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STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION

Reference: Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007; Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

FRIDAY, 8 JUNE 2007

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SENATE STANDING COMMITTEE ON

EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION

Friday, 8 June 2007

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

Participating members: Senators Allison, Bartlett, Bernardi, Boswell, Bob Brown, George Campbell, Carr, Chapman, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Fielding, Fifield, Forshaw, Hogg, Humphries, Hutchins, Joyce, Kemp, Ludwig, Lundy, McLucas, Ian Macdonald, McGauran, Milne, Moore, Murray, Nash, Nettle, O'Brien, Parry, Patterson, Payne, Polley, Robert Ray, Sherry, Siewert, Stephens, Sterle, Stott Despoja, Trood, Watson, Webber, Wong and Wortley

Senators in attendance: Senators Barnett, Birmingham, George Campbell, Fielding, Marshall, McEwen, Siewert and Troeth

Terms of reference for the inquiry:

To inquire into and report on:

Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007;
Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

WITNESSES

Committee met at 8.29 am

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

JAMES, Ms Natalie, Chief Counsel, Workplace Relations Legal Group, Department of Employment and Workplace Relations

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

PRATT, Mr Finn, Deputy Secretary, Outcome 2, Workplace Relations, Department of Employment and Workplace Relations

CHAIR—Good morning, everyone. I declare open this public hearing of the inquiry into the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 and the Workplace Relations (Restoring Family Work Balance) Amendment Bill 2007.On 10 May 2007 the Senate referred the bills to the committee for inquiry. The committee is due to report on 14 June 2007. The committee considered the original Workplace Relations Amendment (Work Choices) Bill 2005 in October-November 2005 and considers that the broader provisions of the bill were sufficiently discussed then. The focus of today's hearing will be the proposed amendments regarding the stronger safety net provisions and the additional fairness test that will guarantee entitlements such as penalty rates are not traded off without adequate compensation. We will also hear evidence on the proposed amendments to return and protect conditions related to public holidays, meal breaks, penalty rates, overtime and redundancy benefits.

Before the committee starts taking evidence, I advise that all witnesses appearing before the committee are protected by parliamentary privilege with respect to their evidence. Any act by any person that operates to the disadvantage of a witness on account of evidence given by that witness before this committee is treated as a breach of privilege. Witnesses may request that part or all of their evidence be heard in private. I also remind witnesses that giving false or misleading evidence to the committee may constitute a contempt of the Senate. We commence proceedings with the Department of Employment and Workplace Relations. Thank you for your submission. Are there any changes or additions to that which you would like to make?

Mr Pratt—No.

CHAIR—I invite you to make an opening statement, after which committee members will ask questions.

Mr Pratt—Given the time constraints of the committee, we thought we might spare you an opening statement today. Our submission is reasonably straightforward. However there was one matter I thought I might just mention briefly. Given that the department is on first today, and we understand that the reason for that is to accommodate interstate participants—typically we would come on late in the piece, which would give us an opportunity to assist the committee with any errors of fact or misinterpretation of the bill—if it would assist the committee, we would be prepared to provide a very brief supplementary submission, say, on

Tuesday next week on any issues that we observe during the course of the day where there are any misinterpretations or inaccuracies. Would that be helpful?

CHAIR—Yes, that would be most helpful. I do appreciate you giving some thought to that. We will take it as a given that you will do that.

Mr Pratt—I have nothing further to say.

CHAIR—I will ask you to briefly run through the technical provisions of the act that make the amendments. We all have copies of the act, but I would like to have this on the record.

Ms James—I will focus on the key provisions. The key provision that determines whether the fairness test will be applied is section 346E. This is a gateway provision, if you like. It sets out the key criterion. You can see there, as per the Prime Minister's statement, that it talks about agreements being lodged on or after 7 May and the salary cap of $75,000 for AWAs. It makes it clear that all collective agreements are subject to the fairness test. Section 346F makes it clear that a variation to an agreement that was made prior to 7 May will bring that agreement forward to be subject to the fairness test. The other key aspect of the application of the fairness test is that the work the employee is doing is work which would usually be regulated by an award. Where there is no actual award that would apply there is a mechanism to designate an award and that is set out in sections 346K and 346L.

The key provision that sets out the fairness test itself is 346M. There has been a lot of discussion about the components of the fairness test so I will not take you through all of it, except to say that at its core the requirement is that fair compensation is to be provided in lieu of any protected award conditions that are not included in the agreement itself. If any protected award conditions are excluded or modified, there must be fair compensation for that.

The provision then goes through and sets out some things that the director may have regard to. Primacy is given to monetary and non-monetary compensation. Non-monetary compensation is defined as something which can have a money value assigned to it and which confers a benefit or advantage on the employee and which is of significant value to the employee.

I would like to point out that this is no different from the no disadvantage test. In fact, if anything it is slightly stricter than the no disadvantage test because the non-monetary compensation definition puts some requirements in there about value to the employee. Many of the submissions have pointed out that this could be subjective, as if this were a criticism. We actually consider this to be a major strength of this test, particularly with individual agreement making. What it enables is the particular value that an employee might put on a thing to be taken into account in a way that, arguably, the no disadvantage test may not have permitted.

Other things that the director may have regard to include the personal circumstances of the employee, and there are a number of examples in the explanatory memorandum that set out how we intend this to work. Those examples focus on situations where an employee might prefer to work different hours from standard hours, although they are full-time employees; and, where ordinarily some of those different hours might attract penalty rates, the test enables the employee to be treated as a normal full-time employee when they are making up

those hours. So the examples in the EM go to things like a person wanting to pick the children up from school after 3 pm, so they leave early each day and make up the time on a Saturday or a Sunday, when there are alternative childcare arrangements for their children.

This is very much focused on personal preference. It is subjective. It is intended to be so. But it also must still be compensation: it must be favourable to the employee. The idea that somehow the employer could say to an employee, 'You must make up the time on the Saturday,' is not what is envisaged by the fairness test and it is not what would be permitted.

The test talks about exceptional circumstances and public interest as well. Certain things can be taken into account then. This is a high threshold. As I said to the Senate budget estimates committee when we discussed this, this is a higher threshold than under the old no disadvantage test. To take into account the industry location or economic circumstances of the employer, for example, not only must it be not contrary to the public interest for that agreement to be in operation; it must also be demonstrated that there are exceptional circumstances to justify it. That was not a requirement under the no disadvantage test.

The provisions then set out a range of processes for assessing what happens when the test fails—a reconsideration period, a 14-day period for the parties to take the advice of the Workplace Authority director and fix the agreement, if you like. Then it sets out the consequences if the agreement is not fixed. The consequences are essentially designed to put the parties in the position that they would have been in if the agreement had never been made, and they require compensation to be paid if the employee was effectively worse off for that period in terms of their take-home pay.

CHAIR—Good. Thank you for that, Ms James. Senators will realise we have one hour for the discussion with the department, and I propose to allow a fair allocation of time between the parties as far as asking questions. Senator Marshall, we will start with you.

Senator MARSHALL—Thank you. Ms James, when you say there is no difference to the old no disadvantage test, you are actually saying that in the context of how it is being applied against the protected award conditions, because the old no disadvantage test applied against the whole award, didn't it?

Ms James—When I was making that reference to the no disadvantage test, I was specifically referring to the nature of things that could be compensation. The fairness test applies against the safety net in the new system, and that safety net takes into account the Australian fair pay and conditions standard, which is not tradeable, unlike pre the amendments to Work Choices, where conditions like annual leave and minimum rates of pay could be traded off—and the protected award conditions.

Senator MARSHALL—But it is quite different in its application, isn't it? It has been put to me that it is the same as the old no disadvantage test, but that is not actually what you are saying—it is quite different.

Ms James—It is operating in a very different context, I would say.

Senator MARSHALL—The way it is applying is saying in terms of measuring the no disadvantage test that it only applies to the protected award conditions and not the overall award conditions, so it is a much narrower focus.

Ms James—The test is applied against the safety net that I just outlined.

Senator MARSHALL—Yes, so it is a much narrower focus than the old no disadvantage test, isn't it?

Ms James—I would not say that it is a narrower focus, no. I would say that it prioritises the key conditions identified in the safety net.

Senator MARSHALL—Didn't the old no disadvantage test apply to the whole of the award, though?

Ms James—That is correct.

Senator MARSHALL—This does not. So it is a much narrower focus, isn't it?

Mr Kovacic—The point that Ms James made, Senator, is that there were components of the award safety net that were previously tradeable which are no longer tradeable.

Senator MARSHALL—I understand that point. I am just trying to make the clear distinction that it is not the old no disadvantage test in its entirety being applied; you are applying it in a similar way, but only to a limited extent of conditions which are now the so-called protected award conditions.

Ms James—It is a different context that we are operating in now. The legislative entitlements that cannot be traded away in the standard also impact on the way that the test works.

Senator MARSHALL—You say that the subjective nature of the fairness test is a strength. What guidance is given for this subjective test? I do not see—maybe you could point me to this—any definitions of 'exceptional circumstances', 'fair compensation' or what is 'significant value'.

Mr Kovacic—One of the intentions is for the Workplace Authority to develop policy guidelines which will assist its officers in applying the fairness test. By way of background, I would like to actually table a copy of the AWA policy guide which the former Office of the Employment Advocate used for the purposes of applying the no disadvantage test. I ask the senators to bear in mind that it is, as Ms James said a moment ago, a slightly different context that it is applying in. But, nonetheless, it actually deals with some of those issues in terms of, for instance, how issues of non-monetary compensation might be dealt with.

Similarly, in terms of some of the flexibilities around hours of work, how they are dealt with and how they should be assessed, one of the points that is made in the policy guide is that it really is at the employee's initiation that those flexible hours or family-friendly arrangements are initiated. The advice that we have had from the Workplace Authority is that they are looking to develop a similar policy guide. As with its former policy guide, that policy guide will be a public document. It will be a document that clearly will evolve over time as issues emerge in terms of agreement making. It is one that I think has previously been made available in an estimates context to this particular committee as well. So it will provide the operational guidance that your question goes to.

Senator MARSHALL—But what standing will that have under the act? I understand that there is an internal process, but are you saying that the whole process will be transparent and public?

Mr Kovacic—Certainly in terms of the policy guidelines, the intention is that that document, as was previously the case, will be a public document.

Senator MARSHALL—No, that is not my question. Will the process of applying a policy document be a transparent and public process?

Mr Kovacic—Certainly, the act envisages that the authority will have the capacity, where the director is not satisfied, to seek further information from the employer and employee or employees potentially to assist the director to satisfy himself that the agreement meets the fairness test. At the end of the day, if the director is not satisfied that the agreement meets the fairness test, he is obliged to advise that it fails the fairness test.

Senator MARSHALL—That is the subjective nature of it. I am asking about the process itself. Will it be transparent? Against the policy document that you talk about, will people be able to pick up and determine whether their agreement has actually been ticked off against those elements of the policy.

Mr Kovacic—Certainly there will be a very clear understanding of how the process will operate. There will be various stages where the Workplace Authority will communicate with the employer and the employee and that will provide an opportunity for the parties to agreements to seek further advice. One of the other elements of this scheme is the capacity for both employers and employees to request a prelodgement assessment so that there can be a degree of certainty, before they make an agreement, that it will comply with the fairness test. So I would argue that there would be a fair degree of openness, if I could put it that way, in the process and the way that the test will be conducted by the authority.

Senator MARSHALL—Ms James said the subjective nature of it is actually its strength and you are saying that it will be worked out against the policy document. I am trying to work out where the subjective overlaps with checking against the set of criteria in the policy document and how that will be evaluated.

Ms James—The subjective nature of the test comes from that ability to take into account, if you like, all the circumstances of a particular case, a particular employee's situation and a particular employer's situation as well. The provisions of the bill set out what actually amounts to compensation fairly clearly. It has to be fair compensation. It has to be something that confers a benefit on the employee and, of course, that is subjective in that different people might place different values on different entitlements. But the guidelines will set out the ways in which particular types of entitlements might be dealt with, considered and valued when it comes to something that can be given a monetary value.

In terms of the question about transparency or consistency in decision making, the requirement is that the Workplace Authority director must be satisfied that fair compensation has been provided in order to find that an agreement passes the test. To do that they have to have sufficient material on which to make an assessment. That is what the precedent around the idea of being satisfied says. They have a very broad but not prescriptive set of abilities to pursue that information. So we have not purported to set out a prescriptive number of steps to

deal with every possible contingency of how the director will pursue information, in what circumstances they will check and double-check and how they will consider every possible agreement out there. That would be bureaucratic, it would be onerous and it would not be conducive to being able to make agreements quickly and in a streamlined manner. What we have done is to ensure that there is a high threshold of being satisfied that fair compensation has been provided while maintaining the flexibility of the director to be able to take into account all the circumstances of the case.

CHAIR—Before we go on, is it the wish of the committee that the AWA policy guide be tabled? There being no objection, it is so ordered.

Mr Pratt—It is very important when considering these issues to remember the starting point. Here it is that an employer and an employee have actually agreed on something and presented that to the Workplace Authority. That is the context we are talking about, there is actually an agreement.

Senator MARSHALL—The very existence of this legislation before us puts a lie to that assumption, doesn't it?

Mr Pratt—No, Senator.

Senator MARSHALL—If employers and employees had agreed willingly to all these things being removed from the agreements in the first place, which has got us to this point, we would not have this legislation before us.

Mr Pratt—The point is that this substantially strengthens the safety net underpinning the workplace relations arrangements.

Senator MARSHALL—That is what we are trying to determine, whether or not it does for the purpose of this inquiry. So let's keep to the questions and answers rather than the rhetoric.

Senator BARNETT—I take exception to Senator Marshall's accusations. I find he is speaking out of order.

Senator MARSHALL—Is there any requirement for the Workplace Authority director to publicise the reasons for their subjective decision?

CHAIR—This is the last question, Senator Marshall, then I will move to Senator Fielding and I will then allow you or Senator Campbell another 10 minutes later.

Senator MARSHALL—How long have we been going?

CHAIR—Over 10 minutes. You have been going for—

Senator MARSHALL—I think the timing also has to be about how responsive the answers are to the questions.

CHAIR—That is agreed, but for the moment this is your last question before we move to Senator Fielding.

Senator MARSHALL—It is a question that goes broadly then to the need, because what you have told me is that, while it is subjective and there are going to be policy documents, ultimately the decision is made by the Workplace Authority director. That is the case, isn't it?

Ms James—As it was the case with the no disadvantage test and the Employment Advocate test.

Senator MARSHALL—This is what wastes my time. It is an easy answer to the question. That is the case, isn't it?

Ms James—I am happy for you to pose the questions and I will answer them.

Senator MARSHALL—All right, but I do not want my time being chewed up by the extra stuff. Ultimately isn't it a decision for the Workplace Authority director?

Ms James—I think I have answered that question.

Senator MARSHALL—Well, is it yes?

Ms James—I said: yes, as it was with the Employment Advocate and the no disadvantage test.

Senator MARSHALL—Thank you for the extra words.

CHAIR—We will now move to Senator Fielding.

Senator MARSHALL—But this is part of a broader question.

CHAIR—I am sorry, Senator Marshall, but you will have to go on with that when the Labor Party turn comes around again. We are now moving to Senator Fielding.

Senator MARSHALL—Let us say I am unsatisfied with that.

CHAIR—It is on the record that you are unsatisfied. I call Senator Fielding.

Senator FIELDING—I have a couple of questions, and obviously I have to be fairly careful with the time. Do you remember this document: *Work Choices: a new workplace relations system*?

Mr Pratt—Yes.

Senator FIELDING—It has the example of Billy. Billy was offered an AWA that explicitly removed award conditions for public holidays, rest breaks, bonuses, annual leave loadings, allowances, penalty rates and shift and overtime loadings. Under this new fairness test, would that AWA be classified as being fair?

Mr Pratt—Only in the most exceptional circumstances. In fact, I cannot think of circumstances where that would apply, but I am not ruling it out.

Senator FIELDING—So you are not ruling that out under the new fairness test?

Mr Pratt—Only in the most exceptional circumstances, but I have not yet seen a hypothetical which would fit that bill—no pun intended there.

Senator FIELDING—So could you give us some understanding of what exceptional circumstances there would be? I would think most Australians would find it pretty amazing that under this new fairness test Billy and his offered AWA would be considered fair.

Ms James—Perhaps the best way to answer that question is to say that those facts on their own would not be sufficient to meet both the public interest and the exceptional circumstances requirement. The explanatory memorandum sets out some examples of

potential exceptional circumstances. One of them is an example of a business that is struggling to keep afloat and a situation where an existing—

Senator FIELDING—Because time is short—and I will step in here—would you take that example. It is hypothetical but you have to answer it because it is in a document that was put out, I assume, by the department. There is nothing about 'exceptional circumstances' there, so we are going to assume that there are no exceptional circumstances. I could waste some of the committee's time by reading it out.

Mr Pratt—In that situation, if there are no exceptional circumstances, Billy cannot occur.

Senator FIELDING—Okay.

Senator SIEWERT—What was that—sorry?

Mr Pratt—My answer was that, if there are no exceptional circumstances, the Billy case from the earlier Work Choices document cannot occur under this bill.

Senator FIELDING—Thank you for that. Have you had a look at all through the submissions that have been submitted?

Mr Pratt—Yes.

Senator FIELDING—I refer to the submission by the Shop, Distributive and Allied Employees Association. I would like to get your views on the example on page 12, in which a new AWA offered to new employees reduces the cash component of the wage by $50 a week but includes a $100-a-week shopping voucher to be used at the employer's supermarkets. Would that case pass the fairness test?

Ms James—I do not believe that would meet the requirements of non-monetary compensation. In fact, as a rule, I think it would be doubtful that it would have met the similar requirements for the no-disadvantage test, because that kind of thing is arguably not a benefit; it requires an outlay by the employee. The definition of 'non-monetary compensation' in the bill strengthens this, because it talks about the requirement that the compensation be of significant value to the employee. Where a financial outlay is required and you have to spend it with the employer, I do not think that would meet the non-monetary compensation test. I also note that that was the position the Employment Advocate took under the no-disadvantage test.

Senator MARSHALL—So you can rule that out, can you?

Ms James—Yes.

CHAIR—Senator Marshall, you can ask those questions when it is your turn. Senator Fielding.

Senator FIELDING—I think some of the interjections are quite helpful, actually.

CHAIR—I will make the decision on that if you do not mind. You have some four minutes left.

Senator FIELDING—Thank you for reminding me of the time. So, Ms James, you can rule that one out. With regard to the fairness test being applied back to an award, how many employees in Australia are not covered by awards?

Mr Kovacic—The most recent data on that goes back to about May 2000, so it is somewhat out of date. But at that stage the estimate was that around 956,000 non-farm employees were award free.

Senator FIELDING—Is there an award for the information technology sector?

Mr Kovacic—It is a sector where there is some award coverage, but it is not universal.

Senator FIELDING—The reason is that most awards were done way before the IT industry was formed. Is that correct?

Mr Kovacic—I think that is probably right. I think it is also a reflection of the fact that the industry itself has not seen a need for award coverage to be established—and nor have the employees in the industry.

Senator FIELDING—There is a common thread in the submissions about who is covered by what award and about employers being confused about which award is in place, whether there is an award and whether the fairness test applies. After reading the submissions, I am left thinking that this is going to cause a fair bit of confusion about how the fairness test applies to people who are not on an award.

Mr Kovacic—For people previously covered by federal awards, it is quite clear in the sense that federal awards were respondency based. So there is a very clear basis for coverage there. For employers and employees formally in the state system, they have come into the federal system on notional agreements preserving state awards, and generally there will be some clarity there. In respect of areas where employees may have been established as new businesses post 27 March last year or, alternatively, have never had award coverage, as Ms James mentioned before, there is the capacity for the Workplace Authority to designate an appropriate award, which would be used as the basis of the fairness test. There is the capacity for employers and employees to seek, as part of the pre-lodgement process, advice from the authority as to what award might be designated.

Senator FIELDING—But isn't one of the conditions for the fairness test being applied that an award is breached? If there is no award, how does that work? I do not understand. It is like the chicken and the egg.

Mr Kovacic—If it meets the $75,000 threshold in respect of an AWA, or in respect of both a collective agreement and an AWA, if the employee is working in an industry that is traditionally covered by awards, in the circumstances where the employer may not have responded to an award there is the capacity for the authority to designate an appropriate award. In essence it extends to businesses and employees working in areas where award coverage exists access to protected award conditions that up until now they may not have had. It is a widening of access to protected award conditions and in that regard it again is another dimension of the strengthening of the safety net for employees.

Senator BARNETT—I want to get some clarity on the fairness test in comparison to the no disadvantage test. I notice in your submission on page 9 it says:

The fairness test provides a stronger safety net because it builds on the minimum entitlements ...

So it is not the same but stronger. Is that right?

Mr Pratt—That is correct.

Senator BARNETT—Have you looked at the Australian Mines and Metals Association submission?

Mr Pratt—We have seen it.

Senator BARNETT—I draw your attention to pages 8 and 9 of that submission where it mentions AWAs in the mining and resource sector. It says:

As at 30 March 2007 37.2% of the resource sector were covered by AWAs.

Then it says:

A review of resource sector agreements lodged in the 12 months to 31 May 2007 reveals that 73.5% of resource sector employees were covered by an AWA, 21.8% are covered by a union collective agreement and 4.5% are covered by a non-union collective agreement.

Can you either confirm now or take on notice the veracity of those figures? There has been some debate politically and in the public arena with respect to AWAs and their penetration of the total employment market. Could you advise the committee as to the industry-by-industry breakdown of the number of employees covered by AWAs. We had some advice from the Employment Advocate last week in budget estimates about the numbers of AWAs by industry and by state, so I was wondering if you could also take on notice to provide the latest figures for AWAs that are current on a state-by-state basis and on an industry-by-industry basis.

Mr Kovacic—We should be able to get that information very quickly downloaded from the OEA website. The information would be as at the end of the March quarter, which is the most recent publicly available information.

Senator BARNETT—I have two other questions. We have two options—we are going to have either AWAs or possibly no AWAs, where common-law contracts are the case in point. The AMMA submission on pages 9 and 10 says that:

The shortcomings associated with a common law contract of employment, as opposed to an AWA, are that ...

It lists 15 things and then sums up:

The use of common law contracts is a legal mine field.

What provides a safer legal arrangement for workers—the safety net arrangements that are proposed in this legislation or common-law contracts?

Mr Pratt—That is a slightly difficult question to answer directly. Clearly, common-law contracts are subject to the award and the standard. AWAs, as proposed by this bill, will be subject to a fairness test where the new Workplace Authority will consider the terms of the AWA against both the standard and the protected award conditions as set out by the award. It is possible to say that there is greater scrutiny of an AWA, but it is important to understand that common-law contracts are also subject to the standard and the various award provisions.

Senator BARNETT—We have seen in recent times on the public record that purportedly honest mistakes have been made. Are workers safer under the government's legislation in terms of their entitlements and terms and conditions of employment or are they safer under common-law contracts?

Ms James—As I said to Senator Marshall, I will answer the question not exactly in the terms you have asked it. I would avoid the terminology 'safer'. The point I would make is that AWAs and collective agreements are enforceable under the Workplace Relations Act. There are penalties for breaching them. The Workplace Ombudsman will be able to take that action on behalf of an employee. These are all aspects that are not available for the enforcement of common-law contracts, which require court action by the employee. The other point is that AWAs and collective agreements must be in writing and AWAs in particular must be signed by both parties. This makes it clear what the terms and conditions of employment are. Often common-law contracts are not in writing, making enforcement very difficult.

Senator BARNETT—The bottom line is that under common-law contracts the employee has to take it upon themselves to follow through, follow up and litigate, if required. Is that correct?

Ms James—That is correct.

Senator BARNETT—AiG made a recommendation in its submission that section 355 be repealed and they made other suggestions regarding amendments. That was a late submission—a letter dated 7 June, which I received last night. I wonder whether you have had a chance to look at that. If you have not, perhaps you could give us your thoughts on that.

