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SENATE

EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS LEGISLATION COMMITTEE

Reference: Fair Work (State Referral and Consequential and Other Amendments) Bill 2009

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SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

LEGISLATION COMMITTEE

Wednesday, 11 November 2009

Members: Senator Marshall *(Chair)*, Senator Humphries *(Deputy Chair)*, Senators Bilyk, Cash, Jacinta Collins and Hanson-Young

Substitute members: (As per most recent Senate Notice Paper)

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Colbeck, Coonan, Cormann, Crossin, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Collins, Fisher, Humphries and Marshall

Terms of reference for the inquiry:

To inquire into and report on:

Fair Work (State Referral and Consequential and Other Amendments) Bill 2009

WITNESSES

Committee met at 10.05 am

CHAIR (Senator Marshall)—Order! I open this public hearing. On behalf of the committee I acknowledge the traditional owners and custodians of the land on which we meet today and I pay our respects to the elders both past and present. Also, as it is Remembrance Day we will stop briefly at 11 am for one minute in memory of those who died or suffered in all wars and armed conflicts.

On 29 October 2009 the Senate referred the provisions of the Fair Work (State Referral and Consequential and Other Amendments) Bill 2009 to the Senate Education, Employment and Workplace Relations Legislation Committee for report by 16 November 2009. The bill amends the Fair Work Act 2009 to enable the states to refer workplace relations matters to the Commonwealth. The bill also amends the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 to establish arrangements for employees and employers transitioning from referring state systems to the national workplace relations system and makes consequential amendments to other Commonwealth legislation required as a result of these amendments.

Witnesses appearing before the committee are protected by parliamentary privilege. This gives them special rights and immunities, because people must be able to give evidence to committees without prejudice to themselves. Any act which disadvantages a witness as a result of evidence given before the Senate or any of its committees may be regarded as a breach of privilege.

[10.06 am]

BOWTELL, Ms Cath, Industrial Officer, Australian Council of Trade Unions

CLARKE, Mr Trevor, Industrial/Legal Officer, Australian Council of Trade Unions

Evidence was taken via teleconference—

CHAIR—Welcome. We have received your submission and I invite you to make some opening remarks to the committee.

Ms Bowtell—Firstly, thank you for accommodating our appearance before the committee by telephone. It certainly assists the ACTU's budget and perhaps the environment as well. The ACTU's submission, as you will have seen from reading it, is not particularly directed at technical drafting issues in relation to this bill, although we do make some comments there. Rather we took the opportunity in making our submission to make some comments about the approach which has been adopted by the Commonwealth in the creation of a national industrial relations system, which the ACTU supports. In particular we have supported the consultative approach that the Commonwealth has taken in dealing with state governments in bringing this about.

Having said that, though, we are concerned that the Commonwealth has missed an opportunity—that is how we see it—in creating the national system, because it has decided to rely exclusively on the corporations power and on referrals of power from state governments, which creates some issues in non-referring states. We are particularly concerned about the state of Western Australia. In that state there are a number of employers and employees who have been traditionally covered by federal industrial relations laws. There will be employees, for example, in local government who have been always covered by a federal industrial award applying to Western Australian local government employers and employees and, under the arrangements that are put in place through this bill and the previous transition act as well, that will sunset in 2011 and there is no equivalent state instrument for those employees to fall back onto.

The second policy issue that we have raised in our submission relates to the Victorian referral, which again is not directly before you but does go to the creation of the national system, where, because Victoria has referred its public sector as well as its private sector and because the approach adopted by the Commonwealth and the states has been to distinguish between employers and employees in the system relying on the corps power, compared to those in the system relying on a referral, we end up with two classes of public sector employee—some who are in there because they are employed by a constitutional corporation and some who are in there because they were referred by the state of Victoria. They have different rules applying to them in relation to what subject matter they can bargain around, for example, and whether redundancy provisions apply to them. That creates some uncertainty and perpetuates the uncertainty for those employers and employees into the future.

We wanted to bring those policy issues to the committee's attention. By way of supplementing our submission, we would also like to put on record our support for the submissions made by Unions NSW and the United Services Union. In our submission we have supported the legislative mechanism that has been adopted to enable there to be a clear line between employers and employees covered by state systems and employers and employees covered by the federal system. The mechanism is, we think, a good one in that it allows the states to nominate which of its public sector or local government employers are in the state system and to have that confirmed by the Commonwealth. Having put that mechanism in place, we can see no need for there to be statutory limits on which of their public sectors the states can nominate. So the exclusion for utilities and energy generation and so on is not one that we support.

Senator HUMPHRIES—Good morning to both of you. I want to clarify the things you were just saying about the position of workers in Western Australia. You are saying that there are workers at the moment who are subject to national awards working in Western Australia who will have access to those national awards brought to an end in 2011 because of the creation of this national industrial relations system. Is that what you are saying?

Ms Bowtell—Yes.

Senator HUMPHRIES—Would you explain the mechanism as to how that occurs. Why is it necessarily the case that this new system needs to create a sort of all-in or none-in situation where you are either in the national system or you cannot access any part of it?

Ms Bowtell—Essentially it is because the definition of a national system employer relies on the employer being a constitutional corporation except for those that are referred. So in Western Australia, where the government has at this stage made a policy decision not to refer, only those employers and employees who are constitutional corporations will be covered by most of the federal system—the national laws. There are employers and employees who are not constitutional corporations, such as Aboriginal hostels and employers and employees in the social and community services sector. And there are employers or employees who may or may not be constitutional corporations, such as local government entities, where their status is uncertain. If they are not constitutional corporations, they are not national system employers or employees, and the Commonwealth has chosen not to rely on its existing power, the conciliation arbitration power, to keep those people in the system. So industrial instruments that were made because you are a respondent to or a party to an interstate industrial dispute will lapse in March 2011. There is no transitional arrangement in place for people to move back into the state systems; they simply will be in the state systems regardless of the quality of those systems and regardless of whether there is a corresponding safety net for them in those systems.

Senator HUMPHRIES—Is there are any legal reason why an enterprise, for example, could not come to an arrangement between the employer and the employees to apply a federal award, a national award, even after March 2011?

Ms Bowtell—The employer and the employees may make an arrangement to reach agreement about the terms and conditions of employment, but to give statutory force to that agreement they would have to be within the scope of the federal system. If you are not within the scope, then there is no power for Fair Work Australia to approve the agreement and give it statutory force and there is no power for the courts to deal with breaches of that instrument et cetera. Had the Commonwealth chosen to continue to use the conciliation and arbitration power—and we think it can do that; it is certainly still there in the Constitution; it has not been removed—it would be possible to extend the Fair Work Act to employers and employees that are also parties to interstate industrial disputes.

The ACTU thinks that this is something that could be done relatively simply without disturbing the architecture and integrity of the Fair Work Act, simply by, for example, saying that a modern award applies to a constitutional corporation, a referred employer and their employees and an employer who is a party to an interstate industrial dispute. Similarly, unfair dismissal could be available to employees of constitutional corporations, of referred employers and of employers who are party to an interstate industrial dispute. There are technical difficulties associated with interstate industrial disputes, but they are no different to the ones that we have had for the last 100 years.

Senator HUMPHRIES—So you are saying an enterprise agreement might mimic some of the provisions of a national award but it would not have the enforcement provisions that are available that Fair Work Australia might administer in the event of a dispute?

Ms Bowtell—That is right. The ability to register that agreement in the state system depends on the quality of the state system. For certain employers and unions, they do not have standing in the state system because they have not operated in that system. Some unions do not have the constitutional coverage to represent their members in the state system because they have always operated, or predominantly operated, in the federal system.

Senator HUMPHRIES—You mentioned that there were some workers who are covered presently in Western Australia by a federal award for whom there is no equivalent state award and they will miss out therefore in 2011 when the federal award ceases to cover them. Do you know if it is the intention of workers in those industries to seek equivalent state awards? Is that possible and could it be done by March 2011?

Ms Bowtell—The Western Australian system is currently under review. At this stage, we cannot know with any certainty what the Western Australian system will look like. But, as I said just before, for some unions at least, they do not have standing in the Western Australian system at present, and achieving standing could take some time. The process of achieving a new award and building a safety net in that system is not one that could be achieved through the normal processes quickly.

Senator HUMPHRIES—So perhaps not quickly enough to cover those workers by March 2011?

Ms Bowtell—There is certainly significant time pressure for that process to be completed in that time, yes.

Senator HUMPHRIES—You mentioned the failure to access the conciliation and arbitration power in the Constitution. There are other powers that might be available as well, such as the external affairs power, to

facilitate this legislation. Do you think that the government should have considered that kind of option as well to cover gaps in the system?

Ms Bowtell—The ACTU policy has been that the Commonwealth should rely on all of the powers that are available to it to create the national system for the private sector, and that continues to be our policy. Clearly referrals are a very clean mechanism to ensure that the system is on a stable base. Each of the other constitutional heads has its own difficulties, but we would encourage the Commonwealth to look beyond just the corporations power and the referrals to plug the gaps where employers and employees are keen to be covered by it. Certainly our understanding is that in Western Australia there is a desire by our affiliates—and, we understand, by at least some of their employers—to remain in the federal system.

CHAIR—Thank you. Would you like to make any concluding remarks before we bring this session to a close?

Ms Bowtell—Just to draw attention in our submission to the issue in relation to the dispute resolution process that may be provided for by regulation to pick up what are going to be called 2B transitional awards, which are the current state awards that will transition from Queensland, South Australia and Tasmania into the federal system. We note that some employer submissions have urged the government to ensure that that regulation not provide for these disputes to be settled by arbitration. In our view, not only as a matter of policy should they provide for these disputes about the operation of the award to be settled by a binding determination by the tribunal; there is no legal impediment to that happening.

We are not arguing that there should be arbitration of wage claims during that time, but settlement of disputes about how an award operates in a particular workplace should be able to be settled by arbitration by Fair Work Australia. We would urge the Commonwealth when it is making that regulation to ensure that it continues to enable those sorts of grievances to come to a final conclusion, with arbitration as the end point. That has certainly been the feature of awards in the state systems, and in transferring them into the federal system it should be continued.

CHAIR—Thank you for that and thank you for your submission and your appearance before the committee today.

Ms Bowtell—It is a pleasure, Senator.

[10.28 am]

MAMMONE, Mr Daniel, Manager, Workplace Relations and Legal Affairs, Australian Chamber of Commerce and Industry

Evidence was taken via teleconference—

CHAIR—I welcome Mr Daniel Mammone, from the Australian Chamber of Commerce and Industry, who is appearing via teleconference. I invite you to make some opening remarks around your submission. We will then follow with some questions.

Mr Mammone—The Australian Chamber of Commerce and Industry welcomes the opportunity to appear today, albeit it by teleconference, and make submissions on an issue of significance for Australian employers. We thank the committee once again for accommodating our appearance via teleconference this morning. On page 1 of ACCI's written submission we summarise our position on the bill at paragraph 5. I will reiterate some of those points on page 1.

