COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

Reference: Workplace Relations Amendment (Right of Entry) Bill 2004

FRIDAY, 18 FEBRUARY 2005

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

To search the parliamentary database, go to:
http://parlinfoweb.aph.gov.au

SENATE

EMPLOYMENT, WORKPLACE RELATIONS, AND

EDUCATION LEGISLATION COMMITTEE

Friday, 18 February 2005

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

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

Participating members: Senators Abetz, Boswell, Calvert, Chapman, Cherry, Jacinta Collins, Coonan, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Forshaw, Harradine, Harris, Hutchins, Knowles, Lightfoot, Ludwig, Mason, McGauran, Murphy, Nettle, Payne, Sherry and Watson

Senators in attendance: Senators Crossin, Barnett, Johnston, Marshall, Murray and Tierney

Terms of reference for the inquiry:

Workplace Relations Amendment (Right of Entry) Bill 2004

WITNESSES

Committee met at 9.02 a.m.

HARRIS, Mr Christopher Lawrence, Senior Workplace Relations Adviser, Australian Chamber of Commerce and Industry

CHAIR—I declare open this public hearing of the inquiry into the Workplace Relations Amendment (Right of Entry) Bill 2004. On 8 December 2004, the Senate referred the bill to the legislation committee for inquiry. The committee is due to report on 7 March. This proposed amendment to the Workplace Relations Act 1996 is intended to define more clearly the obligation of parties in regard to the right of entry of unions to represent their members in the workplace. An important element of the bill is the extension of Commonwealth power to override the operation of the state rights of entry laws within the limits imposed by the Constitution. Under the amendment, a union will be able to exercise a right of entry only in accordance with new provisions of the Workplace Relations Act, with the constitutional limitation being that a union will still be entitled to enter premises for purposes relating to state industrial laws.

I remind all witnesses that, in giving evidence, they are protected by parliamentary privilege. Parliamentary privilege gives special rights and immunities to senators and members and those who appear before its committees. Parliament must function without obstruction, and people must be able to give evidence to its committees without prejudice to themselves. Any act by any person which disadvantages a witness as a result of evidence given before the Senate or any of its committees is treated as a breach of privilege.

I welcome any observers to this public hearing. I welcome our first witness, from the Australian Chamber of Commerce and Industry. The committee prefers to take all evidence in public but it will consider a request for all or part of evidence to be given in camera. The committee has before it submission No. 15. Are there any additions or changes?

Mr Harris—No.

CHAIR—I now invite you to make a brief opening statement and then we will move to questions.

Mr Harris—The Australian Chamber of Commerce and Industry considers right of entry to be a legitimate part of our system of workplace relations but we also think that it is legitimate that such a right should be exercised responsibly and be subject to appropriate restraints. This bill addresses some problems that have emerged because of recent tribunal and court decisions, and we think it will also have the effect of producing an overall more balanced framework for the exercise of right of entry by trade union officials and employees. I think that is all I need to say at this time.

ACTING CHAIR (Senator Marshall)—In paragraph 41 of your submission you allege that the current right of entry provisions really allow unions to engage in fishing expeditions. Doesn't the commission already have the power, if they believe there is a misuse of the right of entry, to control that process?

Mr Harris—What we were referring to there was that the current provisions do not require a trade union to identify any particular breach to exercise right of entry under that particular right of entry stream, and therefore you can have a situation where a union knows perfectly

well that there are no breaches of awards or agreements but can still seek to enter a workplace for that purpose, and that it is reasonable, where a union thinks that right of entry is required for the purposes of ensuring compliance with awards and agreements, that the particular breach is identified.

ACTING CHAIR—The point I am making is that there is already a remedy to that issue. The commission already has the power to control that.

Mr Harris—It is a remedy after the fact. It would be better if employers had protections prior to right of entry being exercised.

ACTING CHAIR—You are assuming people are going to abuse the process. How many complaints have you actually had from your members regarding this issue?

Mr Harris—As a peak body, we represent organisations of employers, so we do not have as much direct contact with employers as some other organisations who may be appearing today. It certainly is an issue that is regularly raised with us by our member organisations and it is certainly an issue that finds its way into—

ACTING CHAIR—What is the extent of the raising of it? I am trying to get a handle on the extent of the problem, and really none of the submissions actually identify any significant breaches.

Mr Harris—I think there is a level at which the issues in relation to right of entry do not always find their way into a dispute that is notified with the commission or in particular legal proceedings. They are quite immediate and they dissipate quickly without it ever going to that extent. I understand some of our member organisations, particularly in building construction, who have had far more extensive experience dealing with concrete right of entry abuses on a day-to-day basis will be appearing before you and will be able to provide you with that level of detail. Certainly in our conversations, our feedback, and our contact with our member organisations, right of entry is regularly raised as an issue where abuses occur or where employers feel that unions have exercised their right of entry powers in a manner which is inappropriate or which has been disruptive to workplaces.

ACTING CHAIR—But you have not actually provided any evidence of that, which is a concern to me. You represent a large number of organisations?

Mr Harris—Yes.

ACTING CHAIR—How many, roughly?

Mr Harris—I am not sure exactly the number of organisations we represent currently.

ACTING CHAIR—How many workplaces do you think it would be, as a ballpark figure? Is it thousands?

Mr Harris—We estimate maybe 350,000 workplaces, through our member organisations.

ACTING CHAIR—How many union officials across the country are you aware of that might cover your workplaces?

Mr Harris—I could not provide that information; I am sorry.

ACTING CHAIR—With 350,000 places, if we just talk about the unionised ones, I suppose there have got to be a lot of union officials to cover that amount. It would be hundreds, wouldn't it?

Mr Harris—I think it is worth remembering that, for many employers, they will never receive a right of entry notice because they do not have any union members and unions are not active in that particular sector. So we are talking about a small proportion of the overall work force or of businesses for whom right of entry is going to be an issue. It is going to be generally the unionised sectors of the economy, but it does appear that there are niches where right of entry is a serious issue—say, in building construction and manufacturing.

ACTING CHAIR—But that is my problem. You say it is a serious issue but you have not been able to identify any hard evidence of that. There are a large number of workplaces, there are a large number of union officials and there must be visits happening every day; I would suspect every union official is probably visiting two, three, four, five and maybe more workplaces. You cannot provide any hard evidence of any breaches. Let's say there are some. What I am trying to get to is: how minute is the problem and isn't this bill really enormous overkill?

Mr Harris—I think we mentioned in our submission that the Cole royal commission identified particular problems in building and construction. Certainly—and I may be able to assist you further by providing some information in writing—it is an issue that you will see very regularly in section 99 disputes brought before the commission. There are numerous cases in the commission's history regarding right of entry. In particular, there have been several recent cases which have attracted some attention and which have caused some problems for employers from our point of view. Like I said, we do receive regular feedback from our members that there are problems, but I do not know how often they would percolate to the point of being taken to the commission or to a court.

ACTING CHAIR—The problem I am having trouble coming to grips with—I am having problems coming to grips with this whole issue—is the point of this bill, because it occurs to me that the problem is very small, based on the overall scheme of things. Obviously some things are going to go wrong as far as employers are concerned, from time to time. The concern I have is that the bill allows for consent visits, and no notice is required if there is agreement between the parties to do so, but when we are actually in a bargaining position and when the unions are in a bargaining position, isn't it something that is going to be used just to lever the bargaining power of the employers during negotiations—if you can then restrict the right of entry of union officials to consult their members, to talk to their members about the bargaining process? I have a genuine concern that this bill is going to be used as a tool, as leverage, in bargaining, and it really has got nothing to do with the general right of entry provisions, because there does not seem to be the evidence that right of entry is being abused.

Mr Harris—I think some of the feedback we have received has been on that issue but in the opposite way: there is an apprehension that sometimes unions will abuse right of entry during a bargaining process, in a manner which is not related to either a compliance activity or holding discussions with employees for the purposes of seeking to recruit union members.

The act contains provisions which protect the capacity of unions to collectively bargain on behalf of their members, to form agreements directly with unions, and this bill will not affect that capacity. If you have a look at agreements that have been negotiated with unions, you often find that those agreements contain facilities for ongoing discussions and renegotiation of an agreement. So, if this bill were passed, I could not see it touching particularly on bargaining processes.

ACTING CHAIR—My difficulty is that I have had first-hand experience of the abuse, so I am aware of it and it does happen. Maybe I could finish off with one last question. You say there is no policy rationale for union recruitment purposes, but isn't it a fundamental principle of freedom of association that really gives rise to the effective exercise of those rights, according to that principle? Are you saying unions ought not to have the right to recruit in the workplace? Because that is how I read your submission.

Mr Harris—We were wondering whether in modern society, with modern means of telecommunications particularly, it was as necessary as in previous periods for unions to physically be present in workplaces to undertake recruitment activities. Unions, like others in our community, have branched out into electronic media—for example, the ACTU have a very good web site, they have call centres. It is a question of balance: whether the potential disruption that could arise from right of entry—

ACTING CHAIR—You are not suggesting to me that unions should ring people that they do not know—they do not know what their phone number is and they do not know where they live. That is not a form of recruitment, surely.

Mr Harris—I think something slightly different, Senator. I just think people are increasingly capable of finding out what services are available to them and going out there and meeting—

ACTING CHAIR—That is not recruitment; that is about people joining.

Mr Harris—Yes.

ACTING CHAIR—Then you are saying that unions ought not to have the power to recruit but simply that people ought to be able to join. There is a very significant difference in that, surely.

Mr Harris—I guess we are raising the question of whether unions require a statutory right to enter workplaces in order to undertake their recruitment activities.

ACTING CHAIR—Thank you. Senator Barnett?

Senator BARNETT—Thank you for your submission. I want to start with this concept of your support for a unitary system, a national system. Notwithstanding the view that some of the state provisions for right of entry may be fair or reasonable, it seems that based on your attachment A, which sets out the occupational health and safety head acts, they are different in each of those states. Therefore, if I am an employer with a business across more than one border, I am going to have to deal with the different regimes. Can you highlight any obvious or serious differences between the states, and can you tell us why it would be difficult for a business to operate across borders when those differences are highlighted?

Mr Harris—The first thing I should say is that, in addition to the OHS right of entry which we have outlined in the attachment to our submission, there are of course state workplace relations acts that provide right of entry. So, from a complexity point of view, an employer may be managing right of entry under three separate pieces of legislation, each one differing in terms of the conditions under which right of entry can be exercised. There are serious differences in relation to the amount of notice that is required—

Senator BARNETT—Are there any examples that you can share with us?

Mr Harris—Certainly. If we look at occupational health and safety legislation, in both Victoria and New South Wales no notice is required. We accept that there were different policy reasons for these acts and the right of entry provisions which are contained within them; nevertheless it is a level of complexity that employers have to deal with that they have to keep across—particularly if they are operating across states. Say they are operating in New South Wales and the ACT: they may have to keep across two separate pieces of OHS legislation, they may have to keep across the Workplace Relations Act, and of course they would have to keep across the New South Wales industrial relations legislation. It is a high degree of complexity that they operate with.

Senator BARNETT—You have not got a summary of the workplace relations right of entry for each state, have you?

Mr Harris—I do not believe we have provided that. It is something that we could provide at short notice if it would assist the committee.

Senator BARNETT—You have got 'powers on union right of entry'. Is that part of attachment A?

Mr Harris—Yes. That is OHS right of entry.

Senator BARNETT—But it is not workplace relations.

Mr Harris—No, but of course it is worth remembering that there are also state workplace relations acts that operate and that employees have to get across, and they differ substantially from the Workplace Relations Act.

Senator BARNETT—Do you think this will cover the field, as it were—this federal legislation?

Mr Harris—It is my understanding that the bill might cover the field in respect of OHS legislation. So, if the bill were passed, unions could still seek to exercise right of entry under state OHS legislation or the Workplace Relations Act. So it is worth keeping in mind that that will still be a level of complexity that will have to be managed by employers.

Senator BARNETT—Apart from period of notice, are there other obvious differences between states?

Mr Harris—I think there are several differences concerning what unions are permitted to do once they enter workplaces in terms of their capacity to interview employers et cetera.

Senator BARNETT—Are any of those provisions concerning right of entry set out in the awards?

Mr Harris—I could not help you there—I am not sure whether state awards still contain right of entry provisions.

Senator BARNETT—I do not know—maybe we can investigate that further. I know that in Tasmania the business community say that there are over 2,000 pages of award information and legislation relevant to this area. Obviously a business has to be on top of all of that. So are you arguing that this will simplify the arrangements and that the unitary national system is the preferred way to go?

Mr Harris—That is right. There is an immediate problem that has arisen because of the Federal Court decision—I think it concerned BCG Contracting. Notwithstanding the decision, we have a highly complex system of right of entry for a country of 20 million people. Harmonisation of right of entry provisions is something we support, regardless of that.

Senator BARNETT—That decision, according to you, says that the Federal Court held that the right of entry may still be exercised under state workplace relations legislation—so that causes the problem.

Mr Harris—That is right—even when all the employees are covered by a Commonwealth industrial instrument such as an AWA.

Senator BARNETT—So that is another imperative for moving swiftly?

Mr Harris—Yes, that is an imperative for immediate remedial change.

Senator BARNETT—Are you able to help the committee on the constitutionality of the legislation in its ability to override state right of entry laws?

Mr Harris—Others attending today may be able to help you a bit more on that, but it is our understanding that there would be a residue of businesses that would not be covered. We would also encourage the federal government to enter into discussions with state governments for the purpose of further harmonisation so that residue is also brought into a national system.

Senator BARNETT—So it is primarily under the Corporations Law?

Mr Harris—If you are using the Corporations Law, of course you have a small residue of businesses that you cannot capture using that head of power.

Senator BARNETT—Some people have argued as well that the legislation is in breach of some ILO conventions. Do you have a response to that?

Mr Harris—It is our understanding that it is not. There is an ILO convention in relation to right of entry but, having just refreshed my memory, it does say that right of entry would be exercised with due respect to the rights of property management. It is worth remembering that right of entry has never been an unfettered right; it has always been subject to a level of regulation. This bill does not remove the capacity of unions to exercise right of entry; it just places it in a more balanced framework.

Senator BARNETT—So it is not the concept that you are concerned about; it is the method in which it occurs.

Mr Harris—That is right—it is about an appropriate level of protection for the businesses.

Senator BARNETT—I think in paragraph 11 of your submission—and this will be my last point, and it carries on from something that the acting chair said—you talk about abuse of right of entry being of concern to employers. You say that right of entry involves legally sanctioned trespass and can be used as a vehicle to disrupt commercial operations. Can you help us in terms of any further evidence or any anecdotal support from your membership around the country to back up that comment?

Mr Harris—As I mentioned previously, it is an issue that regularly finds its way into disputes before the commission under section 99 of the act. That alone would suggest that in some circumstances it is a concern for employers. In addition, it was raised in the Cole royal commission where the commission found, in summary, that right of entry was being used in the building and construction industry to disrupt workplaces and operations. It is something that is regularly mentioned to us by our members, particularly in the context of right of entry being used as a bargaining tool to assist unions in their negotiations with employers. So it is being used strategically rather than for legitimate compliance or recruitment purposes.

Senator BARNETT—Finally, in regard to your offer of this appendix under occupational health and safety, you said that it would not be too inconvenient for you to do that—in terms of the right of entry in the state workplace relations legislation.

Mr Harris—I am sure we would be able to provide you with an updated attachment at short notice.

Senator MURRAY—I want to get into my mind your mind-set about this legalised trespass concept. Do you consider the powers exercised by Customs, ATO, APRA, ASIC, ACCC the department of transport and so on, with respect to search and right of entry, to be legalised trespass?

Mr Harris—It could be looked at like that. Government agencies are subject to a high degree of regulation and oversight and there are sound policy reasons why government agencies have these powers. As I stated earlier, this is a unique right that is given to trade unions and not many other non-government organisations in our society. Having said that, it is a right that we support. We see right of entry as playing a legitimate role in the workplace relations system and we believe that if the bill passed it would continue to function and that unions would continue to be able to exercise right of entry. But it is a unique right. It is a right to enter a workplace whether the employer agrees or does not agree, subject to particular conditions. It is a right that very few non-government agencies in our society possess.

Senator MURRAY—You could consider the exercise of this right as falling into two broad categories: one being the category of recruitment and servicing of members, and the other being the investigation or identification of breaches—typically, state agencies and dependent authorities such as ACCC investigating breaches. Couldn't you consider the right of entry legislation for unions as effectively an outsourcing regime? If you look at the states and the federal regulatory abilities with respect to IR there is nothing anywhere, including in OHS, which matches the ACCC, Customs, ATO, APRA, ASIC or any of those agencies, and somebody has to do that job. My understanding is that, by and large, employers over time have accepted the facility and the effectiveness of that operation. The concern has been with those who abuse the power and not with the power. Isn't that correct?

Mr Harris—Historically, the origin of right of entry provisions in our workplace relations system was as a quasi-policeman role, if you go back and look at the decisions in the early 20th century that gave rise to right of entry powers. I wonder whether unions are increasingly in a position to play that role, simply because of the changes to our society—the level of union membership has fallen. Others may be able to assist you further. There is a workplace relations inspectorate within the Department of Employment and Workplace Relations which—and I can only speak in respect of Victoria—is fairly active; they also have an advisory service which, I understand, takes an extremely large number of calls per day and provides advice on workplace relations matters. I would not like to say that we have a very inactive government inspectorate in the workplace relations field.