Ms James—Rather than addressing the specifics of what AiG have raised, perhaps I will talk about the intention of section 355. Section 355 puts some limitations on the calling up or incorporating of other instruments into agreements. One of the things very common in the old system was that agreements would call up or incorporate the terms of or refer to old awards—sometimes very old awards, sometimes multiple previously applying instruments, agreements and awards. They would call them all up and then provide rules for stepping through the inconsistencies between all those documents. It was incredibly difficult in these circumstances, firstly, to ascertain what the terms and conditions might be and, secondly, you had to wonder whether the employees who were approving the agreements really understood the lengthy documents sitting underneath the agreement itself. Section 355 is designed to permit a degree of incorporation but put rules around it and, effectively, make sure that the terms and conditions that apply to the employee are in the agreement itself. The government considers that that is a better approach than what existed before where potentially you had a lot of ambiguity where calling up was going on. The government's position is still that this is an enhancement for agreement making. It provides more certainty to all parties.

Senator SIEWERT—I understand the authority will have significantly more staff under this new process. How many AWAs are you expecting to deal with? How much time do you expect each AWA will take to assess?

Mr Kovacic—The expectation is that in the next financial year around the same number of AWAs as have been lodged this financial year will be lodged with the Workplace Authority—around 400,000. The data we have estimates that about 90 per cent of non-managerial employees earn less than $75,000 per annum. Concerning the time frame within which the authority is likely to assess agreements, the advice we have is that in circumstances where the information is provided and a prelodgement assessment has been undertaken it should take

seven to 10 working days. For more complex cases it is likely to be more than 10 working days.

Senator SIEWERT—How long will a prelodgement assessment take?

Mr Kovacic—Again, the same sort of time frame should apply. It really depends on the quality of the information provided by the employer or employee in a particular instance and the number of occasions on which the authority may have to go back for further information.

Senator SIEWERT—So the seven to 10 working days is for a complete review including the prelodgement?

Mr Kovacic—No, they would be separate processes.

Senator SIEWERT—That is what I thought you meant. I did not quite understand the answer you gave just then in terms of how long it will take to review a prelodgement, because surely that will add onto the 10 days.

Mr Pratt—It is important to add, of course, that if the prelodgement process has been undertaken then that would speed up enormously the approval of a final agreement being put to the authority.

Senator SIEWERT—That is why I asked the question: how long will a prelodgement assessment take? And then I asked: does that seven to 10 days include that?

Mr Kovacic—Sorry, Senator, I thought what you asked was how long the assessment is likely to take. The second question was then how long the prelodgement assessment would take.

Senator SIEWERT—You said it would be quicker if a prelodgement assessment had been done.

Mr Kovacic—That is correct.

Senator SIEWERT—Then you said it would take seven to 10 days. I was assuming that that excluded the prelodgement assessment.

Mr Kovacic—That is correct. The prelodgement assessment will be a separate process which will occur in advance of an agreement being made and lodged.

Senator SIEWERT—And how long will that take?

Mr Kovacic—Ideally it will be, again, in the order of seven to 10 days, but it really depends, as I said, on the quality of the information that an employer or an employee provides to the authority and the complexity of the case. You cannot be prescriptive about what it might be. Clearly the authority is keen to ensure that prelodgement assessments are undertaken as expeditiously as possible, but it really depends on the quality of information and the complexity of the matters involved.

Senator SIEWERT—I do not want to spend too much time on this because I do not have a lot of time. So it takes seven to 10 days for a prelodgement assessment. How long does it take after that once you get the final AWA?

Mr Kovacic—The seven to 10 days will be in circumstances where an agreement is also lodged, all of the information is provided and it has also been through the prelodgement. It is likely to be in that order.

Senator SIEWERT—So all up you are talking about 14 days.

Mr Kovacic—If you see them as two separate processes—and there might be a gap of whatever between the prelodgement assessment process and when an agreement is actually made and lodged—then each one is likely to be in the order of seven to 10 days depending on the quality of the information and the complexity of the matter.

Senator SIEWERT—How many new staff do you have?

Mr Kovacic—In 2007-08 there are an additional 231 staff for the authority.

Mr Pratt—Just to clarify, that is on top of several hundred staff who have been transferred from the department to the Workplace Authority and the Workplace Authority's existing staffing.

Senator SIEWERT—So how many are there all up?

Mr Kovacic—There will be between 750 and 800 staff all up.

Senator SIEWERT—As I understand it, the exceptional circumstances that can be taken into account when we are talking about the employer can include the employer's financial constraints. Is that correct?

Ms James—Like the no disadvantage test, it is one of the focuses of this component, if you like. The example that is given in the act itself is where there is a short-term crisis that the business is dealing with and, in order to keep the business afloat for a period of time, an agreement that would not otherwise pass the fairness test is allowed to operate. In the previous system one good example of this was an example involving Greyhound.

Senator SIEWERT—I do not actually care about the previous system; I care about this system.

Ms James—I just think that this example is exactly the kind of thing that we are aiming at. The example of the short-term crisis is the same as the old NDT. The key difference between the two is that, by requiring that there be exceptional circumstances as well as requiring that the agreement not be contrary to the public interest, the barrier has actually been raised.

In the Greyhound case, the company was technically insolvent. It had a $9 million deficiency between its assets and liabilities, and the commission noted that certifying the agreement, although there was some loss of certain conditions, allowed the company to secure additional loan funds for ongoing operations. It prevented the company being placed in receivership. It enabled more predictable labour costs for the company, effectively giving the company a chance to stay afloat and maintain the jobs of those people. I think in that case, and in other cases, they also noted that there was unanimous agreement by the employees.

So these are the kinds of circumstances we are talking about when we talk about exceptional circumstances, short-term crises and taking into account the situation of the business. We are not talking about a situation where a business would like to make more money and would therefore like to cut terms and conditions. We are talking about a situation

where there are genuinely exceptional circumstances and it is therefore justified to keep a business afloat to have, for a short period of time, an agreement that would not otherwise have satisfied all the requirements of the fairness test.

Senator SIEWERT—Are those AWAs signed for the same length of time?

Ms James—They could be. One of the things that the commission used to take into account was the duration of the agreement.

Senator SIEWERT—No, now.

Ms James—So now it could be a five-year agreement but, following the case law of the commission when they were considering the public interest requirement in the old system, I think the Workplace Authority Director would take into account duration. There were cases in the old system where the commission would say, 'You can't have it for three years; you can only have it for one year because that's what is justified.' This comes back to the concept of fair compensation and that the deal must be fair in the circumstances. So the authority director would take into account the duration of the agreement when deciding whether or not it was fair to allow it to operate.

Mr Kovacic—Can I just add briefly to one question that I answered before. I should emphasise that where a prelodgement assessment is undertaken, whilst the agreement is ultimately lodged, assessment will be fast-tracked, so it might indeed come down to less than seven or 10 working days in those circumstances. That, together with the certainty that prelodgement provides, is a very powerful incentive for employers and employees to actually use the prelodgement process.

Senator MARSHALL—I will follow up. That is probably where I was leading to. I guess the difference is that the commission's decisions, which you referred to, in the past were actually public decisions that were published and were transparent. Are the decisions now in these circumstances going to be made public?

Ms James—The Workplace Authority is not a tribunal that is going to hold hearings, take submissions and get bogged down in the procedural processes.

Senator MARSHALL—Please, Ms James, just answer the question. I do not need all that because I can read that.

Ms James—And so, because of that, the approach is different. There is no official issuing of reasons, as was the case before, under the NDT.

Mr Pratt—Senator, I do not want to take up extra time—I realise time is short—but it is not possible to answer the questions with yes/no answers often, given the complexity of the subject.

Senator MARSHALL—Well, you really just have. The reality is that it is not going to be open and transparent, is it? There is no need to publish the reasons.

Senator BARNETT—That's your interpretation, Senator.

CHAIR—Order!

Ms James—I would not say that it is not open and transparent. The legislation sets out the requirements.

Senator MARSHALL—Yes, but it is subjective.

Ms James—The director has to provide advice—

Senator MARSHALL—You have told us that it is a subjective outcome. There is no reason to justify reasons for the decisions, is there?

Ms James—I have not said it is a subjective outcome, and perhaps this is why I prefer to answer the questions according to—

Senator MARSHALL—There is nothing in the act which requires the reasons for a decision to be made public.

Ms James—Formal reasons about the result of the fairness test application are not going to be issued—that is correct.

Senator MARSHALL—So, based on all the things that the workplace director can take into consideration when this person comes to make this decision, including exceptional circumstances, none of which has to be revealed, is there anything in the legislation—and this also goes to what Senator Fielding asked—to stop an agreement being declared fair that consists of only the minimum wage and the minimum fair pay and conditions standards?

Ms James—Without exceptional circumstances—and you have not given me any there—the answer to that is that that agreement would not pass the fairness test.

Senator MARSHALL—No, but that was not the question. The question was about the Workplace Authority director making this decision: is there anything in the legislation that would stop him, after he has gone through whatever processes he will that will not be published, approving or declaring fair an agreement that only contains the minimum wage and the fair pay and conditions standard?

Ms James—Yes. What would prevent that from happening is the requirement that the Workplace Authority director is satisfied that fair compensation has been provided, and, based on what you have just articulated, I cannot imagine that that would be considered fair compensation. It simply would not be.

Senator MARSHALL—Well, point me to the bit in the bill which prevents an agreement being declared fair by the Workplace Authority director that contains only the minimum wage and the fair pay and conditions standard.

Ms James—As I said before, Senator, the bill does not purport or attempt to set out every possible agreement out there and every possible result or outcome. The provision that would prevent that from happening is the core provision of the fairness test itself which requires that the Workplace Authority director be satisfied that fair compensation has been provided. In that situation you have just described—

Senator MARSHALL—Or exceptional circumstances.

Ms James—In that situation you have just described, no compensation has been provided whatsoever, and I cannot imagine that that would pass the test in any circumstance.

Senator MARSHALL—No—can't imagine! I had better hand over to Senator George Campbell.

CHAIR—Senator Campbell.

Senator GEORGE CAMPBELL—Mr Pratt, the workplace director, as he is now called, told us at budget estimates that something like 20,000 agreements had been lodged from 7 May, none of which have yet been assessed because he did not have staff to do the assessments. I am told independently that there could be something like 80,000 to 100,000 agreements in the backlog that will have to be assessed. As I understand it, once these agreements are lodged, the conditions that are in them apply. If, in the process of the assessment being carried out over the next few months or whatever time it takes, some or any of those agreements are found to be deficient in any respect and the workplace director requires them to be corrected—which I understand he can order—is there provision for the new arrangements to be backdated to the time of lodgement?

Mr Pratt—Yes, Senator.

Senator GEORGE CAMPBELL—There is. Where is that specific provision in the bill?

Mr Bohn—Senator, the way the bill is set up is that, for agreements lodged after 7 May, the rules in the bill apply, including the rules that provide for payment of compensation and what people fall back to if the agreement ultimately fails the test. So those rules apply to all agreements that are lodged after 7 May.

Senator GEORGE CAMPBELL—So the payment of compensation is also taken to include retrospective payment?

Mr Bohn—It includes all payment from the time the agreement was lodged, if it was lodged after 7 May, until the time when the agreement is found to fail the test.

Senator GEORGE CAMPBELL—Does that include retrospective payment?

Mr Bohn—I am not sure I understand the question. It is all—

Mr Kovacic—If the agreement was lodged on 7 May, any compensation that was payable would be backdated—

Senator GEORGE CAMPBELL—Would be backdated to 7 May.

Mr Kovacic—to 7 May, yes.

Mr Bohn—To the date of lodgement; that is right.

Senator GEORGE CAMPBELL—But it does not specifically provide for retrospective payment in the bill, so is it possible for the workplace director to order compensation from the point at which he determines that there is a deficiency?

Mr Bohn—No, Senator.

Senator GEORGE CAMPBELL—It's not?

Mr Bohn—The legislation provides that compensation is payable in respect of the period from lodgement until failure—the whole period.

Senator GEORGE CAMPBELL—Where is that in the bill, Mr Bohn?

Mr Bohn—It is in proposed section 346ZD, on page 27 of the version of the bill that I have.

Ms James—And, Senator, it is not a matter of anyone making an order. It just is; this is the effect of the bill. There is no discretion around this. The compensation becomes payable; the employer must pay it. If the employer does not pay it, it is enforceable under the act in the same way an award breach is enforceable, and the workplace ombudsman will take action to recover those moneys if they are not paid.

Senator GEORGE CAMPBELL—I will go back and look at the bill.

Mr Bohn—If I could assist by pointing out that section 346ZD, subsection (4), defines the fairness test period—which is the period in respect of which compensation is payable—as the period beginning on the day on which the agreement is lodged and ending on the day on which the agreement ceases to operate, which is the day on which the notice of failure is issued.

Senator GEORGE CAMPBELL—But the point I am concerned about is that I do not think the bill specifically provides that compensation must cover the whole period.

Mr Bohn—It does. That is what that provision does. In respect of any shortfall in that period, that is recoverable.

Senator FIELDING—Just a point of clarification: what is the potential time difference between starting a job under an AWA, for example, and the lodgement date? How big can that gap be? Can you explain that? I know it goes back to the lodgement date. How big can the gap be between starting employment, being paid and the agreement being lodged?

Ms James—It is open for an employer and an employee to make and lodge an agreement before the employment starts—

Senator FIELDING—I understand 'before'.

Ms James—but, under the obligations of the act, you must lodge an agreement within 14 days of having made it.

Senator FIELDING—So, if the person is working for 14 days, the compensation goes back to the date of lodgement, not back to the time they started their job?

Ms James—That is right, but the conditions in the AWA do not commence until lodgement. So for that 14 days beforehand they would have been covered by something else. They would not have been covered by that AWA.

Senator FIELDING—It is a brand new job, so they are not covered by—

Mr Pratt—They will be covered by other applicable instruments in the workplace, presumably the award.

Senator FIELDING—We went through this before. There is no award.

Mr Pratt—Unless it is an industry where awards do not apply.

Senator FIELDING—What happens in that case?

Mr Pratt—Then they are covered by the standard.

Senator FIELDING—The five minimum—

Senator GEORGE CAMPBELL—Ms James, in respect of the example in the SDA submission, you said to Senator Fielding that the voucher would not be regarded as significant non-monetary compensation. What is regarded as significant non-monetary compensation? Can you give us some examples of what are included in that category?

Ms James—I can first take you to the definition in the bill of 'non-monetary compensation':

(a) for which there is a money value equivalent or to which a money value can reasonably be assigned; and

(b) that confers a benefit or advantage on the employee which is of significant value to the employee.

The explanatory memorandum sets out some examples, such as child care, car parking et cetera.

Senator GEORGE CAMPBELL—Let's take the example of car parking. If I work in the CBD of Sydney, it may be a significant advantage to me to be provided with a car space, given the shortage of spaces in the CBD. But if I worked out at Penrith it may not be significant—

Ms James—Absolutely.

Senator GEORGE CAMPBELL—You are saying to me that, in every one of these examples, a workplace director or one of his staff will have to go through and look at each individual circumstance?

Mr Kovacic—Can I just refer you to page 76 of the OEA policy guide, which deals particularly with car parking. It says: 'The value of free car parking facilities for employees may vary according to the location. It is more valuable in the CBD of a major city than in a rural town.' That is the way—

Senator GEORGE CAMPBELL—I understand what is there. The point that I am trying to get to and trying to understand is that you are not seriously suggesting to this committee that you will deal with 400,000 AWAs and that you will have staff to sit down and look at where a car park is provided in the CBD and is of significant value or where it is provided at Penrith and is not of significant value and also look at what the other non-monetary payments are?

Mr Kovacic—In terms of the process and the information that is provided to the authority, the intention at this stage is for the employee information statement to include a section where the employee can actually provide details as to whether a particular non-monetary item is of significant value to them. In those circumstances, there is also the capacity for the authority to seek further advice and information from the employee to enable the authority to assess whether the particular item is of significant value to them.

Senator GEORGE CAMPBELL—That is my third point. In respect of the provisions of exceptional circumstances, there is a provision in the bill where the director is actually authorised to examine the personal circumstances of employees. How does this stack up against the Privacy Act?

Ms James—I do not think that is at all relevant.

Senator GEORGE CAMPBELL—Why not?

Ms James—Because this is a situation where an employee and an employer have made an agreement that the personal circumstances be taken into account and so the employee wants this arrangement. If they want the agreement to be approved, they need to provide the necessary information to the authority director so that the circumstances are clear. It is a voluntary process. If they do not want their personal circumstances to be taken into account, if there is no advantage for them in that, then I do not imagine that they would be making agreements based upon them. The director will not have the ability to compel any information to be provided to them by any person. Any information that is provided is entirely voluntary and based on the desire of the parties to get an arrangement in place which suits their needs.

Senator GEORGE CAMPBELL—If that is the case why are the words used 'the director is authorised' to examine their personal circumstances?

Ms James—What the director is authorised to do is to ask for information if it is not clear that the fairness test has been passed. There is no ability to compel the provision of any information by anyone in this. That is because this is a voluntary system. People have volunteered to make an agreement. They have volunteered to have it scrutinised to ensure that it is fair.

Senator GEORGE CAMPBELL—If the director is concerned that it does not meet the fairness test and he 'asks' the employee for information and the employee says, 'No, those are my personal circumstances; I'm not prepared to provide that,' would they then assume that the fairness test is met?

Ms James—No, not at all. In that case it would be very clear that the director would not have been able to have been satisfied that the fairness test is passed because there would not be sufficient material for them to make that decision. In that event, the agreement would fail the fairness test.

Senator GEORGE CAMPBELL—So in those circumstances, the exceptional circumstances would fall over?

Ms James—To the extent that the personal circumstances are relied upon, the agreement would fall over.

Senator GEORGE CAMPBELL—That is the point I am trying to get at. If an employer and an employee seek to lodge a document that provides for exceptional circumstances and provides for less than fair compensation because there are exceptional circumstances then that can be nullified if the employee says, 'I'm not prepared to provide the personal information'?

Ms James—Yes. I think that we need to distinguish here between the exceptional circumstances, which are primarily about the employer's situation, and the personal circumstances, which are primarily about the employee's. They are actually dealt with under different subsections. In both cases, the authority director must have sufficient material before him or her to enable them to be satisfied. In the event that there is not sufficient material, they will not find that that agreement has passed the fairness test.

CHAIR—Thank you. We will have to leave it there.

Senator GEORGE CAMPBELL—I have one final question in respect of that.

CHAIR—I am sorry, you cannot, Senator Campbell. We have run out of time for this section.

Senator GEORGE CAMPBELL—I am sorry, Madam Chair. There are some serious aspects of the bill that this committee is entitled to ask the department about. I must say it is outrageous that only one hour was allowed for the department to talk to us about the details of a bill that was introduced about a week ago and which we have not had the chance to examine. There are some serious consequences which the department have already indicated that they will be seeking amendments to.

CHAIR—They have agreed to follow up any further aspects of this bill by a further submission on Tuesday.

Senator GEORGE CAMPBELL—Can I ask you to follow up and tell us what the definition of 'significant' is taken to be. Is it the dictionary definition? Or does it have some other meaning in regard to its application under this act?

CHAIR—I think the department will provide a further answer to that in their written submission. Thank you very much for your appearance here today.

Mr Kovacic—To return to Senator Barnett's question, I have some information in terms of the number of current AWAs broken down by state and industry sectors in proportional terms which I can table.

CHAIR—Thank you very much for that. The committee agrees it will be tabled. I might add, Senator Marshall, that the timetable for today was partly set on the representations of the ALP, so we will not have any argument about the times, thank you.

Senator GEORGE CAMPBELL—It certainly was not set with any consultations with me.

CHAIR—It was with your deputy chair.

[9.36 am]

BARKLAMB, Mr Scott, Assistant Director, Workplace Relations, Australian Chamber of Commerce and Industry

MAMMONE, Mr Daniel, Adviser, Workplace Relations, Australian Chamber of Commerce and Industry

CHAIR—Welcome. The committee prefers to take evidence in public. It will consider any request for all or part of the evidence to be given in camera. Thank you for your submission. Are there any changes or additions?

Mr Barklamb—No.

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

Mr Barklamb—Thank you, and I thank the committee for the opportunity to appear this morning. On 4 June ACCI lodged a 36-page submission addressing a range of issues in both the stronger safety net and the work-family balance bills. I intend only to make some brief opening statements this morning and to confine my comments to the operation of Work Choices generally and the stronger safety net bill. The family-work balance bill is addressed from page 33 of our submission, at section 15.

After 15 months, ACCI believe Work Choices is operating well. It has led to the outcomes we identified before this committee, we say, in late 2005. It has led to or contributed to the creation of more jobs—and yesterday's job data shows that employment continues to grow strongly—more confidence and opportunities for more productive, rewarding and flexible work. AWA making has taken off following the Work Choices reforms, with the lodgement and entry of over 300, 000 AWAs in the first 12 months. AWAs are also paying well. ABS employee earnings and hours data for May 2006 show AWAs on average paying 94 per cent higher than awards, more than $400 above average award wages. Added to this material, for the benefit of the committee, is something we may all be less familiar with, and this is raised in the submission of the Australian Mines and Metals Association, a major ACCI member. It is the Melbourne Institute wages report data which showed, as quoted in AMMA's submission:

> … average wage increases to workers on individual contracts (6.8%) exceeded those under collective agreements (3.9%) and awards (3.3%).

So, in very brief terms, we come before you to report as Australia's employers that the Work Choices amendments are generally working positively, delivering the benefits they were designed to deliver and, especially, greater agreement making. Something is really happening out there, Senators: agreement making has taken off. New workplaces are moving into bargaining and new employees are gaining the opportunity for higher wages and greater flexibility that bargaining provides.

We are here today because the government has made a decision to further amend the legislation to add the proposed fairness test, as announced by the Prime Minister on 4 May. ACCI's response was contained in a media release of the same day. Essentially, ACCI do not agree with the necessity of strengthening the safety net. However, that is what the bill which

is currently before you will do—it will strengthen the safety net. The pre-eminent consideration for this committee, we believe, should be the implementation and operation of the changes in the bill you have before you.

ACCI have identified some areas for further consideration in our submission. However, on balance, the formulation of the amendments and their intended operation we believe should not slow agreement making. We believe the form of implementation through the amendments will generally minimise their impact. Our comments are intended to be constructive input within the overall framework of generally supporting the implementation of the stronger safety net announcement. They are framed more often as queries and clarifications, and we commend this input to the committee and to the government.

Lots of claims and counterclaims have been made about what has happened in bargaining between March 2006 and May 2007. Whatever one's consideration of outcomes and developments may be, agreement making has been changed by the Prime Minister's announcement and by the introduction of this legislation. The fact is that the addition of the fairness test will affect any agreements from 7 May which would have modified or excluded protected award conditions.

I want to address some points from the submission of our colleagues from the ACTU with which we have no agreement but wish to highlight very briefly on a small number of matters. Firstly, we reiterate our belief that non-monetary compensation and the consideration of exceptional circumstances as factors taken into account in applying the fairness test will come into consideration only rarely. We do not share the ACTU's view—if this is their view—that this will become common or the usual run of agreement making. We would say that would be an ahistorical assumption from the ACTU and would fly in the face of lessons we know from previously comparable provisions.

Secondly, concerning the ACTU submission, at paragraph 27, we do not agree that taking into account someone's work and family responsibilities in the assessment of what is fair compensation is discriminatory. I could not put our disagreement in stronger terms; we have a polar disagreement with the ACTU on this. Employees seek a diverse range of flexibilities and they clearly value them operationally in day-to-day work. I had the pleasure of being ACCI's advocate in the national work and family test case between 2002 and 2005. I think the ACTU has failed to learn the lesson of that case, which is the range of flexibilities employees seek from employers at the operational level. Generally, we think the approach in the bill will be very good for work and family in the minority of circumstances in which it will be applied.

Thirdly, I refer to the ACTU submission, at paragraph 7, where they highlight the number of employees they say will be excluded from the salary cap on the fairness test. Again, if we have understood them correctly, we think the ACTU is on the wrong track here. We understand that the core principle of this bill is that what one has one keeps, with the additional imposition of award designation for persons under $75,000 per year. Of course, non-award or higher-earning employees are excluded. They have no entitlement to the protected matters and no history of award coverage. We also disagree with the construction from the ACTU, which has been advanced in recent days, that persons making a transition from state award coverage into the federal system will have no award comparator or no

entitlement to the fairness test. Our understanding of the bill is that these are precisely the sorts of persons covered by the notion of an industry that is usually regulated by an award.