Australian employers:

a. Strongly support the goal of having one national industrial relations (IR) system and therefore generally supports a broad referral of powers by State Governments to the Commonwealth, subject to appropriate amendments—

which we outline in our submission—

b. Strongly support referrals of the private, public and local government sectors, which has been the case in Victoria since 1997—

which we refer to in our submission as the Victorian model—

c. Prefer the Victorian model, as the legal framework to refer powers, as opposed to the model canvassed in the Bill;

d. Strongly oppose any ability for State or Territory Governments to veto future changes to the fair work laws, either directly (ie. through legislation) or indirectly (ie. via any inter-governmental agreement);

e. Strongly oppose conditional referrals, such as the ability for the States to withdraw their "amendment reference" if any subsequent changes to the fair work laws breach the "fundamental workplace relations principles" set out in the Bill. This will only cause unnecessary confusion, complication and threaten the viability of a national system.

f. Reiterate the importance that referral employers should not be prejudiced by moving into the federal system and that transitional provisions are essential …

It is important to recall that ACCI did not oppose outright the government's entire fair work legislative package but rather sought to moderate aspects of each piece of the legislation. Whilst some elements of the bill were amended, many substantive issues remain unresolved. Therefore, it is important that the committee appreciate that ACCI's general support for this bill should not be taken as an indication that the Australian employer community supports the entire fair work legislative framework.

ACCI notes that the bill was not scrutinised by the committee on industrial relations, which is a subcommittee of the national workplace relations consultative committee, and that as a result ACCI and its members have had little time to digest the impact of the bill on employers and potential unintended consequences. Accordingly, these submissions are without prejudice to ACCI's future consideration of these matters.

At page 10 of ACCI's written submission, we indicate ACCI's position on the way forward on the basis of a national system. We also outline some concerns that may arise as a result of the intergovernmental agreement underpinning the referral of IR powers. Given that we have not to date seen a public copy of the intergovernmental agreement, we can only draw conclusions from what various state governments have expressed when they have introduced their state referral legislation in parliament, as outlined at page 13 of our submission.

At page 15 of our submission we outline a number of proposed amendments to the bill to ensure that the bill is consistent with the broad policy position of employers that there be a national system that will be viable way into the future. As we said, we do not support the ability for the amendment reference to be terminated under the bill. We also do not support the ability for a declaration to be made to carve out national system employers. We also make some recommendations to moderate the transitional arrangements so that referring employers and employees integrate into the federal system in an orderly fashion.

Finally, at page 22 of our written submission we welcome the government's indication that it will be providing additional services to assist transferring employers and employees to understand the federal system.

We note that many ACCI members are successfully delivering on behalf of the government the $12.9 million Fair Work Education and Information program and we believe that there is no reason why further funding cannot be considered by the government to assist with the delivery of information to referral employers. That concludes our opening statement and we are happy to assist the committee in answering any questions you may have.

Senator HUMPHRIES—I wanted to bring you to the question of what you call in your submission the 'cost of multiple IR systems'. Your table on page 7 refers to the individual position that almost every jurisdiction has at the moment vis-a-vis the other jurisdictions. You talk about there being costs against benefits of this sort of diverse arrangement. You prefer a single unified system. Let us assume that that sort of diversity of outcomes remains with us for some time. Is there actually a greater benefit to the Australian community from having a partially unified system rather than the present arrangements, or are we only going to get the net benefits to the community by having a fully unified system at the end of the day?

Mr Mammone—As we indicated in our written submission, whilst ACCI considers that the bill may not be the ideal method for achieving a unified system, it does represent a step forward towards the ultimate goal of achieving a truly national system for all employers. We estimated in a previous analysis conducted by ACCI that state industrial relations systems cost taxpayers at least $122 million per year on top of the federal system, which we quantified at that time to be $312 million per year.

Given that it appears that Victoria is the only state to refer all of its employers—private, public and local government sectors—and does not have an industrial relations system, we would say that it has reaped the benefits of having referred its power since 1997 in the manner that it has. Unfortunately, as we indicated on page 7, it appears that there will be a hotchpotch of various arrangements, which we say is not ideal at this stage and there should be further efforts subsequent to the referrals currently undertaken by the state to work on referring all residual powers to cover all employers. We say that there will be significant cost savings from reduced associated infrastructure. We do say, on page 7 of our submission, that we are concerned at the current approach for certain state governments to retain control over public or local government is a wasteful use of taxpayers' money in that there are many efficiencies that can be driven by one industrial relations system. We make the further point that the private sector also competes with the government sector in some commercial matters and different industrial relations frameworks can alter those cost structures.

Senator HUMPHRIES—We have heard already from the ACTU and the United Services Union is going to appear after you. They are arguing strongly for the retention of state control over at least the local government workers of New South Wales, and possibly other jurisdictions as well. Are we really seeing a system that is slowly collapsing towards the middle or are we likely to find a system over a number of years that will in fact have this sort of diversity of arrangements that you outlined in the table on page 7 of your submission?

Mr Mammone—I guess time will tell how the system unfolds. We certainly commend the government for working towards referral of the private sector workforce but, as we have reiterated, we do say that a unified national system should set up a framework and a safety net in which the employers and employees are empowered and encouraged to develop their own wages and conditions.

It was not carte blanche that the national system is a goal in itself—the content, of course, remains important. Therefore, if we do see a situation unfold in the future where local governments that are currently covered by the federal laws are subsequently carved out, there are industrial relations frameworks that need to be developed to regulate those workers—then it might all start to unravel, and we do not want to see that situation. That is why we reiterate that full referral by state governments would be the best outcome for everyone. But, given that we are only part of the way there, with appropriate amendments we see the benefit of this bill.

Senator HUMPHRIES—Can I ask you about your comments on the termination of references. You are not in favour of this capacity of the states to terminate an amendment reference because, as you say, it would create fractures and differences between jurisdictions in actual outcomes and you would not get that unified system. Looking at what is proposed, it occurred to me that this is a device to keep jurisdictions inside the tent as much as possible and a small degree of flexibility was necessary to achieve that. If, as you say, the end result ought to be a fully unified system, isn't that kind of tolerance necessary to make sure the system ultimately gets to that desired point?

Mr Mammone—Since 1997, Victoria has operated on the basis that it be consulted if there are any amendments to the federal system and that it always has the ability to terminate its referral. So, since 1997,

Victoria has not had a problem with the arrangements. This is a new mechanism in the system. We appreciate that it will probably be in only the rarest of circumstances that it may be considered. The fact that it sits within the framework as a trigger, coupled with the fact that we do not know what is contained in the intergovernmental agreement, causes us some concern about how the states may horse trade on some issues that may not necessarily be localised to industrial relations matters, and what goes on behind the scenes will obviously affect the federal system as it evolves over time. So we see it as an unnecessary mechanism in the legislation. In saying that, we do not oppose state governments being consulted by the federal government on any proposal to amend the federal laws, and obviously consultation means considering any proposals. We are not opposed to that provision.

Senator JACINTA COLLINS—It is probably convenient that I follow on with the theme Senator Humphries has just explored—the level of tolerance in the system. Your description of the Victorian arrangements is very simplified. You did not address the fact that Victoria did indeed threaten to withdraw from the national uniform system in terms of achieving 20 allowable matters rather than the five that they had on referral. Indeed, the tolerance in the existing arrangements still enabled Victorian workers to stay in the federal system but to achieve a uniform national standard rather than solely five conditions.

Senator FISHER—Yet the referral was not retracted.

Senator JACINTA COLLINS—There was a threat that the referral would be retracted.

Senator FISHER—But it was never so.

CHAIR—It is impossible in a teleconference to deal with it this way. Senator Fisher, Senator Collins will ask questions and if you want to have a go later you are more than welcome to do so.

Senator FISHER—Fair point. Thank you, Chair.

Senator JACINTA COLLINS—I think Mr Mammone was seeking to respond.

Mr Mammone—Sorry, what was the question?

CHAIR—Senator Collins's proposition with a question at the end was to you; it was not to Senator Fisher. If you need it asked again—

Mr Mammone—I apologise; I did not get the question.

Senator JACINTA COLLINS—I was asking you to respond to my comment that your reflection on the Victorian circumstances was somewhat simplified. It did not deal with the dispute that occurred between Victoria and the federal government over the number of allowable matters that were incorporated in industrial arrangements for Victorian employees. The existing tolerance, as Senator Humphries characterised it, did indeed lead to an outcome where Victorian workers remained in the federal system but with 20 allowable award matters rather than the five that had previously existed in Victoria.

Mr Mammone—As I understand it—I do not claim to be an expert in all the iterations of the Victorian referral since 1997—we would put it this way: there were amendments to Victoria's arrangements whereby the AIRC could make common law awards to cover Victorian employers. As I understand it, whilst Victoria may not have been happy with various elements of the Work Choices arrangements, they did not withdraw their referral and continued to engage with the federal government on issues that they felt were of concern. As we said, we do not think there is a problem with state governments engaging with the federal government on various matters that the state governments are unhappy about, but we see that this amendment reference mechanism—the ability to terminate the amendment reference—is a potential problem that would cause unnecessary dislocation for employers. If it is invoked, it will cause uncertainty for those referral employers, and that is the last thing that we want to see. We just want to make sure that there is certainty for the referral employers at all times.

Senator JACINTA COLLINS—The issue I was referring to with respect to Victorian workers was pre Work Choices and, as I said at the time, related to the number of allowable matters that could apply to Victorian employees after a Labor government had been elected in Victoria and also to the threat to withdraw the referral if the federal government did not improve those matters for Victorian workers. It leads me then to your comments about the fundamental workplace relations principles, because that relates to your concern that, if a state government is concerned that those principles may in the future be compromised, they might withdraw. Are there any of those principles that you think are of particular concern? For instance, I note point C is collective bargaining at the enterprise level, with no provision for individual statutory agreements. Does the chamber have a view on that principle?

Mr Mammone—I do not wish to express a view on the actual principles themselves. You must understand that this would only arise in the context of an actual proposal to amend. Depending on what that amendment was, it could fall within any of those principles. I do not know what those proposals might be in the future, so I simply cannot answer that question.

Senator JACINTA COLLINS—One example could be very similar to what did occur to Victoria in the past. Point A in the principles, for instance, is that there be a strong, simple and enforceable safety net of minimum employment standards. Victoria in the past would not have regarded five standards as meeting that principle and would have argued that, indeed, there should be 20 nationally uniform standards.

Mr Mammone—I am sure that might be the case, but another state might consider that to be adequate. It depends on what the actual proposals would be.

Senator JACINTA COLLINS—Does the chamber have a formal position in relation to whether the Western Australian government should refer their industrial relations arrangements?

Mr Mammone—Within the context of our national council resolution, we prefer that we have one national industrial relations system. Obviously, we are advocating that that be by virtue of referral of powers for everyone. So our preference would be for Western Australia within that context to refer their powers, but we understand that there is a separate review being conducted in WA and our Western Australian Chamber of Commerce and Industry might have views on that which may be different from ACCI's. As I said, our preference is for one system.

Senator JACINTA COLLINS—Which is why you previously stressed that further efforts should occur to the current arrangements to try to effect that in the future as well.

Mr Mammone—Correct.