Senator MURRAY—I sit and have sat on many committees and many inquiries. I have been for nine years on a committee called the Senate Scrutiny of Bills Committee, which in 2000 published a report on search and entry. It proposed that entry be governed under the following principles:

- the grant of powers of entry and search by Parliament
- the authorisation of entry and search
- the choice of people on whom the power is to be conferred
- the extent of the power granted
- the kinds of matters which might attract the grant of the power
- the manner in which the power to enter and search is exercised
- the provision of information to occupiers
- the protection of people carrying out entry and search, and
- other general principles

In many respects this legislation captures those broad principles, although they are far more limited, you would agree, than the powers of the ATO or the ACCC, as examples. Are you familiar with that report?

Mr Harris—I am broadly aware of it but not of its detail. I understand that we did make a submission then but I probably could not help you much.

Senator MURRAY—It is just that if you are going to use terms like 'legalised trespass' you need to be familiar with the full literature and the range of approach on that. What 'legalised trespass' indicates to me is that eventually you would prefer it not to be legal and for it to be withdrawn completely. If that were the case, what would you substitute? It is like saying you should not have an ACCC or you should not have an ASIC. What would you substitute? What is your alternative?

Mr Harris—It is an interesting question. I wonder whether if you did remove trade union right of entry provisions, and we are certainly not suggesting it, you would have to look at alternatives, and those alternatives would be government inspectorates being given perhaps additional powers and resources. I guess what we were trying to suggest by that phrase was simply that this is a unique right which should be exercised with appropriate protections in place for abuse. As you have just mentioned, there are government inspectorates in other fields of policy and they are subject to a range of restrictions and oversight. This cannot be an unfettered right; it has got to be subject to some protections and restraint.

Senator MURRAY—Let us turn to abuse. It is clear to me that the opportunities for abuse increase when a system is confused. In other words, if you have two systems operating on one worksite there is the opportunity for people who wish to manipulate that situation to take advantage; or where the person to whom the search is requested is not familiar with the law—in other words where a union official does not carry a card indicating the rights and responsibilities of the employer concerned. I raise that latter one deliberately. A key issue in the exercise of search and entry by Commonwealth agencies has been the lack of the provision of information by police officers, by Customs officers, by ATO and so on to the person being searched. It is not a problem peculiar to the union movement; it is a problem that is common to the exercise of powers. Have you turned your mind enough as an organisation to finding process ways to address abuse rather than changes to the law? I have in mind simple things like applicants for right of entry permits being required to demonstrate knowledge of the rights and obligations associated with the permit and simple things like a card which somebody can refer to as recording their rights.

Mr Harris—I do understand the bill to have provisions of that nature in relation to the issuing of a permit by the Industrial Registrar that will require some level of training and understanding of the workplace relations law and the law governing right of entry before a permit would be issued.

Senator MURRAY—But it does not apply to the employer. The employer is not trained and yet it is the employer who might be aggrieved. So the only way to help the employer is to serve them their rights, if you like.

Mr Harris—Certainly our members provide a wide range of services familiarising employers with workplace relations law and their rights and obligations. As I said, for many employers there is no union presence at the workplace and they will never be subject to a right of entry application. For that group of employers that is not particularly an issue. There is still a unionised sector of the work force where right of entry is something an employer has to have regard to and be aware of. For that sector of the economy, our member organisation particularly certainly provides services that can assist them.

Senator MURRAY—Would you agree that effective, experienced union officials achieve right of entry quite painlessly if they operate on the following basis: they advise the employer beforehand that they are coming, they are courteous and considerate in the exercise of right of entry, they are reasonable about how the process is undertaken and they have developed a long-term relationship with both the employees and the employers. I know that to be the case with numerous union officials. We have to be careful that the minority, the manipulators and the abusers, do not colour what to me is a very effective and long-standing right. I fear that bodies like the ACCI representing their employers have at the back of their agenda the removal of the right rather than the removal of the abuse of the right.

Mr Harris—I can only repeat that we see right of entry as playing an ongoing role in our workplace relations system. We support the right of unions to represent their members effectively. We do not think this bill will undermine that right but it is appropriate that employers also have protections against abuse and that the right is exercised in a responsible manner. We think the bill addresses that issue.

Senator CROSSIN—Mr Harris, you said in your opening statement that you believe that the right of entry should be operated responsibly and with restraints. If I put it to you that, in the 2003-04 period, the commission only revoked seven permits, wouldn't you say the system is already operating responsibly?

Mr Harris—I could not really conjecture on the reasons for that level of revoking of permits. There could be a variety of explanations. As I mentioned earlier, I think that a lot of the disputes about right of entry do not percolate through to actual commission matters or legal proceedings. The bill would provide the commission with greater guidance for the circumstances in which permits would be revoked. We think that the circumstances outlined in this bill are completely appropriate for revocation.

Senator CROSSIN—What is ACCI's definition of a fit and proper person then?

Mr Harris—I think that is a fairly well understood phrase.

Senator CROSSIN—I am wondering what your interpretation of it might be.

ACTING CHAIR—This applies to lawyers, doesn't it?

Mr Harris—Someone who has a track record of responsible behaviour and someone of good character who is committed to exercising responsibly the rights that they have been given under this act.

Senator CROSSIN—Surely if the registrar then issues those permits there is nothing in the current system that indicates, to me, that it is not working. Surely if there were greater levels of abuse of that right of entry then we would see a much higher number than seven being revoked. The power is there for employers or employer organisations to make that application now.

Mr Harris—The additional guidance provided by the bill will assist all parties in knowing what their rights and responsibilities are in the circumstances under which permits should be revoked. Although that particular type of application for revocation is not as common as others, it is an issue that is very commonly part of the range of matters that find their way into disputes before the commission, so it certainly is there. As I stated earlier, it is an issue which we regularly receive feedback on. I am not sure how often it percolates to the point of an application for revocation but beneath that level there is certainly a great deal of activity in relation to right of entry.

Senator CROSSIN—You said before that you did not believe that this bill would in any way breach any ILO convention. I put it to you that, in interpreting the principles of freedom of association and the right to organise, the freedom of association committee of the governing body of the ILO has held that:

Workers' representatives should enjoy such facilities as may be necessary for the proper exercise of their functions including the right of access to workplaces.

What is it then about this current law that you believe does not contravene that intent?

Mr Harris—Right of entry has always been regulated by a statute or by awards. It has never been an at-large right; it has always been subject to a regulatory framework and it has always been subject to restriction. I understand that the relevant ILO convention says that trade union representatives should have access to workplaces with due respect for the rights of

property and management. In our opinion, that provides support for the view that right of entry provisions should provide appropriate protections for employers against abuse or an inappropriate level of intrusion into the workplace.

Senator CROSSIN—But there are laws that you can currently turn to if that is the effect—aren't there?

Mr Harris—We think this bill would improve the operation of the current laws.

Senator CROSSIN—Your organisation has 350,000 members. That is pretty impressive. How do they get to join ACCI? Do your state, territory and regional branches go and visit businesses and talk about the benefits of ACCI?

Mr Harris—No. We are basically the equivalent of the ACTU. We are a peak body for employer organisations, so our members are Master Builders, the Mines and Metals Association, and VECCI, the Victorian Employers Chamber of Commerce and Industry.

Senator CROSSIN—What about if we filter down the structure—and I am aware of the structure. Let us take the chamber of commerce in each state and territory. How would they attract members to the chamber of commerce? Do they visit workplaces and talk about the benefits of joining the chamber?

Mr Harris—Like any other business in our community, they advertise, they promote their services and they have web sites.

Senator CROSSIN—Would they walk through the door and introduce themselves to the person who owns the business?

Mr Harris—They do not have the legal right to do so, but if they are invited into the workplace, I am sure they may do that.

Senator CROSSIN—Are you suggesting to me that they would only go in if they were invited rather than just dropping in to say, 'Hi, I'm from the chamber. Do you want to have a chat'?

Mr Harris—If a business is not interested in their services and they turn up to the front door, they can be told to go away.

Senator CROSSIN—How would you envisage that people in rural and extremely remote places in this country—let us say Indigenous communities, because there is a substantial number of people who work in those communities—might find out about the benefits of trade unions, given limited access to the internet or even television channels, let alone newspapers in those areas?

Mr Harris—There are issues for people living in remote communities in relation to health et cetera. Finding information is more difficult for those people than for people living in big cities. I am not sure how active trade unions necessarily are in those remote areas. I could not assist you any further.

Senator JOHNSTON—Mr Harris, thank you for your submission. I really did appreciate reading it. I am familiar with a number of cases that I think are the genesis behind this legislation. I will tell you what they are: the Victorian forests industry case; the BGC Construction Pty Ltd v Construction, Forestry, Mining and Energy Union case in Western

Australia, which was a state-federal issue; the ETU's Mr Glover down in Victoria—that was always a bit of a problem; the Sizer and MacDonald case in Western Australia; the Office of Employment Advocate v Macdonald—again, CFMEU in Western Australia; ANZ v Financial Services Union in Melbourne; and CSR and Humes in New South Wales. The common thread through those cases, which I think pretty well encapsulate the current state of the law, is that it is the CFMEU by and large, in particular, even in a subheading of Western Australia and Victoria.

What concerns me about this legislation—and I know where you are coming from and I would obviously support the legislation, given what I know about Western Australia—is that, when I read some of the submissions we have got here, there are a lot of babies being thrown out with the bathwater to some extent. What we have in here is that the definition of 'fit and proper purpose' is set out in the act. It worries me that your constituents, your members, are actually going to be worse off with a model of 'fit and proper purpose' because what has happened is that in section 280F, we say:

> (1) The Industrial Registrar must not issue a permit to an official
>
> unless the Industrial Registrar is satisfied that the official is a fit
>
> and proper person to hold the permit.

In subsection (2), we go on to say what a fit and proper purpose is—that is, a person who has received appropriate training. I will come back to that in a minute because I want to put something to you about training, but we go on to say:

> (b) whether the official has ever been convicted of an offence against an industrial law;

That is a terribly inhibiting issue: the commissioner cannot issue a permit to a person who has ever been convicted of an offence. I would have thought that the goodwill that has been built up over, say, 10 or 15 years between an industry and a union might be affected, because if the union has representatives who in dark days gone by—maybe 20 or 30 years ago—were convicted, those people cannot hold a permit. I would have thought that would be to the disadvantage of your members because you might be getting on very well with such a person and have built up a long-term relationship. Under this section, that person is not entitled to use the relationship. We have already established that it is a niche—that is your word—of industry that is the problem. So if one of the outworkers unions has a representative who has been convicted, he cannot hold a permit. We go on to look at these other things:

> (c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:
>
> (i) entry onto premises; or
>
> (ii) fraud or dishonesty;

We have got laws that say that these convictions can be suspended, discounted, absolved by application to a commissioner of police. This does not appear to accommodate that. What worries me is that we have ensnared a broad range of people that your members might want to deal with because they have a longstanding, good relationship with them.

Senator MURRAY—When you are referring to offences, you mean something as mild as perhaps traffic and road offences—that sort of thing?

Senator JOHNSTON—Entry onto premises may even be a disorderly conduct where you go on to drink out of a tap on someone's property and you get a cursory conviction that is not maintained or deemed to be spent. It seems unclear to me. I want to know: how many current permit holders who have never been challenged—apparently, on the basis of the fact that they are still permit holders—would be affected by this act into the future? All I am worried about—selfishly, as a conservative in this parliament—is that your members are going to be dealing with Fred Smith one day but because he has got some conviction, when his permit expires and he goes to get it renewed, he cannot come back. That is a problem, isn't it?

Mr Harris—I think it is appropriate that people who are issued with permits have a track record of acting responsibly when they have exercised right of entry powers. If the issues you have outlined were considered to be issues that needed to be addressed, one way to look at that would be to place some sort of temporal cap on some of those provisions.

Senator JOHNSTON—That is right. I agree with you and I am sure that these provisions do not prohibit individual agreements and protocols being established between peak bodies such as yourselves, unions, nominating representatives and what have you. But remember the permit structure says that the industrial registrar must not issue a permit. That is totally inflexible. I can see situations where you would want him to issue a permit, notwithstanding that there may be something in here to suggest, or which binds the registrar to say, that the person is not fit and proper. I think that is a problem and I would like you to think about that, because I can see your members saying, 'Oh, crikey.' In the building and construction industry, I do not see it as a problem. We have tarred and feathered the whole of the union movement for the recalcitrance of those people behind the cases that I have mentioned to you, as I understand it. I see this as a significant problem.

One of the other things I want to raise with you is the words in subparagraph 2, 'appropriate training.' What on earth would that mean? I do not think it is defined. Can I suggest to you that what is required here is that your peak body needs to sit down with the ACTU and you need to nut out some protocols about which you and your members and the unions that are affiliated with the ACTU can say, 'This is the way we are going to train people. This is the way we are going to establish a set of parameters that everybody understands and knows.' Isn't that a logical way to solve a lot of these problems?

Mr Harris—I am not sure how interested the ACTU would be.

Senator JOHNSTON—You can only try, can't you?

Mr Harris—We would certainly be interested in having discussions with them about developing training resources for people who are going to be issued with permits for the exercise of right of entry.

Senator JOHNSTON—On each side of the industrial equation, employer and employee, there are always going to be bad eggs. The employers have a number of bad eggs that can continually breach the law to the detriment of employees. Somehow we have to solve the right of entry problem but retain the capacity for unions to actively pursue and protect the wages, terms and conditions of their members. I think the six-month situation is not unreasonable. Did you make a submission to the minister at any stage about the six months?

Mr Harris—No, we did not. But we think, unless an organisation is undergoing a particularly high level of turnover, six months is completely reasonable. You are going to be able to talk to all the employees.

Senator JOHNSTON—The bill at 280J says:

> If the Commonwealth is satisfied that a union, or any official of a union, has abused the rights ...

What I am worried about here—and your learned body might take this up with the minister—is that those are very subjective terms that do not appear to have any proper definition. All I can say to you is that this is a lawyer's feast. You need to codify, quantify and tighten up what is abuse, because you will go up before some industrial judge when there is abuse—and we all know what abuse is in a layman's sense—and it is not going to be able to be discerned. It does not say what the standard is. Does the judge find it beyond reasonable doubt or does he find it on the balance of probabilities? I have not read the rest of it; it might say so, but I did not see it as obvious. These things concern me. When we try and fix the law we have actually made it a little bit more difficult for employers in some respects.

ACTING CHAIR—Thank you, Mr Harris, for your submission and your presentation today.

[9.53 a.m.]

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

ACTING CHAIR—Welcome. The committee has before it submission No. 19. Are there any changes or additions?

Mr Thomas—No.

CHAIR—The committee prefers to take evidence in public. It will consider any request for all or part of evidence to be given in camera. I now invite you to make a brief opening statement before we begin our questions.

Mr Thomas—The RTBU, the Australian Rail, Tram and Bus Industry Union, is a federally registered union with some 35,000 members employed throughout the various states and territories. Our members are employed in the operation and maintenance of the railways, tramways and publicly operated bus networks in a number of cities.

The RTBU is opposed to the provisions of this bill and seeks that the committee recommend that it be rejected by the Senate. It is our submission that the practical effect and indeed the intention of this bill is to make it much harder for employees to join a union, to be represented by a union and to participate in the activities of a union. This effect and intention is achieved by narrowing the interface between a union and its members and/or potential members. Further, the effect and intention is achieved by enhancing the capacity of an employer to deny its employees the opportunity to be represented by a union or to undertake a process of considering whether or not to join a union. To use an analogy, if it were a card game, it would be suggested that one was stacking the deck.

This is manifest through provisions in the bill that comprise unnecessary and unreasonable impediments on the right of a union official to enter a workplace. the enhanced use of the permit system to deny or limit the right of a union official to enter a workplace, restrictions on the grounds for entry and the number of entries, the imposition of employer directions on meeting places and the route thereto amongst others establish a kind of labyrinthine structure of bureaucracy and regulation to undermine the capacity of a union to simply speak to his or her members or potential members, and vice versa.

If you look at the terms of the bill and extrapolate who could get involved in the simple issue of a right of entry you could have the union, the employer, the employee, the registrar and the Australian Industrial Relations Commission. You could throw in the Office of the Employment Advocate and, in certain places, you could add the Building Industry Taskforce. We could go further to the Federal Court and a number of big city law firms. The list goes on and on over simply the right of a union officer to enter a workplace. The right of a country's citizens to organise collectively is well known. Members of this committee would be well versed in the relevant ILO conventions, even though it is noticeable that, in submissions by the department and from a number of employer groups, such as the ACCI and AMMA, ILO conventions are not mentioned. There would be no clues for guessing why.

Union membership is more than the mere holding of a membership card, as the Federal Court and the European Court of Human Rights decisions quoted in our submission make

clear. To the extent that the legislation places unnecessary and unreasonable barriers in the way of citizens being able to access and utilise their unions, it represents an attack on the right to organise. In this regard, it is noted that the changes reflected in the bill have no objective or evidentiary foundation. No party that supports the bill provides any evidence of a list of so-called union abuse that justifies the tightening of the existing law. On the other hand, what data there is shows that there is not a problem—indeed, not even a semblance of a problem.

The RTBU's submission identifies that, over a period of three years, the percentage of permits revoked was 0.007 of a per cent. No RTBU official has ever had his or her permit revoked, nor has the RTBU been embroiled in disputes involving a right of entry. We have not been involved in disputes within the commission that have not gone on to applications under section 285. I have been a union officer for roughly 20 years. I have never been denied the right to enter a premises. I have never been asked to leave a premises. I have never been involved with a group of other unions and union officials who have been asked to leave or have been denied entry to a premises.

In the absence of evidence, the rationale is that put by the department. It says, for example, that it is the appropriate body to investigate breaches. Paragraph 175 of the New South Wales department's submission states that federal inspectors have prosecuted only 10 breaches Australia-wide in the last two to three years, while 450 have been prosecuted by the New South Wales department. It is also the case that the federal department has stated that it will not prosecute breaches of the act, awards or agreements where the claim is for less than $10,000. If that is the case, it constitutes to us evidence for enhancing the ability of unions to enter the workplace rather than diminishing it.

