the committee and the department.

Senator JACINTA COLLINS—Mr Rowling, we are looking at talking to Mr Leahy, then I would anticipate that we are still likely to have more questions, at least on notice, but we can work out in the meantime whether it is going to be necessary for others to attend.

CHAIR—The committee stands adjourned until 12.45 p.m. next Wednesday.

Committee adjourned at 12.00 p.m.