Senator JACINTA COLLINS—Are you able to inform us of WACCI's position in relation to this?

Mr Mammone—No. I hesitate to give any indication of what might be one of our member's views on the matter. So unfortunately I cannot answer that.

Senator JACINTA COLLINS—Do you know whether their position is on the record in terms of the Western Australian review?

Mr Mammone—I believe they have submitted submissions to the review but I am not sure of the general thrust of those submissions and whether they are public. So unfortunately I do not have that information.

Senator JACINTA COLLINS—Would you mind taking that on notice on providing it to us if it is public?

Mr Mammone—If it is public, yes. I can take that on notice.

Senator JACINTA COLLINS—Thank you, Chair.

CHAIR—Senator Fisher, I assume you have some questions.

Senator FISHER—Yes, thank you. Mr Mammone, thank you from your evidence. I want to ask a few more questions around the ability of the states to terminate their reference. There are provisions in the bill which provide effectively that a state that refers is thereafter referred to as a referring state. Then the bill sets out a couple of circumstances, to which you have referred, whereby a state or the states could effectively terminate their referral, but the bill provides that a state does not cease to be a referring state if their referral is terminated for the reasons about which you have already spoken—for example, on three months or on six months notice if this so-called fundamental principles are breached. What do you think is the effect of a referring state terminating their referral but remaining, for the definition purposes of this bill and therefore the act, a referring state?

Mr Mammone—What is the effect in that situation if they did terminate the amendment reference?

Senator FISHER—No, I will go to that in a minute. My first question is: what is the purpose of a referring state who terminates their referral not thereby ceasing to be a referring state? I am referring to schedule 1 of the bill and the provisions mainly on page 18 of the bill.

Mr Mammone—I am just having a look at that, Senator, understanding that the bill is quite technical and detailed. As far as we understand the machinery of the bill, there are two ways to terminate—one is on six months notice and the other is on three months notice. By virtue of doing that and still being a referring state, whatever those amendments might be would not apply to those referral employers from that time forward,

which, for us, is a cause for concern given that, if that were the case, we may have a situation where some laws would apply to one business and next door an unincorporated business will not be subject to the same laws.

Senator FISHER—Let's go to that effect. Would that essentially be a return to today or something different from today?

Mr Mammone—If I understand your question correctly, it would be different from what we have at the moment.

Senator FISHER—How?

Mr Mammone—In the sense that in a referral state, which Victoria is, the federal laws apply in broad terms. In the future, if one state, such as Tasmania, does not agree with the amendments to the federal laws and terminates the amendment reference without any other state, then within that state there will be differences in terms and conditions of employment.

Senator FISHER—So within that state, what would be the systems that prevail?

Mr Mammone—If I understand you correctly, the system would be as it applied prior to the amendment. We understand that the IGA has some ability for the majority of states to veto proposed changes, so, considering that those changes get through via intergovernmental agreement processes and this is invoked, the way the system stood prior to that occurring would be the laws that would apply.

Senator FISHER—Let's keep on your scenario with Tasmania. You have the laws that would have applied through the national system to Tasmania during referral. Referral is then terminated in anticipation of changes to the federal laws. Are you saying that that means that all Tasmanian workplaces will be covered, in your view, under the bill by the federal laws as they applied immediately prior to the termination?

Mr Mammone—That is our understanding.

Senator FISHER—So, in your understanding, would there be any role for a state system per se in that scenario in Tasmania?

Mr Mammone—Hopefully the amendments would not be that great to dislocate the system for those workers. That is the great unknown: how many of the laws in this hypothetical example would Tasmania not agree to apply? That could be quite substantial. So, if there is change to agreement making, they may need to set up some infrastructure to deal with that.

Senator FISHER—Exactly. Would Tasmania not then need, at the very least, a carcass of an infrastructure to implement what would thereafter be the laws in Tasmania? They would need some institutions because, presumably, they would not be using the federal institutions anymore—leaving aside the guts of the laws, they would need some institutions to adjudicate, wouldn't they?

Mr Mammone—As I said, depending on the changes and how wide and far they go, that is a possibility. It would be a shame if it were invoked in the future by a state and, as a result of that, money had to be expended for a period of time to put together infrastructure to deal with it.

CHAIR—Mr Mammone, I will cut you off there. We will take a minute's silence for Remembrance Day.

Proceedings suspended from 10.59 am to 11.01 am

CHAIR—I thank members of the committee. We will resume.

Senator FISHER—Mr Mammone, could you get back to the committee on why you think the bill effectively says that a referring state which terminates its referral for either of the circumstances set out in subclauses (7) and (8) on page 18 of schedule 1 of the bill does not cease by that act to be a referring state? Can you take on notice what you think the purpose of that provision is and what you think the effect of that provision would be?

Mr Mammone—I am happy to take that notice, although it is the government's bill and the government has explained what it thinks the purpose is, so I can only answer it within that context.

Senator FISHER—Why do you think there was not a COIL process for this bill?

Mr Mammone—I am not too sure why that process was not invoked. It has been used in the past for the majority of the Fair Work legislation. I suppose that for timing reasons the government did not consult with the national workplace relations committee members. That information is probably within the domain of the department, so it might be able to answer that better than me.

Senator FISHER—Did ACCI ask about a COIL process for this bill?

Mr Mammone—No, because the first time we heard about this bill was when it was introduced into parliament on 21 October. I had no knowledge of the government preparing this bill. Another ACCI officer may have, but to my understanding no-one at ACCI was notified.

Senator FISHER—Since the Rudd government came to power, has there been any other bill that amended the federal workplace relations legislation in its various forms that the government did not subject to a COIL process?

Mr Mammone—I think all of the Fair Work legislation since 2008 has been subject to some COIL process. In saying that, there may have been one that was not subject to that process. I may need to take that on notice.

Senator FISHER—Thank you. Would a COIL process with this bill have helped your understanding of it so that you could then have informed this committee of your views about the effect of it?

Mr Mammone—Certainly the ability—as much as there is—to understand the policy rationale for a piece of legislation which is afforded by a COIL process does assist. Unfortunately we just have not had enough time to digest the implications of the bill since it was introduced. I understand that affected employer organisations in states that that are referring have probably not had as much consultation as they would have liked to have. I also understand that these changes will come into effect by 1 January next year, which is also a cause of concern for employer organisations that have to provide advice on the implications of this.

Senator FISHER—You referred to consultation with your affiliated or member organisations in other states. What consultation has there been with those organisations by respective state governments?

Mr Mammone—As I understand it, there has been some consultation, mainly with the chamber organisations rather than industry associations, which will be just as affected as other employers. I am not sure of the extent of the consultation or whether any of those consultations led to amendments to or moderation of what was being proposed. I am not sure of the detail of that. That would be within the purview of our members' information, not mine.

Senator FISHER—Were those consultations conducted prior to the introduction of legislation in state parliaments?

Mr Mammone—I understand that in some cases there was consultation prior to the introduction of the legislation, but I cannot confirm which states that occurred in or the extent to which it occurred. Obviously we have South Australia, Tasmania, Queensland and Victoria as referring states. The ACCI members involved in that would be able to provide that advice.

Senator FISHER—Yes. For example, was Business SA in South Australia consulted by the Rann government prior to the introduction into state parliament of the legislation to refer South Australia's powers?

Mr Mammone—I am not sure about that matter, because I do not know directly how much consultation was afforded or if there was any consultation at all.

Senator FISHER—I ask you to take this on notice: please ask each of your chamber organisations in the participating states whether they were consulted by relevant state governments at any time while state

parliaments were dealing with the relevant referring legislation and, if so, who was consulted, by whom, when the first contact was made—relative to the referring legislation itself and its processing by the respective state parliamentary systems—and what the duration and results of those consultations were, if any.

Mr Mammone—Thank you. I will obviously take that on notice. I just flag that it may be difficult to get the information from each of the 36 organisations that are members of ACCI, some of which were involved in the referring state legislation process. So I will take that on notice.

Senator FISHER—I understand that, but this committee is trying to get the most informed views we can from the various witnesses on the effect of this legislation. All of us are dancing to the government's time frame, so I understand the difficulties. Nonetheless, we have a job to do and I know that you will want to be as well informed as you can be in doing the job for your members as well. I understand ACCI's position in respect to the termination provisions. Why do you think there are effectively two exit strategies in the bill? There is a scenario that enables a state to terminate on six months notice and then there is a scenario that enables a state to terminate on three months notice. Why the need for two?

Mr Mammone—I might not be able to provide the policy rationale, but the termination on six months is if every other state that has referred terminates on the same day and the other situation is three months with one state terminating. I can only hazard a guess that, either through the intergovernmental agreement or through other conversations between the states and the federal government, there was some purpose for having these two different termination arrangements. I am not sure of the policy rationale.

Senator FISHER—All right.

CHAIR—We are going to wind up at quarter past.

Senator FISHER—I am happy to leave it there. Thank you, Mr Mammone.

CHAIR—Thank you, Mr Mammone, for your submission and your presentation via teleconference to the committee today.

Mr Mammone—Thank you very much.

[11.12 am]

BENFELL, Mr Lindsay John, Manager, Legal and Industrial, United Services Union

CHAIR—I welcome Mr Benfell, who is representing the United Services Union. In what capacity do you appear before the committee today?

Mr Benfell—I appear as the Manager, Legal and Industrial, of the United Services Union, which is a state registered organisation in the New South Wales system under the Industrial Relations Act 1996.

CHAIR—Thank you. We have received your submission and we invite you to make some opening remarks about that, to be followed by questions.

Mr Benfell—We have made a brief written submission. I do not intend to take a long time this morning. We appear this morning to support the bill. As a matter of background, we represent some 30,000 employees of local governments and local government corporations in New South Wales. The local government sector has suffered from uncertainty as to which jurisdiction they were in since the introduction of the Work Choices legislation. There has been some doubt as to whether local governments are trading corporations. The case law has tended to suggest that local government is not a constitutional corporation as is required to be covered by the Fair Work Act. We commend the bill in relation to facilitating the exclusion of local government from the Fair Work Act. It provides certainty for the industry and it allows the New South Wales state government to implement its policy of retaining local government in the state system. Finally, it also allows the federal government to implement its undertaking to allow the states to decide where local government should be, either in the federal or the state jurisdiction. So we commend the bill and, unless there are any questions, that completes our submission.

Senator JACINTA COLLINS—In your submission you are seeking clarification that the bill allows new councils and council corporations to be declared as they are created.

Mr Benfell—Yes.

Senator JACINTA COLLINS—Do you have a specific suggestion about how that can be clarified?

Mr Benfell—No, we are still engaged in discussions with the New South Wales government about the exact mechanisms to be used in their state legislation.

Senator JACINTA COLLINS—Is this a New South Wales specific issue?

Mr Benfell—Not necessarily, no. We could provide a draft if that is of any assistance to you, but I am not too sure what time frame we are talking about.

CHAIR—We are tabling next Monday so unless you are able to get it to us this week—

Mr Benfell—It may be hard to provide a legislative amendment this week. There does seem to be a bit of doubt as to whether that could take place. I believe that it can, but some others have expressed the view that new councils may not be able to be declared. I cannot see, on the face of the legislation, why that cannot happen.