I come to the issue that has been used to justify this legislation—that is, uniformity between state and federal legislation. We submit that that is a red herring. The only other view that you can form is that somehow the current conservative parties have walked the road to Damascus and found centralisation at the other end of it. There is nothing there to suggest that that is the case. I point out that in a recent article in the *Sydney Morning Herald* Premier Carr made a proposition to the minister for health that there be a national dental health scheme. That was rejected out of hand. So from the point of view of having a national scheme, it appears to us that it is more a case of opportunism. It is our submission that this is being used by the government because it wants to make life for unions more difficult, and this is a way of doing it. If the situation had been reversed, and the state legislation was tighter than the federal legislation, I doubt whether the bill in its current form would be before the Senate.

In summary, unions have been in workplaces for years. Since at least the late 19th century they have been entering and leaving workplaces. Over the greater part of that time there has never been seen to be a need to regulate to this degree the capacity of unions to enter workplaces. Until 1996 the legislation was relatively brief and most of the terms and conditions were included in awards. Throughout that time there has been no evidence that it has been used and abused, and in our submission there is no such evidence now. For that reason we say that the legislation that is before the parliament has a lot more to it than merely some alleged claims that unions are abusing their right of entry.

ACTING CHAIR—Thank you, Mr Thomas. I guess if you walked down that road to Damascus in search of a unitary system, you would find Senator Murray at the other end, so we will go straight to Senator Murray.

Senator MURRAY—Mr Thomas, you make some good points. Of course, in your own person, you represent the very argument that, in addressing abuse which does exist, you must avoid making a working system more adversarial and less workable. I think you make a good case. There is the fundamental issue, though, which is particularly apparent in multi-employer sites such as building sites or those sorts of operations, that, if you have two conflicting right of entry regimes set up by state and federal law, it leads to confusion and manipulation. Do you oppose the view that there should just be one right of entry regime applicable on one site?

Mr Thomas—Not as a matter of principle. The issue before us is not so much what jurisdiction right of entry should be in but rather what the nature of right of entry should be. My point is that I see the issue of federal versus state as a red herring in all of this. The legislation is not based on some principle that it is preferable that this form of right be the preserve of the Commonwealth rather than the states. In a principle sense, you are correct: it is rather silly to have two conflicting systems operating together. It just sets up all sorts of problems, which it has done from time to time. But we also have to face the fact that we have had federal and state industrial systems since at least 1904.

Senator MURRAY—In your field, of course, you are aware of the wider union movement and the wider issues. My understanding and my reading of court cases, disputes and occasions where right of entry has been a matter for public comment is that very seldom has it attached to recruitment or servicing of members. Most commonly it is attached to alleged breaches or actual breaches: the areas of wages, conditions, safety and those sorts of things. Yet this legislation attacks recruitment, which seems to me not to be the issue. If there is abuse, it is in the other area. Is that a correct judgment?

Mr Thomas—I think that is a correct judgment. Those sorts of provisions in the bill only reinforce our view that this legislation is not about correcting existing or perceived levels of abuse by union officials in entering the workplace. It goes beyond that. In our view, it goes to trying to put unions in some form of a straightjacket.

Senator MURRAY—With regard to that narrowing of the right of entry for the purposes of recruitment to once every six months, to my knowledge some unions enter a workplace once a decade for recruitment or once every five years. In other places, because of the turnover or the nature of the work force, it might be once a month if it is a highly casualised work force, for instance. That is true, isn't it?

Mr Thomas—I think that is true. There are myriad examples. It depends on the workplace. It depends on whether the union is already organised in the workplace and, as such, may use internal delegate structures for recruitment purposes and the full-time officer does not need to enter to do that. Where I think the issue of recruitment really comes into effect is in new workplaces or expanding workplaces and, it seems to me, that this is the issue we have seen in the courts or in the media. If you are talking about building and construction, the BGC issue—somewhere up in the Pilbara or wherever it was—was an example of where a new project was opening. It was a new work force and part of the problem there was that prior to

the work force entering the place, the employer ensured that they were put onto AWAs and the union was kept out. When the union decided it would go in and endeavour to recruit these people, it jumped up and down. Sometimes the union is entering the workplace because it wants to recruit them and the employer is setting up a system to keep them out. There is a recipe for conflict and that is what happened.

Senator MURRAY—You would agree with my basic thesis that if the law needs to pay attention to the abuse of right of entry, it should focus on the area where that abuse is occurring, which is not in recruitment and servicing of members but in the few cases which have been outlined where people are abusing the other purpose for right of entry.

Mr Thomas—The material before the Senate and what you have seen in the papers—

Senator MURRAY—Sorry, Mr Thomas, I have to move quickly because of the time we are given. The point I am making is this: this law badly affects a union like yours, which, as I understand from your evidence, has not got involved in these problems, because it will directly affect your recruitment and servicing abilities. If the legislation pulls back from that area it will be to your good effect because you will be able to carry on as you are at present.

Mr Thomas—Yes, it will.

Senator MURRAY—The certified agreement shall no longer be able to contain a right of entry provision under section 170LU, which says that the commission must refuse to certify the agreement—in other words, the only bit of law that should be referred to is the new part IXA. That is very common now in law, that a single piece of legislation is referred to by multiple legislation. But the effect here may be deleterious. I know that unions can then go and say, 'You will not let us put it into a certified agreement but we will have a common law agreement and it will still apply but stand outside.' The difficulty with that is that a common law agreement is not enforceable in the Industrial Relations Commission, which is, hopefully, a cheaper area to go to. It is only enforceable in the courts and that makes for extra costs and extra complexity, perhaps. It does seem to me that where both parties are content to have right of entry provisions, provided they do not disagree with the material or substantive nature of the law, they should be allowed to do so. Why shouldn't an employer be able to say to the union, 'We do not mind if you come onto the site every day,' as an example? That is your attitude is it not?

Mr Thomas—Yes. If the union and employers sit down and agree to the ways and means by which the union enters the workplace and a number of other rights to do with access to information and the use of various parts of the premises, why shouldn't they? The recent Macquarie University enterprise agreement has expansive provisions on the right of entry. If that is what a union and an employer choose to do, then why shouldn't they? We are now being told we cannot.

Senator JOHNSTON—Who has told you that? Who has told you that you cannot do a separate agreement? The explanatory memorandum for the legislation says that you can.

Mr Thomas—We cannot have it in a certified agreement.

Senator JOHNSTON—This is the Electrolux case?

Mr Thomas—No. In this draft legislation you can no longer have right of entry provisions in a certified agreement. It currently states that we cannot have them in awards. This legislation will say that we cannot have them in certified agreements. You can have common law agreements but they are fraught with the difficulties of filling the requirements of the common law.

Senator JOHNSTON—Let us come back to how many members you have. How many members does the RTBU have and across which states?

Mr Thomas—We have 35,000 members in all states and territories.

Senator JOHNSTON—Is it fair to say that your members are predominantly or virtually exclusively government employees under the heading of transport, inside each state?

Mr Thomas—That may well have been true up to, say, 10 years ago, but freight transport by rail is now private, with the exception of Queensland. The Victorian suburban rail network is private. Historically, yes, that was the case, and where the railways and trams are run publicly, yes, they are ours. I do not know what it might be at the moment—fifty-fifty? That is a guesstimate.

Senator JOHNSTON—But are those privatised organisations public companies or are they actually private companies that someone owns?

Mr Thomas—Yes. Pacific National, for example—

Senator JOHNSTON—Which is Patrick.

Mr Thomas—It is a combination of Patrick and Toll. We deal with a lot of big construction companies like John Holland and Thiess, who perform maintenance work.

Senator JOHNSTON—What is the annual subscription to be a member of your union?

Mr Thomas—It can vary from state to state, but where I am it is about $320.

Senator JOHNSTON—How has your membership been over the last, say, 10 years? What has been happening to it? Is it in decline, stable or what?

Mr Thomas—It has stabilised in the last three years and has begun to grow. Throughout the nineties, with the massive structural adjustments, so to speak, of the railway industry in this country, there is absolutely no doubt we took a fairly significant drop in membership. To give you an example: in 1986 the State Rail Authority in New South Wales employed 46,000 people; in 2004 it employed maybe 12,000. For a union which is based in that industry, the fate of that industry, in a sense, is—

Senator JOHNSTON—So there has been substantial restructuring for your members. What sort of rate of problems do you have? How many various employer groups have you got? I can think of obviously six that you have, for the states, and then you have the privatised entities. So what have you got—20?

Mr Thomas—By taking the example of the number of companies that we have served logs of claims on in the last four to five years, it is about 80.

Senator JOHNSTON—Is there a problem with the relationship you have with those?

Mr Thomas—There are some we get on better with than others. This week we are doing well; next week we are not. But we have never been confronted with belligerent opposition to our even getting anywhere near the place.

Senator JOHNSTON—So you have not had a trip to the Industrial Relations Commission on a dispute with an employer over anything other than, probably, the wage level?

Mr Thomas—Wage level, working conditions, work practices.

Senator JOHNSTON—Have you had a right of entry dispute?

Mr Thomas—No. The only right of entry dispute that is mentioned in our submission was in 1997 in Victoria.

Senator JOHNSTON—Who was that with?

Mr Thomas—Amongst other people, the Hon. Jeff Kennett.

Senator JOHNSTON—So it was with the government?

Mr Thomas—It was with the Public Transport Corporation. It was publicly owned then. There was a large dispute about an enterprise agreement. Some industrial action occurred at the Labor Day weekend and coincidentally not long after afterwards came applications to revoke the permits. But they were never revoked.

Senator JOHNSTON—I want to just pause to thank you for your submission, because I did find it very interesting and very helpful. You are really scooped up in this legislation by a matter of chance, to some extent. Do you accept that? It seems to me that there are no problems with you and your relationship with employers, and everything seems to be rolling along reasonably well. Is that correct?

Mr Thomas—That might be the view of some. Our view tends to be that, as a union, we are regarded as fair game. The current government has a position on unions. We are a union, therefore we are—

Senator JOHNSTON—Do you mean the federal government?

Mr Thomas—The federal government, yes.

Senator JOHNSTON—The federal government is not an employer that you have an industrial relationship with. But you do not seem to be having any brawls, if I can put it in layman's terms, with your employers.

Senator MURRAY—On this issue.

Senator JOHNSTON—On this issue. On very many issues at all.

Mr Thomas—We have our disputes over enterprise agreements and there are stoppages over enterprise agreements. There are the usual day-to-day matters. You may recall there have been enormous problems in Sydney in recent times with transport and the union been blamed for all sorts of things. But to the extent that some other unions are blamed—whether that is justified or not I suppose is a matter for another day.

Senator JOHNSTON—The contrast I want to draw is very simply the contrast between, say, the building and construction industry unions in Western Australia and Victoria and a union like yourself. There seems to be a chalk and cheese comparison. It strikes me that the

principal problem with respect to right of entry revolves around the use of right of entry for leverage during a pattern-bargaining period. How do you respond to that? Is that true or is that false?

Mr Thomas—I will put to one side the issue of pattern bargaining because that has all sorts of—

Senator JOHNSTON—Bargaining periods.

Mr Thomas—It is during a period of bargaining that the union is most likely to want the right of entry and it is during a period of bargaining that the employer is most likely not to have them enter.

Senator JOHNSTON—That is right. So under the umbrella of a bargaining period, when it is about money, that is when this issue rears its ugly head. You probably do not use it. I am not sure; comment. Do you use right of entry for putting pressure on employers?

Mr Thomas—We have never had this issue.

Senator JOHNSTON—Exactly. That is the point I am making. The point is this: in Western Australia, where I come from, it is used all the time as a point of leverage and for applying pressure. In other words, I think it is misused. All I want you to do is to say—

Senator MURRAY—In one industry.

Senator JOHNSTON—In one industry. I would like you to say, so that we get an understanding of what is actually going on here, is that you are being tarred with a brush that is unjustified given the relationship you have with employers over a long period because of the recalcitrance of a select couple of bad eggs. Is that not the case?

Mr Thomas—I say that we are being unfairly tarred with the brush. Whether that is as a consequence of the views and the behaviour of some other unions or whether it is because of broader views about the role of unions per se is another issue entirely. What I am not likely to say or to get into is some issue about the rights or wrongs of what has taken place in the construction industry in Western Australia.

Senator JOHNSTON—I would not want you to criticise your brothers.

Senator CROSSIN—The Financial Sector Union has put to us that there have been seven permits revoked in 2003-04. Thanks for the research in your submission, which gives us even better statistics. Over a three-year period, only 15 permits have in fact been revoked. We have had evidence already this morning from ACCI, as you know. In reading the submissions I cannot find any evidence at all that shows that there is difficulty in getting permits revoked. The argument we were given this morning is that a lot of employers perhaps do not bother to go to the commission about it. But it would seem to me that the system is not broken, that the system is working and that if employers in fact want to go to the commission to revoke your permit there is a capacity to do that. We have not seen any evidence today of a way in which the commission is restrictive in its ability to do that. Is that your view of how the act is currently operating?

Mr Thomas—Yes, Senator. I have read many of the submissions before you and you have given everybody an opportunity to put the evidence on the table if there is such evidence.

From what I see, there simply is none. The department refers to anecdotal evidence. That is about as brave as it gets on this matter. That is why our submission says that this is not about addressing some sort of systematic abuse by unions of right of entry. It is deeper than that and it goes to the whole question about how this government sees the role of unions in a contemporary society—and it is not much.

Senator CROSSIN—You raised the issue of what constitutes reasonable grounds, you raised the issue of the definition of an officer and even premises—

Mr Thomas—Premises, yes.

Senator CROSSIN—and I can see in your situation where you are coming from when you talk about premises. But would it not be the case that your members also either work casually or do shift work?

Mr Thomas—Yes.

Senator CROSSIN—So, if you are restricted to going to the workplace only twice a year, doesn't that in fact restrict the number of people you have access to?

Mr Thomas—Absolutely. In our organisation, employees overwhelmingly work 24 hours a day, seven days a week, 365 days a year, spread over the entire country—remember you have maintenance crews at spots all along the track. If you say that you can turn up twice a year for the purposes of recruitment, you might as well say you will not turn up at all. To suggest that we have now all got the use of the internet and email is to belie a real understanding of most workplaces and, most certainly, workers in our industry, who are not going to go to emails or web sites to start searching for the way to join the union. In most places these days the marketing exercise is you going to them. They are not going to come to you.

ACTING CHAIR—Thank you, Mr Thomas. Unfortunately, we need to wind up, so thank you for your submission and your presentation today.

Proceedings suspended from 10.26 a.m. to 10.38 a.m.

NOLAN, Mr Peter, Director, Workplace Relations, Australian Industry Group

ACTING CHAIR—Welcome, Mr Nolan. The committee prefers all evidence to be given in public. It will consider any request for all or part of evidence to be given in camera. The committee has before it submission No. 20. Are there any changes or additions to your submission?

Mr Nolan—No, there are not.

ACTING CHAIR—I now invite you to make a brief opening statement, followed by questions from the committee.

Mr Nolan—Ai Group welcomes the referral of the bill to the Senate committee and the opportunity to make a submission today. Clearly, under the Workplace Relations Act, the registered organisations have an important representative role to play and that is clearly recognised within the terms of the act. Accordingly, an appropriate balance needs to be struck between protecting employers from the potential misuse by unions of right of entry powers and retaining a right of entry regime, which enables unions to represent their members quite effectively. In our submission, we believe the provisions of the bill strike an appropriate balance.

Just dealing with some of the issues—not the total submission—clearly the bill would continue to allow union officials to apply to the Industrial Registrar for an entry permit, and we believe that the proposal about the fit and proper person test is an appropriate test to be applied in those circumstances. We believe also that the bill addresses the interaction of federal and state right of entry laws and overcomes existing confusion and uncertainty. The bill does not attempt to intrude on right of entry under state occupational health and safety laws, and we think that is appropriate. The bill also deals with some problems which have been arising in relation to the investigation of suspected breaches of the act or awards. To that end, I suppose the greatest problem we have seen in the past has been the lack of requirement for a union official to identify the nature of a suspected breach, which can lead potentially to fishing expeditions being conducted by unions to access payroll records.

A further problem with the current act is that it does not specify where union officials can hold discussions with employees in a workplace. That is an issue that has been the subject of a number of commission decisions as to what is appropriate. I think the normal practice is that unions would seek to use a lunch room to hold discussions with employees. Employers have a view that that may not be the most appropriate place for those meetings to take place, because there may well be other people there who are not interested in hearing what the union has to say. We think the provisions in the bill do address that, with a reasonableness test attached to it. In the event that a venue nominated by the employer is deemed not to be reasonable, there are quite obviously actions that can be taken to deal with that.

Another problem is access to employment records, particularly for employees who are not members of the union. We think there are some significant privacy issues there. Some employees certainly would not want union officials accessing their employment records, and we see that the bill addresses that issue in a fair way. Those are some of the more significant

issues that we have included in our submission. Our written submission quite clearly sets out our position in relation to other proposals.

ACTING CHAIR—You talked in your submission about the potential misuse of right of entry provisions. I guess that is one of the problems I have: there does not seem to have been any significant hard evidence that there is misuse of the right of entry provisions at the moment, and you refer to 'potential misuse'. Are you aware of misuse of the right of entry?