Finally, we do not share the ACTU's concerns in paragraph 21 regarding scope for payment in kind. We address this issue in our submission at pages 6 and 7. We point out—and I think it has been pointed out to you this morning, so I need not go over it in any further detail—that any agreement to non-monetary compensation will firstly be exceptional, as we have indicated in our prediction. It has to have value to the employee. It has to be agreed—we are talking about agreements at all times—and the Workplace Authority has to determine its value is fair. We say there is a multilevel safety net in regard to these issues.

In conclusion, we commend the detail of our written submission to you and are very happy to address questions.

Senator BIRMINGHAM—Thank you for your comments, especially for highlighting the jobs and wages growth that has occurred under the workplace relations system. I would like to start by trying to knock on the head some of the furphies around the new fairness test compared to the old no disadvantage test. Under your understanding, was non-monetary compensation allowable for trading away award conditions under the old no disadvantage test?

Mr Barklamb—Indeed. Our understanding is that it could be taken into account but, to return to my earlier comments, it was never the run of the mill or the ordinary nature of the assessment under the former NDT, which was overwhelmingly, as we understood, one of monetary compensation against flexibilities in a particular agreement.

Senator BIRMINGHAM—Under that old system, though, was it possible for a worker to trade away all of their annual leave entitlements, potentially?

Mr Barklamb—Indeed, Senator. And the change in architecture, if you will, in Work Choices, the creation of the fair pay and conditions standard, has made a number of matters more inviolate to bargaining than the previous system, in which there was substantial scope to trade away more than the prescribed two weeks in every four of annual leave, or you could make quite substantial changes to sick leave. So, under the previous NDT, in a sense you could in the vernacular say that, when you looked at everything globally, everything was on the table for fair compensation. We are now talking about a system in which a certain number of core matters are parcelled off. It is somewhat less flexible in bargaining than the NDT which preceded it and more protective of employees in that regard.

Senator BIRMINGHAM—So in fact you could have traded away annual leave provisions and you could have traded away, as you just added, any sick leave provisions under the old system?

Mr Barklamb—Absolutely.

Senator BIRMINGHAM—Those are now protected—

Mr Barklamb—They are protected.

Senator BIRMINGHAM—and indeed there is now potentially even less flexibility for employers under the new fairness test.

Mr Barklamb—Absolutely, Senator.

Senator BIRMINGHAM—We have heard some questioning about the types of non-monetary compensation that might be offered. Is it the view of employers and the ACCI that, for example, car parks in the city would be worth a different monetary value from car parks in non-metropolitan locations?

Mr Barklamb—I think the example we used in our submission was that, were someone to be allocating the same value to a car park in Sydney as a car park in Mildura, we believe the advocate would look closely at it. I had the benefit of listening to our friends from the Commonwealth department try to answer a version of this question earlier, and our belief is that the advocate would look closely at any set of non-monetary compensation. We believe that functionally—pardon me, I am using the old nomenclature; I mean the Workplace Authority—the Workplace Authority will develop its own administrative structures as well. But I would imagine it would develop a system of internal expertise and staffing that would deal with non-monetary compensation. So it would not be a case of each individual officer having to go and research the value of a car park in a particular area. I imagine that would become an area of some expertise for internal staff or a division, and those people would be able to very quickly assess an agreement that was allocating a Sydney CBD value to a car park in Mildura, for example.

Senator BIRMINGHAM—I note that it is the wish of the ACCI that guidelines be published for this area so that there can be some transparency and certainty for both employees and employers in valuing an assessment of non-monetary compensation and other areas of trading away conditions.

Mr Barklamb—I think that would be very useful. When we say 'guidelines' we do not necessarily mean an old-fashioned sort of schedule of rates but examples of how things will be valued, examples of how the Workplace Authority may do its work in assessing a fair value and examples of the documentation those lodging an agreement may need to bring forward to have that value assessed fairly and assist the authority in its work. The other thing of course is case studies; we think case studies are of equal value to guidelines, and they will also be very important in assessing these types of areas.

Senator BIRMINGHAM—So is it fair to surmise that, just as we hear employee organisations or unions arguing that they would like to see greater transparency than perhaps the legislation detail might suggest in revealing any areas of trade-off, particularly the valuing of non-monetary compensation, employer organisations such as yours would be looking for a similar level of transparency and openness?

Mr Barklamb—Indeed, Senator. With regard to this issue of transparency, transparency for us is certainty and clarity and guidance on how to navigate the system. We think that is the most important service or feedback that the approval process, or the lodgement and checking process, can offer to our members and indeed to employees. That is the method of communication. I think we can exaggerate the extent to which former processes were transparent as such with regard to, for example, the approval of AWAs or certified agreements by the Industrial Relations Commission. If you read those decisions, they were very often

fairly brief and not a detailed line-by-line analysis. I think we should not get too caught up in saying there was formerly a different approach to these things than there is now.

Senator BIRMINGHAM—If we turn to the provisions for exceptional circumstances under the previous tests and compare them with those under the proposed legislation, is it fair to say that the new exceptional circumstances test or ability to trade away conditions is more restrictive, particularly salary conditions?

Mr Barklamb—The first thing we would say is that there is a consistency or a continuance of the notion of exceptional circumstances. There is a clear guidance in the legislation to refer to serious economic crises. In the framing of the legislation, the architecture is followed from the pre-Work Choices version. We certainly agree that there is some strengthening in there about genuine value. I do not have the provision open in front of me just at this moment, but it certainly appears to us that that will be very rigorously applied. On a line by line comparison to what went before it, it may be that there are additional protections in there.

Senator BIRMINGHAM—In relation to section 346M(3)—personal circumstances—in the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007, you have made a very strong pitch today that those circumstances, particularly as to family responsibilities, are less than satisfactorily regarded in some of the submissions from the union movement. Could you explain some of the practical provisions that you have seen employers use concerning family responsibilities? How are they being recognised and supported? And where is that perhaps not being recognised in the submissions from the ACTU and others?

Mr Barklamb—All members of the committee will be familiar with the obvious changes in parenting structures—such as both parents in work—from what we once had. Many parents make a lot of effort to try to reconcile different rosters, different times within their personal relationships. We are often told about parents who want to truncate their working time to pick up children from school. An example that I am familiar with from the work and family case is that of a mother who specifically requested to work longer than the period for which a meal break would be allocated under an award, and so a penalty rate would need to have been paid because there was no meal break. She specifically did not want to take a half-hour meal break. She wanted to truncate her working day to pick up her children from school. We have parents that want to work out of hours. They would prefer to work 'shift parenting', if you will, to some extent. It suits them to be in the workplace later at night where a penalty rate might be attracted. They wish to work those hours; they suit them. Those hours are not an inconvenience or a disadvantage to those parents in their parenting pattern. Similarly with weekend work, some people want to do their ordinary shifts of work on Saturday mornings and the like. These are the types of requests which are being made to our members on a daily basis that they are seeking to accommodate.

Senator BIRMINGHAM—I notice that the SDA submission suggests that, essentially, all AWAs and certified agreements should be presented to the Australian Industrial Relations Commission for assessment rather than go through the proposed assessment procedure, as was the case under the previous system. What type of administrative burden might that place on employers if they were dealing with that complete assessment?

Mr Barklamb—The first comment I would make in relation to that before I get to the exact question is that time has passed since that proposition. Work Choices changed that. As I understand the policy of the Labor Party, they are not proposing to put agreement approval back into the commission either. So it is a proposition whose time has well and truly passed. That said, to go to the commission requires the services of an experienced advocate. It requires attendance at the commission for particular agreements. The expertise of those various members of the commission in dealing with agreements is not the same as that applied to the agreement-making process by a dedicated Workplace Authority or an Office of the Employment Advocate type of agency, so things can take longer.

I am informed that the time lines for the commission to approve agreements can take longer. Certainly that was the experience with the AWAs that ended up in the commission, although that would not be a fair reflection because they were the hard cases prior to Work Choices. Certified agreement time lines could well take longer and often have taken longer than those of the Office of the Employment Advocate. So you have uncertainty about the status of the agreement, the application of pay increases, milestones and flexibilities under the agreement.

Whilst we would say that the commission has dealt as expeditiously as it can with what it has been doing, this was essentially an administrative process that was wrong for an adversarial or quasi-court based process to deal with. We think there has been a significant improvement in the Work Choices approach of rendering this the preserve of an agreement-approval authority. We need to take little more evidence than that of both alternative industrial relations policies at the moment, which is that they would not return it to the commission.

Senator FIELDING—I refer to point No. 12 on page 4 of your submission where you mention the overwhelming feedback 'during the first 14 months of Work Choices'. You mention—and it is quite true—'shortages of labour'. I think the public is concerned about what happens when there is a downturn and unemployment goes up and workers have less bargaining power. What are your thoughts on that issue?

Mr Barklamb—Firstly, I would like to take the opportunity to say this. Whilst obviously economies have cycles and over time things ebb and flow, that is not merely historical determinism. The extent to which a country stays the course on workplace reform and retains a flexible labour market will influence the extent to which we go into recessions, the shallowness with which we go in and the rapidity with which we come out. So it is not simply a given that we will ebb and flow into these things and that workplace reform is irrelevant to our success as a country in navigating the economic course over time. That said, were we in a very different labour market—were we in the labour market of 1992, 1993 and 1994—we would be in a situation with five strong minimum conditions of employment inviolate to bargaining. We would still have a minimum wage that was the highest or second highest in the world. We would still have this new fairness test architecture that ensured that the protected award conditions could not be bargained away for, say, fair compensation. So we would still have a very regulated labour market and an unparalleled degree of employee protection in international terms in a different and tighter labour market with a higher unemployment rate.

Senator FIELDING—Your submission states that you think this change of the fairness test was definitely not needed. I think you have made it clear in your submission that the government did not need to strengthen the workplace safety net. So you were quite happy with the way it was—is that correct?

Mr Barklamb—Indeed.

Senator FIELDING—I will draw your attention to this. Do you think that it is also right that an employee or a worker should be required to work on Anzac Day or Christmas Day and not be paid a cent more and not get a day off in lieu? Is that ACCI's position?

Mr Barklamb—Public holidays are something that we understand have been dealt with consensually in agreements, both before Work Choices and after, for quite a number of years.

Senator FIELDING—Before this fairness test, was it possible to be required to work on Anzac Day and legally not be paid a cent more and legally not get a day off?

Mr Barklamb—Well, the answer is that under the award system—

Senator FIELDING—The answer is yes or no.

Mr Barklamb—For many awards no, but it was possible to make agreements which rostered work on some public holidays—

Senator FIELDING—Can I go back to that. The question was: was it legally possible before the fairness test to be required to work on Anzac Day and, say, Christmas Day and legally not be entitled to extra pay and a day off?

Mr Barklamb—It was possible, Senator, to make a range of agreements—

Senator FIELDING—'It was possible'—that is the answer.

CHAIR—Mr Barklamb is attempting to answer your questions, Senator Fielding. Please allow him to do so.

Senator FIELDING—Chair, I just make this comment. We are very short of time and therefore what I am trying to do is to get to the answer quickly. With all respect, I have asked a direct question. It does not need explanation. We all know the answer is yes. I am just asking him to answer the question.

CHAIR—These are complex matters. We do not all know the answers. Mr Barklamb has the floor to answer the question, and I would like you to allow him to do so.

Senator FIELDING—Chair, can I ask the question again so it is pretty simple?

CHAIR—Yes, thank you.

Senator FIELDING—Under Work Choices before this fairness test—which is not in yet but it is obviously going to be—was it legal to have someone work on Anzac Day and Christmas Day and not pay them a cent more and not give them a day off in lieu?

Mr Barklamb—There is a range of possible scenarios that could occur.

Senator FIELDING—But is that one possible scenario?

Mr Barklamb—May an agreement have been reached in those terms? Perhaps it may.

Senator FIELDING—Thank you. You say in your submission on page 33, in relation to Family First's family-work balance bill, that the Work Choices amendments did not remove things like public holidays. In fact, all that Family First was trying to do was make sure that things like public holidays such as Anzac Day and Christmas Day were not traded away for nothing.

Mr Barklamb—Perhaps I can clarify the basis on which that paragraph is included in our submission. Please do not think this is a reference to you, but others with a very partisan opposition to Work Choices have been very loose with their nomenclature of what the Work Choices amendments did. A number of people have alleged that certain outcomes were a direct result of the passage of the amendments in late 2005, and that is not an accurate description of what was different on 29 March 2006 compared with on 28 March 2006. That was no more and no less than the reference there.

Senator FIELDING—With regard to non-monetary changes that people may be facing—things like changes in shift times and what not: they can be changed without any compensation at all, even under the fairness test. Is that your understanding?

Mr Barklamb—As I understand the previous process of awards, a range of things were regulated in a minority of awards about shifts. I do not understand all awards by any stretch of the imagination to have been very pejorative about rosters and shifts; it was a preserve of some industries and areas. Some awards merely mandated it was a condition of the award that a particular process be followed to vary a shift, so one would breach the award to not follow that process; but there was not a monetary penalty as such, so it was not something to which you could readily assign a monetary value. As a general view from ACCI, we would describe a lot of those sorts of things as an unnecessary prescription of the conduct of day-to-day workplace relations. They do not fall within the same type of former award condition as the protected award matters, which are matters of clear monetary transfer from an employer to an employee. So we would probably say it is a different beast, a different animal.

Senator SIEWERT—You made comments earlier about the benefits that have accrued from Work Choices. I am wondering if you will acknowledge, then, that this was done in circumstances that were considered not fair by many people, because the fairness test has now needed to be introduced.

Mr Barklamb—It is an assessment of the government that these tests needed to be introduced, for the reasons the Prime Minister set out in his statement of 4 May. We have indicated our belief, from our understanding of what was happening in the field, that they were unnecessary. Our feedback is not that the protected award conditions were being changed in some of the ways that are being spoken about.

Senator SIEWERT—How do you know that, since the OEA, as it was, was not releasing details and we have no understanding officially of what penalties and conditions have been lost?

Mr Barklamb—I have no more than the feedback of my 35 member organisations making AWAs in the field on a day-to-day basis: that within the professional expertise and day-to-day agreement making of ACCI member organisations it was not the norm or demand for them to make agreements of the type most extremely caricatured in some areas of debate prior to and

after the passage of Work Choices. If I can go back a step, Senator, you were initially asking whether the government saw a necessity for it. I would like to point out that significant efforts have been invested in diminishing the confidence of employees in the employer-employee relationship within workplaces. Going around the country I personally received feedback that a lot of employers have found even collective agreements with unions quite difficult to negotiate in the wake of some very hostile advertising that has occurred prior to, during and particularly following the passage of Work Choices. I would like to take the opportunity to say that some harm has been done potentially to workplace relations by some of the uncertainty that has been created by some of the debate of recent months. It is for the government to say why it made the amendments of early May, but that certainly is a factor that needs to be addressed.

Senator SIEWERT—So you do not think these changes are necessary. Is that a correct interpretation of your comments?

Mr Barklamb—That remains ACCI's position.

Senator BARNETT—Thank you for your comprehensive submission. It is most appreciated. In your opening statement, you referred to the Melbourne Institute study mentioned on page 13 of the AMMA submission. I understand AMMA is a member of your organisation. Based on your advice and feedback from your members, does that Melbourne Institute study seem to be consistent with the feedback you are getting on higher wages and AWAs compared to awards and collective agreements?

Mr Barklamb—Indeed, our members are describing wages growth as fairly healthy but within bounds under both forms of agreement and certainly there are very strong rewards for employees entering AWAs.

Senator BARNETT—Secondly, the AMMA submission referred at pages 8 and 9 to the AWA penetration in the mining industry. Have you had a chance to consider the penetration in industries where your members are prevalent?

Mr Barklamb—We have certainly had an opportunity to consider that. I have not brought that data with me today but I can indicate that our understanding of the penetration of AWAs in the mining industry is far closer to that of our expert member that makes the AWAs in that industry, the Australian Mines and Metals Association, and certainly would exceed the types of public impressions that may have been given of low penetration of AWA making in the mining industry. We do not think those figures are quite accurate, or we need to nuance exactly what we are talking about—what proportion of all employees in the industry are covered by them or whether we are talking about the proportion since Work Choices. On either measure, we understand AWAs in the mining industry, as in many industries, have become one of the key mechanisms to secure workplace change. They are relied upon, they are supported and they are entered into in very strong numbers on a day-to-day basis.

Senator BARNETT—They say:

A review of ... agreements lodged in the 12 months to 31 May 2007 reveals that 73.5% of resource sector employees were covered by an AWA.

What is the percentage in other industries—you may be happy to take it on notice—where your members are prevalent because that is a very high percentage?

Mr Barklamb—I think we can get you some information. We will send something to the committee on that basis but our understanding is that the mining industry is among the stronger users of AWAs—without question.

Senator BARNETT—You mentioned the ACTU submission and your concerns about it in a number of respects. Page 2 of their submission says:

The Bill does not protect employees from agreements that undermine the safety net.

What is your response to that?

Mr Barklamb—I would think that is a completely unsustainable proposition. The safety net, as we have gone to earlier, has the inviolate parts in the Australian fair pay and conditions standards, which are protected, without question, under a stronger system. Indeed it is a system of higher penalties than we have ever had in Australia, with more active and resourced enforcement than ever before. This bill adds an additional set of protections for an additional set of matters. I would find that a completely unsustainable proposition from the ACTU.

Senator BARNETT—How would you compare the government's legislative protections for those on AWAs with employees who have a common-law contract arrangement?

Mr Barklamb—Thank you for this question because it has been exercising my mind for quite some time. A common-law contract is an over-award payment under any other name. It was possible in 1965, 1975, 1985, 1995 et cetera. It is not a new proposition in Australian workplace relations. It is not in any way an alternative proposition to individual agreement making through statute. It cannot, to use the words of this bill, 'exclude or modify an award condition'. All one can do is exceed each and every line item in the award and provide equal or more than it within an over-award pay scenario.

In relation to the question of enforcement and observation of the two forms of instrument—although you would not even call the Commonwealth contract an instrument—it is a natural exercise of one's contractual rights. An AWA contains tightly prescribed enforcement provisions. It is very clear that it can be enforced by the new Workplace Ombudsman structure that is proposed in this bill. There are very significant and clear penalties for breaching an AWA, and it is lodged and maintained in a written form, so there is no ambiguity about ultimately what was lodged with and accepted by the Workplace Authority.

A common-law contract may or may not be in writing. Does the version I have meet the version the employer has? Where do I take the employer to litigate on that? What personal cost do I assume in that litigation to try and recover what I say might be my entitlements under that common-law contract? Even further to that, to put on the hat I should be wearing, the employer hat, the employer may believe under a common-law contract that they have paid enough over the odds to make specific changes, such as to shift worker overtime through some additional payment. Where they are in error, there is no ability to even argue the case about the particular trade-offs you may have advanced. A far more certain structure is to be using an AWA where it has been assessed against this new test in particular, because that trade-off or nexus will have been properly assessed and you can have confidence in it and its enforceability over time.

Senator MARSHALL—This legislation has an obvious policy objective outcome, and that has been basically most of the discussion around the place. Of course, this sort of legislation also has some practical compliance issues, which I would like to explore with you as representatives of business. I would like to talk about how the policy outcome being one thing actually impacts on what people have to do to comply with the legislation. Could you explain to me, from a business perspective, what extra activities will be required from any business, small, large or medium, to comply with this particular piece of legislation?

Mr Barklamb—I can certainly have a go at that. There are others who may be involved more closely day to day in the former AWA making, under the previous system, so they could give you a more authoritative answer, but this would appear to me to require the employer firstly to fill out a more detailed form. I know that sounds somewhat trite but I actually think that will be the currency that will oil the wheel of how this will operate. As I understood it, the previous NDT system was administered by asking the employer to articulate items in the award which were modified or excluded and what else was in the agreement, in the quid pro quo or balance sense, against that. So, day to day, an employer will have to go into a little more detail on the operation of the agreement and identify the fair compensation, or what they say is the fair compensation. An employer would also need to provide some details of those elements of fair compensation in seeking to lodge an agreement.

We have mentioned that we believe the exceptional circumstances avenue and the non-monetary compensation type avenues will be just that—exceptional or rare—but obviously when those routes are pursued there would be additional paperwork and evidence required of an employer seeking to lodge something in those terms. There is also an ability, at section 346M(6), for the Workplace Authority director to inform himself or herself in any way he or she considers appropriate about the fairness test. So it may be that an employer might be required to provide more information or to facilitate site visits or contact between staff of the authority and their staff. It is a slightly lengthy answer but I think that gets to the sorts of flavours of what more might be required of an employer day to day after the introduction of the proposed test.

Senator MARSHALL—Maybe this is not the right question, because you have already indicated that you do not necessarily see a need for this. My question really was—answer it how you like: do you see that the extra requirements at a practical day-to-day level match or are compatible with the policy outcome directive or do you see an imbalance there?

Mr Barklamb—Do you mean the policy outcome the government has identified in introducing the amendments?

Senator MARSHALL—Yes.

Mr Barklamb—We have indicated that we thought that this was not necessary and that it carries some additional administrative structures or imposts on our members. I think that is accurate. But the formulation is in terms which will allow the Workplace Authority to communicate with our members. We already had a question earlier from Senator Birmingham about guidelines and case studies. We think there is an opportunity to make this as easy to comply with as possible. We have certainly been very supportive of the efforts of the advocate since its introduction to do that. Are there some additional requirements on us? Yes. Are they

consistent with the policy requirement of the government? With respect, I guess that the government has determined that it will go this course and put the test in place. The one thing we do have confidence in is that the existing structures and experience to date will give us something we can navigate.

Senator MARSHALL—That is the other area that I am not convinced about. How will it actually apply effectively? I am concerned about the non-public process of determining these issues and the lack of precedent. The guidelines are there but I do not see any provision in the act to enable anyone to determine how they are applied in every individual case. I am concerned about how people come to a full understanding of what may or may not comply. I think it is going to be a grey area and, in some respects, pot luck.

Mr Barklamb—With respect, I cannot agree with that because we do have the experience under the previous no-disadvantage test. When there is regulatory change of this type to agreement approval, yes, there can be some learning that the users of the system need to do. We freely acknowledge that. Our members will need to learn some new approaches and ways of doing things, but that learning is quickly moved through and we feel that we are in an approach now where we have the benefit of the previous NDT example. We have had the example of the advocate working with those lodging agreements from the employer community over time between 1987 and 2005 and being able to quickly communicate an understanding of what is in and what is out and what can and cannot be done. Whilst we are going through a bit of an adjustment, I think we are in a pretty good position to have a pretty quick communication in the implementation of this new test to have a fair bit of transparency and understanding of precisely what is possible, what will be approved and what will not be approved.

The other thing is that the feedback to me on the advocate is that it is an organisation that takes its internal consistency and administrative processes quite seriously. It is fairly customer responsive and people do want to argue the toss about particular provisions and to understand why or how they need to be modified or, particularly for my members and others seeking to lodge agreements all the time, to develop a bit of feedback to understand what they need to do in the future to make the agreement process work more easily. We have confidence that this is an iterative learning process that will be navigated quite quickly.

Senator MARSHALL—So you think that, once an agreement has been approved as passing the fairness test, that agreement will be able to be relied upon in the future?

Mr Barklamb—I would be very cautious in saying that because I understand that the test requires consideration of the particular circumstances and the particular remuneration structure required—putting to one side the non-monetary and exceptional circumstances which are arguably less able to be extrapolated to other cases because they would require a circumstance-specific examination. I think that the authority will identify and promote those examples which it thinks are clearly able to be generalised from its guidelines, case studies and those types of examples and, in doing that, will communicate the type of general propositions which arise from the approval of specific agreements.

Senator MARSHALL—If we take the car park example, are you suggesting to me that, within the same employer group, the same car park could have a different value assigned to it per employee or per agreement?

Mr Barklamb—No, I am not. That would be the sort of area where there would be communication between those seeking to examine the agreement and those seeking to lodge the agreement. There are opportunities for prelodgement approaches. If you are going to be lodging other agreements, with a similar non-monetary compensation for car parking, it would be prudent in that circumstance to identify that to the people who are dealing with your agreement or identify it in writing when applying and seek to specifically advance an agreement on the basis that you will be trying to repeat that process for others.

Senator MARSHALL—Is it possible that a car park could have a different value applied to it by different individuals? The provision of a car park may be worth something to someone but not worth much to someone else?

Mr Barklamb—At all times this is an agreement. So, if you are a committed bike rider or a public transport person, like me, the provision of a car park may not be something you freely agree to in your particular remuneration structure. It may not be of value to you.