Senator JACINTA COLLINS—This might be an issue that we simply explore with the department when we speak with them.

CHAIR—There being no further questions, is there anything else you would like to expand on?

Mr Benfell—No, thank you. I do not want to waste your time. Essentially we support the bill for the reasons we have put. We commend the government for allowing local government to remain in the state system.

CHAIR—Thank you for your submission and for your presentation to the committee today.

Proceedings suspended from 11.17 am to 12.01 pm

BARAGRY, Mr Ron, Legal Counsel, National Workplace Relations, Australian Industry Group

SMITH, Mr Stephen, Director, National Workplace Relations, Australian Industry Group

CHAIR—We will reopen these hearings and welcome witnesses from the Australian Industry Group. We have received your submission, thank you. We invite you to make some opening remarks to the committee, to be followed by some questions.

Mr Smith—Thank you. We welcome the opportunity to express our views on the bill. Ai Group strongly supports the referral of state industrial relations powers to the Commonwealth. Given the national workplace relations system which applies to a large majority of employers and employees, we believe that the only logical approach is for the states to refer their IR powers to the Commonwealth and work within the new national framework. We can see no logical reason why the same national workplace relations system should not apply to all employers and employees. All employers and employees should have the same system for employee entitlements and employment obligations. We would prefer a complete referral of powers. However, it is apparent that some states wish to retain powers relating to the state public sector and local government. Recognising that reality, we support the more restricted scope set out in the bill.

One major concern that we have about the bill is the understandings which have apparently been reached between the federal and state governments regarding the referral of state powers. As the committee is aware, Ai Group worked very hard to ensure that the Fair Work legislation is fair, flexible and productive. However, the legislation is lengthy and new and it contains many untested provisions, including the good faith bargaining laws, the National Employment Standards, the general protections and the new unfair dismissal laws.

It is possible, indeed probable, that once court decisions start coming through, some as yet unforeseen problems will become apparent. This is what happened with the Work Choices legislation. Amendments were made a year after the legislation came into effect to address problems which arose for business regarding the provisions in the Australian fair pay and conditions standard relating to the accrual and taking of leave. Problems also needed to be addressed in the regulations relating to record-keeping requirements. The same situation occurred with the Workplace Relations Act 1996. There were a relatively large number of amendment acts passed by parliament between 1996 and 2004, including amendments dealing with youth employment in 1999, tallies in 2001, termination of employment laws in 2001, registered organisations in 2002, genuine bargaining in 2002, union bargaining fees in 2003, protection of volunteers in 2003, termination of employment in 2003, common rule awards in Victoria in 2003, transmission of business in 2004 and industrial action that same year. There was the codifying contempt offences legislation that was passed very quickly to deal with one particular incidence of unlawful behaviour by a particular person and then there was the validation of workplace agreements legislation in 2004. So the history shows that there has been a need for many amendments to be made following the passage of new industrial relations laws.

Senator FISHER—Lots of bite-size chunks, Mr Smith, manageable by parliament.

Mr Smith—Yes, and there were a great many additional bills that we would have liked to have seen passed at times that did not get through. But most employers and employees are already covered by the workplace relations system at the national level, and these employers and employees need workplace relations laws which can be readily amended if problems arise. We are particularly concerned about the agreement apparently reached between the federal, state and territory governments that if even one state or territory believes that an amendment undermines the fundamental workplace relations principles then the amendment will not proceed unless it is endorsed by a two-thirds majority of states and territories. The fundamental principles are extremely broad and virtually any amendment to address problems that might arise for business could be regarded by one or more states as undermining representation rights or employment protections.

We are very concerned that under the bill and its related intergovernmental agreement the cost of including non-corporate employers and their employees in the national system could be a far more cumbersome and inflexible system for all employers and all employees than the one currently in place. We are concerned that the bill, when considered in conjunction with the IGA, could lead to state governments have been an effective power of veto over amendments, state governments pressuring the Commonwealth into making amendments, being able to pressure the Commonwealth not to proceed with important amendments, delaying amendments or terminating their amendment references and then having different versions of the national system applying to different groups of employees. The bill appears to take significant power away from the federal government

and give it to the states, not just in respect of laws applying to sole traders, partnerships and other non-corporate employers but for all employers. Such a power shift could end up being a major problem for business if problems arise with the legislation and vital amendments cannot be made.

A further and related area of concern relates to the definition of 'excluded subject matter' in sections 30A and 30K. We believe that it is essential that the definition of 'excluded subject matter' in the bill align with the definition of 'non-excluded subject matter' in section 27 of the act so that there is clarity about the relationship between state laws, federal laws, federal agreements and federal awards. We submit that it is not appropriate to give states increased powers in these proposed areas that differ between sections 30A and 30K as they differ from section 27 as it would undermine the provisions of the Fair Work Act. In conclusion, if we were asked the question whether we want the legislation to proceed on the current basis, our view is that we would rather the package not proceed. We are happy to answer any questions.

CHAIR—I am glad you finished with that because I was going to ask you that. I guess the obvious question from what you have just said is what would you expect the Commonwealth to do in this regard. We cannot force the states to make the referral. If they put conditions on the referral, is it better to have a mostly unitary federal system with some exceptions or not have one?

Mr Smith—I draw your attention to the explanatory memorandum, which I am sure you have read, and the regulatory analysis. It analyses the number of employees who are in the national system at the moment versus those who are not. It is very clear that the vast bulk of employees are already in the national system. So we do not want to find that we end up with completely a unworkable process for amending the national laws just to bring in the employees of sole traders and partnerships and other non-corporate forms. That would be a huge loss, we believe, to the public interest and the interest of industry.

No-one has been more supportive of a national system than the Ai Group. We have supported it for decades and we argued for it a long time before it gained any popular appeal. But we believe that the terms of the intergovernmental agreement are completely inappropriate in that area where it gives the states veto rights over any amendments. We very strongly oppose that.

CHAIR—Just so I am clear: you do not support this bill proceeding?

Mr Smith—We do not support the package. We are at a little bit of a disadvantage because the IGA has not been publicly released, although there have been comments made about it in various state parliaments, including the Queensland parliament, where it was made clear what the relevant provision that we have referred to is. But, in terms of the overall package as we understand it, we do not think that that package is going to be one that is going to be in the interests of industry or in the public interest.

Senator FISHER—Thank you, Mr Smith and Mr Baragry. To your knowledge, was there any COIL process for this bill?

Mr Smith—No.

Senator FISHER—Did the Ai Group ask the government about a COIL process or about any discussions about the bill before it was introduced in the House of Representatives?

Mr Smith—No. We have been extremely busy with lots of the elements of the reform, so we certainly did not make the request, no.

Senator FISHER—When did the Ai Group first become aware of anything to do with this bill?

Mr Smith—When it was introduced into parliament.

Senator FISHER—The House of Representatives?

Mr Smith—Yes.

Senator FISHER—That makes it all a bit difficult, I suppose. Do you think a COIL process have assisted with your understanding?

Mr Smith—We very much welcome the COIL process but the essential part of this package really is the IGA, and we have had no involvement in that process at all. Of course it is appropriate that the federal and state governments talk about these issues, but this is an outcome that has a potentially major impact on industry if the legislation proves to be problematic in any number of areas and amendments need to be made to it. On the history of the past 15 years of so with previous legislation, that most likely will occur. Despite the good efforts of the very competent drafting team, when you look at our own experiences, we pursued the Electrolux case in the High Court. That was a case that related to one paragraph in the Workplace Relations

Act. The Electrolux case related to one sentence, so who knows how a court is going to interpret the legislation.

Senator FISHER—Has the Ai Group asked the government for a copy of the signed intergovernmental agreement?

Mr Smith—We have not. As you know, Senator, the inquiry has been called at very short notice and we have not had an opportunity to do that—or, in short, we have not done it.

Senator FISHER—I understand. So the Ai Group's position is that the bill as currently drafted should not proceed. What is the Ai Group able to say about what should happen to the bill in the event that a signed copy of the intergovernmental agreement does become publicly available prior to the passage of the bill?

Mr Smith—The most problematic aspect, as we understand it, of the intergovernmental agreement is the paragraph that gives the states the right to frustrate and block any amendments if two-thirds of the states do not agree. Just having a copy of the IGA, unless it says something different, will not be relevant to that, because in the Queensland parliament that paragraph has been tendered. The problem with this issue is that it is not the bill itself; it is the understandings that surround the bill. As we understand it, the IGA has been signed by the Commonwealth and a number of the states. If we had been asked what our view was before it had been signed, we would have put the view very strongly that we think it is totally inappropriate that that agreement be reached. But that agreement, as we understand it, has been reached. The bill is very much related to that but the part that we find most offensive is not in the bill. That is why we said that we would rather the package, as we currently understand it, does not proceed. But it is a bit difficult when part of it is really sitting outside this parliamentary process.

Senator FISHER—If a signed copy of the intergovernmental agreement were to become publicly available and your fears about the existence of the two-thirds majority clause were realised—so, if there were in the signed intergovernmental agreement provision for two-thirds of the states to hijack the then federal government's reform agenda—what would Ai Group say then about this bill?

Mr Smith—I come back to what I was saying before. The vast majority of people are already in the system. As we said in our submission, the rights of those employers and employees are essential. There are far more of those than there are employees that the reference directly relates to. As we understand the package, it is going to make addressing any problems far more problematic for the vast majority of employers and employees, and therefore we do not think that that is in the public interest. We are very supportive of the referrals but not at any price.

Senator FISHER—Inevitably, the consequence of what you are saying is that the Ai Group would still oppose the passage of this bill in its current terms.

Mr Smith—The problem is that the IGA has already been signed and sits outside the bill. If the effect of the IGA is that it has no effect if the bill does not go through then, yes, we would rather the bill not go through. But, as to the status of the IGA in an environment where the bill does not go through, we are not quite sure what that means. Is there some understanding that would still sit there between the Commonwealth and the state governments about amendments to the legislation that sits independently from the bill? We do not know. Maybe that is spelt out in the IGA.

Senator FISHER—If a copy of the signed IGA became available and there were in it that the two-thirds of the states can overrule the federal government clause, then if there were not a provision somewhere—anywhere else, be it in this bill or be it somewhere else—that bound all parties to the referral, that would effectively negate the ability of two-thirds of the states to overrule the federal government, and that would effectively negate the clause in the IGA about which you are concerned. If the bill remained in its current terms and if there were that offensive clause in the IGA and nowhere in the ether, and there was not anything binding to negate the effects of that clause then AiG would, surely, have no choice but to oppose this bill, consistent with what you have said.

Mr Smith—That is right, Senator.

Senator FISHER—Yes, thank you.

Mr Smith—We do not support the package, but I would just make one other point: the IGA, as we understand it, is not just the bit about the two-thirds majority situation. There are a whole range of consultative aspects, time frames and so on. As we said in our submission, it is not just the power of veto; it is the power to delay things for a long period of time and effectively block things, even if that veto power was removed.

Senator FISHER—We do not really know, do we, because none of us have been privy to it?

Mr Smith—That is right. We have not seen a signed copy of it.