Mr Nolan—I would have to say that I cannot cite particular cases. We have within the Ai Group what we call our BIZ Infoline, which is the equivalent to a call centre for members to ring in. I would make the observation that right of entry is a fairly significant issue when one analyses the nature of the calls that come in to the BIZ Infoline. Just yesterday I got out some statistics which would be very conservative, and that is that we have had about 350 or more contacts—354, I think it was—in the past 12 months just on the right of entry issue. I am not saying that that is evidence of misuse, but certainly it is evidence of our member companies not properly understanding what the rights are and seeking clarification. It does demonstrate that, if nothing else, it is a significant issue that our members are dealing with.

ACTING CHAIR—Yes. And there may be a whole range of reasons and it may simply be a matter of education.

Mr Nolan—Yes.

ACTING CHAIR—You also indicate in your submission that you are concerned about unions using right of entry not really to address any hard issue but merely as a fishing expedition. But isn't it the case that the commission already has the power to address that if that is a concern of employers? I specifically refer to a statement from Deputy President Polites in the case BHP Billiton iron ore v William Tracey where he said:

> If it became apparent that the right of entry provisions were simply being used as a fishing expedition, then the Commission would have the power to place additional limits on the exercise of this power.

Given that the commission already has the power to deal with that aspect of your concern, why do we need to go further with legislation at this point in time?

Mr Nolan—This is an issue that arises quite regularly in dealings with our members—that is, where a union has sought access to payroll records. The point we would make is that, whilst that access might be available under the Workplace Relations Act in the sense of individual circumstances, we think it is a broader, more generic issue. If there is a suspected breach and to ensure that access is not just a fishing expedition, it is more appropriately dealt with in the way that the bill deals with it—that is, to say, 'You tell me, X, Y, Z company, what the suspected breach is and we will then know what records to make available.' If there is inspection of work involved, that gives us a better idea of what those inspections might involve and what areas are involved. We just think it is more appropriately dealt with through the bill.

ACTING CHAIR—But doesn't that then come back to my first point: if there is no hard evidence that there is any abuse of the system at the moment—and you refer to it as potential misuse—what is it that we are trying to legislate for? I understand your point, and maybe that was more of a rhetorical question than a real one. The other thing you said in your opening submission is that one of the problems is that union officials would generally like to meet in

the lunch room and that that can be disruptive to work. I guess I disagree with you on that fundamental point—I do not think meeting in the lunch room is very disruptive of work. In fact, it is probably the preferable place to meet, from all sides. Again, doesn't the commission already have the power and discretion to order that meetings take place in a particular area—

Mr Nolan—Yes—

ACTING CHAIR—if there is that concern?

Mr Nolan—Again, it is a matter of what is the most appropriate way to deal with that. That is where our submission is coming from. The approach that you are suggesting concerns the powers that exist under the Workplace Relations Act at the moment which require, in an individual instance, some sort of application being made to the commission in relation to that matter. We believe, again from the point of view of appropriateness, that it is more appropriate to have the issue dealt with whereby the 'reasonable' is clearly there in the bill. It has to be a reasonable venue that is nominated by the employer and the right of that can be challenged through the commission if the union deems it is not. So it might be reversing—

ACTING CHAIR—Reversing the onus, yes.

Mr Nolan—the situation, but I think it provides some clarity. Quite often the first point of argument on access is where the meeting is going to be held. I think that has led not necessarily to issues of magnitude that need to go to the commission for resolution but certainly to a very unsettling start to that primary access by the union in not even being able to understand what an appropriate venue is. We think it is appropriate, in the way that the bill is structured, for the employer to have a role in nominating an appropriate venue for the meeting—then with that reasonableness test attached to it.

ACTING CHAIR—Thank you.

Senator BARNETT—Thank you for your submission, Mr Nolan; it is appreciated. Can I just clarify something up front. We have this federal legislation; we have the state workplace relations legislation, which is different in each state in terms of right of entry; and then we have the awards. Excuse my ignorance, but do some of the awards include right of entry conditions?

Mr Nolan—No, certainly not in the federal jurisdiction. We have not had a state jurisdiction in Victoria for some years, until recently. I think the general principle is that right of entry was clearly dealt with under the Workplace Relations Act and was taken out of the award system through the simplification process.

Senator BARNETT—Are you saying there are no right of entry conditions in any of the state awards—or are there perhaps some awards around the country where terms and conditions must apply to right of entry under that award?

Mr Nolan—Sure.

Senator BARNETT—Because I do not know the answer.

Mr Nolan—If I could take that question on notice, I can certainly provide that information for you. I cannot answer it right at the moment. I think in Western Australia it is embedded in legislation.

Senator BARNETT—Yes. I think in each state it is embedded in legislation.

Mr Nolan—Yes, which would probably mean that it is not incorporated into the award system.

Senator BARNETT—Yes, that is what I am trying to determine, because then you have, with respect, another layer of potential confusion and duplication perhaps. In any event, each state's workplace relations legislation has its own terms and conditions relevant to notice, the appropriate venue, the reasonableness of the right of entry and those types of things. Is that correct? And it is different in each state?

Mr Nolan—It would differ in each state. Whether it goes to the extent that the right of entry bill before the Senate at the moment does, again I could clarify that for you, but I do not think it goes to the issue of venue, reasonableness or whatever as to where meetings might be held—

Senator BARNETT—It is more generic, is it?

Mr Nolan—Yes, I think it is.

Senator BARNETT—That is what I was hoping to ascertain. I asked the ACCI this question and they said that they would try and do some sort of matrix of what the provisions are in each state. If you can clarify that or do your own matrix, that would be of interest.

Mr Nolan—Yes. Fine.

Senator BARNETT—Because is it not a key argument of yours in favour of the unitary system that there will be one rule, essentially, in terms of right of entry across the country?

Mr Nolan—Yes, that is right.

Senator BARNETT—So if I am running a business in Melbourne with operations in other states then I do not have to check the different rules that apply to me in those different states.

Mr Nolan—That is correct.

Senator BARNETT—Is that a key argument in favour of this legislation?

Mr Nolan—Yes.

Senator BARNETT—Are there any other key arguments apart from that in favour of a unitary system for right of entry—or a unitary system generally, for that matter?

Mr Nolan—I chalked up 25 years with the organisation yesterday and, for as long as I have been there, there has been a very overt policy about a unitary system being more appropriate. We do not think it is appropriate, with the size of Australia's work force, to have a federal industrial relations system and then a series of state systems as well. So, organisationally we say that is an objective that we should try to achieve, and that is why we supported the introduction of common-rule awards in Victoria—because the alternative was to re-create another state system. We did not want that.

Senator BARNETT—Firstly, congratulations on your 25 years.

Mr Nolan—Thank you. It feels like 50!

Senator BARNETT—You have done very well. Secondly, in terms of AiG, how many members do you represent?

Mr Nolan—Around 10,000 nationally.

Senator BARNETT—And do you have any idea how many employees there are?

Mr Nolan—Over a million.

Senator BARNETT—Would many of those members have operations across state borders?

Mr Nolan—Yes.

Senator BARNETT—Most of them?

Mr Nolan—No, but certainly we have a significant number of national organisations who have operations in a number of states. I cannot quote the percentage on that, but it would not be the majority.

Senator BARNETT—But a significant proportion?

Mr Nolan—Yes.

Senator BARNETT—So again it is the argument in favour of one system?

Mr Nolan—That is correct.

Senator BARNETT—You mention on page 2 of your submission the CSR Humes case and Mr Andrew Ferguson, secretary of the New South Wales branch of the Construction and General Division of the CFMEU. You give an example where you highlight the problem in terms of exercising their right of entry powers. Apart from that, do you have other evidence to share with the committee in terms of the problems caused by the interaction of federal and state laws?

Mr Nolan—Again, if I could, I will provide some additional information on that. We focused on this case in particular because it almost highlights someone being multiticketed in a union and producing whichever ticket they need to get onto a particular site or whatever.

Senator BARNETT—Is this an isolated case or do you think this type of event might occur in other instances?

Mr Nolan—We think the commentary from Mr Ferguson that was reported in the *Workplace Express* is probably a view that is fairly widely held across the trade union movement. It says, 'If we can't get them on the federal ticket, we've got the state ticket. If we haven't got that, we've got the occupational health and safety right of entry ticket. So it doesn't really matter what happens to any one of them because we'll just use one or the other.' That is a very confusing issue and it is something that can be clarified by this bill.

Senator BARNETT—What is your response to the accusation that this is in breach of an ILO convention?

Mr Nolan—We have not focused on that in our submission. Probably the rationale for it is that we do not believe that this bill to any great degree affects the rights of employers and employees and their representative bodies. So we did not share the view that it has that sort of

impact. Sure, it represents change, but we have supported it because we think the proposals deserve support.

Senator BARNETT—In terms of the constitutionality of the legislation, do you have a strong view that everything is in order, that it is constitutional and that it is relying on the corporations power and perhaps other powers? Do you want to share your views on that?

Mr Nolan—I am not sure whether my views at the end of the day will determine that issue. Certainly the states might have some views about that, but we think on the surface of it the corporations power could be used to implement that. But there may well be a divergence of opinion about that.

Senator BARNETT—This is an issue we are debating more broadly at the moment; it is not just about this legislation in terms of the unitary system. AiG has supported a unitary system for some time. The reason I ask is that I assume that you have evidence to back up your claim that the constitutional powers are adequate.

Mr Nolan—Yes. Organisationally that is the view. If we had thought there was some difficulty as an organisation about the rights under the Constitution then we would have reflected that in our submission.

Senator CROSSIN—Given that the work force these days is highly casualised and there is a high degree of shiftwork, don't you believe that restricting the right of entry to a junior official to only twice a year is not recognising the flexibility of the modern workplace?

Mr Nolan—There could well be a view along those lines. There is clearly shiftwork in place. Workplaces have restructured over a period of time. We think, however, in the context of the bill that we need to avoid open access just with 24 hours notice to the workplace. In the context of the way in which the bill has been put up, six months is the period that has been identified and we do not have any alternative suggestion to that. We think the rationale behind supporting the bill is that the access issue is too available under the current provisions, with just 24 hours notice.

Senator CROSSIN—Are you suggesting to me that perhaps six months is too restrictive? If I am going into say, a primary school, I could probably go twice a year and say with some degree of confidence that one or two people might have changed. But if I am going to walk into my downtown Kmart store on behalf of the shop distributors union, I could probably walk in there four times a week and see an almost totally different set of people, depending on the time of the day or even the day of the week. Surely, though, the restrictions of twice a year—if you are saying that 24 hours is too much notice, and I have not seen any evidence in any of the submissions that suggests where there has been a problem with that—are too restrictive?

Mr Nolan—Our organisation's position is that, in the context of the bill, it is an appropriate time frame.

Senator CROSSIN—At the moment, we have had evidence that there have been only seven permits revoked in a 12-month period and 15, I think, over a three-year period. Do you believe that the commission has proved itself incapable of dealing with inappropriate behaviour, or breaches of right of entry?

Mr Nolan—No.

Senator CROSSIN—So what is wrong with the current system that needs further restrictions placed on it?

Mr Nolan—On the issue of revocation of permits, we really have not seen that as a huge issue, in the sense of our submission to the inquiry. I suppose companies may be reluctant to go through that process. Whether the proposals free that situation up or not, I am not sure, but I know there certainly have been cases where the commission has dealt adequately with applications to revoke permits.

Senator CROSSIN—But they are relatively few, if we are looking at seven in a 12-month period. If this bill goes through and permits are going to be revoked, employers will still have to take action in order to get those permits revoked. There is nothing in this bill that suggests to me that that is going to improve the situation, but it will place further restrictions on the current bill position.

Mr Nolan—I really do not have anything to add to that. You have clearly expressed a view. In the context of the bill, we have suggested some amendments in our submission. One of them, in relation to the revocation issue, on page four of our submission says:

The *Workplace Relations Amendment (Right of Entry) Bill* deals with many of the problems which have been arising regarding the interaction of Federal and State right of entry laws.

It is in that context that these comments are made. But we question if there could be more flexibility for the registrar 'to determine an appropriate length for the disqualification period', rather than having a mandatory period. The reason for that is that the mandatory minimum may not match up with what has occurred in relation to the revocation of a state right of entry permit. That is really the only context in which we address the issue of revocation.

Senator JOHNSTON—I think, listening to the chamber of commerce and you, it is clear that a right of entry is required that is effective yet not disruptive or open to abuse. I think that is a reasonably held position on behalf of employers. The problem I have with this legislation, if I do have a problem with it, is that what we have tried to do is to create a couple of legal concepts that I suspect ultimately will end up reducing the effectiveness and increasing the litigation, which to me, having been an employer, is something I want to avoid desperately. In section 280F—and I put this to the chamber of commerce—we have the notion of a fit and proper person. I suspect it is reasonably common that large employers, over time, build up a reasonable relationship with the union permit holder.

Mr Nolan—Yes.

Senator JOHNSTON—Everything works well and they can talk and they can nut out the problems that are there. I am not talking about a pattern bargaining period or protected action or anything like that, because that is where we get into some problems, but just the day-to-day, run-of-the-mill situation of, 'We'd better check on the blokes to see how they going and we want to come through.' Often I would expect that there would be no formality even.

Mr Nolan—Yes.

Senator JOHNSTON—That is an important concession on your part, because I think the system works reasonably well. If the union fellow with whom the employer has a relationship

has ever been convicted of an offence under industrial law he cannot get a permit. I think there needs to be flexibility there such that the Industrial Registrar, in granting a permit, can look at all the things that are in 280F(2). It says in 280F(1) that he must not issue a permit to someone who is not a fit and proper person, and in 280F(2)(f) it says that he must have regard to:

… whether a court, or other person or body, under a State industrial law, has cancelled, suspended or imposed conditions on a right of entry for industrial purposes that the official had under that law …

I would think a lot of officials would be caught because they would have had a right of entry that arguably had a condition of having to find a condition. The industry might have needed conditions to make the permit work safely. I see this as a bit of an open-ended thing that causes a problem. I would like you just have a think about that. A whole lot of good relationships may be severed because, when the permit is up for renewal after three years, if the person has something of a dim, dark history of even minor infractions, he cannot get a permit. I see that as a problem for the employer because you have got to build that goodwill up with a whole new permit holder. Is that a problem, do you think?

Mr Nolan—I think your observation is right that a lot of companies have developed reasonable working relationships with the local organiser or the broader union, I suppose. A lot of companies have, either through certified agreements or just by informal arrangements, relaxed the right of entry—the 24-hour notice situation, for instance, where they might say, 'If I'm calling past, is it all right if I drop in?'

Senator JOHNSTON—It is a courtesy thing and the relationship is a good one.

Mr Nolan—That is right. Clearly those officials where those relationships exist at the moment hold permits, so they are not subject to the sort of situation that I think you have just identified, whereby they have been convicted of something, because they had the ticket at the time that that relationship developed. I would suggest also that those relationships are most likely to develop with officials who conduct themselves well.

Senator JOHNSTON—The only problem I have with that is the renewal. I think the renewal is an application process. I suspect it is, and that is what worries me. That is the only issue that worries me. I have one final question; I know the chair wants to move on. I hope that I am assisting to solve some of these issues. A permit holder can come on but he or she has to suspect on reasonable grounds that a breach has occurred. I am uncomfortable with how that is going to work. Is it going to be a statutory declaration? Suspicion on reasonable grounds is almost an oxymoron. Suspicion is a gut feeling. It is a thought that there is something terrible here. But what is reasonable? It might be reasonable if I am a hard-nosed, experienced person who is in a tough industry, I smell a rat and it is a reasonable aroma, if you follow me. All I am worried about is that we get ourselves into greater litigation. I would like to see some codification of what reasonable grounds are. I would like to see some practical way that we have thresholds that need to be pierced so that everyone knows where they stand. Is it a stat dec or whatever? I am interested in your view.

Mr Nolan—As I indicated in my opening statement, investigating suspected breaches is one of the old chestnuts around this issue of right of entry. Our members are absolutely gobsmacked. Those who particularly have not had any dealings with unions before are

gobsmacked when we say to them, 'Yes, they do have a right to come in and investigate a suspected breach and, the way decisions stand at the moment, they don't have to tell you what it is.'

Senator JOHNSTON—You have to stand back and let them come in.

Mr Nolan—That is a very uncomfortable situation for our members at large. The other point and the point we are making here is about avoiding fishing expeditions.

Senator JOHNSTON—Correct.

Mr Nolan—If it is only a matter of accessing payroll records to see what that might do to assist in some sort of campaign of recruiting additional union members, we say that that is not what investigating a suspected breach is all about. We do support the proposition that says that they have to be able to identify what that suspected breach is. It also focuses the issue, doesn't it, because it identifies what the potential breach is that is being investigated and enables the company to prepare with appropriate material, information—

Senator JOHNSTON—Disclosure.

Mr Nolan—All that sort of thing. The act deals with a situation about being able to apply for a notice from the Industrial Registrar about not giving the 24 hours notice of coming in for a suspected breach. There is some protection there, if you like. It might, to a certain extent, even address the issue you raised.

Senator JOHNSTON—What I am worried about is that you get a stock standard suspicion document. I am looking at the building and construction industry, where there is abuse. I do not think a lot of your members are in that industry. You probably have some but—

Mr Nolan—We have quite a few.

Senator JOHNSTON—the point is, I do not think abuse is rife in the broader spectrum. I am looking at the abuse situation where the union will actually prepare a stock standard document. Then they go to court and of course the registrar approves it. So then they are right, for forever and a day, just to put that up and say, 'We're coming in.' What I want you to consider and assist me with is, firstly, is suspicion enough? Do you want the person identified who has made a complaint? Do you want a sworn statement that it is legitimate? Do you want a level of evidence? If you do, at what point do we become self-defeating—in other words, we are making the union jump through too many hoops in order to police a bad egg, which I think is a legitimate purpose on their part—such that we also close off the abuse level so that there is not a standard practice? As I have mentioned today, I have seen a number of cases. The Victorian forest industry is one, where 16 timber mills got done over on the same day. I would like you to think about that and say to me, if you can, what you think is acceptable in order to make the system work without abuse.