Senator MARSHALL—No, but I suspect we all understand that the reason we are here with this legislation is that many agreements are put as a 'take it or leave it' option. If there is a standard pattern AWA across the employer group which, to my understanding, is more common than not, it includes the provision of a car park. It is put on a 'take it or leave it' basis. How is that reconciled when it is worth something to someone but it is of no value to someone else?

Mr Barklamb—To go back to the first question as to whether it could, inherently, have a different value, from one car park to the next, I do not—

Senator MARSHALL—But people agree to it because it is a case of: 'Either agree to this or no job.'

Mr Barklamb—I do not accept the premise of that. The extent to which particular agreements are negotiated or imposed is something that has taken up a lot of discussion.

Senator MARSHALL—That is why we are here with this legislation, isn't it?

CHAIR—Not necessarily.

Senator MARSHALL—Previously, technically, every employee and every employer agreed with trading their protected award conditions; hence, the need for this legislation to protect them. Doesn't the mere existence of this legislation acknowledge that people really were not agreeing?

Mr Barklamb—I probably led myself slightly off track here. We certainly do not believe that there is any sustainable basis to conclude that any particular proportion of agreements between March 2006 and May 2007 had a particular character with regard to protected matters. I think many fairly unsustainable characterisations have been made on that. To return to your previous line of questioning on car parks and the assignation of value, I do not have a set view on whether something has a constant value. That would be something for the Workplace Authority, but they may look, for example, at treatments of car parking in other

areas of law such as taxation or fringe benefits tax. I am not sufficiently aware or expert enough to say whether there is a variable value or in fact one standard value that would be assigned to some of these things and whether that would be persuasive to the authority in considering the extent to which compensation is fair to a particular employee.

Senator MARSHALL—How will your members deal with the tax application for non-monetary benefits and will it create a burden for business?

Mr Barklamb—As I understand it—and I am not a tax person—the tax framings and understandings are there, well determined and understood. It is simply a matter of whether an employee in a particular agreement has a particular benefit and, if so, the employer would be aware of the tax treatment of that benefit.

Senator MARSHALL—But remuneration in any form is taxable, isn't it? There will have to be a tax implication for non-monetary benefits?

Mr Barklamb—No more or less than the packaging of such things prior to these amendments. Particular benefits have always been provided for a number of employees, be they child care, car parking or other things. That tax treatment would be the same challenge for our members as it has always been.

Senator GEORGE CAMPBELL—Twice now you have referred to the fact that your organisation does not believe this legislation is necessary. You say that is based on information being provided to you, presumably, by your member organisations, of which you already said there are 35?

Mr Barklamb—The exact numbers may be slightly incorrect. It is 35 or 36, from memory.

Senator GEORGE CAMPBELL—Is AiG one of your member organisations?

Mr Barklamb—No, it is not.

Senator GEORGE CAMPBELL—So your 35 member organisations have been saying to you that the legislation is not necessary, and none of the things that the government is seeking to address in this legislation are happening in workplaces that your 35 or 36 member organisations have membership in?

Mr Barklamb—I want to perhaps clarify the basis on which we say that. It is a mix of an understanding of the macrodata, the employment data, the wages data, and the general day-to-day feedback we take from a number of employers about what is going on out there in the community—

Senator GEORGE CAMPBELL—What data precisely are you talking about?

Mr Barklamb—The first part of my comment refers to the macrolevel employment data and wages data. I mentioned the employee earnings and hours survey before, the Westpac Melbourne Institute—

Senator GEORGE CAMPBELL—This is the ABS data?

Mr Barklamb—It is ABS data. I understand the point you are making about a second tranche of material. Firstly, we have an understanding of the macrodata showing sound outcomes. Secondly, we have our day-to-day discussions with employers at large, who have described to us generally the making of AWAs with fair reward and remuneration in them.

Thirdly—I do not want to tell you I have spoken to all 35 of our members about this; all 35 of our members do not necessarily make AWAs—the feedback to me from the professionals who make AWAs is that, for the most part, they are making them with high remuneration and outcomes for employees. They are not of the type caricatured by certain representations of AWA-making. The fourth basis on which we base the opinion that it is not necessary is that we have some serious questions about the types of so-called evidence that people have presented about what was happening between March 2006 and May 2007 and we have significant doubts about the reliability of that material.

Senator GEORGE CAMPBELL—So the data that you are relying on are ABS statistics?

Mr Barklamb—At the macro level—yes.

Senator GEORGE CAMPBELL—Are they representative surveys?

Mr Barklamb—Yes. In talking about wages growth generally in employment they are obviously the macrosurveys of the economy.

Senator GEORGE CAMPBELL—Are they representative surveys?

Mr Barklamb—Absolutely.

Senator GEORGE CAMPBELL—But the only organisations in the country that would have detailed data on what is happening within AWAs or in negotiation of AWAs would be the Office of the Employment Advocate or now the Workplace Authority office.

Mr Barklamb—This matter is well known to the committee, but we would dispute that they have that data. Thank you for the opportunity to address this question. Some very preliminary, non-validated and non-verified data was presented in estimates in mid-2006, which does not enjoy the imprimatur of the office. There was a second set of leaked data, as I understand it, earlier this year which enjoys no statistical validation or checking. I have got a number of points I can make about this. The May 2006 data involved a couple of hundred AWAs and a partial assessment only of them—not the quid pro quo, not the trade-offs, not the extra money, not the extra flexibility—but even then it was 200 agreements out of 306,000, a sample of about 0.1 per cent of all AWAs made during the period.

I will throw in another point for the sake of it. Looking at the structure of the protected conditions, as they are included in the act between March 2006 and May 2007, lends itself to a very crude understanding of what the agreement may have done. One reading of the agreement may be that this removed the protected conditions, but it may have only modified them. It may have only changed one penalty rate in one circumstance, but it could have been read very easily to have changed them all. So we have no confidence in the data that people are bringing forward to show particular outcomes for those periods.

Senator GEORGE CAMPBELL—But you are happy to accept the ABS statistics and rely on that data and you are happy to accept the data from the OEA—is that right?

Mr Barklamb—We do not understand the data has the imprimatur of the OEA.

Senator GEORGE CAMPBELL—It is their data. They are the only people in the country who are collecting data on AWAs. You have to take it there to have it registered. What they said at estimates a week ago was that they have not done a statistical analysis on all of the

AWAs, but you would presume that if they are giving even a cursory glance at them when they are registered they would be picking up discrepancies in those AWAs.

CHAIR—You might allow Mr Barklamb to respond.

Mr Barklamb—As I understand it, there are two pieces of data which have come out publicly from the OEA—and I use the term 'from' advisedly because there was the initial set of estimates data and then there was the second set of what appeared to be leaked data. Neither was statistically verified. Neither was said to be a representative sample. Neither enjoyed the imprimatur of the OEA as finalised or reliable data—nor indeed, as I understand it, was it ever accepted or acknowledged or advanced on the basis that it was even an accurate account, presentation or interpretation of the agreements concerned. So I must say to you that in statistical or analytical terms I believe we do not know, and that information is not reliable.

Senator GEORGE CAMPBELL—Where do you believe the government got the information, the data or the advice from that this legislation was necessary if none exists?

Mr Barklamb—As I understand it, it is the government's own policy commitment to make these changes for reasons the government has set out.

Senator GEORGE CAMPBELL—But the government believed the changes were necessary because something was happening out there in the workplace. Where do you believe they got the advice that these changes were necessary?

Mr Barklamb—The government has made its own assessment that these changes will strengthen the safety net in the system. We have come before you to say that, whilst we may not feel they are necessary, they will generate a stronger safety net. The one thing I have said to you today that we do know was going on—the one thing I can personally indicate to you from talking with employers—is that there was an element of workplace disquiet and a diminution of workplace relations within some workplaces because employees were rendered afraid or uncertain about their workplace relations and trust in the employer through some very negative advertising and publicity.

Senator GEORGE CAMPBELL—You're not suggesting that they just got their information out of the newspapers or that it is based on scare stories or scare campaigns run by the ACTU?

Mr Barklamb—There have been a range of things going on. I am merely saying to you that, at the workplace level, some workplaces have had a diminution in their workplace relations, trust and confidence due to general public impressions that we believe were created in error.

Senator GEORGE CAMPBELL—Without any substance to those circumstances at the workplace?

Mr Barklamb—We know of no substance to the particular things that are being advanced. The ACTU have run the ad highlighting the advocate's evidence to estimates in May 2006, and I have indicated to you a range of reasons why we believe those are unsustainable presentations of non-facts.

Senator GEORGE CAMPBELL—I will finish on this question. If your member organisations, the 35 or 36 of them, were negotiating agreements that were undercutting wages and conditions, would you expect them to tell you?

Mr Barklamb—I do not sit down and closely interrogate my members. I am talking about the kinds of catch-up conversations one has. One asks how the system is going. One assesses the experiences of one's members both at a social level and within our forums. I do not want to lift the veil on how we make our decisions, but we obviously have discussions around the table about how things are going. We take feedback from our members about the agreement making they are doing. Have I put them in the witness stand? No, I have not. Have I had conversations with a range of them about how AWA making is going and the types of things their employers are doing? Yes, I have.

Senator FIELDING—I did not get a chance to ask the department about this, but I know they will probably be watching and maybe they can answer the question as part of their written response. There was an article in the *Weekend Australian* about an employee of Global Television Services who was sacked for operational reasons, and the operational reasons were that the company decided to restructure. The company was not in any financial difficulty. The Australian Industrial Relations Commission has ruled that this is legal under Work Choices. I know that Family First is alarmed by that report, and I was wondering whether you were alarmed by it.

Mr Barklamb—I know nothing about that report, I am sorry. I did not see the *Weekend Australian*.

CHAIR—I am sure if the department are watching they will take that into account when they put in another submission. The time for this discussion has expired. The committee will suspend for morning tea.

Proceedings suspended from 10.34 am to 10.51 am

de BRUYN, Mr Joseph, National Secretary and Treasurer, Shop, Distributive and Allied Employees Association

SMITH, Mr Bernard Joseph, Assistant Secretary, NSW Branch, Shop, Distributive and Allied Employees Association

CHAIR—Welcome. The committee prefers to take evidence in public. It will consider any request for all or part of evidence to be given in camera. Thank you for your submission. Are there any changes or additions?

Mr de Bruyn—There were a couple of changes which we notified the committee of and which was to be circulated to senators. There is nothing further beyond that.

CHAIR—That is correct. I invite you to make a brief opening statement before we go to questions.

Mr de Bruyn—Thank you, Chair and Senators, for giving us the opportunity to make a submission this morning. The Shop Distributive and Allied Employees Association is a union with 220,000 members as at 31 December 2006, and we submit strongly that the proposed fairness test in the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 is inadequate for the following reasons. Firstly, the bill continues to permit Australian workplace agreements to be concluded between the employer and individual workers. The fundamental problem with an AWA which overrides any other industrial instrument and can be put to a worker at any time is that it involves an unequal bargaining relationship between the employer and the worker. The employer holds all the cards. He determines whether the worker has a job and the starting times and finishing times of each work engagement, the nature of the work to be performed and how it is to be performed, and the timing of meal breaks and tea breaks and so on. To imagine that a worker can rise to the occasion and bargain with the employer on an equal basis in these circumstances is utterly fanciful. This is particularly so for vulnerable workers such as juniors and casuals. Even if the worker is so unique in his or her job that the employer cannot afford to lose him or her, the worker is unlikely to have the skills, the experience and the knowledge to be able to deal successfully with the employer on the employment conditions and the rates of pay. The continued existence of the AWA as an instrument will guarantee that workers will continue to lose out, no matter what protections may be legislated by the parliament.

Secondly, the bill ignores all those Australian workplace agreements and collective agreements which came into force between 27 March 2006 and 7 May 2007 and which take away conditions of employment without compensation or without sufficient compensation. We know from evidence given by the Employment Advocate before a Senate committee last year that most AWAs filed after Work Choices commenced removed various entitlements from workers. If it is now felt that workers need protection, the legislation should be backdated to cover all agreements filed since the Work Choices legislation commenced.

Thirdly, as we have stated in our written submission, in the retail industry in Queensland, New South Wales, South Australia, Western Australia and Tasmania, if all protected conditions are excluded or modified in a proposed agreement, the fairness test does not apply. This means the fairness test can be avoided in these five states, where over 73 per cent of

employees in the retail industry are employed. This covers over one million retail workers. The same would apply for other industries which are presently covered by notional agreements protecting state awards.

Fourthly, in the retail industry in the ACT and the Northern Territory, the fairness test would not apply because the retail industry is not usually regulated by an award as it is defined in the legislation. This means the fairness test can be avoided for another 33,000 retail workers.

Fifthly, the proposed fairness test ignores a range of important conditions. They are not included in the fairness test. There are many examples one can give, but just to throw up two—the first is rostering entitlements, which are extremely important for retail workers; and the second one is the right to refuse to work on Sundays. In fact, the fairness test is limited to protected award conditions.

Sixthly, the fairness test is applied by inexperienced public servants operating in secret, not by an experienced independent umpire—namely, the Australian Industrial Relations Commission—operating in open court and publishing its reasons for a decision that are subject to appeal.

Seventhly and finally, the use of non-monetary compensation means that employees can still be worse off financially under the application of the fairness test.

For all of these reasons, we believe that the safety net bill does not achieve what its supporters claim. The Work Choices legislation in its entirety should be repealed, and a fair and balanced national industrial relations system should be put in its place. Thank you.

CHAIR—Thank you. I will pass to Senator Marshall.

Senator MARSHALL—Thank you, Mr de Bruyn. I think you have quite clearly identified the fundamental flaw in the Work Choices legislation, and that is the assumption under Work Choices that employees and employers come to the bargaining table with equal power and equal bargaining strength, and of course that is not the case.

I would like to understand more about your experience of how AWAs are actually dealt with because I am concerned about the secrecy of the application of the fairness test and how precedents will be set, if they are set—how people will be able to rely on one agreement passing and then be able to rely on that agreement to take it elsewhere. I would like you to talk about that in the context of your understanding of how agreements are actually offered. Are they offered to individuals as individual agreements tailored to an individual or are they offered as a common AWA across an employment group, on a take it or leave it basis; and, if an element has passed the fairness test in one agreement and it is applied consistently across every employee, does that necessarily give a fair outcome for every individual employee?

Mr de Bruyn—Our experience is that AWAs within a business are offered on a take it or leave it basis. The employer draws up what he believes to be an appropriate AWA for the business. That is usually done with expert advice and assistance, which might be from a lawyer or from an employer organisation. That AWA is then offered as the template for all of the people in the business who are ordinary employees, and it is offered to them on a take it or leave it basis.

This time last year there was a controversy raging over the Spotlight AWA, which became well known around the country. The Spotlight AWA takes away all the protected conditions. It is a very basic AWA and it will be recalled that the publicity mentioned there was a 2c per hour increase in the rate of pay. The origin of the 2c increase in the hourly rate of pay was not because the employer wanted to offer a derisory increase in the hourly rate to compensate for all the loss of conditions, it was because they used the Victorian adult shop assistants rate of pay, which was 80c per week higher than in New South Wales, and 80c per week translates into 2c per hour. So the employer was not intending that to be compensation, the employer was intending simply to offer the standard rate; and, of course, all the protected award conditions were taken away.

The Spotlight AWA can continue to be used by the company in the future under the legislation as it stands because, as we have found, in the way the legislation is drafted, the fairness test will not apply to a retail company such as Spotlight. What Spotlight does is to offer that AWA to all new employees on a take it or leave it basis. It therefore creates extraordinary anomalies. For example in Victoria it means that, if you are an existing employee whose terms are covered by the Victorian federal shops award, you get double time for work on Sundays but if you are a new employee covered by the AWA, you get ordinary time for Sundays. So one person gets twice the hourly rate compared with another even though the same work is being done and that situation can continue despite this proposed fairness test. So the experience we have is that there is a template AWA. It is offered to everybody on a take it or leave it basis. In the case of Spotlight it is offered to all new employees. If they refuse to sign, they do not get the job. If they do sign, they do get the job, and that is how the company is using natural turnover to introduce substandard conditions of employment into its business.

The retail industry turnover is very high. Spotlight is a company which typically would have turnover of perhaps 30 per cent per annum. Sometimes in retail businesses it is even higher and so it does not take long before that becomes the new standard that operates in the business. Spotlight also gives the same AWA to existing employees where they seek to have a change in their terms of employment. We had one example of a lady who was a casual worker in Spotlight. She was asking the company to become part time and therefore gain the advantages of permanency. The company said, 'We'll agree to that provided you sign the AWA.' She came to the union for advice. We analysed it for her and she was going to be worse off, so she declined to make the change.

Senator MARSHALL—There has been some discussion this morning about the protections contained in the fairness test when the so-called protected award conditions are to be removed. The words 'fair compensation' are used but there are also words such as, 'exceptional circumstances' 'public interest' and 'significant value'. I have not yet seen any definitions of any of those words spelt out in the bill. I am just wondering whether you have concerns about how these things may be dealt with in a subjective way by the Workplace Authority director.

Mr de Bruyn—We have very great concerns about how non-monetary compensation might be dealt with. Those concerns are particularly felt by us because of the comments that

were made by the Prime Minister on 4 May when he first announced that the government was going to introduce this test. He said in the interview:

In some cases extremely flexible working arrangements can be given in return for the non payment of penalty rates ...

That opens up enormous scope for people to lose financially in their employment in return for some flexibility in their working arrangements, which may cost the employer nothing, which the employer might very well be able to provide without any change to other conditions of employment but is simply using it as a means, a device, to avoid the payment of penalty rates. In that particular interview the Prime Minister went on to say:

It can be the case that a particularly beneficial arrangement is made by a parent in relation to leave to do things concerning their children in return for an understanding that if that parent is required to work at irregular hours then penalty rates are not to be paid. Now these are all assessments that will be made.

Clearly, the Prime Minister, representing the government, envisages that this legislation will enable an employer to provide flexibilities the nature of which may be quite ordinary in their terms but which avoid the payment of penalty rates, which frequently are a significant component of a person's income. In the Spotlight example I gave before, Sunday work in Victoria in the retail industry under the award is paid double time for ordinary time work, not overtime. It may very well be that an employer says to a worker, 'I will give you this flexibility,' and as a result the hourly rate is cut in half. If that happened, that would be an absolute disgrace.

Senator MARSHALL—But you think that could be allowed under this fairness test proposal?

Mr de Bruyn—The Prime Minister, in announcing it, made it clear that those sorts of things can be done.

Senator MARSHALL—It has been put to the committee by both the department and ACCI this morning that we have to appreciate that these agreements come to the table based on genuine agreement between employee and employer—it is what they want, what they have agreed to. Is it your practical experience with the operation so far that that will be the case?

Mr de Bruyn—No. AWAs are invariably offered on a take it or leave it basis. There is no genuine negotiation and, as I said in my opening comments, in the vast majority of cases of ordinary workers they are not in a position to negotiate on an equal basis with their employer. Therefore, the idea that you have an equal negotiation and the employee gets benefits in return for making certain concessions simply does not happen in the real world. Let me give you another example. A supermarket in Western Australia was being sold and the new owner came into the store in the week before he was to take over. He held a meeting with all the employees, who were covered by an industrial agreement negotiated by the union which still had at least two years to run. We thought and the employees thought that despite the transmission of business these people would be secure. The new employer came to those employees and said, 'I'm taking over this business next week. I'm happy to employ you provided you sign this AWA,' and out came a standard template AWA to be signed by all employees in the store, irrespective of their circumstances. He said, 'If you sign the AWA,

you'll get employment with me when I take over next week. If you don't sign the AWA, I won't employ you.'

We did not believe that, under the Work Choices legislation, what he was doing was legal, but nevertheless we got legal advice. The legal advice that came back from a senior QC was that under the Work Choices legislation an AWA can be offered at any time and if it is signed by the employee it becomes immediately effective, overrides any other industrial instrument and can be offered as a condition of employment. So the advice was yes, he can do what he was suggesting. So our advice to the employees was, 'If you want to retain your employment when the change of ownership occurs, you had better sign the AWA even though it is not a palatable thing.' In the event, two employees refused to sign and lost their jobs. All the remainder signed the AWA and they were all worse off because the AWA took away all their so-called protected conditions, penalty rates and so on without any increase in the rate of pay. So that is how it works in the real world.

Senator GEORGE CAMPBELL—Mr de Bruyn, the example that you gave to the committee about what has been occurring at Spotlight—and I presume that you have looked at this legislation in detail, so if you are unable to answer the question, don't—wouldn't Spotlight, now, in their agreements, be forced to reintroduce those protected award conditions in any new agreements they seek to register?

Mr de Bruyn—No, because the way the legislation is drafted, we believe that Spotlight would not be covered by the fairness test. If you look at the legislation, Spotlight was traditionally covered by state awards around Australia; there was a federal award in Victoria and a federal award in the ACT and the Northern Territory. In all of the company's operations other than Victoria, we do not believe that the fairness test will apply because the legislation prescribes that if you are bound—

Senator GEORGE CAMPBELL—Which clause are you looking at, Mr de Bruyn?

Mr de Bruyn—I am looking at paragraph 52AAA of schedule 8. Paragraph 42 of the bill. It states that the criteria for whether a fairness test is activated in this instance are threefold: firstly, the workplace agreement was lodged; secondly, immediately before the workplace agreement was lodged, the employer and the employees were bound by a NAPSA, a notional agreement protecting state awards; and thirdly, the workplace agreement contains protected notional conditions because the agreement did not expressly exclude or modify all of the protected notional conditions. The Spotlight AWA expressly excludes all the protected notional conditions; therefore, this does not pick it up.

Senator GEORGE CAMPBELL—So even when you come to renew agreements they will still, in effect, be able to avoid the responsibility.

Mr de Bruyn—Yes. As we read the bill that is before the Senate, Spotlight can continue to offer its substandard AWAs to all new employees and will not face the new fairness test.

Senator GEORGE CAMPBELL—On the question of non-monetary reward, I understand that in your industry, particularly in the clothing sector, it is quite common for employees to get access to this kind of clothing. Has there been any attempt by employers so far to include that as part of the remuneration package, or do you see the potential for that in the future?

Mr de Bruyn—I am not aware of any examples where a discount on the merchandise that is sold by the retailer has been put into part of the remuneration. To date that has usually been offered as a benefit to employees over and above the normal remuneration. But there is obviously a serious question arising under this bill: if non-monetary compensation is to be permitted, will discounts on merchandise, vouchers or whatever be able to be offered by the employer in return for doing away with penalty rates and other protected conditions?

Senator FIELDING—I notice that on page 3 of your submission you talk about a review that was recently undertaken of 100 agreements in the retail and fast food industries. Could you give us some background on those and what led you to do that?

Mr de Bruyn—That was done by our Victorian branch and I must confess that I am not familiar with that research.

Mr Smith—In New South Wales we undertook a similar sort of exercise as part of a recent child employment principles case. We handed up 26 agreements that were done in a template form and which stripped out all protected award conditions. I think just about every agreement contained only the award base rate of pay for those conditions, but they excluded all protected award conditions. They are the sorts of agreements that would continue to operate in the retail industry despite the fairness test. Because of the way that the bill is currently drafted, the fairness test would not apply to those sorts of agreements.

Senator FIELDING—The concern that I have—I think it is a bit further on in your submission—is that some agreements that have been entered into before the fairness test kicks in—and let us face it, AWAs can run for one, three or five years and some will still be on those conditions for a number of years—would definitely breach the fairness test. Do you think that is the case?

Mr Smith—Whilst the fairness test would not to apply to those agreements even if they were entered into after this bill is passed, if you were theoretically to apply the test I do not think they would pass the fairness test on monetary value.

Senator FIELDING—The area that I have most concern with is that if you vary the length of those agreements the fairness test would not be evoked to have a look at those agreements, so they could be extended in perpetuity, basically.

Mr de Bruyn—This is where there was an amendment made to our submission. The maximum period for an agreement to apply is five years from their commencement. It is possible for existing agreements to avoid the fairness test for a five-year period commencing from the date of the lodgement of the agreement. Therefore, because there are so many AWAs that have already been lodged, even if they are not for a five-year term they can be varied to extend their term to make them a total of five years in duration from their original inception. And if nothing else is amended in the agreement, then the fairness test is avoided for that whole five-year period.