Senator FISHER—So there may or may not be a provision in the IGA that allows two-thirds of the states to say no to prevent the then federal government from amending the federal Workplace Relations Act. Leaving that aside, the Ai Group has put its concerns about the provisions in the bill that allow the states to terminate their initial, their amending and their transitional references. Can you explain why you think the bill says that in the event that a referring state terminates its references in either of the scenarios that provide for the giving of three-months notice or six-months notice it remains a referring state?

Mr Smith—Mr Baragry, would you like to deal with the technical aspect of that?

Mr Baragry—I spent a lot of time looking at that because it was a mystery to me.

Senator FISHER—Time which we did not have, Mr Baragry.

Mr Baragry—Yes, exactly. I think the answer is that it would mean they are not bound by future amendments but they are bound by the rest of the act up to that point of time, which would be a very difficult situation in practice. For us dealing with the practical circumstances it would make it impossible to deal with a number of situations.

Senator FISHER—Indeed that is the only conclusion one can logically reach, and the consequences for business and workplaces would undo any good from the referral, I would think, wouldn't it?

Mr Smith—You potentially have a number of different versions of the national workplace relations system applying to different groups of employees. As set out on page 5 of the regulatory analysis, for 18 per cent of private sector employees the jurisdiction is unclear. So just who that group would be is not entirely clear of course.

Senator FISHER—That scenario pretty much negates much of the motivation for supporting a referral of powers in the first place, does it not?

Mr Smith—Yes. We would support a complete referral of powers, as happened in Victoria. We think the history in Victoria shows that that has been a very positive outcome for everyone.

Senator JACINTA COLLINS—Even though it was a ghetto with only five available matters?

Mr Smith—That issue was changed over time.

Senator JACINTA COLLINS—Several years.

Mr Smith—But we think if you look at the whole picture there—and we supported it originally and were involved in the inquiries and so on along the way—the outcome is a positive one. If that is not achievable than the idea of a referral that leaves out local government and/or the state public sector is not as good, but if that were all that the referral did then that would still be—

Senator FISHER—Preferable—

Mr Smith—beneficial.

Senator FISHER—to now.

Mr Smith—But we do not think that this arrangement with all these understandings and potential outcomes, depending upon the partial withdrawal of different types of references, will be a beneficial one based upon these understandings that we believe exist through the IGA.

Senator FISHER—If a referring state, whether or not technically it remained a referring state, terminated its referral, what would it have to do, if anything, in respect of infrastructure in its state to deal with workplace matters?

Mr Smith—That is very hard to say because it would, presumably, depend on what infrastructure it had retained to deal with the state public sector, local government and so on. It may not be a situation that requires a huge amount of change in infrastructure. There certainly would be problems for industry because industry then would be faced with the outcome of it.

Senator FISHER—In these globally-challenging times you would have thought that if the powers were referred there would be a very much reduced vestige of infrastructure left or maintained in each referring state; otherwise you would think the taxpayers of the relevant states would have something to say.

Mr Smith—You would certainly hope so. As we pointed out, we believe that the ideal model is the Victorian model where the whole infrastructure is removed and it is all dealt with nationally. But we are unaware of what the states plan to do.

Senator FISHER—If that were the scenario then a referring state in that scenario would have no choice other than to recreate that which it undid at the time of referral—in other words, recreate state infrastructure to deal with workplace matters, wouldn't it?

Mr Smith—That is right.

Senator FISHER—What do you think is the intent of having two separate limbs under proposed sections 30L(7) and 30L(8) to allow a referring state to terminate the reference? Why have one that enables one to do the job at six months notice if all referring states do it at the same time and a second that allows a termination at three months notice if these so-called fundamental principles are violated in the opinion of a relevant state government. Why have those two separate limbs?

Mr Smith—I am not aware of any reason why they would be different.

Mr Baragry—From my commercial experience I think that has all the hallmarks of a compromise agreement and somebody insisting on a particular power in the event of something happening. It is of some concern that the circumstances in which the three months notice can be given are so broad and are so undefined. I immediately thought: how would you interpret those situations? I think it would give a lot of latitude for people to rely on.

Senator FISHER—And be it on the relevant state governor's head, according to the bill: 'If the governor of that state declares that, in the opinion of the governor, this act is proposed to be amended in a manner inconsistent with one or more of the fundamental workplace relations principles'—it is pretty much a kitchen sink for the state governor, isn't it?

Mr Baragry—It would be a source of great legal work, I can assure you of that. Lawyers would have a field day with it.

Senator JACINTA COLLINS—Mr Smith, I am somewhat confused that your submission did not cover the last component of your opening statement: 'In the circumstances of what we understand might be part of the intergovernmental agreement then we would prefer the bill not to proceed.'

Mr Smith—It is not that that statement is inconsistent with the submission.

Senator JACINTA COLLINS—I did not say that.

Mr Smith—While we were considering what you would most likely ask us, we thought that was a question we would most likely receive, so we thought we would answer it and give a considered response to that in our opening statement.

Senator JACINTA COLLINS—Your anticipation was correct, because ACCI were essentially asked a similar question and they said that they would prefer the bill to proceed. What follows from your statement, though, seems to be a fundamental difference from the regulatory impact statement. You disagree with the canvassing in that of options 1 and 2 and would prefer to see option 2 prevail—status quo.

Mr Smith—We would certainly prefer that there be a referral of powers—we strongly prefer that but, as we said earlier, not at any cost. So if we are faced with this package or with the status quo then we would prefer the status quo.

Senator JACINTA COLLINS—Yes, I understand.

Mr Smith—But we are very strong advocates for the referral of powers but on acceptable terms.

Senator JACINTA COLLINS—The other element of the discussion today—I addressed this with ACCI and I will also do so with you because it is a fairly naive view of the potential of cooperative federalism. You say you want the Victorian arrangement. You gave, as did ACCI, a fairly glossy picture of what the Victorian arrangement actually was and is. The Victorian arrangement fails to take account of the fact that Victoria is just one state and had always retained its capacity to withdraw from the federal system. That is how we got Victorian workers from the ghetto, of only five allowable matters, up to the uniform national standard of 20. If we are dealing with more than one state, presumably there needs to be a mechanism if we want to retain all of the states we can in the federal system for resolving any disputes between those states.

Mr Smith—We are comfortable with the idea that states have the power to withdraw their reference and, as applied in Victoria, that power was always there and the Victorian government at times made statements about

that right but, at the end of the day, it was not exercised. We see this as a very different scenario where the states are being given enormous power to influence amendments to the legislation. If they have the power to withdraw then we would think that would be a logical part of them referring their powers. But we would prefer an all or nothing on that. It is entirely appropriate that there be a consultation process, a bit like the COIL process—which we are involved in—and other forums for the state governments and the Commonwealth to consult. But we do not believe that there should be this right of veto and we do not think there should be an ability to unduly delay or frustrate amendments that are necessary.

Senator JACINTA COLLINS—But my point is that the right of veto exists, anyway. Each state has the capacity to withdraw. What this two-thirds mechanism achieves is a means of retaining the states in the federal system, giving long-term security without one state being able to say, 'No, I'm just going to withdraw.'

Senator Fisher interjecting—

Senator JACINTA COLLINS—Sorry?

CHAIR—Just ignore the noise!

Mr Smith—As we saw in Victoria—and we were very heavily involved all along the way in the developments in Victoria, including the rebuilding of the common rule system and so on—there is an enormous disincentive for a state government, once it has referred powers, to take them back—

Senator JACINTA COLLINS—Exactly.

Mr Smith—because it then has to set up a state commission and incurs enormous cost to do that. So before it does that it logically has extensive discussions with the Commonwealth and, in most cases, a compromise is reached.

This is a process where, if there are necessary amendments that need to be made to the federal legislation, there is then this cumbersome and in our view unworkable process to go through a whole series of steps before those amendments are introduced into parliament and then hopefully passed by the parliament. Those vital amendments could be extremely important to industry if problems arise with the bargaining laws or the NES as we have seen in the past.

Senator JACINTA COLLINS—Yes, but if you want to have a national uniform system and provide an incentive to states to join such a system, and if we look at recent history and what has occurred at the federal level with attempts to build a national system, then you have to address the disincentive that exists for states to buy into it. The first disincentive is the history of what we know happened in Victoria and the difficulties in getting uniform standards for Victorian workers. The second one is what occurred with Work Choices. So how do you propose that a federal government convince states that Work Choices, for instance, would not be revisited at some point in the future?

Mr Smith—We believe it is illogical for the states to keep state systems for non-corporate employers and that sooner or later—hopefully sooner—they will refer their powers, because there is enormous cost associated with maintaining state systems for a small group of employees. What has happened here, it appears, is that this package has not been put together in an environment where the Commonwealth does not have most of the people in the national system; it is in an environment where most of them are there. The very logical thing for the states to do is just to refer. So we think the Commonwealth has gone much too far in making compromises with the states. We want the referral, but not at any cost.

Senator JACINTA COLLINS—This is by virtue of the application of the corporations power, which is not a longstanding aspect of our industrial history.

Mr Smith—It has been confirmed by the High Court, though.

Senator JACINTA COLLINS—I am not arguing that point, but I am talking in terms of the states' historical role in industrial relations. You are pretty much saying that the federal government should be saying to the states, 'It's too costly and burdensome for you to maintain institutions that have been built up over many, many years, and eventually you're going to cede your powers anyway, so we're not going to give you any recognition.'

Mr Smith—We have a good relationship with state governments, and we deal extensively with them in every state. We are not putting the view that the states are not a very important part of the picture, but we are very worried that, with the overwhelming majority of employees and employers in the national system, this process and this agreement that has been reached will prevent what may be vital amendments from being made to the legislation as it relates to those employees. As we said during the inquiry into the Fair Work Bill,

we think that this legislation needs to be very carefully monitored and that, if any problems arise, parliament needs to remain open to any amendments. We are concerned that the role of the Commonwealth parliament is now subject to all of these other processes that need to take place before amendments are made.

Senator JACINTA COLLINS—Those amendments would previously have needed to occur in state systems, for instance, so it is simpler in that respect if you want national consistency.

Mr Smith—We are very supportive of national consistency—just not at any cost.

Senator JACINTA COLLINS—Let me run through, though, what may be the mischief that you are seeking to address. My contention would be that the mischief, if any, is probably a revisitation of a new government with an ideological agenda that would compromise the basis of a strong national uniform system anyway. So if we look at the fundamental workplace relations principles, which you say are too broad and problematic, then we are looking at issues such as:

> a) a strong, simple and enforceable safety net of minimum employment standards;

That is fairly general, but the states want a guarantee of a strong system, not five minimum standards such as grew out of Victoria.

> b) genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;

I cannot anticipate amendments that are going to make that problematic unless someone sought, at the other extreme, to reintroduce preference arrangements in awards, which I do not think is that likely. So I do not necessarily see mischief there. Do you?