Mr Nolan—The key concern that we have is that at the moment there is no requirement to identify any suspicion, any suspected breach. As a first step we say that that is the starting point: what is the suspected breach? As I say, it assists the parties in progressing the matter. In our submission we also make the point about reasonable grounds for that suspicion. We are not saying that goes to identifying the employee that has raised the issue, necessarily, but to avoid the situation that you have mentioned about this sort of pro forma list: 'What do we use

this time? We have a list of 10 issues and we will pick No. 9 for this company and use that.' The reasonable grounds would underpin that suspicion and might alleviate the problem of a shopping list being developed.

ACTING CHAIR—Your discussion with Senator Johnston prompts me to ask whether or not you believe that there are more applications to the commission, whether they be dispute notifications or not, involving award or agreement breaches than there are applications to revoke permits.

Mr Nolan—I would say the former would involve more applications.

Senator MURRAY—Following up Senator Johnston's remarks, perhaps the union should just be asked to specify the grounds. 'Reasonable' surely is up to the registrar to determine, but the union should just be able to specify whatever grounds it wants.

Mr Nolan—Yes. That does not fit outside our thinking.

Senator MURRAY—You have, which is AIG's wont, thank goodness, suggested amending the bill twice, which is much better than those from business groups who just say, 'Pass it.' I want to ask you questions about those two. With respect to the damages issue, on the last page of your submission you say:

Consideration should be given to amending the Bill to require that the AIRC conciliate to endeavour to resolve the matter (for a 72 hour maximum period as applies under s.166A) before a party can pursue damages.

What you are really suggesting is a sudden death arbitration as an alternative to the lengthy and costly court process.

Mr Nolan—That process of the 72 hours comes under section 166A of the act. A notice of intention to take action in tort is filed—

Senator MURRAY—I remember negotiating the time period with the minister.

Mr Nolan—Indeed. But there is no arbitration involved in that. That 72 hours under the 166A arrangement—and we would say appropriately under this proposition—is an opportunity for the commission to try and resolve the differences between the parties before that step of going to court is taken.

Senator MURRAY—I actually phrased it badly in saying it is a sudden death arbitration. Of course it is a conciliation and if it doesn't work then you go on to courts. What I really meant to ask was whether you think it should be converted to a sudden death arbitration as an alternative.

Mr Nolan—No.

Senator MURRAY—Right. The other point you have made with respect to amending the bill is on the third page of your submission, where you are say:

With regard to point 2 above—

which referred to requiring the Industrial Registrar to revoke or suspend the union official's federal entry permit—

consideration should be given to amending the Bill to give the Industrial Registrar more flexibility to determine an appropriate length for the disqualification period.

That seems to me to reflect a reasonable principle in administrative law, namely that punishments of any kind should have a time frame applied to them, that certainty should be delivered and that there should be some flexibility for individual circumstances. Have you made that point to the department before, or is it the first time it has appeared?

Mr Nolan—This may well be the first time it has been raised.

Senator MURRAY—Do you have any wording in mind that you could assist the committee with?

Mr Nolan—We could, yes indeed. We do not have it at the moment but if I can take that on notice we can work on.

Senator MURRAY—I wonder if you would be good enough to write to the committee and suggest wording which would fulfil that outcome.

Mr Nolan—Yes.

Senator MURRAY—And perhaps whilst you are doing that you could fulfil the outcome of the other amendment recommendation.

Mr Nolan—The 72-hour one? Okay.

Senator MURRAY—Thank you.

ACTING CHAIR—Thank you, Mr Nolan, and congratulations on your 25 years. I hope for the last decade or so I annoyed you enough as well.

Mr Nolan—Thank you.

Senator MURRAY—There is a quote from *Jesus Christ Superstar* where he says, 'It has been three years but it feels like 30.'

Mr Nolan—The grey hairs I do have, Senator Marshall, can be attributed to most of those.

ACTING CHAIR—And vice versa, Mr Nolan.

Senator MURRAY—Looking at his head, you won.

[11.20 a.m.]

MASSON, Mr Rodney, National Communications Manager, Finance Sector Union of Australia

SCHRODER, Mr Paul, National Secretary, Finance Sector Union of Australia

ACTING CHAIR—Welcome. The committee prefers all evidence to be given in public. It will consider any request for all or part of evidence to be given in camera. The committee has before it submission No. 6. Are there any changes or additions to your submission?

Mr Masson—Not at this time.

ACTING CHAIR—I now invite you to make a brief opening statement to be followed by questions from the committee.

Mr Masson—Thank you for the opportunity to appear on what is an extremely important matter for the 60,000 current members of the FSU and the tens of thousands of potential members and employees of the finance sector. I would like to take the opportunity to make some opening remarks about our industry, our members, our employers and our history as a union and the impact we see arising from this legislation, all of which seeks to augment the written submission. I would then invite senators to take the opportunity of asking Mr Schroder to expand on those points.

The finance industry has been at the cutting edge of technological and global re-engineering, restructuring and change in this country. Along with this revolutionary change has come enormous change in the workplace. We still have retail outlets and branches, but we now have major centralised sites—call centres, processing centres, IT centres et cetera—all of which posses a similar characteristic: they are highly secured environments with highly regulated and supervised work, often to the extent of complete overofficiousness. They have team leaders, supervisors, managers, senior managers, HR managers, right up the chain to the head office people. They typify the hierarchical structures that we have come to see in our industry.

The work is highly regimented and regulated. You do not get up to go to the toilet in these areas unless you have permission, unless you have met your targets, unless you can prove that it is absolutely necessary. You certainly do not get up to talk to the union three floors below in an office adjacent to the general manager's and next to the HR consultant, unless you want everyone to know about it. The level of officiousness of your team leader and supervisor will have a direct bearing on your performance assessment. If you are assumed to be a troublemaker, you will be subject to poor performance ratings and be black marked by those who control your career opportunities and your remuneration. Our industry has changed and the management practices within it have become more intimidating, more imposing and more demanding of people—it is psychological, it is apparent and it is real.

The concept of an equal balance of power between employer and employee is a complete anomaly for the vast majority of working people in our industry. To talk about our members, what we know about the people who work in our industry is that they take enormous pride in their work. They would never compromise their customer's privacy or security. They may harbour doubts about their employer's intentions but they harbour no doubts about serving

their customers. They want access to independent, specialist advice, even to test what they are told by their team leaders and managers about what their employment entitlements are. They want access to union officials in their workplace for the benefit of validating what is told to them by their seniors, seeing the union active for them, helping them balance the power imbalance—indeed, that power imbalance comes about through access to information or information asymmetry, as it might be known—ensuring their rights are not being violated, seeking independent professional advice and representation, being involved and participating in the processes that will affect their lives, and being involved from a position of some persuasion.

Our members are white-collar, private sector employees. They do not need, as we submit will be the result of the legislation, to have to stand up in front of their peers and openly disclose to management their right to belong or participate in their union. They want their freedom of association and they want privacy of that freedom. They just want the workplace to be more fair and just. They understand that in order to achieve that they need access to the expertise of their union. The bill that we are considering will, as our submission argues, only make this more difficult for them.

Our employers are amongst the biggest and most powerful economic group in society. They run highly regimented workplaces constructed on hierarchical systems designed to ensure maximum compliance with authority and to minimise independent thought or creativity. Having a different point of view or differing authority in their midst is abhorrent to them. Having said all that, we are able to reach local arrangements with local management. But even these managers, with their local knowledge and understanding, are subjected to overrule by the head office environment, particularly at times when it is strategically advantageous to that head office's intention or ambitions. We have numerous examples of local arrangements being unilaterally reconstructed by the employer, particularly at times of dispute or during enterprise bargaining. For this reason we believe that the legislation indeed panders to those strategic desires at the head office level, giving them even greater capacity to frustrate what is local harmony.

For ourselves, the FSU has never in its history—and we have been a union since 1919—had any concern of privacy, customer confidentiality or disruption of business brought before it or against it by an employer in any jurisdiction. Why would we? We understand the motivation of our members. We would not seek to compromise what they value, and they value and place above all else their customer service. We have negotiated local entry arrangements in line with local conditions and adhered to them. But we cannot perform the role requested of us and needed by employees in our industry if those pursuing the strategic objectives of shutting us out are empowered by the black letter law that is before us. We want to ensure people have representation when and where it is needed. We exist to help correct the power imbalance that inherently exists between employer and employee in bargaining conditions. We fully understand, respect and seek to make more beneficial the nature of the work our members are involved in. We are capable of local dialogue and local arrangements where they meet both parties' objectives and where they are not subject to unilateral ideological interference. We want to encourage employee involvement in the bargaining of

their conditions. In fact, we want to encourage democracy in our organisation. It is our view that this legislation will only ensure that we become less democratic and less representative.

To summarise those brief points, our industry is one of the most profitable in the Australian community. If profiteering is the measure of whether business is being disrupted then clearly there is no disruption in this industry. Our members want their union in their workplace because there exists a power imbalance and because they want access to independent and professional advice.

The employers seek to affirm the power imbalance through this bill and in their behaviour by discouraging collectivity among workers and by denying access to independent information and denying union access to the workplace. Our union stands ready to represent the interests of its members and potential members. Its history is impeccable with regard to the right of entry, and its future will be bright. Our view of this legislation is that it is nothing more than an attempt to enshrine opportunities for those head office areas with strategic objectives and employers to act outside the law and to deny working people their rights. In the interests of fairness, democracy and freedom of association we are asking the committee to reject this bill. Thank you for this opportunity, Chair.

Senator CROSSIN—Thanks for your opening statement and for your comprehensive submission—it is very good. I will go to a couple of questions. I think you make a fair point on page 3 of your submission that people want to see their union representative at a face-to-face level, and that it certainly means a lot more if you are visible in the workplace. In what way do you believe this bill will restrict your capacity for your members to have confidence in the effectiveness of the union?

Mr Schroder—I think it is absolutely true that people want to see the union face to face. We do a lot of focus group work and a lot of surveying of people, and they want to see us. I think the best example is the one that Rod spoke about. A lot of the workplaces we now deal with have hundreds of people working in them in a very secure environment. They have code locks and everything else that you have to use to move from anywhere you like. You are sitting in a room, with a team smaller than this, and you have a team leader watching. We think this will lead to what we have experienced repeatedly, particularly since the mid-90s—and it is increasing—which is that the employer is deliberately trying to make us invisible. That is really what goes on.

If a member doing a mortgage processing wanted to talk to their union, the employer would have them stand up in front of their team leader, walk past their manager, walk out through secure doors, go down a lift and walk past the general manager three floors down to a room that we are in. What is the effect of that? The effect is that the member has to reveal, 'I'm sorry, team, I might have a problem. It shouldn't be too bad, but I'm just going to tell the union about it,' for a start. Secondly, do they know where the union is? Their privacy is invaded. The reality of this is that, the harder you make it for people to see us, the more that filters who does see us. I often have discussions with employers and say, 'If you put me three floors away, I'll tell you who will come: the complete nutters and the people who are most upset, because they are the only people who will be driven enough to do it.' So we end up getting a skewed view of what is going on in the workplace as well.

Really simple examples are these: the employer ensuring we are not able to distribute materials to people, because it makes it look like the union is visible and active; the employer having us not use email because it makes it look like we are visible and active; the employer not letting us have an alternative opinion about whether you should be able to work if it is 35 degrees Celsius on the floor because the air conditioning is not working; and the employer settling something with us after we have raised a problem and announcing the solution without even mentioning the Finance Sector Union in its correspondence. So it is a quite sophisticated, deliberate and determined effort to remove us from their workplace entirely.

To think that there is some notion of freedom of association or easy access to the union is actually a nonsense. I spend a fair bit of time speaking to the chief executives of all these companies and they say, 'Of course that's not true. We love diversity, we love you being involved in the discussion and we want to balance people's work and family lives.' But the reality is actually that, the less visible you can make the union, the better. In fact, we know that some managers are judged on whether membership of the union is rising or falling in their area. Note that there is nothing formal on your KRA that says, 'Union membership dropped so you get a five per cent bonus,' but they go around and check and say, 'Your membership has gone up in here. Is there a problem, are you doing something wrong?' They see union membership as a gauge of the happiness or otherwise of the staff or the performance or otherwise of the manager.

The idea of making us invisible is very prominent amongst very many employers, and we think that is what this does. It says, 'I've got to get up, I've got to walk past everyone, I've got to declare I've got a problem and then I've got to have the energy to go and do this at a time when my targets are very strict.' I do not know if many of you have been in these particular workplaces, but when I am on the phone or off the phone it is electronically recorded. If I am in the toilet, it is recorded. We have had people counselled for spending too much time in the toilet, let alone for going to see the union. This is the sort of impact.

Senator CROSSIN—I think you have touched on something that no-one else has raised this morning—that is, that this legislation will tend to lead you to get a skewed view of the workplace. There has been no recognition in these submissions or from industry groups that in fact the union can play a positive role in resolving workplace problems and issues. You say here that you are determined to be democratic and participative—that is correct. I would like some comments on how you believe this bill will not enable you to do that. But you have raised a very valid point, that there are times that you can actually see people in the workplace, the problem is identified, you raise it with the boss and it can be sorted out before it escalates.

Mr Schroder—Always.

Senator CROSSIN—This bill, I see, prevents that from happening to the extent that it does these days.

Mr Schroder—We have included in our appendix part of a particular exchange with the ANZ Bank. When the commissioner facilitated us being in front of people and we found the solutions, the manager who is responsible for ANZ Mortgage Operations fixed every single thing straightaway and said, 'Gee, if I'd known about this I never would have let this

happen—never.' The dialogue with him is absolutely superb and he says, 'Why didn't you bring it to our attention earlier?' We said, 'We would have loved to have been able to.' There was a protracted process whereby it was assumed that we were going to be looking for something more sinister when neither Rod nor I, or anyone who works for us, have got time to find things. I would rather be talking about global outsourcing and the impact on the industry or people's superannuation needs than worrying about whether people are getting their meal money at 530 Collins Street, Melbourne.

When we went through it there was problem after problem, but the HR person giving this advice was experiencing no scrutiny from anyone. They now concede they got it wrong but they then went to head office and said, 'Do we have to let these people in?' They were told, 'No, you don't have to. You can do this, this and this to frustrate them.' So when it gets to the person who is actually running the business, if there is a problem they want to know about it. If they are acting outside the agreements they want to put that right. There is not a person in the banking industry who says, 'I'll deliberately work out how I can rip these agreements off.' They cannot afford to do that. It is too damaging to their reputation, but it is a matter of turning a blind eye to it or allowing it to fester. It is not in the HR person's interest to say, 'I've realised I've really stuffed up and it's going to cost the bank $700,000.' They are not going to do that. That is not in people's nature.

Senator CROSSIN—How realistic is it in a modern and flexible workplace to restrict your access to twice a year?

Mr Schroder—It is complete nonsense. Some workplaces we would not get to twice a year and some we might need to be at six times in a month. For example, we are currently negotiating with Westpac an enterprise development agreement. We are all committed to it. David Morgan is on the record as being committed to it. The union is committed to it. We are talking about quite complex issues and people want to come back two, three or four times. It is an arbitrary thing that does not make any sense about how often we access workplaces. If there are breaches I think the whole community would want us to find them and eradicate them. If there are 10 visits worth of breaches they would want them to be found and if there are no breaches then we are not going to visit. To us, it is so arbitrary that it does not make any sense at all.

Senator CROSSIN—I have asked this of all the witnesses. We have had evidence that there have only been 15 permits revoked in a three-year period. I have found no evidence to suggest that the number of permits being revoked is related to the law being inadequate or the commission being incompetent in dealing with it. It has been put to us today that perhaps not enough employers are taking the issue of revoking permits to the commission, but from where I see it, I do not see a system that is inadequate. Is that your assessment?

Mr Schroder—In our industry, as Rod said in his opening remarks, nobody has ever raised any of these issues with us nor sought to revoke any permits of any of the employees of the Finance Sector Union. What is more—and I think Rod's point is very important, and it goes to the issue of being democratic and representative—our members want us to act in a lawful, proper and respectful way, so we do, consistently. We have had no experience of an employer saying, ' Hang on. We want to revoke a permit,' or 'We want to put any pressure on.' I would want to know if somebody was acting outside of what was reasonably expected anyway

because it does not reflect well on the Finance Sector Union. I cannot go much further than that because our experience is that it has never actually been raised with us by employers.

Senator MURRAY—A permit system means regulation. It means permits have to be given in a proper manner and for proper reason and only withdrawn in a proper manner and for proper reason. If we turn to 280J, it seems to me that the biggest weakness in there is trying to pillory a union for the behaviour of individuals. We know that in every 100 human beings there is somebody who is not everything they might be. So I am not surprised that there are officials of unions who behave badly—and there are parliamentarians who behave badly. I would have thought that the first amendment to 280J would be to remove the ability of the commission to withdraw the rights in toto of a union. Let me give you an example before you respond. If you look at the Cole royal commission, even the CFMEU, which has a particularly black record in this area in the eyes of many people, was regarded very well in some states and localities and very badly in other states and localities. So to take the rights of the whole union away for what is happening in perhaps Western Australia or Victoria would seem very harsh to, say, Queenslanders or Northern Territorians. How do you react to that?