Senator FIELDING—On a separate point, we heard this morning from the department that some of the talk is that the fairness test is similar or the same—it seems to be a bit tricky about that works with the no disadvantage test. On collective agreements and the understanding of how it applies to individuals and groups, are you able to work through that?

I know in your submission you talk about when the disadvantage is as a whole or when it is an individual that could be worse off.

Mr de Bruyn—We believe that under the fairness test the likely interpretation will be that one will look at what applies on average across the group, rather than looking at each individual person. That makes it quite different to the old no disadvantage test, which obviously looked at the agreement in comparison with the award in its entirety, but then it went on to look at the individual circumstances of each employee, and the fairness test had to be applied and passed for each individual person rather than just for the average. Therefore, it is possible under the fairness test for a minority of employees to be worse off but the collective agreement will still then pass.

Senator FIELDING—That is certainly a concern. I have a final point, which I raised previously. You may need to take this on notice and respond at another stage. It is in relation to the article in the *Weekend Australian* on 2 June 2007 on the case of an employee of Global Television Services who was sacked for operational reasons. The operational reasons were that the company decided to restructure—it was not in any financial difficulty—and the Australian Industrial Relations Commission has ruled that this is legal under Work Choices. Obviously you will need to look at this a bit further, but if that report in the *Australian* is correct would it be a concern to your workers?

Mr de Bruyn—One of the worst things about the Work Choices legislation is that it has taken away the right to contest an unfair dismissal from the vast majority of workers in this country. Any employee who works in a business of less than 100 employees no longer has any right to contest an unfair dismissal. If you work in a business where there are more than 100 employees then once you have got the required period of service up you can contest an unfair dismissal, but you cannot if the restructuring of the business was at least part of the reason for the dismissal. So if the employer can argue that a restructuring of the business was at least part of the reason for your dismissal then the commission has no jurisdiction to hear it and therefore you have no rights under the unfair dismissal provisions of the Work Choices legislation.

This is one of the worst things about the Work Choices legislation, which employees find to be objectionable because the security in their employment which they previously had has been largely or completely taken away. Security from being arbitrarily dismissed from the job that is giving you your livelihood is fundamental to employees, fundamental to ordinary working people.

Senator FIELDING—Just to clarify this point: the issue I was raising there was to do with the 'operational reasons' and that it quite clearly seems that restructuring is an operational reason—

Mr de Bruyn—Yes.

Senator FIELDING—which I do not think was the intended purpose of it at all, to start with.

Senator SIEWERT—Following on from that question about operational reasons, have you seen other examples? That one has been quoted in the media and there have been others. Have you heard of a lot of cases where that has been used to justify people being dismissed?

Also, for me, that is linked to the issue about exemptions. If there are massive holes in the operational reasons clause, are you concerned about what holes there will be in what can be allowed under the exemptions rules?

Mr de Bruyn—We are concerned about how widely 'operational reasons' is being interpreted. There was the case of the Priceline employee who was involved at a senior level in the design of stores and the use of space in stores. He was dismissed by the company, and a few weeks later the same job was being advertised at a lower rate. He took a case to the commission to get reinstatement, and the company was able to show that he was dismissed for operational reasons. The fact that the same work was being readvertised at a lower rate did not give the commission jurisdiction because the jurisdiction was not there in the first place. I do not know of many cases because in the retail industry we enjoy good relations with virtually all the employers with whom we deal and where there are dismissals for whatever reason we can usually sort them out without needing to go to the commission, and so the jurisdictional issue does not arise.

You really do wonder what is happening in the world where people are not unionised, where they do not have a trade union to go to, because normally what happens there does not appear above the horizon—there is no public visibility. We are very concerned at the decisions which the commission is making about how widely they are interpreting 'operational reasons'. It means that, where the employer has over 100 employees, 'operational reasons' can easily be found to justify dismissals. Therefore, any security that people in the larger companies might feel they still have under Work Choices is very much jeopardised.

Senator SIEWERT—You raised the case of the supermarket in WA. In the media around that time was the case of some young people who had basically missed out on a number of weeks pay because they were being required to pay for their uniforms. Is it possible, under your interpretation and looking at the bill, that that could be included as part of non-monetary compensation?

Mr de Bruyn—The provision of a uniform?

Senator SIEWERT—Yes.

Mr de Bruyn—I would answer it this way. There is nothing in the bill that I have seen which would prevent it, so presumably it becomes a matter of interpretation. I go back to the words of the Prime Minister when he first announced that this fairness test was going to be legislated. He seemed to provide a wide opportunity for non-monetary compensation to be able to be offered by the employer to compensate for taking away protected conditions.

It ultimately will depend upon how it is interpreted, and we know that the person who is going to do the interpreting—the Employment Advocate—is not likely to be sympathetic to the views we represent. You have to remember that the Employment Advocate from the outset of the Work Choices legislation has been running seminars all around the country for employers to advise them how they can use the Work Choices legislation for their business. If the Office of the Employment Advocate is using all of the resources that are at its disposal to advise employers how to take advantage of the Work Choices legislation, you would expect that the disposition of the Employment Advocate would be to allow these sorts of things—

these non-monetary compensations—to be used to take away penalty rates and other conditions.

Senator SIEWERT—I did some very quick calculations. I do not know whether you were here when I asked the department about how many staff they were going to have and how many AWAs they were going to be dealing with.

Mr de Bruyn—I was not here.

Senator SIEWERT—They said there were going to be about 400,000 and they were going to have up to 800 staff. My quick calculation suggests that that is 500 per staff member per year. Do you believe that that is going to be adequate time for an assessment of individual AWAs?

Mr de Bruyn—No. If you take an agreement and you compare it with, say, the award that would otherwise apply, that is a very significant task to undertake. Even just the straight comparison may not under the fairness test lead you to be able to make a decision. There may be things about the employer's business that you need to find out about before you can come to a conclusion under this so-called fairness test. So to do an analysis of just one agreement is likely to take a substantial period of time. Therefore, there is an enormous task ahead for the Employment Advocate and his office, under his new title, to check not only the agreements that have been filed since 7 May but to continue to examine each agreement that comes in from now on into the future. It would take an army of public servants, with all the best of intentions, to be able to do this job.

Senator BIRMINGHAM—Mr de Bruyn, is it fair to say that you and the SDA have a fundamental objection to AWAs and individual agreements?

Mr de Bruyn—Yes.

Senator BIRMINGHAM—Also, you believe that unfair dismissal laws should be reintroduced to cover all workplaces?

Mr de Bruyn—Yes.

Senator BIRMINGHAM—So, no matter who was sitting at this table or who were the government of the day, you would actively lobby them to abolish AWAs and individual agreements and reintroduce unfair dismissal laws for all workplaces?

Mr de Bruyn—Of course.

Senator BIRMINGHAM—Including of course people such as your state secretary in South Australia, Mr Don Farrell, whom I expect will be joining us in the Senate from 1 July next year?

Mr de Bruyn—I understand that whether he is going to join you was the subject of a meeting yesterday, but I have not heard the result.

Senator BIRMINGHAM—I believe he secured—not so surprisingly—the No. 1 spot on the ticket.

Mr de Bruyn—Well, I am very pleased to hear it.

Senator BIRMINGHAM—And you would expect him to uphold the SDA policy when he gets here?

Mr de Bruyn—I certainly hope so.

Senator BIRMINGHAM—Mr de Bruyn, can you tell me this. In collective agreements negotiated by the SDA, have you ever traded away penalty rates?

Mr de Bruyn—Yes.

Senator BIRMINGHAM—And could you give us a guarantee that workers under those collective agreements are no worse off than they would have been under the award conditions?

Mr de Bruyn—Yes.

Senator BIRMINGHAM—You are absolutely certain?

Mr de Bruyn—Well, the no disadvantage test was applied to them. The old no disadvantage test is where you had to submit any agreement to the commission and the commission made a comparison between the agreement and the award that would otherwise apply. The agreements passed the no disadvantage test.

Senator BIRMINGHAM—So no worker under a collective agreement negotiated by the SDA where penalty rates have been traded away is worse off than they would have been under the award conditions?

Mr de Bruyn—That is what I believe, because that is what we submitted to the commission in the no disadvantage test. The no disadvantage test would not have been passed if it were otherwise.

Senator BIRMINGHAM—We have all sorts of hypotheticals that are thrown up around these hearings. We hear about young employees who work casually on weekends, and the argument is put that, under an AWA that might be negotiated, they could be worse off if weekday rates were raised but that there could be a levelling out between weekday rates and penalty rates over weekends and so on, so in net terms employees benefited but there might be isolated examples where employees did not benefit. You are saying that, under the collective agreements negotiated by the SDA, such young employees who only work weekends would not be worse off than under the award rates.

Mr de Bruyn—Because when we negotiated these things they were always accompanied by complex savings provisions which protected people from being worse off. It was because of those savings provisions that the commission, in looking at the agreement, recognised that nobody was worse off and therefore the no disadvantage test was passed.

Senator BIRMINGHAM—It is true that the previous no disadvantage test allowed for the trading away of annual leave, sick leave and such conditions, isn't it?

Mr de Bruyn—No. I am not aware of the trading away of annual leave under the old arrangements.

Senator BIRMINGHAM—It allowed for some trading away, whereas the proposed fairness test—

Mr de Bruyn—I am not aware of that.

Senator BIRMINGHAM—That is certainly counter to some of the evidence we have had earlier today.

Mr de Bruyn—I was not here for the earlier evidence, but I can assure you that that issue has never been something that we have engaged in as a union. I must admit I was not aware that it was possible to trade away annual leave. We have certainly never done it. In fact, we would be opposed to trading that away, because people need their four-week break every year from their employment to recharge their batteries.

Senator BIRMINGHAM—Indeed. In fact, this new fairness test makes that harder and in fact is a greater protection than the previous no disadvantage test was.

Mr de Bruyn—I am not aware of sick leave and annual leave being traded away under the previous arrangements before Work Choices came in. We certainly did not trade sick leave or annual leave. We were typically trying to increase the availability of sick leave to employees.

Senator BIRMINGHAM—I will turn to non-monetary compensation and particularly, shall we say, family-friendly negotiations. You seem to have been highly critical in your evidence of the ability of employees to negotiate different working hours or different arrangements with employers that might suit their personal family arrangements. Why is that the case?

Mr de Bruyn—Because typically employers have a standard AWA which has been drawn up for their business by an outside expert, either from an employer association or by a lawyer, and they use it with all of their employees. There is no negotiation. It is put on a 'take it or leave it' basis. Take, for example, the Darrell Lea AWA which got publicity recently. The company decided that it wanted to take away the penalty rates and other entitlements like tea breaks and so on from casual employees who typically work in the company on weekends. It had a standard AWA drawn up, it was issued to all of the casuals within the company, and they were asked to sign it. There was never any individual negotiation with any of the casuals. While they had the right to say no as existing employees, most casuals in the company felt that, with the employer putting it to them and their not being in the union and therefore not getting union advice, they were required to sign. There was no individual negotiation, no taking into account individual circumstances, no looking at family-friendly provisions and, once the casuals signed the AWA which took away their entitlements without compensation, they were simply filed with the Employment Advocate and the people were worse off.

Senator BIRMINGHAM—But, under the union policy, you would trade away the opportunity for any employee to make those negotiations with an employer.

Mr de Bruyn—No. Under the old system of awards and under the agreements that we negotiate, it is perfectly possible for any employee to sit down with the employer to negotiate anything which sits above that agreement or above that award. From time to time, that happens. We encourage it, and if the employee and the employer sitting down together can work out something which sits above the award and which satisfies the desire of the employee for, say, some family flexibility then we—

Senator BIRMINGHAM—But it is a one-way street, isn't it? The employee in that instance is attempting to get something. Their chances of obtaining those family-friendly arrangements are much diminished by the fact that there are very few things that you would allow them to trade with an employer.

Mr de Bruyn—The employee might very well be asking the employer to agree to a family-friendly position which imposes no real cost or disadvantage to the employer. Let me give you an example in the retail industry. Let us say that there is an employee who is a mother and has the responsibility of, for example, taking children to school or picking them up in the afternoon and wants to change her hours of work in order to better fit in with those family responsibilities. It is no skin off the retailer's nose to adjust the working hours of that employee so that she can attend to her responsibilities and invite other employees to change their hours so that there is continued provision of labour at all the required times with nobody being worse off. That is of no disadvantage to the employer.

Senator BIRMINGHAM—Unless she would actually rather work at a time when penalty rates were paid and negotiate with the employer to secure those hours and perhaps negotiate away some of those penalty rates in return for the valuable opportunity of spending more time with her children.

Mr de Bruyn—But, if the employer suffers no disadvantage arising from the change in the hours, why should the employee give up part of their income to pay for it?

Senator BARNETT—I will continue on that line. I want to clarify your comment earlier. You were not aware that you could trade away up to two weeks annual leave?

Mr de Bruyn—Are you talking about under Work Choices or before Work Choices?

Senator BARNETT—Either.

Mr de Bruyn—I certainly was not aware that you could trade away annual leave before Work Choices came in. I am aware that there was the possibility of cashing out annual leave under Work Choices since 27 March last year because that has had a lot of publicity.

Senator BARNETT—I want to get it clear that your union has never traded annual leave, I think you said, in negotiations and agreements that you have had with employers?

Mr de Bruyn—Not in reducing entitlements to annual leave, no. I take it that what you are talking about is an agreement whereby you reduce the entitlement to annual leave from, say, four weeks to two weeks and in return you might get, say, a higher hourly rate?

Senator BARNETT—Yes. That is what I am asking.

Mr de Bruyn—The answer is no.

Senator BARNETT—Have you ever traded away annual leave loading?

Mr de Bruyn—Yes. There have been examples of that—for example, in the Bunnings agreement. Before Bunnings started building their big stores, they came to us to negotiate an agreement. They were insistent that they did not want the annual leave loading to be part of the entitlements, and they said that they would compensate for that in higher rates of pay. We were reluctant about that, but we did the agreement, and the first agreement came into being. That occurred for a while, but the employees over time continued to insist to us that they

wanted the annual leave loading to be restored, and no amount of us explaining to them that it was part of their higher hourly rate of pay would work. So, in the end, it became part of the negotiation of the next agreement to restore the 17½ per cent leave loading, because the employees were insistent upon it and they would not accept that it was part of a higher hourly rate of pay.

Senator BARNETT—I am interested that you differentiate between trading away annual leave and annual leave loading and that you have used the Bunnings example. You indicated that you were not aware that you could trade away annual leave prior to Work Choices. It is my firm understanding that you could trade away all of your annual leave and sick leave prior to Work Choices. Work Choices has required a minimum of, I think, 15 days a year or two weeks leave for the first time in law.

Mr de Bruyn—In all of my experience of negotiating enterprise agreements up to the time that Work Choices came in, I am not aware that the question of trading away all or part of four weeks annual leave or all or part of sick leave entitlements in return for some other benefit has ever come up. It has never been put to us by an employer.

Senator BARNETT—But you were advising the committee that you were not aware that that was the law.

Mr de Bruyn—No, I was not aware that it could be done. It has never crossed my mind that anybody would even propose it.

Senator BARNETT—Let us move on. Is your union in the habit of trading away penalty rates, annual leave loadings, monetary allowances and overtime, shiftwork loadings and penalty rates when you are negotiating agreements?

Mr de Bruyn—There have been some occasions when we have traded away some penalty rates in return for other benefits—which typically was a higher rate of pay.

Senator BARNETT—So there have been some examples—you admit to that?

Mr de Bruyn—Yes, and it is done in such a way that everybody is no worse off or, preferably, better off by virtue of the higher hourly rate of pay and, secondly, by virtue of the savings provisions that are put in place.

Senator BARNETT—I understand you have a five-year collective agreement with Figgins Holdings Pty Ltd. Are you aware of that agreement?

Mr de Bruyn—I cannot be certain. Figgins, I think, is a chain of shoe stores. I am not aware if we have a current agreement with them, but we may have. There are a number of companies which are a chain of shoe stores. If Figgins is the one I am thinking of, in fact we failed to renew our agreement recently, so we terminated the old agreement hoping that the people would then fall back under the pre-existing award.

Senator BARNETT—I am not sure how recently this happened, but the advice I have is that there was a five-year collective agreement with your union, that overtime and Sunday penalty rates were reduced, that the spread of ordinary time hours was increased, that annual leave loading was removed and absorbed into pay, that rest breaks could be consolidated, that there were more flexible rostering arrangements and that shift loading was removed. That is an example where there has been a whole lot of trading away of these conditions.

Mr de Bruyn—I am not familiar with that agreement. Certainly I was not involved in the negotiation of it.

Senator BARNETT—All right. It is your union that I am referring to.

Senator GEORGE CAMPBELL—Have you got the agreement? Could you table it?

Senator BARNETT—I will be more than happy to follow up on that as soon as possible.

Senator MARSHALL—So you do not have it?

Senator BARNETT—Not with me, no, but we can follow up on that.

Mr de Bruyn—We will provide a copy of the agreement, if it exists, to the members of the committee.

Senator BARNETT—Thank you very much. That would be most helpful. How do you go about getting support for an agreement like that? Do you have a vote with your members? What if some of them, for example, do not support such an agreement?

Mr de Bruyn—Under the legislation, for most of the time that that agreement-making has been done by the union it has been a legal requirement that you conduct a vote amongst all the employees; and only if the majority support the agreement can it go forward for certification.

Senator BARNETT—And what about the minority?

Mr de Bruyn—You conduct the vote and if there is a majority who vote in favour then the agreement goes forward to the commission, under the old arrangements for the application of the no disadvantage test, and if the no disadvantage test is passed, the agreement is certified. If the no disadvantage test is not passed, the agreement is not certified.

Senator BARNETT—For all those employees?

Mr de Bruyn—For all those employees. As I have explained before and as we say in our submission, the no disadvantage test is applied in respect of individual employees to make sure that they are all better off. The commission satisfies itself in an open court that that is the case.

Senator BARNETT—So that applies even if 51 per cent vote for it and 49 per cent vote against it?

Mr de Bruyn—Yes. That is the way this parliament operates, too. A majority is a majority; if you have the numbers, you get there.

Senator BARNETT—There has been some public discussion about your views on common-law contracts, with respect to certain employers and there being honest mistakes and so on. I am interested in whether you think employees are more secure in their entitlements, terms and conditions, and job security under a common-law contract compared to under the legislative arrangements that we have here for AWAs.

Mr de Bruyn—I think that under the Work Choices legislation employees are extremely insecure. In the case of a common-law contract, the question is: does that operate alongside the Work Choices legislation or does it operate under what applied before Work Choices? Before Work Choices the award was the minimum and a common-law contract could not

undermine that minimum. A common-law contract could only sit on top of the award; it could not go, in any way, below an award because it was not an instrument to override an award.

Senator BARNETT—I am not sure if you have had a chance to look at the AMMA submission to our inquiry.

Mr de Bruyn—No.

Senator BARNETT—In any event, if you have not, they say that common-law contracts of employment, as opposed to AWAs, create a 'legal minefield'. They say that in their submission at page 10. What would you say to that proposition?

Mr de Bruyn—Under the old arrangements before Work Choices, a common-law contract could only operate on top of an existing award or agreement that was legally enforceable. It could not change the terms of an award or an agreement, because it did not carry the power to do so. As for common-law contracts under Work Choices, it just creates greater complexity. But the instruments that under the Work Choices legislation have legal effect are AWAs if they apply because they override any other industrial instrument. Otherwise, the legally applicable instruments are certified agreements or federal awards.

CHAIR—Thank you for your appearance here today.

[11.52 am]

BOWTELL, Ms Catharine Mary, Industrial Officer, Australian Council of Trade Unions

BURROW, Ms Sharan, President, Australian Council of Trade Unions

CHAIR—Welcome. The committee prefers all evidence to be given in public. It will consider any request for all or part of your evidence to be given in camera. Thank you for your submission. Are there any changes or additions?

Ms Burrow—No.

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

Ms Burrow—Thank you. I will deal with the amendments generally and Ms Bowtell will sum up in terms of what we suggest the committee might do with respect to amendments. These amendments are indeed a recognition that the Work Choices legislation is unfair. It is just disingenuous, we believe, for the government to say that they did not understand that there would be unintended consequences. If you go back to the committee hearings held before the legislation was passed, you see that submissions from the ACTU, 150 academics and many others to this committee actually demonstrated the legal consequences of providing unilateral power to the employers to impose AWAs that could extinguish award conditions and lower the floor of wages and conditions.

With more than 1,000 AWAs being signed every day, the majority of them removing one award condition and many of them removing all award conditions, the response of the fairness test, we believe, is also disingenuous. As a means of protecting award conditions, it has an enormous set of loopholes. It does not apply to all agreements. As to the lost tribe of those already on existing exploitative agreements and those who are excluded at the other end, we believe that, given the technicalities that will be raised in the bill—particularly about state employees—2.5 million workers is the minimum number of those who will be excluded.

The fairness test does not apply to all conditions. We are shocked—and I am particularly shocked, given my passionate commitment to paid maternity leave—to see that the bill does not pick up and protect paid maternity leave where it is in awards. Long service leave, an entitlement that workers who have given good service should be respected for, and retrenchment arrangements are things that are not picked up even as a base intention of this fairness test.

It does not guarantee full monetary compensation. Unless it does, we believe that any one, individual, first and final determination in a secret process as to non-monetary compensation and the value people would see of that is totally inappropriate. But what is even worse is that, if it is a genuine fairness test, people will still be worse off. Non-monetary compensation means people can still be worse off.

It does not recognise many workers. We are a bit horrified to see that some men, but in particular women, who work part-time and take home much less than $75,000, but who are in senior positions, will in fact have no access to this protection. We are talking about a range of occupations—senior nurses, finance workers, team leaders or supervisors in many industries—where women choose to work part-time to marry their work and family

responsibilities. They deliberately choose those hours where they can share the care, weekend or nights, and they get additional recognition through penalty arrangements that enable them to pay their bills and invest in their own homes. They potentially take home $20,000, $30, 000 or $40,000 but are still excluded. They will lose that extra value that they have put on that choice to work unsocial or family unfriendly hours.

It introduces an abhorrent criterion. I would never have believed that any industrial relations system would have 'personal circumstances' as a loophole or an excuse by which, again, many men, but mostly women, can actually have their work devalued because they are primary caregivers. It is unbelievable that people, particularly women, in the parliament would vote for such a criterion in legislation. I could be working alongside another worker at night or on a weekend but, because I am not giving primary care at that time—because I have the support of my partner or indeed my family—I would be earning less than the person working alongside me. We have had equal pay provisions since '69, '71 and '74, but universally since '74. We have seen the gender pay gap emerge again under this legislation, which takes us back to the seventies. This, frankly, is direct discrimination. It is abhorrent.

I heard the question asked by the senator. I am sure he will ask me again and I would look forward to exploring why that should never appear in any legislation. You have two applicants for a weekend job, a Sunday job. When asked why they want this job, one says, 'My mother can care for our baby today,' and the other one says, 'I need the extra money to pay the bills.' You can see the discrimination straight away. If both of them are taken on, they would have different contracts if that personal circumstances test was applied. Or they would take the cheaper labour if there was only one position. It would be a parent, but most likely in this case a woman.

Then of course it broadens the exceptional circumstances—which we have always accepted in a short-term, reviewable frame that the commission might facilitate—beyond a company with an incapacity to pay over a short time, and able to be reviewed, to individuals. Again, I just find it appalling that, potentially, someone going to their first job, people who have been made redundant, people living in 'locational' areas—we do not even know what that means—or indeed people in other circumstances could have exceptional reasons why they would have a lesser AWA, an AWA that takes away those entitlements for up to five years.

Of course, the process is secret. It is not transparent; it has no review. We have already pointed out that it is just a very bad joke to suggest that, to get any kind of review, working people would have to go to the High Court. This issue is not only the cost but also the exceptional nature of such an appeal process—and then only probably on legal jurisdiction or process. It is just an appalling thing for any democratic parliament to impose on working people. The assessment is after and not before. It is incredibly complex. It will bog down proceedings. We believe it is probably unworkable.

Finally, I will go to technical issues. There are many state employees left out because if they have gone from an inferior agreement to a new agreement that will have expunged the award base. Again, you can probably see that the majority of these people would be more vulnerable workers in inferior circumstances by way of wages and conditions. We think it excludes hundreds of thousands of state workers, particularly women, if this is not just a

technical error. If it is deliberate, it is pretty shocking. If it is a technical error, it ought to be fixed up immediately.