Mr Smith—We do not have a problem with those principles but we have a problem with the concept that, if any state government believes that any proposed amendment intrudes upon those principles, then this other process applies. It does not even need to be a reasonable view—you would hope it would be. Take what happened with the Work Choices legislation. There were some very important issues which arose about leave accruals, leave payment rules and record keeping and no one foresaw those problems but they were there. The legislation needed to be fixed and it was fixed—that sort of thing. State government, in consultation with all of the stakeholders at the state level, might say, 'No. Changing the leave payment and accrual rules could intrude upon the genuine and enforceable safety net or could intrude upon the rights of employees. Therefore, we are not going to support it.' That sort of amendment might be frustrated for months and months in discussions with the state governments and then it may not proceed when it could be absolutely critical to industry. You could pick any other example.

Senator JACINTA COLLINS—Yes, but the brake on that point is that two-thirds of state governments need to be convinced of that view rather than one particular state saying—and I get to the next point here:

> c) collective bargaining at an enterprise level with no provision for individual statutory agreements.

So we have, for instance, a new federal government seeking to reintroduce individual statutory agreements and the capacity for four of the states to say, 'No, we're no longer staying in this system. We're out of here.' Do you want to see that problem revisited?

Mr Smith—We do not, but as we understood it—we might be wrong—presumably with this IGA the Commonwealth could give notice to withdraw from it anyway. So if one of the key aspects of this whole IGA is that somehow or other it might relate to what future state or federal governments might want to do, presumably any future Commonwealth government could just give notice and withdraw from it. Presumably it is not going to achieve that anyway, but the problem is that, if you take the scenario you talked about where one state had a view that an important amendment did impact upon the fundamental workplace relations principles, two things could happen: that state could delay things for a long period of time because of the discussion process and that state obviously could influence the views of other states or territories and, if they were totally out on their own, they could give notice and withdraw from the amendment referrals relating to those issues and end up with another version of the workplace relations system applying to that fairly vague boundary around the employers and employees that relate to the non-national system employees.

CHAIR—Given what you said, is it your position that Western Australia should refer all of their powers in line with the way Victoria has done?

Mr Smith—Yes, we support all states referring all powers.

Senator JACINTA COLLINS—Unconditional.

Senator HUMPHRIES—I have a question more to educate me about the history of this process. You make reference to the longstanding and effective referral of IR powers by the Victorian state government. In trying to understand how that has worked in the decade or so since it happened, can you give me an example of a positive outcome for Victorian workers or employers as a result of that referral which would indicate why Victorian workers or employers were better placed by virtue of that referral having taken place?

Mr Smith—There are numerous examples. One is that, ever since that referral took place 13 years ago, employers and employees in Victoria have not had to deal with state awards and federal awards. If you look at the manufacturing sector, where a lot of our members are based, it is very common to have a federal award applying to the manufacturing workplace, a state award applying to the clerks, a state award applying to the sales staff and a lot of award-free people. It is a much simpler system. It was a simpler system when we just had schedule 1A and it is still a much simpler system since we have had common-rule awards and the expanded version of schedule 1A.

Senator HUMPHRIES—So the benefit has been the ease of dealing with industrial relations frameworks and making decisions affecting outcomes in workplaces?

Mr Smith—Yes. It is a much simpler system and an enormous saving in cost to the public without the machinery that is being maintained in other states—unnecessarily, in our view.

Senator HUMPHRIES—There are not necessarily any better outcomes in terms of conditions, salaries or anything else for workers or benefits for employers and better productivity in that state?

Mr Smith—We have not looked at figures from that point of view, but we certainly do not perceive that they are any worse in terms of wage levels, productivity levels and so on. Logically, there would be some benefits flowing in that area from the less-complex system. Certainly they are no worse off and the community is much better off, in our view.

Senator HUMPHRIES—Thank you.

CHAIR—That is all we have time for. Thank you for your submission and your presentation to the committee today.

Mr Smith—Thank you.

[12.48 pm]

KOVACIC, Mr John, Deputy Secretary, Workplace Relations, Department of Employment and Workplace Relations

PERDIKOGIANNIS, Ms Elen, Branch Manager, National System Legislation Team, Workplace Relations Legal Group, Department of Education, Employment and Workplace Relations

RODDAM, Mr Mark, Branch Manager, Safety Net and Wages Branch, Workplace Relations Policy Group, Department of Education, Employment and Workplace Relations

SHELLEY, Ms Collette, Branch Manager, National Workplace Relations System Unit, Workplace Relations Policy Group, Department of Education, Employment and Workplace Relations

CHAIR—The committee welcomes officers from the Department of Education, Employment and Workplace Relations and we thank you for your submission. As I am sure you have some substantial opening remarks to make we invite you to make them, and that will be followed by questions from the committee.

Mr Kovacic—I thank the committee for the opportunity to participate in today's hearing. The bill under consideration by the committee underpins a significant national reform that will bring Australia to the closest point in its history of having a single set of workplace relations laws for the private sector. It is strongly supported by the states and the Commonwealth due to its capacity to provide certainty and stability for Australia's private sector employers and employees into the future.

The bill seeks to implement the government's election commitment set out in 'Forward with Fairness' to establish a uniform national workplace relations system for the private sector to ensure the future economic prosperity of the nation. Specifically, the bill amends the Fair Work Act 2009 to enable states to refer workplace relations matters to the Commonwealth for that purpose.

I note that each of these submissions made to the committee indicates general support for the bill, but I also acknowledge that there has been some criticism of certain aspects of the bill and the proposed framework for creating a uniform national workplace relations system for the private sector. The criticisms that the bill should not allow local government and public sector corporations to be excluded from the national workplace relations system need to be considered in respect of the government's policy in Forward with Fairness which states:

> Current arrangements for the public sector and local government can continue with many of these workers regulated by State industrial relations jurisdictions.
>
> State Governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their own employees and local government employees.

This has always been the government's policy and the bill is consistent with that commitment. I should also point out that the mechanisms used to allow exclusions of local government and public sector corporations from the applications of the Fair Work Act provide certainty of coverage to many of these entities whose coverage has previously been unclear.

The provisions of the bill are underpinned by a multilateral intergovernmental agreement which was developed in close consultation and cooperation with the state and territory governments. A copy of that multilateral intergovernmental agreement has been made available to the committee. The multilateral intergovernmental agreement outlines the roles and responsibilities of participants in the national system and sets out the key principles that will underpin the new national system into the future. One element of the multilateral intergovernmental agreement is that it provides for a Commonwealth proposal or amendment to the Fair Work legislation to be considered by the Workplace Relations Ministers Council referring states and territories subcommittee if the proposal or amendment is considered to undermine one or more of the key principles. The multilateral intergovernmental agreement provides that such matters will be resolved by endorsement of a two-thirds majority of that subcommittee. Where a two-thirds majority does not endorse a Commonwealth proposal or amendment, the intergovernmental agreement provides that the Commonwealth will not proceed with the proposal or amendment until identified issues are resolved.

The bill also contains provisions for the termination by a state of an amendment reference. There has been some criticism of these provisions in the submissions and today I would like to reiterate some of the comments made in the department's submission, which can help to explain the development of these provisions and the manner in which they operate.

The bill enables referring states to terminate their amendment references and remain in the national system by proclamation of the State Governor with three months notice if the Governor considers that an amendment to the Fair Work Act is inconsistent with the fundamental workplace relations principles which were agreed to by the Workplace Relations Ministerial Council in May 2008. Combined, the arrangements in the intergovernmental agreement and the elimination of amendment reference provision protects states' long-term interests in a cooperative workplace relations system and addresses states' concerns that unwelcome changes to workplace relations laws could be forced upon them without any consultation by a future Commonwealth government.

The amendment reference provision was developed in close consultation with the states and provides an assurance of the Commonwealth's intention to work cooperatively with them on amendments into the future. However the provision is not anticipated to be used in any but the most extreme circumstances. For example, the South Australian Minister for Industrial Relations, the Hon. Paul Caica MP, when talking on the operation of the amendment reference in his second reading speech to the South Australian referral legislation, the Fair Work (Commonwealth Powers) Bill 2009 noted:

It is envisaged that if all jurisdictions were meeting their obligations under the intergovernmental agreement, the provisions of this bill for the termination of the amendment reference because of inconsistency with the fundamental workplace relations principles would not need to be applied and, in effect, would only be contemplated in the most extreme circumstances where the agreed fundamentals of the national system was threatened.

Some of these submissions have also raised technical issues about aspects of the bill. In that regard the secretariat raised some of those issues with the department and I would like to be able to table some information which deals with those issues and may assist the committee in its deliberations, if the chair pleases. In closing, I note that the bill reflects the government's commitments in Forward with Fairness and the government's subsequent consultation with states and territories. I would now welcome any questions that the committee might have.

Senator FISHER—May we have a copy of Mr Kovacic's written statement that he just read?

Mr Kovacic—Mine has annotations on it, sorry, Senator.

Senator FISHER—I am not unhappy to receive a copy of it with annotations on it.

Mr Kovacic—It has actually got some deletions on it as well.

Senator JACINTA COLLINS—Mr Kovacic, the issue is that we have a very limited time frame, and waiting for the *Hansard* might be problematic. Could you provide the committee with your statement?

Senator FISHER—That may be Senator Collins's issue. My issue is that I would like to ask Mr Kovacic about—

CHAIR—You do not have the call, Senator Fisher.

Senator FISHER—statements he has just made.

CHAIR—You can.

Senator FISHER—I would be assisted by a copy of the written document from which he has read.

CHAIR—He has already indicated to you that it has got annotations on it and he is not going to provide it to you in that form. He has indicated that he will email it to you. Is there something about that you did not understand?

Senator FISHER—There is something about it that I did not find satisfactory, but thank you, Chair.

CHAIR—I do not know what it is unsatisfactory—

Senator FISHER—In that it is after the event.

CHAIR—The standard process is that witnesses are called before the committee and they make some opening remarks to the committee. In actual fact, they are invited to do that by the chair of the committee. This has always happened, in every Senate inquiry that I have ever been involved in. If the process were that we asked people to come with a prepared statement and table it, I suppose we could dispense with verbal submissions. But no-one has ever made that request to me.

Senator FISHER—I am entitled to make the request, Chair. Thank you.

CHAIR—Yes, and I have let you do it and you have got your answer. Whether you think it is satisfactory or not is a matter for you. Can I ask my question? Is that suitable to you, Senator Fisher?

Senator FISHER—I am well over it, Chair. Please do.

CHAIR—Mr Kovacic, in your submission you talk about a consultation process, you talk about extensive consultation with the states and territories and ongoing consultation with other major stakeholders such as the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions and the Australian Industry Group. I have to say that both ACCI and the Australian Industry Group have indicated less than enthusiastic support or acknowledgment of those consultations. I would like you to detail a little bit more about what those consultations actually involved.

Mr Kovacic—I think the reference in the department's submission is a general reference to the extensive consultation that occurred in development of the Fair Work legislation, of which this bill is part of a suite. Clearly the predominant level of consultation has been with the states and territories themselves, and that dates back to the early part of 2008, following a decision by the Workplace Relations Ministers Council to endorse Forward with Fairness as the basis for a national workplace relations system for the private sector and to establish a high-level officials group to, in essence, progress the discussions around the development of the Fair Work legislation but also around the arrangements for the possible referral by states of their workplace relations powers to the Commonwealth.