Mr Schroder—I have not heard anyone in the parliament say that a banking licence should be revoked because a dodgy loan was written. It is a nonsense. It is clearly a device to try to destroy an entire enterprise based on an individual's behaviour or performance; so I completely concur with your observation. The other point that I would make, though, is that we take very seriously the professionalism and performance of our people. With respect to the idea that somebody might be acting in a way that is not in accord with members' expectations, I would expect that it would be a long time before it would have to be a revocation of a permit situation in our scenario. I think that, just as a matter of justice, it is a ridiculous proposition that somebody performing badly brings the whole house down.

Senator MURRAY—That is the first principle. The second principle of justice is that any punishment shall be for a specified period. The harshest of all sentences is that you may be detained at the Governor-General's pleasure—which of course means he or she can revoke it. It seems odd to me that, in 280J, I only see the term 'for a specified period' with respect to one area, whereas I would have thought that any withdrawal or alteration of rights should be for a specified period overall—as a general principle. Would you agree with that?

Mr Schroder—It might be possible that the use of the word 'transportation' was a bit outside people's comfort levels, because it does seem to me that if somebody has done something then they should be punished for that and it should be in accord with all of the normal expectations of understanding what you have done and the period of time for which you will be punished.

Senator MURRAY—The point you make about where interview rooms are put is a little theatrical, because I cannot imagine that in every finance sector workplace the designated meeting room is three storeys down and between the general manager and the HR person. But you do make the point that a reasonable meeting room, from the perspective of an employer, should also be reasonable from the perspective of the union. That is really the point, isn't it?

Mr Schroder—That is part of the point, although I might say that it may just be an extraordinary coincidence, but just about always the request is what we would see as unreasonable—and often on a different floor and often requiring hurdles to be met.

Senator MURRAY—Many branches, for instance, do not have floors—

Mr Schroder—You are quite right. I must say that, in relation to our entire submission, our minds have been particularly on the centralised and concentrated workplaces. Indeed, I would be very surprised if any employer or any employee felt difficulty in reaching access with us in a retail branch environment. In fact, it does not really occur. In some particular cases it does, but as a general rule that is not an issue at all. The much more difficult environment is the Westpac Launceston call centre or the ANZ mortgage operations building in Perth or the other very large building sites within the major capital cities. When I was making that observation, that is where we most regularly experience our difficulty—in those highly concentrated, highly secure, large workplaces.

But if I understand it correctly, your point—that whatever is arranged should be reasonable for both parties—is absolutely right. We think the onus in this has shifted the other way. The employer can ask for whatever they like and then we are compelled to go to the commission and argue that it is unreasonable. That is the shift.

Senator MURRAY—Given that I accept the proposition that the employer has rights in this matter but that I also accept your point, I wonder if you would be good enough to provide the committee with some wording which would diminish the possibility of intimidatory situations being chosen from either perspective.

Mr Schroder—We would be delighted to do that.

Senator MURRAY—Thank you. You suggest that the bill be rejected as a whole, which of course would mean the existing right of entry situation would continue. In my view that is not an acceptable outcome because there are problems with the existing right of entry situation—from the perspective of unions, from one angle, and from the perspective of employers, from the other. There are areas of abuse and use which need to be tightened up. It would be helpful to me if you could briefly identify those areas of change which you might see as least threatening or as most helpful, depending on your perspective.

Mr Schroder—What informs our submission is our experience of our industry. I understand your perspective, which is to say, 'We think there are abuses or problems'—

Senator MURRAY—Let me give you a specific example—and I am sorry to interrupt you. I accept it as a central proposition that you should not have two right of entry regimes operating on the one work site. I suspect that does not generally apply for your union. It certainly applies for some multi-employer work sites such as building and construction sites or major factory operations. Do you have any objection to the view that there should just be one regime that applies on a work site?

Mr Schroder—The only experience we have of multiple rights of entry is where there are state and federal jurisdictions. That is our only experience currently.

Senator MURRAY—In my view, one or the other should prevail.

Mr Schroder—I am not in a position to make a comment about that because I have not explored it, but on the face of it this is not one of those things that causes any difficulty for us.

Senator MURRAY—As a principle—

Mr Schroder—As a principle—

Senator MURRAY—or in principle, you do not object to this.

Mr Schroder—it is not something that causes us difficulty.

Senator MURRAY—What other areas of change occur to you which are in the right direction but are perhaps not conveyed in the right wording?

Mr Schroder—We make the recommendation that the bill be rejected because we think very little about the current operation is improved by what is being proposed. In our view, it will give our employers, who are substantially powerful employers, more rights and more control over the union's visibility and access. From our point of view, the current regime actually makes things more difficult than we think they should be. For example, prior to the mid-nineties we would have been able to regularly make a visit in a workplace to somebody's workstation. If we wanted to visit members in a particular area—and I will use mortgage operations as an example—we would provide notice that we were going to be in attendance, we would meet with the employer and tell them what we were there to do and what we were there to talk about, and we would move from desk to desk. We would say, 'We're here from the union and we want to talk to you about this and let you know about that.' The first question would be: 'Are you busy, are you in the middle of something, or do you have a couple of minutes?' Very often the employer was quite happy for us to grab four or five people in a team environment to give the same spiel for five minutes—let them know who we were, leave the details and then they could get back in contact with us. What we have noticed since about 1996 is that that has increasingly tightened up. Interestingly, the original argument put was that we were in some way disrupting work. Rod outlined—

Senator MURRAY—From a productivity point of view?

Mr Schroder—Quite. What is not understood is that because the work that people do is so tightly monitored and so much part of a strict regime—people are under so much pressure—they simply will not talk to you if they are in the middle of something.

Senator MURRAY—But it was less tightly monitored in the mid-nineties?

Mr Schroder—Quite, and it has become much more tightly monitored so it has become more difficult. If you were to ask me—

Senator MURRAY—Just talk to the lawyers!

Mr Schroder—That is quite right. We are moving into a billable hours phase for a telephone call-centre worker in the banking industry! If we could have what we like, we think there is a valid role for the commission to play because we think the employers will try to make us invisible at all costs. We think that an employer is not in a position to determine what is reasonable access to the union by a member of the union. Equally, I readily concede that the union is not the best organisation to decide what is reasonable in terms of access to employees in the workplace; I readily concede that. However, what we think is before you all now is the

prospect that the employer can decide and will decide—and will make us jump through the hoops in order to determine—whether it is fair or reasonable. So if you are asking me if we would prefer where it is going compared to where it is at the moment, we would rather it be where it is at the moment.

If we wanted to take the next step and think about how it really should be, we think that employees who are members of the FSU should be able to have reasonable access to their union in their workplace at a time that suits them and in a way that protects and upholds their privacy. To tell you the truth, it used to be the case that we could regularly find that very easily, with agreement with employers locally. I would even suggest that, currently, if it were a matter of asking the local manager, 'Can we talk to your people?' and it was not related to some ideological battle and it was not related to something much broader—that seems to be the invisibility of the trade union movement generally—then we would be able to find that happy medium.

Senator MURRAY—There are two main sides to right of entry: one is the breaches side, or ensuring that wages and conditions are adhered to, and the other is the recruitment and servicing of members. There is a restriction in the bill concerning the right to visit every six months. I know from my own dealings with the finance sector that the rates of casualisation and changing staff are quite significant, which I assume means that a visit every six months would not be enough to reach the kind of flexibility which is available in the workplace. Even something as attractive as flexible hours, from a family point of view, means that you would visit some people but never get in contact with them because they were on the early shift or the late shift. Is that right?

Mr Schroder—You make a point so good that it should have been in our submission! It is not just temporary staff—and the proportion of temporary staff, incidentally, we know from ABS unpublished data in the last five years, has moved from being two per cent of our industry to 10 per cent of our industry. So 10 per cent of the employees in our industry have no entitlements and are temporary workers.

Senator BARNETT—That is the finance industry?

Mr Schroder—That is the finance industry, yes, and that is deposit-taking, insurance and financial services. But as you also know there has been the substantial phenomenon of the introduction of part-time work in the industry. For example, I could not visit a workplace on a Tuesday and get anywhere near seeing the entire work force. There is no chance. Indeed, to get access not only to the temporary workers but also to the part-timers, I would need to visit that workplace two or three times, simply to get to everybody. So your point is a very powerful point and about something that is particularly prevalent in our industry.

Senator BARNETT—Does that percentage include casuals—both temporary and casual employees?

Mr Schroder—Yes. The 10 per cent figure from the ABS unpublished data includes anybody who does not have entitlements, so that everything is bundled into an hourly rate. That is a move from two per cent to 10 per cent in five years.

Senator MURRAY—Don't you love the concept of unpublished data? It is real and it is official, but it is kind of—

Mr Schroder—What we will do is publish it ourselves and try and make it a little bit more real and official!

Senator BARNETT—You made reference to the Westpac call centre in Launceston. What is diabolical or difficult about access there? I am Launceston based and I have an interest in what you said.

Mr Schroder—I probably referred to it in a different way. We have a good and constructive relationship with Westpac, so I must say it is not an ideological or philosophical war. But you may not know that Westpac took over the former Ansett call centre in Kings Meadows. There are two sites, run as two separate call centres with two separate managers, with 120 employees in each.

They work from very early until very late at night and it is a particularly mechanised and very thoroughly monitored workplace. The difficulties in an environment like that are in getting to people on their various shifts and in simply getting someone to come off the phone sufficiently long to talk to. I do not know if you have visited the workplace. It is a great workplace. It looks out over the bush and there are cows running around.

Senator BARNETT—It is all on one level.

Mr Schroder—Yes. It is really good. It is very nicely designed. There is an example of where we were actually involved in designing the workplace and it has a lot of positives about it. But it is a very long distance from where you are to where the meeting rooms are, for instance. Who you are and when you get up is very visible. When you get up you take your headset off and you click, 'I am now moving away from my desk.' In good, constructive times, that is perfectly fine. But there are also times of difference of opinion, which we have at the moment about the scheduling of Launceston Cup day, for instance. Most people would want to take holiday on that day. Obviously they have got to keep a reasonable work force there to serve the national customers. So we have got a difference of opinion. We think you should not have to do it more than X number of times over a five-year period. When we have got that difference of opinion and we want to talk to people about it, it is really much more difficult for them to get up from their desks.

Senator BARNETT—I want to pick up on your opening statement, Mr Masson, and a comment you made that, if you are a union agitator or are very pro that area, then it does impact on your work progress. I think you mentioned that, if you are a manager and you have a percentage of unions in your work force, then your work progress in terms of outcomes might go down. Apart from anecdotal evidence, do have anything to back that up? That is actually discrimination.

Mr Schroder—It would be. Whenever we find examples of it we draw it to the attention of the employer, because we do not deliberately go around looking for 298K and other actions against employers. But, for instance, the example I used there was one particular enterprise where I know—it is anecdotal, but I know for sure—that every senior executive is provided with the union membership in their particular areas and is asked questions about why it is going up or going down. Have I got that email? No, I have not. Could I get it? It seems very extreme that I would be able to do that. Where we are able to gather evidence about that, we bring it to the employer's attention. If it is adequately dealt with, we leave it at that.

Senator BARNETT—Have there been any prosecutions that you are aware of?

Mr Schroder—We had a very successful prosecution against the ANZ bank in relation to our national president, Joy Buckland, not so long ago. The prosecution there was related to the bank expecting Joy not to speak at all about her workplace conditions or her union activity—prohibiting her from it. You may recall that.

Senator BARNETT—I just want to nail a particular response you gave to Senator Murray about the consistency around the country in your openness and acceptance of the fact that, if there were one regime that could apply that was acceptable, you would be happy with that.

Mr Schroder—I think my response was that I have not done a lot of work internally about that, so I am not suggesting that that is the FSU's position. But, if you are asking me about the principle of having one regime, I think that it makes logical sense.

Senator BARNETT—With respect, I think that is part of the thinking behind this approach. We want to set up a consistent approach for your members, for example, who are all around Australia, not just in one state. And the employers have operations across state borders. One system—and we have got to get it right—would have merit.

Mr Schroder—If you look at our industry, we are probably a little uniquely placed in the sense that the vast bulk of our employers are national employers and the vast bulk of our agreements and awards—95 per cent plus—are national agreements and awards. I would not like to leave you with the impression that I am giving you a well-considered, detailed response to that question. It is something that we have not put a lot of organisational energy into.

Senator BARNETT—Can I go to this ANZ case study that you have there. From what I have been advised and what I understand, your right of entry request was to 'walk the floor'. I think you set out some examples of where you wanted to go to the workstations because it is difficult if people have to take their headsets off and walk down to a room. I think in your statement you said they would have to go down three floors. Can you see it from their point of view in terms of it being disruptive in the workplace when you are standing there at their workstations when they are working away doing what they are meant to be doing?

Mr Schroder—Quite. Can we see it from their point of view? Of course we can. Can they see it from our point of view? Some of them can, some of them cannot. But the point that we would most energetically try to put to you is that, if this was purely and genuinely about their level of comfort with us genuinely exchanging with our members, identifying things on their merits and dealing with them, each of us would be very reasonable and able to sort things out. I am contending that there has been a sustained and determined effort to try and make our union invisible so as to give the impression that management is the only point of advice, source of information and relevant authority in the organisation.

Senator BARNETT—I can see that, but there is a little bit of a dichotomy where you are at the workstation and they would say that you are obstructing their work progress and productivity—there is a room over here on the same floor in a similar location where you can go and meet. But you are saying that you do not want to do that; you just want to be at the workstation.

Mr Schroder—We took up Senator Murray's suggestion to perhaps come up with some words to deal with some of those things, but my response to that would be that we do not disrupt people's work. You have team leaders and managers there and if somebody is on a call to a customer, you do not say, 'Could you get off that call and talk to us, we are the union.' It is not going to happen; it does not happen.

Senator BARNETT—One final question, because I know Senator Johnston will want to ask a question. What about the issue of privacy? I know you have mentioned that things have been tightened up since 1996, but privacy has become more important for all of us in Australia and across the globe. So in terms of providing guarantees from your union, you simply cannot do that. You cannot guarantee that you will not access private information if you are standing at the workplace and it is all sitting there on their desk. So you can see the argument in favour of having a separate meeting room.

Mr Schroder—But we can. Ironically, part of the proposition here is that we cannot deal with the right of entry issues in our agreements. But, if you look at our agreements, almost all of them have right of entry and all of the reasonable things about not disrupting work flows. It is in an agreement; it is a certified legal document. In terms of respecting the privacy and confidentiality of customers, not only can we but we do and, ironically, extracting those right of entry provisions is the thing that relieves all of those things. So what we have at the moment is enterprise agreements with each of these employers saying, 'We will not be disruptive, we will recognise workflows, we will do it in a reasonable way and we will completely and utterly protect all confidentiality.' I think it is a storm in a teacup. What do you think? There are 6 million Commonwealth Bank customers and I am going to stand at a screen and, just by chance, there is going to be a screen that is going to be of some import or interest to me? I think that is a beat-up designed to reduce our visibility in the workplace, frankly.

Senator BARNETT—The end result is that we are trying to strike a balance between right of entry for yourselves and having privacy protected.

Mr Schroder—If it is about that genuine balance then that is welcomed.

ACTING CHAIR—Senator Johnston, if you could be fairly quick, please.

Senator JOHNSTON—I promise I will be very quick, as always. The visibility of the union: I do not think that is a matter of public policy, is it?

Mr Schroder—I am not sure how these committees normally operate and whether we should be completely open and frank.

Senator JOHNSTON—Open and frank!

Mr Schroder—The bit I can get for you absolutely and utterly is that a very vast range of employers in our industry are increasingly worried about their reputation and how they are seen by the community, and there is a gap between the rhetoric and the reality. So what do they do? They take their lead from the key decision makers around the place. Who do they take their lead from more than anything else? They take their lead from the federal government.

Senator JOHNSTON—I wish it were that simple.

Mr Schroder—No, I am not saying that they make their lending practices based on what you decide, nor do I say that they embrace your FSR based on that. But in terms of how you can treat people and what is fair and reasonable practice, they very much look to what the parliament says is okay and reasonable practice—absolutely. It is also the theme, the style and the language.

Senator JOHNSTON—That is very interesting. We have enshrined the right of entry, reinforced it, underlined it and enhanced it in some respects by codifying it in greater detail than it has ever been codified before. The fact that you have a relationship with your large multinational or large national corporations which seek to diminish your visibility is a matter for you and them.

Mr Schroder—I do not think so. I think it is a matter for the community and for the general public to say, 'Do you want a workplace where unions are okay, where it is reasonable for them to be here and there is no real drama—where it is no revolutionary step to be able to have decent access to unions?' My contention would be that the mood and the style have been to demonise unions.

Senator JOHNSTON—Some unions, certainly. I do not think all unions.

Mr Schroder—If you went to workplaces pre-1996, you would see that you do not ever hear the ideas about how you should deal with people anymore. You never hear about tripartite, you never hear about genuine cooperation where we have a legitimate role. You hear the invisibility and eradication of third parties, outsiders and intervenors. The language has become that we are in some way not part of the industry or not a constructive force. We are determined to be a constructive force. As I said at the beginning, we are being pushed onto a small plank of making a lot of noise in order to get some attention, which cannot be the constructive interaction, because that is a longer term investment.

Senator JOHNSTON—I want to go through the bill because you have made a number of complaints but, when I look at the bill, I cannot see the specifics. You are telling me what is happening now is a negative. When I read the bill, I do not see those negatives being addressed or amplified by what I see here. You say the six-month provision for membership is a problem but you also say in some circumstances it is not. In terms of rights of entry with regard to surveillance of adherence to awards, occupational health and safety and other things, what are the specifics of the problem? We have heard about ideology. Where are the specifics mechanics that cause you grief?

Mr Schroder—I did not think I had shared any ideology. I thought I was being very reasonable and pragmatic actually.