Overall, we think that these amendments fall far short of the standard of the old no disadvantage test. That is particularly unfortunate given that we still have the rest of the Work Choices legislation: unfair dismissal provisions which no longer protect the majority of working people, no collective bargaining rights and, particularly, no independent commission. When you have the newly named Workplace Authority and the Workplace Ombudsman still under the direction of a minister, with no right of appeal and no transparent process, it falls far short of the natural justice and transparency that people expect in legal arrangements. No company would stand for contractual arrangements where they had such a process and neither should any employee.

With regard to your bill, Senator Fielding, we appreciate the intention behind it. We suggest that your proposals regarding public holidays and meal breaks should be recognised in any piece of legislation with appropriate arrangements for people to agree on what that looks like, but we ask that you discontinue your view on ordinary hours of work as we believe that it would, again, affect family time and personal time in such a way that would deregulate the working day over time almost entirely. We certainly understand that your intention, to the extent that you were able, was to clean up a piece of legislation, Work Choices, that has worked against working Australians.

Ms Bowtell—I want to draw your attention to the technical amendments that the ACTU proposes to the legislation that we think would remedy deficiencies in the legislation that do not appear to be consistent with the stated policy position. While our submission includes a number of recommendations that would be new policy that we believe the committee should adopt, there are three areas that we would like to draw attention to in the legislation that we think are drafting deficiencies.

The first is in relation to employees who were traditionally covered by the state industrial relations system. Those employees are not usually regulated by an award because they are not usually regulated by a federal award and a federal award is defined in the legislation. Therefore, we look to the amendments to schedule 8 of the Workplace Relations Act which are found in clause 42 of the bill. When you look at clause 42 and the proposed introduction of clause 52AAA, what you see is that there are two significant loopholes in the legislation for those workers. The first is that the fairness test will only apply to people who were in the state systems at the time Work Choices was introduced and became covered by the federal system if on the day preceding the making of a workplace agreement they were covered by an old state instrument, a preferred state agreement or a NAPSA. There are a group of workers who were at that time covered by preferred state agreements and NAPSAs who have since made an agreement and may make another agreement. That group of workers is not picked up by this amendment. Any worker who was in the state system and has made an agreement in the last 18 months will not be picked up by this amendment. They will never be able to have the fairness test apply to them unless and until the industry or occupation within which they work becomes covered by a federal award. The act envisages that that would happen through the award rationalisation process, but, as you well know, that process has not commenced and is very unlikely to be concluded within the statutory time frame.

The second loophole that is found in this part of the legislation is the one that the SDA pointed out in their submission—that is, for these former state regulated employees to be covered by the fairness test, they have to be covered by a workplace agreement that contains notional protected conditions. It only contains notional protected conditions if they have been deemed to be included. But of course it is open to exclude them. If the agreement says, 'This agreement excludes all the notional conditions,' then it does not trigger the application of the fairness test. So those groups of workers miss out.

The third technical loophole that exists is in relation to workers who, again, have made agreements in the last 18 months which are deficient agreements. The bill provides that, if your agreement fails the fairness test, you fall back to and your compensation is calculated upon the instrument that would have applied but for the deficient agreement. But there are a group of workers who are on agreements which have taken away all their conditions. Envisage a worker who has signed an AWA, it has stripped them of all their conditions, the fairness test has come in and their employee offers them a new AWA, with an extra $50 a week in compensation for the loss of conditions. That agreement is found to fail the fairness test. The effect of the legislation is that that agreement becomes inoperative and the default position for that worker is the preceding AWA—the one that did not have the extra $50. So they fall back to worse conditions than what they were on under the deficient AWAs, and there is no compensation because there is no gap. We strongly recommend those three technical amendments to you.

Finally, for completeness, we refer in paragraph 63 of our submission to the Welfare to Work legislation. In shorthand, we are referring there to the activity test for the purposes of the Social Security Act, which provides: 'A beneficiary—the recipient of payments—satisfies the activity test if they are prepared to take work that meets the statutory criteria.' The statutory criteria refers only to the Fair Pay and Conditions Standard and does not include lost protected matters. A prospective employee could refuse an offer of employment that would not have met the fairness test but would be deemed to not satisfy the activity test, so they would fall between the loopholes there. We point out those matters to you, and we are happy to take questions on the remainder of the submission.

Senator BIRMINGHAM—I have a technical question to start with in relation to the point you raised. Thank you for the approach you have taken, which is perhaps a little more constructive than that of some others. Could you tell me how many employees you think may fall into the loophole around NAPSA?

Ms Bowtell—No, but if you consider that there are over one million workers who are covered by either an AWA or a collective agreement made in the last 18 months and then you say that about 40 per cent of those people were former state system workers then that is the potential group.

Senator BIRMINGHAM—But it is probably a lot smaller than that, assuming your interpretation is right. I am happy to—

Ms Bowtell—Some of those will be on agreements that provide them with terms and conditions well in excess of the award that they displaced. But there will be a group—which

we know from data that was released from the OEA, which you were discussing earlier with Mr Barklamb—for whom there is insufficient—

Senator BIRMINGHAM—I am sure we can look at whether those assertions you have made are correct. Thank you for, at least, bringing them to our attention. With respect to broader policy issues—and I previously asked Mr de Bruyn similar questions—as a general principle, the ACTU stands opposed to AWAs and individual agreements, does it not?

Ms Burrow—Yes, because the way the legislation is written is about unilateral power. The employers hold all of the power: 'Sign the contract or you don't get the job,' the threat of unfair dismissal and no collective bargaining rights. On any analysis, it is stacked against the working person.

Senator BIRMINGHAM—You also believe that unfair dismissal laws should apply to all workplaces?

Ms Burrow—Yes, we do. We do not think that principles of rights should actually be divisible. That does not mean that we do not understand that we have to make it possible for small business not to incur unnecessary costs in having those things examined. But we do think that any son or daughter should have the same rights, no matter whether they work in small or large businesses.

Senator BIRMINGHAM—And you would lobby whoever was sitting at this table or whoever was in government, whether it is those of us here now or whether it includes Mr Combet, Mr Shorten, Mr Farrell or others, to abolish AWAs, abolish individual agreements and to bring back unfair dismissal laws?

Ms Burrow—Yes, indeed.

Senator BIRMINGHAM—And you would hope that, given their close affiliation with the ACTU, they would act on that?

Ms Burrow—I would actually hope all parliamentary people would understand that you have to have a fair go all round and that the system is not in balance. It does not actually represent the test of any sense of fairness when unilateral power is held by one person, in this case the employer.

Senator BIRMINGHAM—Are you aware whether unions affiliated with the ACTU have negotiated away penalty rates or other such conditions as part of certified agreements?

Ms Burrow—I can tell you, as Mr de Bruyn did, that of course many of us, including me, have negotiated such things but only on the basis that they met, in the previous legislation, the unfair dismissal test. Just recently I negotiated annualised salary with a major corporation but, because there is no disadvantage test, we actually appended all of those entitlements at the back of the agreement. We put in place an annual review process to see that the worker could not be worse off. If they in fact were better off, the company was happy to accommodate that but if they were worse off, their salary would be adjusted. Those entitlements would get the same sorts of increases in this agreement up to four per cent a year, as would the base salary. So wherever those conditions are preserved, we do not object to annualised salaries, we simply object to people losing those conditions, being worse off and not being able to access them under further arrangements when you renew an agreement or fall back to an award.

Senator BIRMINGHAM—Are you happy to give the same guarantee that Mr de Bruyn did that no individual case under those agreements that you have negotiated might be worse off than they would have been under the award?

Ms Burrow—Under the old legislation, indeed, because the no disadvantage test would have prevented it. This does not meet the standards that the no disadvantage test set. There are just so many loopholes that people can still fall through the cracks.

Senator BIRMINGHAM—I assume, unlike Mr de Bruyn, you recall that the old test did allow for some negotiation away of annual leave or sick leave provisions and so on?

Ms Bowtell—The no disadvantage test was a global test. It was not a line by line, condition by condition test. It was a test that was global so that it compared whether, in relation to all of the award and agreement conditions, the workers were disadvantaged or not. That was how the test was applied, so no condition was sacrosanct under the no disadvantage test. That is not actually something that the ACTU pursued. I recall us running quite hard in a case, under I think it must have been 1992 legislation, in relation to a company called Arrowcrest where there was cashing out of annual leave. We were unsuccessful in saying that there was a public interest in not allowing people to cash out annual leave and we lost that case. It has not been a policy position that people should go round cashing it out. The legislation permitted the cashing out of annual leave. No condition is sacrosanct under the no disadvantage test.

Senator BARNETT—In light of recent discussions—we are a committee looking at the IR arrangements—would you like to clarify for the record your position with respect to your lobbying for Australia replacing Colombia on the ILO list that has been referred to publicly?

Ms Burrow—I would like the minister and associated senators who have actually claimed that to tell the truth. The truth is that, as both the ACTU president and the international president, I would always support Colombia being top of the list. It is abhorrent. They actually shoot trade unionists in Colombia. The truth is that at no time would I ever have lobbied for Australia to replace Colombia. We did not. It did not happen like that. In fact—perhaps you should have addressed this to ACCI—the employers refused to address the issue of Colombia. It is such a scandal in the international arena that it sent shockwaves through the committee and will no doubt be the subject of a governance debate when we meet as an ILO governing body.

Senator BARNETT—But you stand by your actions?

Ms Burrow—I did not, would not and never have lobbied to not have Colombia as part of the list. In fact there is a special debate when the governing body meets about commissions to Colombia to see that in fact people have their human rights preserved. This is a serious international issue. To keep repeating that somehow I of all people would have actually lobbied not to have Colombia on the list is just dishonest, Senator.

Senator BARNETT—We heard from the SDA that they were not aware that prior to Work Choices you could trade away annual leave and sick leave. Are you aware of that situation?

Ms Burrow—Ms Bowtell just answered that. It is not a policy position of the ACTU. We happen to believe that annual leave and sick leave are in fact non-monetary entitlements—

they go to health and wellbeing—that should underpin any workers' lives. In the case of Mr de Bruyn, I think he said not only that was he not aware but also that he had never been involved in such a negotiation. I can assure you that I have not been either. We are aware of the case that Ms Bowtell talked about where we lost, and we know that it has happened on other occasions, but it is not an ACTU policy.

Senator BARNETT—You mentioned in your opening statement appeals and the need for appeals under the new safety net proposals. That is the way I understood your comments—that there should be an appeal process. What is your understanding of the appeal process under the no disadvantage test? Is that allowed or not? If so, to whom does one appeal?

Ms Bowtell—Under the former provisions of the Workplace Relations Act the no disadvantage test was conducted by a single commissioner but could be appealed, for a collective agreement, to a full bench. Under the AWAs, they were reviewed by the OEA. If the OEA had a concern about whether an agreement met the no disadvantage test, that was referred to the commission. I do not have a copy of the former legislation here; I cannot recall whether there was an appeal mechanism there. The proceedings were at least open and parties could put submissions, and written reasons for a decision were issued in relation to whether or not an agreement met that test.

In relation to how that process worked in the commission, often the commission would require undertakings from parties to make sure that the agreement in its operation met that test. To pick up on some of the earlier questions about individual circumstances within a collective agreement, if the commission was uncertain whether an agreement met the no disadvantage test for all employees then the routine practice was for the commission to require a formal undertaking from the employer that in its operation it would not disadvantage individual employees. That was the way that was routinely dealt with in the former system.

Senator BARNETT—I have just referred to a different view that has been expressed. There has been some debate this week by legal experts about the fairness test and the right to appeal. I think most people say an appeal to the High Court is the only appeal process. I note that a Sydney lawyer from Fisher Cartwright Berriman, partner Benjamin Gee, indicated this week that the government has exactly the same arrangements under the proposed safety net arrangements compared to the no disadvantage test and that it is exactly the same position as the no disadvantage test. That is a legal matter—

Senator MARSHALL—Can that opinion be tabled?

CHAIR—I will get the piece of paper tabled.

Senator BARNETT—I would be happy to.

Ms Bowtell—That would have been the case if the Office of the Employment Advocate did not express a concern about whether an agreement met the no disadvantage test. That is true. There was no automatic referral to the Industrial Relations Commission. So that would have been the case under the previous legislation for AWAs but not for collective agreements, which were certified by the Industrial Relations Commission.

Ms Burrow—And you may recall, Senator, we oppose AWAs—and have since 1996.

Senator BARNETT—Yes, I am actually aware of that.

Ms Bowtell—It was also a requirement under the previous legislation that the president of the commission provide, in conjunction with the Office of the Employment Advocate, protocols and advice about how the OEA should go about assessing the agreement. So, while there not a review process, there was some more transparency.

Senator BARNETT—But you would agree that, under the fairness test, undertakings between parties can be agreed and accepted?

Ms Bowtell—Yes.

Senator BARNETT—I want to ask you about your views on the ALP's policy, Forward with Fairness, with respect to unfair dismissal cases and whether you support the approach put by the ALP. They have put forward the fair dismissal code and, as far as I am aware, they have not provided details on it. I am wondering about your views on that arrangement, on who is going to decide what is in the code, on what will be in it and on the genuine compliance arrangements under the code.

Senator MARSHALL—That is not a question on the legislation.

Senator BARNETT—It is not directly related to it, but we are talking about the safety net arrangements and the unfair dismissal arrangements.

Senator MARSHALL—But if you have finished your questioning on the legislation—

CHAIR—Order, Senator Marshall! I suspect that what Senator Barnett is asking about is not on the legislation and therefore is outside what we are discussing today.

Senator BARNETT—I will move on to my final question. Ms Burrow, you talked about the family friendly provisions in your opening statement. Are you aware of and do you agree with the ABS statistics that say that those on AWAs are earning 94 per cent more on average than those on an award and, on average, nine per cent more than those on collective agreements?

Ms Burrow—No. I would have to see the data disaggregated. Ms Bowtell might be able to help me out. We know that, when you disaggregate the figures, women in particular, but also everybody else, earn more on a collective agreement than on an AWA. In that context—

Senator BARNETT—You disagree with the ABS; is that what you are saying?

Ms Bowtell—No, I do not disagree with the ABS data. You have to look at—

Ms Burrow—The disaggregated—

Senator BARNETT—Does Ms Burrow?

Ms Burrow—No, I said that I would want to see the disaggregated data because if you are including managerial then you might well be right, but I can tell you that when you look at disaggregated data of an AWA income versus a collective agreement income you will see that people on AWAs are worse off.

Ms Bowtell—When you are comparing rates of pay you have to make sure that, as far as is practical, you take out things that are not related to the work that is done. The most direct comparison is the non-managerial hourly rate of pay. That is the rate that the ABS uses, for example, when it is looking at the gender pay gap. It is true that both collective agreements

and AWAs are higher than the award rate of pay, except for casual women. Casual women on AWAs actually earn a lower hourly rate than award dependent women. From that, I interpret that it is a compositional thing. You have a composition of low-paid women on AWAs who bring that down.

Senator BARNETT—Do you agree with the ABS saying that it is 94 per cent higher on average—

Ms Bowtell—I cannot tell you whether it is 94 per cent or not. I can tell you that AWAs and collective agreements across most classifications, but not all, pay higher than award, but across most classifications collective agreements pay higher than AWAs when you use the correct data, which is the non-managerial hourly rate of pay.

CHAIR—Senator Siewert, you have approximately six minutes.

Senator SIEWERT—Thank you. I want to go to the loopholes that you have identified. I will start with the last one you mentioned, which is Welfare to Work, because that is an area that I have been particularly concerned about. If I understand what you are saying correctly, somebody could say that they think their AWA is unfair and have it evaluated as unfair yet, because they had said that they did not want to take the job because it is unfair, they could then get pinged—that is the technical term!—for not meeting the activity requirement and hence be in breach.

Ms Burrow—The activity requirement is to be prepared to take work that meets the statutory guidelines, and the statutory guidelines say that the job has to offer at least the Australian Fair Pay and Conditions Standard. It does not say that it has to comply with the fairness test. I think there would be a consequential amendment to the Social Security Act required to pick up this test if it were to become law.

Senator SIEWERT—Yes, absolutely. Earlier you talked about the other loophole and people covered under the state system. How many people do think would be included in that cohort?

Ms Bowtell—The first loophole is the group who were in the state system who have made an agreement and then made a subsequent agreement. I tried to answer that question earlier and I am not sure that I can, but it is a subset of the million people. It is the state group, probably about 40 per cent of the million people, and a group within it has made agreements that do not meet the fairness test. For the second loophole it is a much broader group. As the SDA pointed out, it would probably mean the entire retail sector outside Victoria could potentially not be covered by the agreement. Other industries and occupations that have been traditionally covered by state awards include most clerical workers, potentially nurses, depending on how you do the numbers, and teachers—although most teachers are outside the scope of this legislation anyway—in the private sector, and so on. It would be many workers—millions.

Senator SIEWERT—I want to clarify something. Ms Burrow, you raised at the very beginning of your evidence the figure of 2.5 million workers not picked up. This cohort of workers under these three—

Ms Burrow—Are additional.

Senator SIEWERT—are additional, aren't they?

Ms Burrow—There could be some double counting.

Ms Bowtell—The first group is a subset of the one million who are currently covered by Work Choices agreements. The second group is additional.

Senator SIEWERT—So we could be talking about a substantial number of workers that are currently not covered. I also want to go to the issue of transparency and clarify it a little bit more. The evidence we heard this morning, which I think you came in at the end of, said that the director does not have to give reasons for the decision. How would somebody be able to appeal it or take adequate action if the director is not required to give reasons?

Ms Bowtell—I think that the prospect of a High Court appeal is practically impossible.

Ms Burrow—Yes.

Ms Bowtell—In the absence of decisions, it is practically impossible. I note—picking this up from Senator Barnett's questions as well—that the ACTU is not the only submitter to be concerned about the lack of reviewability of the decision. I think AMMA raised it in their submission as well and I may be wrong but I think ACCI did as well, so I think it is a generally held concern that a fairly junior bureaucrat could make that decision and there would be no avenue for review.

Senator SIEWERT—I will ask you the same question as I asked the shoppies. On the figure of 400,000 AWAs: do you agree that that is the figure that is likely to be dealt with in a year? I asked the department and they said about 400,000.

Ms Burrow—We do not know. We know that more than 1,000 a day are being signed at the moment. You can do your calculations, and the department probably has a better guesstimate then we would have, but we do think the whole process is probably unworkable in any kind of time frame that you would deem efficient. With regard to your last question, Senator Siewert, the other thing that worries us is the fact that the analysis that counts is done after someone has been forced to sign the individual contract, so there is no real choice for the individual, if it is deemed to be fair and they believe it is not.

Senator SIEWERT—They have to sign.

Ms Burrow—Yes. Our recommendation is that it is done first, and then people have genuine choices.

Senator SIEWERT—A prelodgement assessment can be carried out, but they do not have to do a prelodgement assessment.

Ms Burrow—I find it impossible to believe that you can get prelodgement advice in a timely fashion when you are being offered a job, given the statistics you just raised, which are pretty unbelievable with regard to the process post lodgement being able to be dealt with—and of course, in addition to that, collective agreements as well.

Ms Bowtell—We have some experience of this in relation to prohibited content where the Office of Employment Advocate can provide prelodgement advice to employers and, although it cannot formally provide it to anyone other than employers, it does so informally—it is not advice—to unions as well. We are aware of cases where about 10 weeks has been taken. We

are told that the turnaround time that you can expect is 30 working days—around six weeks—for advice. The advice is regularly hedged in terms of: 'We cannot say. You will have to provide more information.' We are also, as I think we say in our submission, aware of a number of examples where the advice changes often with the same person or between people.

We have an example that I was given by one of our affiliates of a company that has done six collective agreements since Work Choices. The first three were assessed as containing no prohibited content. The fourth was assessed as containing prohibited content. Amendments were made. The fifth mirrored the fourth and was assessed as containing new prohibited content, and amendments were made. And the sixth was assessed as containing new prohibited content, and amendments were made. So we have very little confidence in the capacity of the Office of the Employment Advocate to do it in a timely fashion.

Senator FIELDING—We have heard earlier today that there are a number of people who are not covered by awards, and you have raised the notional issues as well, and the SDA made that clear. It is certainly in the hundreds of thousands of Australians, and I would say it is close to a million Australians, who are going to be not covered by an award in one way or the other. The fairness test is really applying the fairness to an award. The concern that Family First had before the government put in the fairness test was that basically there were a number of things that really should be guaranteed for all Australians. That was the attempt of the Family First bill: to put it through the legislation in such a way that it covered everybody, whether on an award or not, to make sure that that was there and could not be traded away.

I do not know whether you have had a chance to look at Paul Keating's comments last night and at some of the discussions he had, but I think that was very similar to some of the thinking of Family First in putting it in the legislation centrally to make sure that every Australian was covered, not just by trying to cover it with a couple of bandaids through a fairness test and a few other bits and pieces. Do you have any comments on that?

Ms Bowtell—I think the approach that we would take is that there are conditions that should not be tradeable, and that is something that we would support. But we also think that there are a lot of things where the flexibility to bargain is the best way to go, and we have supported that for a long time. People do not often believe that the ACTU support that, but we do. Things like the hours of work, the arrangement of hours and so on are things where we think the safety net is best set at an industry or even an enterprise level, and then people can bargain flexibility around that. So our preferred approach is to say that it is the award system that sets the safety net around hours of work. We are quite happy with legislation setting the safety net around the things that we do think no-one should trade, like annual leave, sick leave, redundancy pay and so on.

Ms Burrow—Public holidays—

Ms Bowtell—Public holidays.

Ms Burrow—and meal breaks.

Senator FIELDING—How does the fairness test affect things like the example—which I think is absolutely un-Australian—of the Tristar situation with redundancy? Family First has tried to cover that issue, and I understand your comments. But I am just asking generally: do you think the fairness test is going to address that issue of redundancy such as in the Tristar

situation, which all Australians, I think, were appalled by when they saw and heard about it? Does the fairness test cover that at all?

Ms Bowtell—The Tristar example only protects redundancy provisions that are in a workplace agreement or in an award. If you make a workplace agreement with no redundancy provisions, there is nothing to protect, and the fairness bill does not protect redundancy provisions. So it will be perfectly lawful—it is now, if this bill goes through—from 7 May to continue making agreements that contain no redundancy provisions and therefore there is nothing to protect.

Senator FIELDING—So the situation of Tristar is waiting to happen again, basically?

Ms Burrow—Absolutely.

Senator FIELDING—We know that most employers do the right thing and most workers do the right thing, but obviously we do need to cover situations that have already happened once, and we should not allow people to fall through cracks again.

Ms Burrow—We agree.

Senator GEORGE CAMPBELL—I preface my first question by saying that ACCI in their submission this morning argued fairly strongly that this legislation was not necessary, that in the contact they had with their 35 or 36 member organisations they were not aware of any instances where award conditions were not being underwritten by AWAs in the workplace and that the ACTU scare campaign in fact had created a deterioration in workplace relations out in the workplace and created uncertainty in many workers' minds as to whether or not their conditions in fact were being protected. So my first question to you is: in terms of this legislation, and given the deficiencies which you have raised and have sought to have amended, is the ACTU supportive of this legislation to the extent that it is actually an improvement on what currently exists?

Ms Burrow—We think that is a decision for the senators. It is certainly not equivalent to the old no disadvantage test. For the opposite reasons to those given by ACCI in opposing this, we still believe that employers—and we agree with Senator Fielding that there are many good employers out there—who seriously want to take away award conditions will still be able to do so. Not only is it the case that people who fall outside of the fairness test will continue to be able to be exploited with imposed AWAs, but it is even the case for those who might come within its parameters. If the employer seriously wants to take away conditions or to reduce equal pay and discriminate directly against those with personal circumstances, including family responsibilities, then it will happen. We think that it has as many holes as a basketball net, so it is not a model piece of legislation. But we certainly understand that the current arrangements are even worse, so we will leave it to you to decide, Senators, whether you will vote for this. What we would urge you to do is to close the loopholes, to put it back to a standard that equals the no disadvantage test, and then we might seriously believe that there is some concern. We still do not support AWAs where the employer can simply say, 'Sign the contract.' There is no right to bargain collectively and there is no change to the unfair dismissal law—which is the huge baseball bat that employers can hold over workers. But we ask you to amend it to bring it up to the standards of the no disadvantage test, and we hope that the government, if it is serious, will agree with such amendments.