In terms of direct consultations with stakeholders such as ACCI and AiG, you would be aware that one of the suite of bills that was considered as part of the Fair Work legislation was a transitional and state referrals bill, which was I think the third of the Fair Work bills. That was part of a process of discussion with stakeholders through a COIL mechanism, in addition to the consultation that occurred with states and territories around the issues of referral. Many of the provisions in this bill are similar to the provisions that relate to the provisions in that act now, which deals with the Victorian referral.

In addition, we understood that most if not all jurisdictions were, in their own space—if I can put it that way—also consulting either formally or informally with stakeholders, both employer and employee representatives within their own jurisdictions around the issue of referral to the Commonwealth. So we anticipate that they would have been picked up as part of that process. But, in terms of the details of those sorts of consultations, we are not entirely across all of those details in terms of their specific nature. In terms of the number of meetings that we have had with state and territory officials, I think they are in the order of about 20—

Ms Shelley—There have been a number of meetings, both multilaterally and bilaterally. The high-level officials group, which was established by the Workplace Relations Ministers Council in February 2008, has met on 17 occasions. That comprises state, territory and Commonwealth officials. In addition to that, there has been a total of 36 bilateral meetings. Those are more formal bilateral meetings supplemented by numerous phone calls and informal discussions. So there has been extensive consultation in that regard.

CHAIR—The Ai Group indicated today that they do not support the passage of this bill. That was not in their written submission to us, but they included that in their opening statement. Have they made that position clear to you in the consultations you have had up until now?

Mr Kovacic—No. I bumped into Stephen Smith in Melbourne last Thursday. He subsequently emailed me a copy of the AiG submission, which is supportive of the passage of the bill, so that is news to me.

CHAIR—Okay. In terms of consultation the other way—it is often about whether the government is consulting with others, but those others are expected to receive the consultation—there would be some obligation for them to consult their position. The purpose of consultation is not simply information providing; it is actually a dialogue, is it not?

Mr Kovacic—In essence it is an exchange of information. An exchange of views is the way that we have approached it in the context of the fair work legislation. As I said a moment ago, it is news to me that AiG's position has changed from its formal submission.

CHAIR—So they had not consulted you about that position till now?

Mr Kovacic—No.

CHAIR—Thank you.

Senator JACINTA COLLINS—One issue. Thank you for adding to your opening comments the additional remarks about cooperative federalism. I assume that followed in part from our earlier discussions today. I ask for some reflection on the issue of how consistent that is with cooperative federalism in relation to other areas where we have sought national consistency.

Mr Kovacic—The area that I would highlight most consistently in this sort of area is the multilateral intergovernmental agreement that I referred to in the opening statements. We were very mindful in developing that intergovernmental agreement how it stacks up against similar intergovernmental agreements that exist across the Commonwealth jurisdiction. As part of the discussions that we have been having within government—for instance, with the Attorney-General's Department—those issues have been part and parcel of our thinking. In general terms it would be true to say that the intergovernmental agreement is consistent with the approach taken in other IGAs but nonetheless reflects the specifics of the process that has been agreed to by state and territory ministers and the Commonwealth through Workplace Relations Ministers Council.

I highlight that since late 2007 the Workplace Relations Ministers Council has met on, from memory, six or seven occasions. On each of those occasions it has discussed not only the development of the government's fair work legislation but also issues associated with the referral of powers and the development of the national workplace relations system for the private sector. My involvement with the Workplace Relations Ministers Council dates back to the early eighties. It is probably the most significant and comprehensive level of consultation around a set of workplace relations reforms that I can recall through forums such as the Workplace Relations Ministers Council, and I think it would be true to say that the discussions through the ministerial level and, equally, the officials level, have been the most constructive and most cooperative that I have been involved with. I think that is a reflection of the positive approach that all ministers in all jurisdictions have brought to the ministerial council.

Senator JACINTA COLLINS—I remain unconvinced of the mischief that the Ai Group is concerned about, so I am interested in what other IGAs have been structured in similar terms—indeed, whether there is any example of such mischief arising out of those arrangements in other policy areas. I do not know if that sort of information is readily available.

Mr Kovacic—We can certainly take that question on notice. To the best of my knowledge, the sorts of areas that were identified previously in terms of IGAs were around the area of corporate law. It was one that not only was mentioned originally in the Williams report but was looked at fairly closely by us in the context of our consideration. There are probably others that we are aware of. I think, from memory, most of those contain provisions for dealing with circumstances where amendments are proposed to national frameworks. We can certainly look to provide that information to the committee.

Senator JACINTA COLLINS—This approach in itself is no groundbreaking precedent in cooperative federalism, is it?

Mr Kovacic—Not that I am aware of.

Ms Perdikogiannis—If I may amplify Mr Kovacic's answer, it is a usual feature of intergovernmental agreements that they provide for some sort of process of voting or approval of Commonwealth proposals to amend the national law. This is not unusual at all. As far as we are aware, the parties to the agreements have engaged in a cooperative manner and we are not aware of the mischief that AiG has raised.

Senator FISHER—Mr Kovacic, when you were asked about the Australian Industry Group's position on the bill, you indicated that the Ai Group had not consulted with the department about its position. Is that right? Would you clarify your answer.

Mr Kovacic—I was asked whether AiG had consulted with the department or informed the department of the change in its position from its formal written submission around supporting passage of the bill. I indicated that I was not aware and that, to the best of my knowledge, AiG had not informed the department that its position had changed from its formal written submission.

Senator FISHER—Did the department contact the Australian Industry Group about this bill at any stage prior to the presentation in parliament of this bill?

Mr Kovacic—Not in a formal sense. The point I made before is that we understood that each jurisdiction that was considering referral was undertaking either formal or informal consultation processes with the key stakeholders in their jurisdictions and we would anticipate that there was fairly widespread consultation as part of that process. Whether AiG or any of its affiliates was part of that process I do not know.

Senator FISHER—Would the department please inform the committee on notice which consultations were conducted, with whom, by whom and when?

Mr Kovacic—We would have to seek advice from state and territory departments.

Senator FISHER—Certainly, but at the moment you are saying 'you think'.

Mr Kovacic—We are aware that certainly in South Australia, for instance, it has a formal Industrial Relations Advisory Committee—that is its title—which is a tripartite sort of committee. We certainly understand that, at least in that jurisdiction, stakeholders were consulted formally through that mechanism.

Senator FISHER—Can you confirm that, please, in South Australia's case. If it was a formal mechanism, that will be on the record, including who was consulted, by whom and when, in proximity.

Mr Kovacic—We will ask that of jurisdictions and endeavour to get that information.

Senator FISHER—Thank you. In the process of providing that information, can you provide it with reference to the introduction into the relevant state parliament of their referring legislation?

Mr Kovacic—We will do our best. I stress again that we are beholden to other jurisdictions in terms of the provision of information, but we will do our best to provide that.

Senator FISHER—Why wasn't there COIL for this bill?

Mr Kovacic—A combination of two issues: one, the sort of consultation that we understood was occurring within state jurisdictions and with a range of stakeholders, but there were timing issues as well.

Senator FISHER—So you thought the state jurisdictions were doing it, so that will be right? Plus, the government is in a hurry?

Mr Kovacic—I think it is also fair to say that, in terms of the provision, the bill deals with the referral and the acceptance of the referral from various state jurisdictions—those jurisdictions that have made the decision to refer. So clearly the focus of the department's discussions was with those various jurisdictions. As I mentioned those jurisdictions were having consultations with a range of stakeholders and, certainly, we would have anticipated that what they brought to the discussions that they were having with the department would have reflected the views of stakeholders as part of that process. I think that issue, factored together with timing issues, are the two issues that I would highlight as the reasons for it.

Senator FISHER—Since the election of this government have there any other bills to amend the workplace relations legislation that were not the subject of a COIL meeting?

Mr Kovacic—There are a couple of recently introduced bills around Telstra long-service leave and amendments to the Occupational Health and Safety (Commonwealth Employment) Act that I do not think we have had COIL processes around. But in terms of provisions relating to bills dealing specifically with the Fair Work Act, I am not aware of any where there has not been a COIL process.

Senator FISHER—The two examples you have properly singled out both apply to select parts of the Australian workforce—the occupational health and safety legislation to Commonwealth employees and the Telstra legislation to Telstra employees. So I understand you to be saying that in respect of legislation that potentially applies to the bulk of the Australian workforce, as does this bill, as far as you are aware this government has always conducted a COIL meeting in respect of every bill to amend the workplace relations legislation, other than this bill?

Mr Kovacic—That is my understanding, but I will take that on notice and confirm that.

Senator FISHER—Can I ask you questions about the intergovernmental agreement?

Mr Kovacic—Sure.

Senator FISHER—Is it a public document?

Mr Kovacic—In the sense that it has not been publicly released, but we have certainly made copies available to the committee. Also, I understand that some of the jurisdictions have made it available within their jurisdictions.

Senator FISHER—So it is a public document?

Mr Kovacic—For all intents and purposes, yes.

Senator JACINTA COLLINS—One moment, Senator Fisher, while we deal with the status of this document. As committee members we understood that we had received it on more confidential basis and you are now saying it is a public document. I can understand that answering questions is one thing—and I am sure you will let us know if there are any particularly sensitive aspects—but if that then means that the document is available for public release that is a different issue.

Senator FISHER—Mr Kovacic has said that it is.

Senator JACINTA COLLINS—That is what I am clarifying.

Mr Kovacic—I think you are probably right, Senator Collins, in the sense that it is not. It is being made available on a confidential basis to the committee and, in other jurisdictions, to key stakeholders. I suppose that was loose language on my part in the sense that it is not publicly available. I think the intention will be to make it publicly available at a certain stage. But we are certainly happy to answer questions that might have help.

Senator FISHER—For example, you may not have heard the evidence provided before you by the Australian Industry Group. Essentially, they had difficulty in answering questions about the bill because they had not seen a copy of the intergovernmental agreement. The witnesses from the Australian Industry Group, Mr Baragry and Mr Smith, are right behind you, sir. May I ask that a copy of the intergovernmental agreement be provided to them right now, particularly given the rapidity with which the government is proposing to have parliament deal with this legislation and the difficulty that the witnesses have had in reaching an informed assessment about this bill, despite their best endeavours to do so? May I have the Australian Industry Group provided with a copy?

Mr Kovacic—I would need to take that on notice.

Senator FISHER—Chair, when will questions on notice be answered by the department?

CHAIR—When they are able to answer them. I know one of the questions you have already asked them involves them asking state government departments to find out that information. By the time that gets back, we will certainly have reported, I would have thought, just as a practical observation.

Senator FISHER—That is why I asked. There is little point in having the questions asked answered post report.

CHAIR—Indeed, Senator. You do know when we are reporting, don't you?

Senator FISHER—Yes, I do. So I would be asking that the committee ask the department to provide answers in time for them to be taken into consideration for the writing of the committee report.

Senator JACINTA COLLINS—I am sure they will provide whatever answers they are able in that time frame.

CHAIR—All we can do is ask them to answer the questions as soon as they can. We cannot make them answer questions which they cannot answer within the time frame.