Senator JOHNSTON—Forgive me then.

Senator MURRAY—He meant reasonable ideology.

Mr Schroder—That is right. There is no role for the parliament in too many matters.

ACTING CHAIR—It was a question that may require a fairly detailed answer and it may be better to take that on notice and follow it up with a supplementary submission.

Mr Schroder—I am happy to do that if you think there is a requirement to provide some more detail about the specific hindrances and embellishment of the submission. I am happy to provide you with that.

ACTING CHAIR—You talked about some of your certified agreements. They included provisions for right of entry at the moment, the process, protocols and privacy. I think it would benefit the committee if you could provide some of those extracts to us as well.

Mr Schroder—Of Course. No problems at all.

ACTING CHAIR—I thank you both for a very passionate and frank contribution today.

Proceedings suspended from 12.08 p.m. to 1.25 p.m.

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

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

DELAVEC, Ms Nada, Industrial Officer, Australian Council of Trade Unions

ACTING CHAIR—I welcome the witnesses from the Australian Council of Trade Unions. The committee prefers all evidence to be given in public but will consider any requests for all or part of evidence to be given in camera. The committee has before it submission No. 7. Are there any changes to your submission?

Ms Bowtell—No.

ACTING CHAIR—I now invite you to make a brief opening statement, to be followed by questions from the committee.

Ms Burrow—Thank you. We again apologise formally for being late. Our submission I think stands as read. I would like to make a few points of emphasis and Nada will put in anything that I leave out. I know that some of you have been down this route before. You have looked at the evidence and what we have put before you when similar bills have been before the Senate over the last several years. But this is a very serious bill, for a number of reasons. As a member of the ILO governing body, I can assure you that the cases I watch and participate in evidence around, in terms of breach of freedom of association and the capacity to organise, would absolutely provide a similar context into which this bill would fit. Fundamental rights under ILO convention 87 and its capacity to support ILO convention 98 would be breached by the nature of this bill.

Senator BARNETT—What was that second convention?

Ms Burrow—Conventions 87 and 98. The nature of the bill is such that it absolutely fetters the right of employees to access union support, advice, information and general understanding of both their award entitlements and the commitments by way of any enterprise agreement. Indeed, it would potentially prohibit general advice around all manner of things, from superannuation to antidiscrimination, issues around skills progression and career classification. It fundamentally restricts not only the capacity of unions to recruit, because that can take quite a long period of conversation and relationship building, but indeed the capacity of unions to resolve small areas of concern before they become larger disputes. I made the point recently in a workplace relations consultative committee, both to the minister and indeed to the business leaders there, that the truth is that every day thousands of officials go into workplaces and every day small issues are sorted out and people are given confidence about knowing about their entitlements. Moreover, quite often those visits are actually at the request of employers. Union officials very often provide an environment whereby, because an employer knows there is something of concern or indeed is seeking advice themselves about appropriate entitlements, small issues can be sorted out.

I spent many years as an organiser and the nature of the job was that you would walk onto the site, you would say hello to the employer, you would meet with officials both in a formal and often in an informal setting. On the way out you would either simply indicate that the staff were happy and life was in fact harmonious or you would say, ‘Look, I’ve got a couple

of issues I need to discuss with you.' If they were minor you might take the opportunity of resolving them at that point, or you would indicate that you would send a letter and seek a more extensive meeting. That is the nature of good industrial relations.

The other thing I would stress is that already it is fairly arbitrary to have the distinction between the right of entry for the purposes of examining a suspected breach of entitlement and the nature of general discussions. To instigate a third difference is to suggest that people can keep their lives in some sort of compartmentalised boxes. Of course, if you are sitting down and talking to someone, you will range across a variety of issues and then you might actually say, 'By the way, we could offer you further services, if you were a member.' It seems to me a fairly logical and human way to approach industrial relations.

Finally, there is a real issue about the creation of a workplace based on fear and intimidation and potential invasion of privacy. For an employee who might already be concerned about the security of their employment, who might not have the confidence to actually approach the CEO or the appropriate human resources or industrial relations manager about an issue concerning them to have to put their name potentially to a request for an investigation of a potential breach of entitlement being provided by the employer or simply to be seen by the employer to approach the union—because the nature of this bill is to dictate potential rooms and how you might access them and so forth—is something we would be very concerned about. We would be very concerned that in fact what we are breeding is not harmonious, safe workplaces—both physically and psychologically safe—but a culture of potential fear and intimidation. When you realise that for any genuine concerns by the employer, the Industrial Relations Commission has the power to deal with concerns from an employer, you would have to say, 'Why would we breach the fundamental human rights of working Australians by limiting their access to support from a union official in a way in which you would really only ever expect to see from some of the worst cases of abuse of ILO conventions—that is, international law—in regard to industrial relations?' It seems incredible for a fair Australia that this would be the sort of amendment to the workplace relations legislation that the government would think was fair and reasonable.

ACTING CHAIR—Thank you.

Senator BARNETT—Did you say that this is one of the worst bills that you think the government has introduced in terms of its industrial relations regime?

Ms Burrow—We have dealt with a few but there is no question that it is right up there. This is about whether people can know that they have the support of unions to actually give them advice and to provide them with support and representation to resolve disputation. Of course, it not only puts in breach the rights of those union members but it in fact puts in breach the rights of all workers who are covered by awards who would normally expect that they might be able to receive support in that manner.

Senator BARNETT—It is a very serious issue for you.

Ms Burrow—Absolutely.

Senator BARNETT—I want to go to this principle in your submission that you are concerned about in terms of the single system of industrial relations. On page 19 in paragraph 122, you say that it will create confusion. If we put that to one side for a moment, how do you

feel about the concept of having one system? Let us say you could get the balance right, so that it was fair and reasonable to all sides: employees and employers. How would you feel about that if we could get the balance right?

Ms Burrow—If the government was talking about a harmonised industrial relations system or an end to confusion, they could approach this very differently. They could seek to sit down with state ministers and state governments and actually work out by agreement a range of provisions that were equal, whether they were in a state or federal jurisdiction. The nature of this bill is arrogant in that it seeks to override state entitlements with no such commitment to a harmonised environment and would leave at least 15 per cent of employees on a very different set of arrangements.

Senator BARNETT—Because of the constitutional powers? Why do you say 15 per cent?

Ms Burrow—I will ask my legal friends here to make sure I get this right. If the corporations powers were used then there would be 15 per cent of employees, which is about 800,000 workers in New South Wales alone, left out of this system. Not only does it deny states rights by having no consultation but also it would leave those people outside the system.

Senator BARNETT—You have raised a number of issues; let us go down this 15 per cent track. This bill, as it is framed, only applies to 85 per cent of the work force in Australia?

Ms Burrow—Maximum. And there is still some question about some state employees.

Senator BARNETT—Is the bill unconstitutional?

Ms Burrow—We believe it is unconstitutional but you would have to ask a constitutional lawyer. It is certainly unconstitutional for those 15 per cent and it may be for a greater number. Beyond the constitutional issue, it goes to the extreme of a relationship between state and Commonwealth governments that has never been tested in this way before.

Ms Bowtell—The question of the constitutionality of the bill is separate to the question of the reach of the corporations power. Whether the Commonwealth can validly make a bill and whether this has sufficient connection with the corporations power is the first question. The second question is the reach of it. I think Sharan's answer went more to the reach of it. If it is a validly passed bill there will still be confusion at the edges of the reach of the corporations power where the status of a particular organisation as a financial trading organisation is unclear. You have the clearly unincorporated sector, partnerships and so on and then you have some other areas where we have lack of clarity.

Senator BARNETT—Do you have any legal advice to that effect? Do you want to table it with the committee?

Ms Bowtell—No, we do not have any legal advice in writing.

Senator BARNETT—Let us go back to this principle of the unitary system. I am still not quite sure, Ms Burrow, whether you think that if the terms and conditions are fair and reasonable a unitary system is okay. You mentioned sitting down with the states and what have you. Hypothetically, is a unitary system bad, good or what? What is your answer?

Ms Burrow—In and of itself a unitary system is not necessarily a bad thing. We have a 100-year tradition that has state and federal jurisdictions, and states rights would dictate by practice, if you like, that where governments seek to harmonise industrial relations—and it has happened many times—there are dual appointments, as you would know, between state and federal commissions. Many times the sharing of powers has been dealt with by consensus and agreement at the state level. This bill would seek to simply trample on the rights that the states believe they are currently not only entitled to but also practise in terms of the state jurisdiction.

Senator BARNETT—I am just asking whether, if you struck the balance fairly and reasonably, you would prefer that system with the same rules all around Australia—because your members are all across the country and employers operate across state boundaries. Would you think that is a preferable option?

Ms Burrow—We do not think it is a preferable option but I am on the public record as saying that our dispute with this particular amendment and indeed the proposals by the government for a unitary system is not about the concept of the unitary system; it is about the nature of the conditions and the fact that you would be creating a very much weakened jurisdiction for 15 per cent at least, and probably more, as the constitutional debate comes in. I just want to get this on record: we want to see a fair set of conditions and we do not believe that the bill we are dealing with today goes to the heart of fairness. Whether it is in a dual or unitary environment—and you would only achieve the unitary environment if the states were by consensus willing to refer their powers—we do not believe that this bill lives up to international law let alone any sense of fairness or indeed an ambition around harmonious workplaces.

Senator BARNETT—Some people would say that the fairest system of all is where there is no duplication, no inconsistency and the same rules apply all around Australia. A Victorian Labor minister, Rob Hulls, strongly recommends a unitary system, and he says he will lobby in favour of a unitary system because that is his view and the view of the Victorian Labor government. Obviously, other state governments have a different view.

Ms Burrow—For the record, Rob Hulls says, 'Only if the rules are fair.' The question of fairness and the human rights, the most serious rights of employees, are not in fact covered off by the restrictive nature of this bill, whether it would be in a unitary system or not.

Senator BARNETT—Can we look at the fit and proper person provisions of the bill and your views on that. Are you happy with the concept that the right of entry should be subject to the fit and proper person test?

Ms Burrow—We have been down this road many times. We believe that the current provisions allow the commission to deal with those questions and indeed deal with any concerns by either employees or their representatives or employers. Nada, you might want to deal with that more extensively.

Ms Delavec—I think the committee has heard a lot about this already today. Currently the registrar issues those permits. They are issued expeditiously. I think over 1,000 permits a year are issued by the registrar and they are done usually within a number of days or weeks. The number of revocations on the basis of inappropriate behaviour is so small that you would

essentially be imposing a very onerous system on over 1,000 people to deal with potentially a very small number of breaches. It is not justified on the basis of past experience.

Senator BARNETT—But 280F, in schedule 1 of the bill, talks about a fit and proper person. It says, 'The Industrial Registrar must have regard to the following matters,' and then sets out those particular matters where an offence has occurred. Making the Industrial Registrar aware of the past background does not seem to be unfair.

Ms Delavec—I think there are a lot of regulations which you could say at face value were fair or unfair. You could equally say it might not be unfair to have the same requirements for an employer before they are allowed to employ somebody. The issue is about what extent of regulation is reasonable or warranted in the circumstances. We say it is unwarranted, given past conduct and experience.

Senator BARNETT—I think you have said the proposed arrangements are discriminatory.

Ms Burrow—Yes. The current arrangements have proven to work very well. They do not discriminate and the commission has obviously shown—

Senator BARNETT—But they are different in each state, aren't they?

Ms Burrow—Again I come back to your earlier question. If this was a consensus arrangement where the states and the Commonwealth sat down and worked out a fair and reasonable set of requirements, we would watch that with interest, of course.

Senator BARNETT—But, if all the ministers were sitting here and they came up with an agreement and said, 'There you go—these are the new arrangements. They are fair and reasonable.' What would you say?

Ms Burrow—We think these are onerous.

Senator BARNETT—What would you say if they were all sitting here and they gave them the tick?

Ms Burrow—This set of requirements?

Senator BARNETT—No, I am saying if they came up with whatever they came up with—a set of fair and reasonable rules.

Ms Bowtell—We would have to look at the rules and see whether in our view we thought they were fair and reasonable.

Ms Delavec—It is hypothetical.

Ms Burrow—If they were a fair and reasonable set of rules by agreement, we would do nothing but give them a tick. If they were this set of requirements we would say they were onerous and purported to have the potential to be discriminatory.

Senator BARNETT—What do you say in terms of the right of entry into workplaces where there are no union members?

Ms Burrow—The award system provides entitlements for around 10 million working Australians, and unions have never seen their duties as only relating to those members. We bargain for our members and we do pretty well—our members receive 18 per cent above the wages of nonunion members. But we have always taken very seriously an employer's

responsibility to provide for the entitlements enshrined in the awards or indeed in legislative arrangements like occupational health and safety law, anti-discrimination law and superannuation requirements—all of which we have had some role in establishing.

Senator BARNETT—So do you think it is justified that you can have access to the workplace where there are no union members in that workplace?

Ms Burrow—Certainly, for two reasons. One, as we just indicated, is that we have a responsibility both legally, by being parties to awards, and legislatively in terms of safety or discrimination questions and superannuation entitlements. The other is that we do have a right—again, under international law—to access working people for the purpose of recruitment and capacity to organise a round of collective bargaining.

Senator BARNETT—Do you have a matrix or summary of the terms and conditions that apply to right of entry in each state and territory? Are you able to advise the committee of those?

Ms Burrow—I am sure we would have them on record.

Ms Bowtell—We did not include one with our submission but a number of other parties have submitted summaries of how they see the provisions. We would be happy to indicate to committee members afterwards if we have any disagreement with any of the ones that have been submitted to you.

Senator BARNETT—I do not know every state's workplace relations legislation.

Ms Burrow—There are matrixes around and certainly they can be provided.

Ms Bowtell—Both the ACCI and the New South Wales government submissions contain summaries of the—

Senator BARNETT—That is occupational health and safety?

Ms Bowtell—And right of entry provisions, I believe.

Senator BARNETT—Not the ACCI ones.

Ms Burrow—We will have a look at it, and, to the extent that we can advise you, we would be happy to do so.

Senator BARNETT—That would be really good.

ACTING CHAIR—Does the ACTU meet regularly with peak employer organisations? How often have they raised the issue of right of entry as a significant concern to employers throughout industry?

Ms Burrow—Prior to the discussion at the workplace relations consultative committee with the minister where it was in fact raised by us, I cannot recall an incident where a peak body has actually raised an issue with me. Clearly, we have had discussions about previous bills on both a formal and informal basis with employer bodies but, with regard to an issue having been raised—indeed, if you look at their workplace surveys, which has come up as a major issue—I cannot recall an incident, to be honest.

ACTING CHAIR—This has been an issue troubling me throughout this inquiry. I know Mr Nolan talked about the necessity of this bill to stop potential misuse of the right of entry

because he was not able to point to any hard evidence of examples of misuse. In fact, all the submissions really lack any substantial evidence of systemic misuse. Clearly, we have identified that the commission does seem to have the ability to move if there is misuse. There have been a number of permits revoked. I am just trying to get my head around what you see as a real motivation behind this bill. Again, I do not see the evidence for it being necessary in the first place. Certainly, it does not seem to address in a fair way the right of entry provisions, if there were any deficiencies in them as they are.

Ms Burrow—You would actually have to ask the government that because, frankly, when you look at the evidence it shows that since 2000, I think, there have been 15 cases dealt with by the commission. When you have thousands of unionists walking onto work sites every day, overwhelmingly in a good relationship context with both employers and employees, then it seems to us totally unnecessary. But I suppose what is most shocking is that Australia is a member of the ILO and they are a signatory to the ILO conventions that we have cited, amongst others. We also, at this point, hold the chair position of the Human Rights Committee. So it would seem extraordinary that this bill that is on the table, which violates those particular conventions, would be brought forward by an Australian government.

Senator CROSSIN—Ms Burrow, just touching on something that Senator Marshall said: there has been a lack of concrete evidence, from the submissions we have seen, that actually proves to us that the system is not working. You are right: there have been 15 permits revoked, I think, in a three-year period. Can you glean any instances or remember any cases of breaching the right of entry provisions that would be significant enough to warrant legislation of this sort?

Ms Burrow—No. On the contrary, I receive regular phone calls requesting the support of either me or union officials to resolve issues from employers as well as employees. So it would seem that it is an issue that government wants to pursue, rather than one that would have any kind of evidentiary base in terms of practice and procedure in the field.

Senator CROSSIN—This morning I quoted from some principles of freedom of association that the Committee on Freedom of Association of the Governing Body of the ILO set out:

> Workers representatives should enjoy such facilities as may be necessary for the proper exercise of their functions including the right of access to workplaces.

But this morning we had evidence from employer groups that in fact they are not breaching ILO conventions, they are not restricting right of entry to workplaces at all and they are just moving the rules a little bit in terms of what they believe would now be a fairer system. Can you make some comment about that?

Ms Burrow—The question is: fairer for whom? It is certainly not fairer for employees. And I would argue that it is not fairer for employers who genuinely enjoy harmonious relationships with their workers and who would want to continue working with them and their union representatives to provide for productivity and the general workplace harmony that that provides. If you look at the jurisprudence at the ILO—and I have occasion at least two, often three, times a year to read much of it—then I think, by any fair standard, if someone were

genuine about giving evidence they would say this constrains the principle of what is a fundamental human right.

Senator CROSSIN—In paragraph 121 of your submission you say that unions should be recognised as having a role in investigating breaches, rather than confining their role to policing member entitlements only. In what way do you believe this restricts the role of the union in investigating breaches? What do you see as a difference between investigating and policing entitlements?