Senator GEORGE CAMPBELL—I have not read the legislation in detail as it was only available last week and we have had other things to do as well as this. But from my cursory reading of it it seems to me that there is a potential for people on collective agreements to be treated differently to, or to be worse off than, those on AWAs in terms of meeting this fairness test. It seems that you can negotiate things under collective agreements which may disadvantage some employees, but provided that it does not disadvantage the substantial bulk of the employees under the collective agreement it is capable of being registered. Whereas I presume that if an AWA does not meet the fairness test—the five criteria or whatever they are—then it will not be capable of being registered, but that may not be the case with respect to collective agreements. Is that your understanding of the legislation, or am I reading it incorrectly?

Ms Burrow—Its potentially more restrictive, but I know that you are asking about a particular technical issue about being able to negotiate the inclusion of award conditions in a collective agreement. That intersects with the current rules about prohibitive content, so I might Ms Bowtell to deal with that.

Ms Bowtell—I think that the issue is that the proposed legislation would simply require the Workplace Authority director to be satisfied on balance in relation to a collective agreement, and there is no clarity given as to what that means. Whereas under the no disadvantage test there was a built-up case law, or jurisprudence, which guided people as to what that meant, and what that meant was that it was not possible to trade some workers off for others—to say that we will give the shift workers more but the day workers will get less and overall it meets the global no disadvantage test because there is a requirement that it be applied in a way that no-one is worse off. So we would like to see it strengthened. I think the SDA picks that up quite well on page 8 of its submission.

Senator GEORGE CAMPBELL—But that, you think, is a deficiency and it needs to be addressed.

Ms Bowtell—It is, and it is not something that we draw attention to in our submission but the SDA covers that reasonably well. I think Andrew Stewart's submission picks that up as well.

Senator GEORGE CAMPBELL—I drew your attention earlier on to the proposal by the AiG that came in yesterday. It is essentially seeking the repeal of, I think, section 355, which would allow award provisions to be referred to in an agreement without being spelt out in specific terms. What is your view about that sort of proposal?

Ms Bowtell—There has been some debate internally about whether that is a good or bad way of making agreements. Some unions prefer to do it that way; others say that it is easier for everybody at the workplace to understand their rights and obligations if the agreement does spell out what is required. So it is an issue around clarity in agreement making. We did not see any reason for a prohibition on including, by incorporation, the terms of an award. In practice, where parties have tried to do that, the Employment Advocate has regularly written to them and said, 'I am uncertain as to whether this then contains prohibited content and, until I review the actual award that you are referring to, I cannot tell you whether it contains prohibited content,' and then over time has developed a series of advices in relation to

particular awards. The national building and construction industry award, the metal industry award and others have been the subject of a series of advices. I know you are hearing from the Ai Group after us and I am sure they have had the same experience as us where, just when you think that an award has been cleared of prohibited content, the Office of the Employment Advocate come back and tell you there is another section of it that they now think is prohibited. So it is difficult to incorporate those in the agreement. There is a practical barrier as well as the section 355 barrier.

Senator GEORGE CAMPBELL—I will ask them, obviously, what their thinking is behind the amendments, but I thought I would take the opportunity to—

Ms Bowtell—Certainly, there are unions affiliated with us who would prefer to do their agreement making in that way, and there are employers who would be happy to do it in that way—to incorporate the terms of the award in the agreement. They have difficulty doing that at the moment.

Senator GEORGE CAMPBELL—That is if the parties are in agreement about—

Ms Bowtell—It seems unusual that the legislation would prohibit that.

Senator GEORGE CAMPBELL—On the exceptional circumstances issue, we know that there are case histories in the past of companies that have been allowed to vary conditions of employment because of their particular circumstances, but they have usually been accompanied by a time limitation upon how long it can operate before a review et cetera. It was argued by the department this morning that one of the factors that the Workplace Authority director would have to take into account is the time that these exceptional circumstances agreements were being sought to cover. But I am not able to find anything in the draft legislation where it in fact says that.

Ms Burrow—No. Our understanding is that it is simply a blanket time frame that equals the life of the individual contract or AWA itself unless the parties have agreed otherwise. So we are really concerned about this. We are concerned for two reasons. The example used in the government's material goes to that well-known case at SPC, but of course that was an agreement between the parties—and I have already pointed out the imbalance of power when an employer can simply determine an individual contract—and it had a limited life. Now, that is the very point you raised, Senator. I might add that we are also very concerned, beyond that issue, about the broadening of 'exceptional circumstances' from a company's circumstances or capacity to pay, to individual circumstances, which should never appear because that absolutely goes again to direct discrimination, just as the provision for a person's personal circumstances does.

Senator GEORGE CAMPBELL—The issue that I raised with the department this morning, Ms Burrow, in respect of that was whether or not that provision for a person's personal circumstances to be taken into account was in fact in conflict with the Privacy Act. The department said no, because the Workplace Authority director had no power to insist on their providing the information to him. In those circumstances, if the individual did not provide that information then there would be no basis for exceptional circumstances to be granted because the director would not have all the information before him to make a

decision. I found that a very convoluted proposal from the department, but that is what they said.

Ms Bowtell—The Workplace Authority can gather information from the employer or the employee. So whether we are talking about the personal circumstances factor or the exceptional circumstances factor, which includes an individual's employment opportunities—so, the two issues in the legislation—in either case there is no obligation to go to the worker. All that information could be gathered from the employer, and the Workplace Authority director can take that information from the employer into account without verifying it with the employee.

There is no obligation to go back to anybody for information but, if they do go back, they need not go back to the employee. They may go back and say, 'This seems no good. It doesn't seem to meet the test. Why do you think you can get away with this?' The employer might say, 'Because they've been long-term unemployed and they wouldn't get a job anywhere else. That's why.' Or they might say 'Because she's a single mum, she's got no-one to look after the kids except on weekends. It suits her to work weekends so that's why I don't have to pay the 200 per cent loading on Sunday.' The employer can say that and there is no requirement to verify it.

Ms Burrow—You have two elements: direct discrimination and employer verification as potentially the only basis for decision making in secret.

Senator GEORGE CAMPBELL—Wouldn't that potentially put the employer in breach of the Privacy Act?

Ms Bowtell—It is not information that they have collected and stored on a database. I do not have encyclopaedic knowledge of the Privacy Act, but I do not think that they are using information that they have collected and stored in a record for a purpose that they would not be allowed to use it for. It would be a lawful purpose that they were using it for. I do not have a copy of the legislation. We could take that on notice and give you some information about that.

Senator GEORGE CAMPBELL—I would appreciate that because I am really concerned that there are personal aspects of people's lives that they may not want disclosed.

Ms Burrow—Exactly. But it is abhorrent, anyway. This should never be the case because it leads not just to potential breaches of privacy but to direct discrimination—which should have been eliminated once and for all based on all of the old areas of dispute—and therefore legal outcomes around equal pay, equal rights et cetera. I also want to pick up finally in this context on Senator Fielding's earlier question. We have seen what the term 'operational reasons' means. It means very little. Whether or not it is morally right, the commission has determined that, legally, operational reasons are very broad. So, too, are exceptional reasons. Economic circumstances, from our point of view, are the same thing—if you just have to assert it, if you do not have to open your books or show capacity to pay, if it is secret and not transparent, and then of course it even goes beyond that to the individual. These things are shocking. They are terrible pieces of legislation. They simply open people to exploitation.

Senator GEORGE CAMPBELL—Finally, are you aware that the Office of Workplace Services, as it is now known—the old OEA—will have something like an additional 600

employees engaged for the purpose of administering the fairness test? They told us at estimates hearings a week ago that it would be around 200. The minister upped the ante to 600. We understand that the bulk of those people will be engaged from labour hire firms, such as Skilled Engineering, and that the maximum training that they will receive is in the region of two weeks before they are engaged in the process of scrutinising these agreements for certification. I think the Employment Advocate told us that something like 20,000 agreements had been registered since 7 May. I am told independently that there is likely to a backlog of about 80,000 requiring assessment at any given point in time. In those circumstances, how likely is it that the strict interpretation of this new legislation will be applied to every agreement that is put forward for registration with that office? How confident could you be that in fact it has at least met the test that will now be put in place?

Ms Burrow—I do not think you can be confident of any of that. I think a system, even going forward from day one, with that many workers is probably not workable. But, in terms of dealing with the backlog and then going forward from a clean start, you have said it all, Senator. What I find somewhat unbelievable in what you have just told me is that I was not aware that the intention of the department or the authority was to hire people from a labour hire company rather than by direct employment.

I was certainly not aware that they would get only two weeks training. I can assure you that I have had more years than I would want to count of industrial experience, and I take a lawyer with me. If I were actually going to assess against any code—but in this case the complexity of awards—I would not do it. So I cannot believe that you can find 600 or 800 people, give them two weeks training and they will be able to do this with any accuracy. If I am appalled at the loopholes in this legislation, I am even more appalled that, with no transparency, working Australians are simply going to be conned again. This cannot possibly provide justice.

CHAIR—Senator McEwen, you may ask one question. That is all we have time for.

Senator McEWEN—Ms Bowtell, earlier you referred to groups excluded. I am talking about the group excluded by virtue of their state award coverage. You mentioned retail workers, clerks and nurses. Are there any other categories of employees that you think come in under that state award? And please give us your opinion of the gender breakdown.

Ms Bowtell—It would be the areas that have traditionally been covered by the state systems that have now moved into the federal system—leaving aside perhaps the public sector and some of the unincorporated areas. You would also include some but not all of the community and public sector, depending on whether they are constitutional corporations. So that would be SACS type workers and so on. It would be retail and clerical, certainly. Health workers in aged-care facilities would probably be covered, again depending on whether it is a corporation. By and large they are female dominated occupations.

CHAIR—Senator Fielding has one more question.

Senator FIELDING—I have asked this before today. There was a report in the *Australian* on 2 June. The words here are 'operational reasons'. You picked that up before. The concern is the fairness test. The issue that Family First raised was about redundancy in the Tristar matter, but just recently there has been another issue here. The Australian Industrial Relations Commission has ruled that a company that has decided to restructure—the word 'redundancy'

is not used—is legally allowed to sack people, under Work Choices, because of the restructure. Has that been brought to your attention before?

Ms Bowtell—I am not surprised. I have not read the decision, so I am commenting only on the newspaper report, but I was not surprised by the decision of the commission in the Carter and Village Cinemas case. Nor was I surprised by the Priceline decision. It has always been my view that the 'operational reasons' ground was very broad, and I would not be surprised if it has been cast that way. At the time that the Work Choices bill was going through the parliament, it was said that the only reason for that was to stop people double dipping and getting a redundancy payment and an unfair dismissal payment. It clearly goes much further than that, and I think it gives carte blanche to employers, if they just decide they do not want someone, to dismiss them, regardless of the size of the business.

Senator FIELDING—Given that—

CHAIR—That is it. That is two questions.

Senator FIELDING—It is not a question.

CHAIR—I said one.

Senator FIELDING—It is not a question. Just in response to that: I think most Australians would be shocked to know that 'operational reasons' would include restructuring.

CHAIR—That is a comment, not a question, and it is out of order.

Senator FIELDING—I do not think it is at all.

CHAIR—It is.

Ms Burrow—We agree, Senator Fielding.

CHAIR—There is also one more question from Senator Birmingham.

Senator FIELDING—It is not out of order. That is a joke!

CHAIR—It is out of order.

Ms Burrow—It is not at all.

Senator BIRMINGHAM—Ms Burrow, you have made a very passionate argument today against what seems to be any consideration of the inclusion of personal circumstances in the trading away of any conditions. Are there any areas at all where you think that a parent should have the flexibility to trade away some conditions to gain extra convenience in the care and looking after of their children?

Ms Burrow—Go for it; I have made my point.

Ms Bowtell—The issue is not about trading away; the issue is whether it is essential to have people forgo the safety net, the floor below which you are not meant to fall, because they have caring responsibilities.

Senator BIRMINGHAM—What about penalty rates?

Ms Bowtell—Let me just explain to you. I do not know how long it is since you have read an award, but awards currently contain time-off-in-lieu provisions, make-up-time provisions and individual facilitation clauses which allow you to start earlier and finish later, to change

the time of the meal break or to shorten the meal break. The system contains the flexibility that parents and carers need now, without them forgoing entitlements.

Ms Burrow—The short answer is: no trading away and certainly flexibility above the safety net; no-one should fall below it. This is just direct discrimination. It takes us back three decades, particularly for women, but increasingly for men, who are taking up caring responsibilities.

Senator BIRMINGHAM—The short answer is: no flexibility. Thank you.

Ms Bowtell—No. The short answer is: there is sufficient flexibility, Senator.

Proceedings suspended from 12.54 pm to 1.30 pm

BARAGRY, Mr Ronald Joseph, Legal Counsel, National Workplace Relations, Australian Industry Group

SMITH, Mr Stephen Thomas, Director, National Industrial Relations, Australian Industry Group

CHAIR—Welcome. The committee prefers all evidence to be given in public. It will consider any request for all or part of the evidence to be given in camera. Thank you for your submission. Are there any changes or additions?

Mr S Smith—Just the supplementary submission.

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

Mr S Smith—Ai Group welcomes the opportunity to express its views about the Workplace Relations Amendment (A Stronger Safety Net) Bill and the Workplace Relations (Restoring Family Work Balance) Amendment Bill. With regard to the stronger safety net bill, we regard the changes as fair and sensible measures which should allay the view within the community that more protection is needed to prevent unfairness in agreement making. We support the bill but we have proposed a few amendments to improve clarity and workability. Most Ai Group member companies will be unaffected by the bill because, as we assess the situation, their agreements already easily meet the proposed fairness test. No doubt there will be a cost to some businesses in some industries. But, very importantly, the fundamental architecture of the national workplace relations system we do not believe is affected by the bill. We believe that agreement making will continue to be a relatively simple and flexible process and there will not be an excessive compliance burden on companies.

The bill's provisions are broadly consistent with the position that we advocated during the development of the Work Choices package whereby we proposed that workplace agreements, other than for highly paid employees, should be compared against award penalty rates and other key conditions of employment to assess their fairness. We are a strong supporter of the existing agreement-making system and the flexibility that it offers to both employers and employees. We are satisfied that the bill does not compromise this flexibility.

Our position on the specific provisions of the bill is set out in our written submission. As you are aware, we did file a supplementary submission proposing a consequential amendment to section 355 of the act. This section imposes substantial restrictions on workplace agreements importing, by reference, the terms of awards. We believe that, given the introduction of the fairness test, that provision should be repealed or substantially amended for the reasons that we have set out in that submission.

Finally, with regard to the restoring family work balance bill, we are supportive of the recognition that that bill gives to the need to assist employees to balance their work and family responsibilities. However, the amendments that are proposed in the bill, we believe, would create operational difficulties for employers, as we have set out in the submission. We would be happy to discuss those practical issues in more detail.

CHAIR—Thank you. I will ask Senator Barnett to open.

Senator BARNETT—Madam Chair, I table the two documents I referred to before lunch regarding the High Court and the Figgins Holdings workplace agreement 2006.

CHAIR—Does the committee agree that they be tabled? There is agreement.

Senator BARNETT—Thank you. Thank you, Mr Smith and the AiG, for your submission. I have noted your supplementary submission this morning. I asked for the department's response to your views on section 355. You can check the *Hansard* for their response, and I am happy to have any further feedback that you may wish to provide to that in due course, as soon as convenient.

Mr S. Smith—Thank you.

Senator BARNETT—I am not sure if you have had a chance to look at the AMMA submission to the inquiry. They refer to the Melbourne Institute report that refers to the increase in wages of those on an AWA, those on a collective agreement and those on an award. The Melbourne Institute indicated, according to the AMMA:

... average wage increases to workers on individual contracts (6.8%) exceeded those under collective agreements (3.9%) and awards (3.3%).

I wonder whether, based on feedback from your members, that is accurate and consistent. Do you have any feedback on the wage increases for those sectors?

Mr S. Smith—While we do not have any specific details, we have no reason to believe those figures are not accurate. We have not had an opportunity to study the AMMA submission in detail.

Senator BARNETT—On pages 8 and 9 of the AMMA submission—and I draw this to your attention—they say, on the mining sector:

A review of resource sector agreements lodged in the 12 months to 31 May 2007 reveals that 73.5% of resource sector employees were covered by an AWA ...

That is a very high percentage. They have some other statistics there supporting their view that AWAs are very important to their sector. Do you have any comments or a response as to the importance of AWAs to your members? Do you have any statistics or feedback in terms of the different industries that your members represent other than the mining and resources sector?

Mr S. Smith—Yes. We view AWAs as an important part of the flexibility that exists within the agreement-making system. We believe that employers and employees should have the right to make an individual agreement, a collective agreement, an agreement with a union, an agreement without a union, a registered agreement or an unregistered agreement. We strongly support the retention of AWAs. Our membership exists across many sectors like manufacturing, construction, ICT, labour hire and others. There are some sectors of our membership—for example, the telecommunications sector—with a heavy penetration of AWAs. That is even so for the manufacturing sector. I think the latest statistics show that the manufacturing sector is third on the list of sectors as to the number of AWAs. There certainly are large numbers of AWAs in the industries that we have a heavy membership in; but we also have many members that have collective agreements, many of those being with unions and

many without unions. We do not favour one particular form of agreement over another. We just say that flexibility should be there.

Senator BARNETT—Yes, and choice should be there. I refer to the discussion we had earlier with the ACTU regarding ABS statistics which show that, on average, those on an AWA were 94 per cent higher than those on an award and, according to the ABS, nine per cent higher than those on a collective agreement. There was some debate as to whether or not they agreed with those statistics. What is the AiG response to the ABS statistics? Do you agree or disagree with them?

Mr S. Smith—We have no reason to believe that they are not correct. We do not have the details at hand. You would assume, given ABS processes, that those figures were accurate.

Senator BARNETT—We had some discussion about the merit of an appeals process. I have tabled a document today regarding the view of at least some legal authorities that there is really very little to no difference as to the no disadvantage test and that appeals would go to the High Court under either. Can you share your view—and your experience—on the appeals process under the proposed legislation and under the no disadvantage test?

Mr S. Smith—My colleague Mr Baragry may have something to say on this. I will just make one point. When we were having a look at this issue we did consider whether there should be an appeal mechanism. But, for the reason that you have identified, Senator, it did not seem to us that anything had really changed from the process that was there with the OEA. Indeed, you can appeal a commission decision to a full bench of the commission, but if you wish to go any further you need to go to the High Court. We would hope, for the reasons identified in some of the other submissions, that the Workplace Authority would review any of its decisions, which parties objected to, in a sensible way. We do not see, given that it is a decision of the Workplace Authority that, logically, you could really have, in effect, an appeal process to the Workplace Authority. That is the body making the decision. But you would hope that, if a decision was made by a fairly junior person within the authority, there would be an administrative process whereby you could have that decision reviewed by a more senior officer. We have no reason to suspect that that would not be the case, because we have always found the OEA to be receptive to issues like that. We have also said in our submission that the OEA—and we believe the Workplace Authority—through the Acts Interpretation Act would have the ability to revoke or amend any decision that it made.

Mr Baragry—With reference to people saying that there are proceedings in the High Court, it is some years since I have been involved in these, but there is a procedure available where you would go to the High Court for a writ of prohibition—the old prerogative writ—where you would say that the officer concerned had exceeded their authority or not exercised their authority. But, from my experience, it is automatically remitted then by the High Court to the Federal Court. It does not go straight to the High Court; they remit it back to the Federal Court. That is my understanding, but it could be a bit out of date.

Senator BIRMINGHAM—Thank you both for the very positive submission you have made. I would like to turn to aspects of the fairness test and particularly non-monetary compensation and, in particular, the assessment of exceptional personal circumstances. Could

you offer experiences of your member companies as to how variations have been made which benefit individual personal circumstances?

Mr S. Smith—We heard the evidence given by the ACTU and this argument about discrimination, but we do not see it that way. We see that people are individuals, and the sorts of things that they value could differ quite dramatically from one person to another—and that is not discrimination. One person may substantially value flexible working hours, based on their family responsibilities or just their lifestyle choice, whereas someone else may value monetary compensation. Some people value leave much more than other people do. Some people are happy to trade off annual leave. People like me would never trade it off in a million years because I value my leave, but I do not say that other people should not have the right to trade off a certain amount of it if that is what they value. I think it is a legitimate part of the fairness test.

Senator BIRMINGHAM—You think that the way it is currently constructed gives employees a fair say and, indeed, with respect to the determination that is made at the end of the day an employee must see that trade-off as being of value?

Mr S. Smith—Yes. There is a process for seeking information from employees. I think the thing that was not highlighted so much with the ACTU is that it is an agreement so, at the end of the day, the individual has to agree. That is a very significant issue relating to this discrimination argument. The individual will make a decision about whether they value those things, subject to the fairness test, but the Workplace Authority will be making its decision based, amongst other things, on the information that the employee provides about how much they value that particular flexibility.

Senator BIRMINGHAM—The individual has to agree and then, when it is subject to assessment, if it looks unusual, one would think the individual employee will be asked whether they do value it, such that it warrants trading off?

Mr S. Smith—Yes, and it would be looked at in a practical way in that the monetary aspect would be looked at first and, if that is satisfied, it would move into other areas if there was still an argument that the agreement did not provide fair compensation across the board. If these other concepts come into it then you would expect—and I am sure it would happen—that the Workplace Authority would be seeking information from the employees and that that information would be assessed on its merits.

Senator BIRMINGHAM—Your submission is quite positive about the new fairness test. How do you believe it compares with the old no disadvantage test?

Mr S Smith—We would see it as being a lot more flexible than the old no disadvantage test, but the concepts are still there largely. It is a test about the fairness of an agreement, but it does bring in these own attributes like the value that an individual might place on non-monetary aspects and also on their particular circumstances. I think in contemporary society that is entirely appropriate.

Senator BIRMINGHAM—With regard to the position of employers trading off annual leave provisions or sick leave provisions, do you see this new fairness test as being on par or stronger than the old no disadvantage test?

Mr S Smith—I was a bit surprised with the SDA and ATCU's evidence on this issue of trading off annual leave because some unions do trade off annual leave. Under the old system there were many collective agreements. We provided evidence about them in the work and family test case that we were involved in, as were the ACTU. Some unions, such as the Australian Services Union, have entered into agreements to cash out all annual leave above four weeks annual leave—for example, all long service leave. Under the old system there were no restrictions, but it was subject to the no disadvantage test. I certainly never saw any agreements that traded it all off. Typically there was a certain amount and a lot of employers would worry about excessive leave balances and employees in many cases wanted to trade that off. So it was always at the initiative of the employee. But different unions have different policies about it. Now, of course, there are all the protections built in. You can only trade off two weeks, it has to be in a formal agreement and it has to be at the initiative of the employee. We have seen quite a number of agreements that do this and the employees have strongly supported this flexibility, even senior people and junior people. It is one of those things that some people value. It is not something, as I said before, that I myself value because I value the leave.

Senator BIRMINGHAM—There have been arguments put by both the SDA and the ACTU that seem to suggest that they would rather the assessment of both collective agreements and individual contracts or AWAs occur by, say, the Industrial Relations Commission rather than as is suggested in the bill before us. What type of burden do you think that would place on business if that were to be the alternative?

Mr S Smith—We think the existing processing system is working effectively. There is no need to go back to the scenario that was there. When all agreements were being processed by the AIRC, it became a fairly contrived process where we would go along to a hearing every Monday, say, with a long list of agreements on a running list and it would just be like a sausage factory anyway. There was a public hearing and there was an opportunity to raise any issues, but most of them went through very readily and it was an enormous waste of resources to do it that way. The Labor Party's policy now says that agreements should be approved on their papers, so even the ALP's latest policy is not suggesting that we go back to public hearings other than, it seems, in exceptional circumstances. So we think the Workplace Authority is the obvious party to register agreements.

Senator BARNETT—I have a quick follow up to the comment you made about the trading in of annual leave and sick leave. We did have some debate earlier today with the SDA. They were not aware that you could trade in sick leave and annual leave. I am not sure whether you heard that advice from them. Is there any debate about that as far as you are concerned?