Senator FISHER—In that case, I would nonetheless be seeking an answer to the questions that they are not able to answer now in time for them to be taken into consideration for the drafting of the report as well, because I suppose something will be better than nothing. I would still seek an answer to all the questions placed on notice.

CHAIR—You do not need to say that. If the officers take the question on notice, they will answer it.

Senator FISHER—Thank you, Chair. In respect of the intergovernmental agreement, which states have signed it?

Mr Kovacic—At this stage, South Australia, Tasmania, Victoria and the two territories have signed the intergovernmental agreement.

Senator FISHER—So not New South Wales, not Queensland and not Western Australia.

Mr Kovacic—Queensland, as you would be aware, has introduced into the state parliament legislation to refer its powers. At last workplace relations ministerial council meeting, the relevant minister, Minister Dick, indicated that at that stage the Queensland government had not made a decision on referral, but he indicated that were the Queensland government to decide to refer its powers, which it has subsequently done, it would be prepared to sign the IGA in the form that it exists. New South Wales is yet to make a decision on whether or not it will refer its workplace relations powers. As I think you are aware, the Western Australian state government has indicated publicly that it will not be referring its powers but that it is currently conducting a review of its state workplace relations system and, post that, may consider initiatives to harmonise its legislation—

Senator FISHER—Thanks. Chair, how long do I have to ask questions?

CHAIR—Till 25 past.

Senator FISHER—Today?

CHAIR—Yes, certainly today, not till 25 past tomorrow.

Senator FISHER—Mr Kovacic, other states which have signed the IGA signed it on 25 September, which was prior to their passing the relevant state legislation. Why did Queensland not do so?

Mr Kovacic—Because at that stage they had not made a decision as to whether they were going to refer. But, as I indicated a moment ago, at the last meeting of the workplace relations ministerial council the Queensland minister did indicate that, were Queensland to make a decision to refer, it would be prepared to sign the IGA in the form that it is in. That was reflected in the communique that was subsequently issued by the council.

Senator FISHER—Thank you—time is tight. Is there a provision in the IGA that talks about two-thirds of the states being able to take action in the event that they are in agreement with each other and not with the federal government?

Mr Kovacic—Sorry?

Senator FISHER—Is there a provision in the IGA that talks about two-thirds of the states?

Mr Kovacic—There is a provision that means states can suggest amendments to the fair work legislation. Where states suggest proposals to amend legislation, there is not a requirement there in terms of a two-thirds majority. What the act—

Senator FISHER—What part of the IGA is that?

Mr Kovacic—If you will just bear with me.

Senator FISHER—I do not have long.

Ms Shelley—Senator Fisher, I think what you are referring to is clause 2.18 of the IGA, which says that if one of the members referring states and territories subcommittee of the Workplace Relations Ministers' Council considers that a Commonwealth proposal or amendment may undermine one or more of the principles which are in the IGA and which are also reflected in the bill, they can ask for that proposal to be referred to the subcommittee for resolution. That means that for that proposal to proceed it will need to be endorsed by a two-thirds majority of that committee, which comprises the Commonwealth, the territories and the referring states.

Senator FISHER—Mr Kovacic, I think you said in your opening statement that the IGA works together with the bill. How?

Mr Kovacic—In essence it is one of the levels of governance. Clearly, the bill reflects and contains the principles, but it is one of the elements of the governance arrangements around a national system. I think at the last estimates hearing, in response to a question from Senator Humphries, I indicated that there are three levels of governance around a national system. Firstly, there are referrals bills. Secondly, there is the multilateral IGA and, thirdly, there are bilateral intergovernmental agreements.

Senator FISHER—Thank you. I will look at that answer. Where does the bill reflect the two-thirds majority principle referred to in clause 2.18 of the IGA?

Ms Shelley—When I said that it reflects the principles, I was referring to the principles that are set out in the IGA at clause 1.2(a) to (e).

Senator FISHER—Mr Kovacic, how does the bill reflect the IGA?

Mr Kovacic—The bill contains the principles.

Senator FISHER—Where does the bill contain the two-thirds majority principle set out in the IGA?

Mr Kovacic—The bill does not contain the two-thirds majority issue.

Senator FISHER—Why not?

Mr Kovacic—What the bill contains is the principles set out at clause 2.11 of the multilateral IGA and, as I have mentioned, the governance arrangements for the national system are comprised of three components of which the bill is one.

Senator FISHER—On notice, can the department provide the committee with a table that explains the difference in definition between the terms 'mirroring jurisdiction' and 'cooperating jurisdiction' used in the IGA, particularly in clause 2.8, and the definitions in the bill of a referring state which does not then terminate either its initial or an amending reference and of a referring state that may well remain a referring state but which terminates an amendment reference under either clause 30G or 30L of the bill. Can the department provide the committee, on notice, with those definitions. What would be an example of an amendment to the Fair Work Act that is inconsistent with one or more of the fundamental workplace relations principles?

Mr Kovacic—Probably the most identifiable would be an amendment to reintroduce statutory individual agreements.

Senator FISHER—If the government's proposal to abolish the Australian Building and Construction Commission were not implemented prior to the passage of this bill, and then a government subsequently abolished the construction industry cop, would that violate the so-called fundamental principle in clause 9B(2) of the bill that there be an independent authority to assist employers and employees within a national system for the building and construction industry? It might in the view of a particular state, might it not?

Mr Kovacic—This bill relates to provisions of the Fair Work Act, not to separate building industry legislation.

Senator FISHER—So it is only amendments to the workplace relations act. What about an amendment to the regulations under the Fair Work Act? Could that violate the fundamental principles? Please answer that on notice. What about an amendment to the code of practice for unfair dismissals? Would an amendment to that potentially violate the fundamental principles of the workplace relations act and be able to kick-start subclause (7) or (8)?

Mr Kovacic—As a general comment, the bill together with the multilateral IGA reflect the spirit of cooperation and collaboration that have been a hallmark of the discussions and development of the Fair Work legislation and the discussions with not only state and territory officials but also state and territory ministers. That is the spirit that is reflected in the bill. Indeed, the multilateral IGA is an extension of that cooperative spirit, a continuation of it and a recognition that, in terms of a national workplace relations system, a fundamental underpinning of it is the need for a continuation of those sorts of cooperative arrangements.

Senator FISHER—The department's submission says:

… there may be amendments … to the Bill as a result of—

CHAIR—You are out of time, so I am now going to go to Senator Humphries.

Senator FISHER—I have one final question and I am happy to put it on notice. May I finish this question?

CHAIR—When I tried to pull you up last time, you continued to talk and asked the question anyway.

Senator HUMPHRIES—I am quite happy to forgo my right to ask questions and defer to Senator Fisher.

CHAIR—Fantastic. Senator Fisher, you should keep going then, until 1.30.

Senator FISHER—Thank you. So much more time we would have had, Senator Humphries! I am so comforted, as no doubt will be workplaces.

CHAIR—Senator Humphries, as the deputy chair, had indicated to me that he had questions.

Senator FISHER—Thank you. Time is short.

CHAIR—Senator Humphries is actually a member of this committee and I thought it was appropriate to go to him.

Senator FISHER—As it was.

CHAIR—I do not know why you needed to make those comments then.

Senator FISHER—Thank you. Mr Kovacic, the department's submission says:

The Department is … working closely with States on … referrals, and … there may be amendments required to the Bill as a result of … discussions—

about future referrals. Why is the parliament considering this bill without those discussions having been achieved? Therefore, what is the hurry with the bill?

Mr Kovacic—As I have mentioned, we are still in negotiations with New South Wales as to whether they will refer their workplace relations powers.

Senator FISHER—So you are talking about other states. In terms of the two exit provisions in the bill relating to amending referrals, why is there one that allows all states to do so on six months notice without any reason and one that allows one state to do so on three months notice if that state considers that fundamental workplace relations principles have been violated? Why are there two different provisions?

Ms Perdikogiannis—The six-month provision is the standard provision that exists in Commonwealth referral schemes. Of course all references are in their own way different, but the three-month provision reflects

the compact and the understanding between the Commonwealth and the states as to the future operation of the system.

Senator FISHER—I have three questions which I will now place on notice, given the time. Can the department inform the committee as to why it is not satisfactory for the bill to simply provide that one or more states may terminate their initial reference, their amending reference or their transitional reference on the provision of three months notice? Why is that provision not in the bill?

Mr Kovacic—I would just reiterate the point that Ms Perdikogiannis made. Six months in terms of a determination of a referral is probably the common—

Senator FISHER—Then I ask the same question as well on notice, replacing three months with six months. So that is two questions in one. My final two questions relate to the effect of the triggering of sections 30L(7) or (8). I would ask the department on notice to provide the committee with a table that sets out the law that would apply in the event of the triggering of clauses (7) and (8). Actually, I am going to ask the department to provide the committee on notice with a table that sets out the legislation that would apply to a referring state that initially refers workplace relations powers to the Commonwealth and then terminates an amending reference. In particular, what then happens to the status of the laws in that place in respect of the initial referral? Do the laws of that state then fall to be governed by what the federal laws were as at the date of referral and as at the date of the termination of the amending reference?

My second question for the department is to provide a table setting out the effect of what then happens if that same state, which is still a referring state, decides that, despite there being a second amendment to the federal Workplace Relations Act, post that state's initial referral, that state is not unhappy about that amendment to the Workplace Relations Act so decides that it will have that amendment, thanks very much? Can that happen under the bill and what will be the effect? I then ask for a table with the same effect in the event that all initial referring states decide to terminate an amendment reference when there is a first amendment made to the Workplace Relations Act post initial referral and, secondly, all states then decide that, when there is a subsequent amendment to the Workplace Relations Act, those states are not unhappy about that subsequent amendment and wish to have that amendment effective in their states. Is that possible? What legislation will prevail? Thank you very much.

CHAIR—Mr Kovacic, do—

Senator JACINTA COLLINS—Do you need to clarify any of that question?

Senator FISHER—Time would help clarify a lot but it appears there is none.

Senator JACINTA COLLINS—You have just been given an extra five minutes.

CHAIR—I would just make the point in respect to that that this is not much less time for inquiry than we had for the entire Work Choices legislation, by the way.

Senator FISHER—Oh, get over it, Chair; you are the government—come on!

CHAIR—You are the one who seems to want to make some point about that.

Senator FISHER—I am trying to make a point about this bill. I am trying to get my head around it.

CHAIR—You may want to look up the word 'hypocrisy' in the dictionary and reflect upon that. Mr Kovacic, we have made arrangements to get the *Hansard* as quickly as possible. It will come to the committee first before it is published. As soon as we can get the *Hansard* for this particular part of the hearing we will forward it to you to assist you in answering Senator Fisher's questions.

Senator JACINTA COLLINS—We just will not guarantee that the questions actually made any sense!

Senator FISHER—Neither can I. Thank you for your best attempts. I think I know what I am asking. I am not sure I understand the bill.

Mr Kovacic—I think I understand the gist of what you are asking.

CHAIR—Thank you for your submission and your presentation to the committee today.

Committee adjourned at 1.35 pm