Mr S Smith—I do not think there is any debate about it. I think you could find many certified agreements on the public record that have traded off an amount of sick leave and an amount of annual leave by agreement with the unions. All those I have seen are always about excess leave. With the sick leave, often there are incentive schemes and so on where there is an ability to cash out beyond a certain level. In many cases those schemes have worked very well at reducing absenteeism. With the annual leave, there are many examples of that under the old system, subject to the no disadvantage test.

Senator BARNETT—That is right, but the law prior to Work Choices was that you could trade in your annual leave and sick leave.

Mr S Smith—Yes, without any restriction, but subject to the no disadvantage test.

Senator BIRMINGHAM—I assume that you are not aware offhand of any instances where, say, the SDA has made such agreements.

Mr S Smith—No, we do not have a big membership in the retail sector. I am not aware of any, no.

Senator BARNETT—There has been some debate with regard to the penetration of AWAs as a percentage of the total workforce. The department tabled for us this morning and the OEA tabled last week the fact that it is 8.4 per cent of the total workforce who are on AWAs. That is effective of March 2007. That is a public statement—it was made last week and is public today. Is there any debate about that as far as you are concerned, in light of the fact that various members of the Labor Party have indicated that it is three per cent, four per cent or even five per cent of the workforce?

Mr S Smith—We would like to have a look at those figures. It is very confusing because the ABS stats show it at 3.1 per cent and we did see the comments of the OEA on the figure of eight per cent, so we really do not know which one it is. I think it is something that is legitimately part of the public debate and we would be very interested to have a look at the statistics that were provided today.

CHAIR—They have been tabled, so they are now public information and you may like to look at those later on.

Mr S Smith—Thank you.

Senator FIELDING—Looking at the submission I have, on page 4 it says that the stronger safety net bill provisions are:

> ... broadly consistent with the position advocated by Ai Group during the development of the WorkChoices package whereby we proposed that workplace agreements ... should be compared against award penalty rates and other key conditions to assess fairness.

I think that is the rub and the reason this fairness test has come in—to compare with something. The issue that we have heard consistently today are that there appear to be some industries and some areas where awards are not applicable. Some industries never had awards from that basis. Communications is one, for example—they have other awards with bits and pieces of it—but predominantly the IT sector. What are your thoughts on how you provide a fairness test against something where you do not have an award? The reason why Family First put forward their bill was to provide some of that so there was something there on some basic working conditions. Obviously the fairness test has overtaken some of that, but generally speaking your position was that there should be some fairness in comparing it back to awards. So I come back to: what about those areas where you have nothing to compare it with?

Mr S Smith—We are the main employer association involved in the IT and communications sector. The awards that do exist in those sectors we have negotiated and we are the parties to, like the telecommunications services industry award, the IT professional employees award—there is about half a dozen of them. In the last three to five years, there

has been penetration of award coverage in those areas and, interestingly, those awards, by agreement with unions like the ETU, the CPSU and even the ACTU, cut the penalty rates out at a certain level—in particular C7. That was the basis of that position that we put in our reform submissions.

But those sectors, to the extent that they still do not have any award coverage—and there certainly are a lot more than there was—do not have any rights to penalty rates anyway. But the Fair Pay and Conditions Standard is quite comprehensive in providing benefits in the area of sick leave, and hours of work and so on are more generous than what was there before. I do not think a lot of people recognise the significant improvements in areas such as sick leave and so on that have come from the establishment of the standard.

Senator FIELDING—So you are saying that, even though there may not be an award, those people are still better off than they would have been beforehand. There are some people who may have some sort of agreement with their companies at the moment but, if an AWA is struck, all of a sudden it will be compared back to the minimum conditions and maybe not to what they might really have been on beforehand. I think that is a genuine concern from people.

Mr S Smith—In my opening statement I made the comment that we are sympathetic towards the apparent intent of your bill to recognise people's work and family balance needs and so on, but we do think there is a significant problem every time you try to legislate for minimum conditions because it brings in every employee from a managing director to an IT professional to a store person and creates enormous difficulties. We agree with one comment the ACTU made, which is that issues such as hours of work are certainly best addressed at the industry level because the sorts of flexibility that is needed in a contract call centre sector on hours of work might be entirely different to the construction sector, as a couple of examples. It is quite problematic to deal with some of these concepts in legislation to go beyond a certain point of regulation. Like for the hours of work, for example, you can say that there are certain parameters there but, once you start defining the hours of work, it does create a lot of potential unintended consequences, we believe.

Senator FIELDING—Some of the other issues I raised with a few of the others were, firstly, the redundancy issue—the Tristar issue was one—and, secondly, about how operational reasons can now basically include, 'I am restructuring and I can sack you now.' I have to say that most employers do the right thing and most workers do the right thing. It is about getting balance between the two. Is that a concern to you at all?

Mr S Smith—I will let my colleague deal with the issue of operational reasons, but just on the issue of redundancy protection and the Tristar scenario, as everyone is aware, that situation is before the courts and the courts will assess that on its merits. We do not seek to put any view one way or the other. There has certainly been a public debate about it, but the only decision on the issue at the moment has gone in the company's favour—the decision of Deputy President Cartwright. So the matter is before the court and we will wait for and watch the outcome like everyone else will. Ron, did you want to deal with the other issue?

Mr Baragry—Yes. The operational reasons are very wide, but the case law is such that they must be genuine operational reasons. Having said that, it has to be genuine. It is tested to

see if it is genuine. But, then again, an operational reason can be restructuring. If you decide to reallocate positions within a company and change people's positions and salaries, those would be operational reasons.

Senator FIELDING—Previously you could restructure for sure and if someone was redundant they were redundant, but the issue of restructuring and saying 'you are sacked' I think takes it a lot further than currently.

Mr Baragry—It is not as easy as that. You have to have a genuine operational reason. You have to have a good business case for what you have done and that is tested.

Mr S Smith—The other thing is that, when you have a look at all these cases, you see that in virtually every one of them the situation was a classic redundancy scenario. There has been a lot of debate about the fact that it is quite broad, but all of these famous or infamous cases—however you want to describe them—were just classic redundancy scenarios where there was a job there one day and there was not a job there the next day. So it is broad on its face.

Senator FIELDING—I think redundancy is obviously a legitimate issue. The issue is one of basically just saying one day, 'You are sacked.' I think that is a bit rich really. Anyway, we may just have to disagree on that.

Mr Baragry—It is not as easy as that. You have to have a genuine business case. There was a decision a few weeks ago when a company tried to argue that because an employee had molested another employee they could terminate them for operational reasons because there was no position to employ them in. That was rejected completely as not being an operational reason.

Senator FIELDING—Maybe they just needed to restructure then. To me, it is very broad. I think it is a lot broader than most Australians would think is reasonable.

Mr Baragry—It is broad.

Senator SIEWERT—Earlier you were answering some questions about looking at personal issues in assessing AWAs, which leads me to how much time is available and whether it is actually going to be possible for the Workplace Authority to actually carry out a proper assessment to look at those issues. Have you had a look at the capacity that the Workplace Authority has to carry out assessments of AWAs? Do you think there will be genuine assessment of them?

Mr S Smith—I think the legislation will be quite clear on what their responsibilities are. AWAs and collective agreements will be coming into force upon lodgement and then they will be assessed—it means that we would all hope and expect that it will be done in a timely way, but it is not necessary that it all be done on the day of lodgement, for example. So we would expect, and all the appearances are, that there will be a lot of resources devoted to this task by the Workplace Authority and through government funding. So we are not aware of any problems and we are not anticipating any.

Senator SIEWERT—We heard evidence this morning to suggest that there is already a huge backlog and secondly that the department said they are expecting about 400,000 to be lodged and dealt with beyond the backlog. We heard that there may be up to 800 staff. My

calculation is that that is about 500 AWAs per person per year. Given the time that is supposed to be allocated for assessing AWAs, I actually do not see how it could work.

Mr S Smith—It is certainly a resource issue and the government does need to provide sufficient resources to enable the task to done. The legislation is quite clear and the Workplace Authority needs to have sufficient resources. We are not in a position to know what that level of resourcing should be but, if it turns out that the existing plans in that area are not sufficient, we would be seeking more funding from the government to provide more resources. But at this stage we are not aware of any problem.

Senator SIEWERT—What would you see would be the acceptable time for delay between when an AWA is lodged, assessed and a result as to whether it is fair or unfair comes out the other end—particularly if the result is that the AWA is unfair?

Mr S Smith—It needs to be done as quickly as possible. We would be concerned if it dragged on. There is a backlog of course that needs to be addressed, but you would hope that it would be done certainly within a month but much quicker than that if possible. It is hard to put a figure on it.

Senator SIEWERT—In your submission and from your comments, you seem to be supporting these amendments, whereas the ACCI this morning does not support the amendments—but you do. Do you think they are a step forward?

Mr S Smith—Yes. We believe there is a public perception that does need to be addressed that the prior legislation is resulting in unfairness to some segments of the community and we do support this legislation, yes.

Senator SIEWERT—You only see it as a perception, not as a fact?

Mr S Smith—We have not seen any evidence of it ourselves, but we do believe there is certainly a perception that does need to be addressed, yes.

Senator MARSHALL—Can I just then clarify this annual leave and sick leave issue? I think what you said is that you are aware of some agreements that have enabled a cashing out of annual leave and sick leave in a surplus sense, so it is sick leave and annual leave that is accrued above and beyond an annual entitlement. Is that what you have said?

Mr S Smith—Yes. All those that come to mind are, for example, on sick leave you can cash out your sick leave beyond, say, 10 days and with annual leave you can cash out your annual leave beyond four weeks. All those that come to mind off the top of my head are structured in that way, yes.

Senator MARSHALL—So it is not the wholesale cashing out of the entitlement; it is cashing out of an accrued benefit.

Mr S Smith—Yes. It is a partial cashing out, a bit like the current legislation.

Senator MARSHALL—I just want to be clear on that because there has been some argy-bargy. You indicated that you would support an internal process of review or appeal if people are unhappy with the outcome of the application of the fairness test.

Mr S Smith—Yes, we would hope and expect that that would be the case anyway. We did have a look, as I said before, at the ability for the Workplace Authority to rescind, amend et

cetera the decisions it made and we were satisfied, after looking at the Acts Interpretation Act, that that is a general power that is there. So, if a decision was made by an officer within the Workplace Authority that the employer or indeed the employee was concerned about and thought was wrong, we would think that there would be a process of being able to seek a review. We do not think necessarily that it needs to be put into the legislation, but we would be concerned if it were not available. We have found that the OEA has been cooperative in the past when those sorts of issues of concern about their decisions arise and we do not expect that it would be any different with the Workplace Authority. Of course there is this ultimate ability to appeal to the High Court or on remittance back to the Federal Court if there is a substantial problem with the powers exerted et cetera.

Senator MARSHALL—For any process, even an internal process of review or appeal, people would need to know the grounds that their AWA either passed or failed the fairness test. In turn, would you then support publication of the reasons why an AWA passed or failed the fairness test?

Mr S Smith—No, we would not support that because that would breach privacy. If there is a publication of the reasons for it, then there is a publication of the parties to the AWAs and that is inconsistent with the whole notion of AWAs being agreements made between the parties.

Senator MARSHALL—Maybe I should not have used the word 'publication', but the ability for the individual to access reasons for the decision of whether their AWA passed or failed the fairness test.

Mr S Smith—We think, if there had to be written reasons, it would just bog the whole process down. At the end of the day all of these again are agreements; they are agreements reached. So it is more likely to be the case that the employee or the employer is worried that their agreement failed the fairness test rather than that it passed the fairness test in a sense. These are individuals who have reached agreement and the agreements are just being validated after that. So we are not expecting many instances perhaps other than employers or employees who really want their agreement to be in place—

Senator MARSHALL—Then you cannot see any need for this legislation at all, can you?

Mr S Smith—We can, because we think there is this public perception that needs to be addressed. The government has addressed it and we think the legislation is balanced and fair.

Senator MARSHALL—At the moment, prior to this legislation being passed, technically there is an agreement between both parties for every agreement to be lodged. So it is purely a perception that there is unfairness in your view?

Mr S Smith—There is certainly a perception. Whether that perception is reality we do not know. We have not seen any evidence of it ourselves. But the government has decided to address this perception of the reality. We do not have the statistics of course on AWAs, but now that the legislation has been introduced we do think it is a sensible piece of legislation that is workable.

Senator MARSHALL—So it is to address a perception.

Mr S Smith—We believe it is to address a perception. Even if it is a reality then it will address that problem. Presumably the government has look at the issue of the perception and the reality in deciding to introduce—

Senator MARSHALL—The point I am trying to make is that you cannot really have it both ways. If it is a reality, then there will be the difficulty of people understanding whether they pass or fail the fairness test and whether they freely entered into those agreements in the first place. You are using the argument that there is no real need for any formal review or appeal process because you have to remember that these are agreements between the parties, so there will not be a need for that.

Mr S Smith—I see them as two completely different things. There is the issue of the fairness test, which is about the content, and then there is a whole series of issues about the lawfulness of the agreement, which go to things like coercion, duress, compliance with the fair pay and conditions standard and a whole range of other things. That is a different set of legal requirements that have always been there and will continue to be there. The fairness test is just one more specific set of requirements that deals with the content.

Senator MARSHALL—You have indicated that you support the current $75,000 threshold for the income test as reasonable if deemed to constitute remuneration. You also indicate that most member companies have agreements that already meet the criteria of the test. Would you support the $75,000 threshold being indexed each year to ensure that it maintains its value?

Mr S Smith—We think the way the legislation is currently drafted is workable when it stays at $75,000, but, as we understand it, there is an ability for the minister to review that. So we do not see a need to automatically index it. There is a process, of course, and it does not require legislative change to increase it, as we read the legislation.

Senator MARSHALL—What is your view on why the threshold is there anyway? If as you say, employers are doing the right thing, it is simply a matter of applying the test to everybody, so why does there need to be a threshold?

Mr S Smith—It is a bit like those awards about which I was talking to Senator Fielding—awards that were reached across the telecommunications and call centre sectors by agreement with the ACTU, the ETU, the CPSU and other unions. There was a recognition and a consent position that there is something different about higher paid staff versus lower paid staff. Lower paid staff need the protection of penalty rates and so on. When you look at the award negotiations for higher paid staff—the people in professional roles and managerial roles—it is widely recognised that senior people need less protection than less-senior people.

Senator MARSHALL—You indicated that you would like to be able to call up the provisions of the award that were not going to be modified in a general sense. Is that the way it is done now?

Mr S Smith—As you would be well aware, in sectors like manufacturing it was extremely common to have a workplace agreement that linked in with the relevant award. Work Choices has enabled the first Work Choices agreement to link in with an award. But as section 355 says, the only way you can link in with an award is if the award applied immediately prior to the workplace agreement. So it is only the first generation of them that you can have linked in

with an award. For those that are being linked in with an award at the moment, it does have the complexity that Cath Bowtell mentioned, which is that you have to oust specifically all of the prohibited content areas. But a lot of employers are still willing to do that. They prefer to have a workplace agreement that links in with, say, the Metal Industry Award—even though there is a little bit of complexity and you have to knock out 10 or 12 provisions of the award to address prohibited content issues. They will not have the option after their first agreement and they will be forced to have a 50 or 60 page workplace agreement. But, for the reasons we set out in our submission, it seems a very sensible way for an employer, by agreement with its employees or by agreement with the relevant unions, to simply have the agreement linked in with the relevant award if that is what all the parties want it to do. Then they know they are meeting the fairness test. When the Workplace Authority looks at it they can readily see what the relevant award is and that the agreement meets the terms of that the award without going through it line by line—it might be a 50 or 60 page document. It just seems a very practical and sensible way to go, and we think section 355 should be looked at in the context of this fairness test.

Senator MARSHALL—I want to clarify that this what you are talking about, because this is what came to mind—for instance, the annual leave provisions. If an employer and employee actually cannot agree about the use of an accrued entitlement then the award has a number of processes that have been developed over many years that protect both the employer and the employee around how that annual leave disagreement will be dealt with. That is something that will happen rarely; but it is something that both parties actually need to fall back on as a way to resolve a difference. Is that the sort of thing you actually require in awards but would not necessarily want to reproduce in every agreement that you have?

Mr S Smith—There are issues about the relationship between an agreement and the fair pay and conditions standard in an area like annual leave, but you can certainly improve on the standard. Section 355 requires, and will require even more when the first generation of Work Choices agreements elapse, is a fully comprehensive agreement. Some parties support that of course. It does mean that you then end up having a discussion about every issue when in many cases the parties really were quite happy to leave that issue as something that the award dealt with, something that was settled and so on. So there are a lot of employers, employees and unions who are quite happy to have an agreement that links in with an award. We think the fair test is another good reason. There is a clear relationship now between the legislation and awards. Workplace agreements are very closely linked to awards through the fairness test. The other point that we made in that submission is that we do see an inconsistency between section 354 and section 355. Section 355 says you cannot import award conditions as terms of an agreement and section 354 talks about protected award conditions—which really means that if you are going to modify an award condition then you really have to refer to the award to do that. It is one of these issues that we believe should be tidied up as part of this bill.

CHAIR—Before we go to Senator Campbell, Senator Siewert, I want to if possible correct something that you said. I think you said that ACCI gave the impression they did not support the bill. Is that correct?

Senator SIEWERT—I said that they did not see the need for the bill. I will correct that. They did say that they did not see the need for the bill.

CHAIR—That is fine.

Senator GEORGE CAMPBELL—Coming back to the issue of annual leave, I would like to clarify this because there seems to be a total misunderstanding of what has applied in the past with respect to annual leave and sick leave. It is true that there are many agreements across industry for people to cash out annual leave over and above the immediate year's entitlement of four weeks that exists. That has been around for require a while. At the time that that was first introduced in areas in the metals industry the argument that was put, and which has some validity, was that people in some areas were accruing substantial entitlements—for example, they would accrue annual leave at a wage of $150 a week and then by the time they got around to taking it the employer was up for $300 a week to meet that annual leave payment because of wage increases that had occurred over the period of time. That was one of the reasons there was an agreement in part to the cashing out of annual leave beyond the immediate 12-month entitlement. So there were some valid reasons as to why that was put in place. But there was never a position in place before where you could actually reduce your entitlement of annual leave from four weeks to two weeks and cash out the two weeks for that year.

Mr S Smith—There was nothing to stop that, but it was subject to a no-disadvantage test. We really do not know, because it would be a matter for a member of the commission to determine, but you would think that if there was a situation where the employees in a workplace—if there was the agreement of the union—could have a mechanism where half the annual leave could be cashed out then there is a very good argument that that does not disadvantage anyone. That case the ACTU mentioned really went to that issue.

Senator GEORGE CAMPBELL—The Arrowcrest one?

Mr S Smith—Yes.

Senator GEORGE CAMPBELL—I suspect that they were very rare cases indeed.

Mr S Smith—They were, because unions like the AMWU and others strongly opposed any cashing out other than the overflow, if you like.

Senator GEORGE CAMPBELL—I just want to get that issue on the record. The issue you raise in respect of section 355 I raised with the department this morning when they were before the committee. I must say I thought the arguments of the department were spurious; nevertheless, they put up some reasons as to why they would not accept that sort of proposal. Could I ask you to look at the transcript and give us a response to some of their reasoning why 355 is not valid? They say that it may pick up old awards or obscure conditions and provisions. I do not necessarily see that that would be the case in the current agreement.

Mr S Smith—Yes, I would be happy to do that.

Senator GEORGE CAMPBELL—Thank you. In terms of the industries that your association covers, is there a high incidence of non-monetary compensation currently in existence?

Mr S Smith—No. That is why we made that comment in our opening.

Senator GEORGE CAMPBELL—Sorry, I was not here to hear your opening comments, unfortunately.

Mr S Smith—It is similar to what is in the opening of the written submission: we do not expect that many of our members will have difficulties with the fairness test, because the agreements that we see—and we process large numbers of them for our members—would easily meet the fairness test and easily meet it on the monetary aspects, we believe.

Senator GEORGE CAMPBELL—In respect of the industries that you service, do you provide employers in those industries with template AWAs?

Mr S Smith—No, we would give them some advice on how to draft an AWA, which would be what sort of clauses they would have to put in there from a mechanical point of view. But we do not have template AWAs, no.

Senator GEORGE CAMPBELL—You have never had template AWAs?

Mr S Smith—At different times we have put together some documents. For example, under the old system there was an interest amongst some employees in cashing out of their annual leave or long service leave, so we put together some drafting guidelines. But we do not have a template AWA, no.

Senator GEORGE CAMPBELL—Again, in those industries, the essence of this legislation, Work Choices, is choice and negotiating individually with an employer. Do you have any idea of the average time spent by employers in your industry negotiating with each individual?

Mr S Smith—You are asking in the context of AWAs?

Senator GEORGE CAMPBELL—In the context of AWAs, yes.

Mr S Smith—I would not think it is that lengthy. When a company has AWAs across its operations, there are often similar clauses and themes in those agreements. At the end of the day the individuals have to agree to that document.

Senator GEORGE CAMPBELL—I understand there is a difference between individuals having to agree to the document as opposed to individuals sitting down and negotiating an individual document—which is really my next question. If I were to go to a boilermaker's workplace out in Granville, would I find much variation in the AWAs that applied to boilermakers in a particular factory?

Mr S Smith—Amongst our membership, we would not have a lot of instances where there are AWAs in those sorts of workplaces. I think it depends a bit on the type of work also. Other unions like APESMA do get involved in negotiating AWAs in that professional area. A lot of the time in those areas there is quite a process of negotiation, we believe. But in workplaces with production employees and so on, where those companies do have AWAs, often there is quite a lot of similarity between different AWAs.

Senator GEORGE CAMPBELL—You anticipated my next question. I was going to ask you if there is a wide variation in the approach that is taken at senior management and professional level as opposed to what is taken at the shop floor level, if I can use that term to describe it.

Mr S Smith—I think it does vary a lot, Senator, but in general I would think—I am just speculating—there would be more time spent negotiating in those professional areas because

you do end up in negotiations about issues of restraint of trade and all sorts of things that might apply to a professional versus a semiskilled or unskilled or skilled worker.

Senator GEORGE CAMPBELL—The Employment Advocate, or whatever his new title is these days—the workplace director—told us at estimates two weeks ago that there were going to be an additional 200 employees. The minister said 600 but the department had a different figure this morning, so we are not too sure what it is going to be. But the Employment Advocate told us that roughly 20,800 AWAs had been lodged from 7 May, none of which had been subject to any scrutiny at that point in time. And if they are lodging them at the rate of a thousand a day we must assume there has been an escalation in the number that are sitting there waiting to be looked at. He did indicate that they would be bringing employees in from labour hire firms initially to start addressing the backlog and then people would be offered permanent positions in the Public Service. I have since been told that people are being given two weeks training and then expected to do this assessment of AWAs. From your experience as an advocate dealing with awards and agreements over a long period of time, is it realistic to expect someone with two weeks training to have the knowledge to be able to make the sorts of comparisons that are required under these provisions?

Mr S Smith—I think there are ways that this process could be handled administratively in a fair and managed way. People who are less skilled at the process should not have as much difficulty looking at the monetary aspects of an agreement. They will be faced with, you would presume, paperwork that will be filed at the time the agreement is filed which identifies the awards and so on, and obviously that issue will have to be looked at. But the OEA had, under the old system, a calculator that was applied to AWAs and identified whether or not they met the monetary aspects. So one way that the Workplace Authority could look at this from an administrative point of view would be to have the lesser skilled staff applying the fairest test to the monetary aspects, and any that do not pass in that area could get dealt with by more senior people, as an example, looking at the harder cases. We really do not know how they are going to handle this administratively, but processes like that might make sense.

Senator GEORGE CAMPBELL—We have been told that there are going to be 5,000 or 6,000 of these a week.

Mr S Smith—It comes back to what I said before, that we expect, as other parties do, that there would be sufficient resources to do this. We have no reason to believe that the resources are not sufficient.

Senator GEORGE CAMPBELL—I am not suggesting the resources in themselves may not be sufficient. I am suggesting that there is a question mark over whether the competency is in the resource to be able to do it effectively.

Mr S Smith—It is hard to comment because we are not aware of that information that you say is fact—that there will be labour hire employees doing this. We are not aware of that.

CHAIR—It is now 2.30 and we will need to come to an end. Thank you very much, gentlemen, for appearing before us today.

Mr S Smith—Thank you.

CHAIR—I thank Hansard, other senators and the secretariat. Thank you for this expeditious hearing.

Committee adjourned at 2.29 pm