Ms Burrow—There are two issues that come to mind for me. One is that, as a party to awards, the union has a responsibility to see that working people generally are actually receiving their entitlements. The second is a question of discrimination. If we had not been able, on a reasonably regular basis, to have a look at the records of employment and consider the conditions provided, then we would not, for example, have been able to resolve a whole lot of pay inequity arrangements or provide the sort of advice that allowed employees to pursue, often with our support, either informally or through the commission, a breach of entitlement and have it resolved.

Ms Delavec—I will just add to that. The other requirement which is proposed in this bill, which is specifying the nature of the breach, of itself can expose the complainant to the employer's scrutiny. Even if you do not have to give the name of the employee, it is usually pretty clear who it is. If there are only a couple of people who work a particular type of shift or who work in a particular area on a particular type of shift, just in specifying the nature of the breach, the employer will know who rang the union. Particularly in an environment where the employer might be anti union or even just annoyed that someone has raised an issue, that obviously exposes that employee to, if not straight discrimination, then the many ways that employers can show their unhappiness with particular employees.

Senator CROSSIN—With the nature of the casualisation of the work force these days—shiftwork and the incidence of turnover in the workplace—it would seem to me that allowing access to a workplace only every six months fails to recognise exactly what is happening in workplaces today. Do you have a view about that?

Ms Burrow—You are correct, but it goes further than that. In many workplaces it actually prevents people from accessing all of the employees. There are often a range of sites and shifts. The different working arrangements, lunch breaks and morning tea breaks and all of those sorts of issues in workplaces today are very complex. Potentially it would mean that a restriction to two meetings a year for the purpose of recruitment would not allow union officials to even talk to or communicate with the employees by other means.

Ms Bowtell—In a large supermarket it can take you a week of sitting in the lunch room to touch base with every employee or as many employees as you can to explain, for example, the terms of a certified agreement prior to the ballot. Being in the supermarket lunch room across the range of shifts that people work—

Senator MURRAY—Don't forget night fillers.

Ms Bowtell—As I said before, that is across the whole range of employees. That is right.

Senator MURRAY—You will not see them at lunch.

Ms Bowtell—No, you will not, so you actually have to be there 24 hours a day for seven days to touch base with everybody who is rostered in that supermarket simply to explain the purposes of the EBA. If you were restricted to recruitment visits once every six months it would be very random as to what proportion of the workplace you would actually get to see face to face.

Senator CROSSIN—It has been put to us that unions should now perhaps recruit by electronic means and that, in fact, the need to approach people on a face-to-face basis could be superseded. I did raise the question of how you might do this in remote communities. The proposition is that a union is a service; it is out there; if people want to know about it, they can pick up a phone or look at a web site. To some extent there probably might be people like that. How successful has your hotline been compared to meeting members on a face-to-face basis?

Ms Burrow—All of those possibilities are complementary. But, as I am sure you can all accept—otherwise you would not meet face to face in parliament—none of them go to the question of the sorts of relationships and discussions that you can have face to face. If you think about the workplaces in this country, English is still the predominant language but there is a multitude of languages. There is a multitude of work practices, from factory floor to hospital to call centre, all in some sort of hierarchy. Common sense dictates that the change suggested is an improbable reality. At best, it is a very small but of course, in some industries, valuable complementary service. Again, I go to international law. That would not pass the laugh test in the freedom of association committee at the ILO.

Senator MURRAY—I will deal with two issues. The first is a pleasure for me, Ms Burrow, because it is the first time I have had the opportunity on record to congratulate you on your accession to international leadership. I think it is a great credit to you. More importantly, it is a credit to Australia and to the system that throws up people like you. I know that TS Eliot wrote that he measured life in coffee spoons, but it seems now that people in public life measure it in shirts. I wish you a wardrobe full of shirts and a long service in the cause of Australia and the world generally.

Ms Burrow—Dignity would prevent me from telling you that it is not the shirts that I run into trouble with, as I spend too much time on aeroplanes. But thank you, I appreciate it. It is a daunting challenge. But you are right: it is an honour for Australia and for Australian union members and their leaders. For me personally it is something that I am still coming to terms with.

Senator MURRAY—I am biased, but I think you deserve it.

Ms Burrow—Thank you.

Senator MURRAY—The other issue I raise goes to politics and strategy. For nine years now I have had a challenging time sitting in the balance of power role on IR issues. It has been a difficult and sometimes unloved task. As you know, in four months time the coalition will have the numbers to do what they wish. So essentially the fact that the Senate rejected out of hand the recommendation of the FSU simply means that they have rejected it for four months. It will come back intact.

The question, of course, is: how can we moderate the bill to reflect good intentions within the bill? I will name one way for you. I think the ability of people to forum shop jurisdictions on the same site is ridiculous. It either has to be a state regime or a federal regime. I have never understood why it should be both. The bill should be moderated to reflect the principles that both employers and unions agree to. By and large, those principles suggest to me that it should be a regulated practice, it should be a fair practice, it should have consideration for the needs of employers as well as the practical needs of the union and abuse should be capable of being disciplined. That is the broad ambit. By all means reply as you see fit, but I would ask your officers rather than you if they could provide us with wording to address some of the criticisms you have, bearing in mind that I think it is more sensible to amend than destroy, given the climate we have. If you would accept that task on notice, that would be helpful.

Ms Burrow—We will always accept that. I am not confident we can find the appropriate words, but I do note and thank you for the fact that you have had a go at this several times. Some of those past discussions will, I think, hold us in good stead as the bill comes before you to vote on formally in the parliament. We know your commitment to a single system but we also note that your views about such a system are that it ought to be fair and protective of people's rights on both sides of the table and that it ought to uphold international law. We appreciate that.

If we can find amendments, let us have a go at that. At the end of it, I can only ask that, at least as a symbol of decency from lawmakers like you, who have proved to be very fair and decent, the opposition parties generally stand on principle and oppose the bill because of the extreme restrictions that it places on working people. I would argue too that, in the fairness of the way in which work is done and rights are respected across state and federal jurisdictions, that it be rejected on the basis that there has been absolutely no attempt to involve the states in consensus, agreement or consultation around what might make for a fair, harmonised environment across these and other questions that are currently on the discussion table.

ACTING CHAIR—Thank you for your submissions and your presentation today.

[2.03 p.m.]

O'NEIL, Ms Michele, Victorian State Secretary, Textile, Clothing and Footwear Union of Australia

ACTING CHAIR—I welcome our next witness from the Textile, Clothing and Footwear Union of Australia. The committee prefers all evidence to be given in public. It will consider any requests for all or part of evidence to be given in camera. The committee has before it submission No. 13. Are there any changes or additions to your submission?

Ms O'Neil—No.

ACTING CHAIR—I now invite you to make a brief opening statement and then field questions from the committee.

Ms O'Neil—I would like to thank senators for the opportunity to address you this afternoon. Firstly, the Textile, Clothing and Footwear Union adopts and supports in full the ACTU's submission that you have before you and the comments that my colleagues have made before me this afternoon.

We sought to put in our submission to this inquiry and to appear here today because we have a view that this bill should be defeated in its entirety. We also have a view that there is a particular concern for and argument about the situation of home workers and outworkers within the clothing industry that warrants the attention of this committee. We would argue that, as an alternative to the bill being opposed, it should be amended to provide for an exemption in relation to the workings of right of entry provisions as they affect the clothing industry and, in particular, the contracting chain of work and the provision of work to outworkers. Our submission explains the interrelationship between the federal and state jurisdictions and outworker rights and provisions.

Speaking as the Victorian secretary of the union, we also have a particular story to tell about the position of workers in Victoria as a result of the fact that we do not have a state system and we do not have state registration of unions. Our submission also details the unique situation we are in in Victoria because, without having a state industrial relations system, we do have the Outworkers (Improved Protection) Act. So we have a specific piece of legislation in Victoria that deals with the protection of these workers. I know a number of you in this Senate are familiar with our very unusual set of industrial rights and regulations that have been set up over many years dealing with outworkers in our industry. They have been set up originally with the introduction into the clothing trades award some 25 years ago of a set of provisions that did not just deal with rights in terms of outworkers' rates of pay.

ACTING CHAIR—I just might hold you there. I have to establish the status of the committee. You may now continue.

Ms O'Neil—As I was saying, there is a long history of having very unique provisions that deal with the situation of these workers, both in the award and in the federal act, which now has specific provisions that deal with outworkers in Victoria who are deemed to be contract workers. Amendments to the Workplace Relations Act in 2003 added those provisions. The state act that I already mentioned, and there are also provisions in a number of states—New

South Wales in particular—that are similar to Victoria in dealing with outwork specific legislation. I understand a number of other states are considering similar legislation.

This system, if you like, or regime, is built on the premise that outworkers are unique and that the system of contracting out of work and—most importantly—the transparency of the contracting chain within the clothing industry are critical to getting to the bottom of the rights and the treatment of these workers. This Senate has participated in inquiries that have documented in full the level of exploitation of these workers. More recent inquiries continue to substantiate the gross level of exploitation of and unfairness to these workers, who are some of the most vulnerable in the country. They are reliant on, and the regime that I have spoken about is based on, the capacity for the union to be able to enter workplaces, discuss with workers and inspect documents that relate to the contracting chain and the giving out of work—regardless of whether the union actually has members in a workplace or not.

I want to premise the comments I will make about that with a number of general comments. Leaving aside for one moment the situation of outworkers, there are particular issues about this legislation that I think need to be brought to this committee's attention. It seems to have been designed to have a disproportionate effect on some of the most vulnerable of employees, and it is precisely those employees' workplaces that will be affected by this. What I mean is that it is very likely that, even with the introduction of this bill, highly organised workplaces where there is a high union density would not be largely affected because those types of workplaces are often characterised by having reputable employers that see having a collective voice and representation of workers through a union as something that is positive for the business. I have been approached by a number of employers in my own industry who would fit that bill who have described to me that they see this legislation as unnecessary and, regardless of whether it came into force, they would not change their existing practice with us about our capacity to enter their workplaces and to speak to workers as we need to.

The other element is that it is very likely to not affect those workplaces that may be seen to have traditional muscle or traditional industrial strength. It is not those workplaces in which those practices are likely to change as a result of this legislation; it is those workplaces where workers are most vulnerable, most fearful, most likely to be cautious of having their union membership exposed to their employer and most likely to already be in an exploitative or unfair situation where this legislation will hit. It is precisely those workplaces where workers report to us on a regular basis that they are not able to disclose to their employer their union membership. I am frequently contacted by workers in our industry who say, 'Before I tell you what is happening in my factory, can you guarantee to me that you will not disclose my name or any aspect of what I'm telling you to my employer?' This is a daily occurrence in my union. The basis of us then entering those workplaces and investigating what we have been told or speaking to those workers is only on the basis of us providing a guarantee to those workers to protect them by not disclosing their identity or any aspect of their complaint which would lead to their identity being disclosed. This provision is misguided in the sense that it purports to go after this mythical, I think, group of rogue union officials out there. Where it is actually going to hit is hardworking union officials who are out there trying to protect vulnerable workers from exploitation.

You have heard already the issues around size of sites and shiftworkers, so I will not go into that. But it will also affect in particular migrant workers and workers who do not have English as a first language. Again, we commonly receive phone calls from workers, their children and their partners who either cannot speak English or who speak very little English and say a very small amount about there being a problem in their workplace. They usually say, 'Please come in so we can explain this to you. I can't tell you on the phone. We need you here so you can see what's going on.' These workers often do not know the details of their rights, so their capacity to be able to say in full, 'This particular aspect of my entitlement under my award or my agreement or the act is being breached,' to detail that in such a manner that a union official could put it into a form and then use that as part of a right of entry provision, is non-existent. It is an unrealistic notion that those workers would have that much detailed knowledge of their own entitlements, let alone the capacity to put it in the terms that are required.

Another issue is that it will disproportionately affect women. Again, the majority of workers in my industry are women. The majority of casual workers are women. The majority of workers in low paid work are women. It is likely that the effect of this legislation would mean that a lot of the unregulated work of women where exploitation occurs will not be able to be exposed. It will add another layer of silence to what is already a problem that we have not effectively dealt with in this country.

Often our investigation into sweatshops, small workplaces and workplaces where there are problems is sparked by a request from an employer. Reputable employers approach my union and say, 'I'm being undercut by that sweatshop down the road. I need you to go in there and find out what they're paying their workers and check that those workers are being treated fairly.' So the good guys in the industry actually request us to use our right of entry and inspection powers to go into workplaces where we have no members and investigate why it is that that company is undercutting the reputable employer who is giving a worker fair wages and conditions. So it is the boss that says to me, 'I'll tell you where that sweatshop is. Please go in there and find out what they're doing because I'm losing orders as a result of the exploitation that is occurring in that workplace.' So it is not only a request of employees that drives us into those workplaces.

I am conscious that I wanted to leave some time for questions, but I do want to end by bringing us back to where I began, which is the particular situation of outworkers. As you know, the industry is characterised by this very long contracting chain. We recently undertook an inspection of 151 workplaces in Victoria over the period of October and November last year. That was an inspection into the treatment of outworkers and the provisions of the award that dealt with contracting out. We currently have rights that allow the union to be able to require the employer to provide the union with details of where work goes. When they are not making the work in the factory—they are giving it to somebody else and that person is giving it to somebody else—we have rights under existing award provisions and under the Victorian Outworkers (Improved Protection) Act to have that system disclosed and made transparent to the union. There is no requirement that we have a member in the workplace to be able to get access to those records.

The effect of this legislation would be to wipe what has been built up now over more than 20 years by the efforts of this Senate, and in fact many others, to introduce some sort of regime where the union has a capacity to see where work is going and check that the workers at every level in that chain are being treated fairly. If you remove our capacity to have access to that information for anyone other than union members, it immediately removes our ability to both investigate and prosecute some of the most exploitative labour practices in the country.

I note there are some statements in the department's submission to this inquiry about it being the proper role of the inspectorate and the department to take actions of these sorts against exploitative practices. I have been a union official at the Textile, Clothing and Footwear Union for 16 years. In that time, I have never, ever known the federal inspectorate to take one case of prosecution against an employer in our industry over these issues. I characterise the difference my union makes by saying that, over a period of 12 years in Victoria, my union has taken to the Federal Court five different batches of extensive prosecutions, the last of which was 30 companies that were prosecuted for breaches of the outwork provisions in 2003. Each time, they were based on our ability to enter workplaces, require those records to be given to us that actually disclose where the work was going and then be able to check on the conditions of the workers that were doing work. We do not do that work because it leads us to union members. We do not do that work because it increases the membership base of our union. I wish it did. We do it because it is our role and responsibility to try and regulate and ensure that there is fairness in an industry, that workers are treated the same regardless of the size of the workplace they work for and that they have the same rights and terms and conditions of employment wherever they work—whether it is in home, in a sweatshop or in a large factory.

Our concern is that these workers rely on our union not in a traditional sense of representation in many ways; they rely on us to actually be their voice regardless of whether they are our members or not. They rely on us to enforce a regime. You will see in our papers in fact a quote from the union's case of prosecution in that last round where we prosecuted a company called Lotus Cove. The judge that found the company guilty, Justice Merkel, talked about the breaches of the award regime as serious and that the regime is addressed at preventing abuses which are causing considerable social and economic problems in the community. The justice himself recognised that it is about keeping that regime and having some validity to it and some capacity to look after these workers.

I will end by saying that, as you can hear, I am concerned that the bill, with all its facets, is one that is not fair and one that breaches both human and industrial rights of workers. Also, this bill, if it were put in place, is not insidious because of its attack on unions. It is insidious because it is based on a premise that somehow the legitimate day-to-day work of unions is not about and not linked to the protection of workers and the enforcement of fairness in and the rights of the Australian community.

Senator MURRAY—You might not know but in 1996 I, on behalf of my party, was the first person ever to get outworkers put into federal legislation.

Ms O'Neil—I was aware of that, Senator.

Senator MURRAY—So you have some sympathy from me and from us on that front. You said in your conclusion that the bill should be amended so that the existing provisions under the Federal Clothing Trades Award, the Victorian Outworkers Act and the Workplace Relations Act are not affected and may have continuing operation. I heard what you had to say but, with respect to that specific example, is there anything in the wording of the bill which says that they will be under threat?

Ms O'Neil—Yes, because the bill deals with the only exception being the provisions of health and safety acts at a state level.

Senator MURRAY—Could you go away and consider some wording to recommend to the committee whereby the outworkers will continue to get protection within the law. I ask you that because there is a long history of this committee—both in its references version and in the legislation version—of being unanimously warm to the fate and importance of outworkers being protected under the Australian system. In my view, it has not been a partisan issue; it has been a non-partisan issue. I suspect you would get some sympathy, if you were able to assist us there.

Ms O'Neil—We will have no problem with providing you with some specific wording about how that could apply.

Senator MURRAY—The two main aspects of right of entry concern, first, addressing breaches or suspected breaches of wages and conditions. The other aspect is the recruitment and servicing of members—and of course non-members—through recruitment. Your address mixed up both, naturally. If there are ills within the system, in my view they are principally attached to a minority of union officials manipulating rights of entry conditions to fabricate, if you like, disputes about wages and conditions. Very seldom have the court cases or the IRC examinations of these issues attended to poor behaviour with respect to recruitment and servicing. My expectation is that that is an area, or one of the areas, in which it is legitimate for the bill to be adjusted. If that is done, will that go some way or only part of the way to addressing your concerns?

Ms O'Neil—It would only go part of the way. My experience is that the two areas of work are not neatly divided. It is our experience, when going into workplaces, that it is often the case that these things are all dealt with at the one time. For example, just this week one of my organisers and the assistant secretary of this union attempted to enter a workplace in Geelong which had 15 workers, and they were called by a worker and asked to attend. The first time the organiser went alone and was refused right of entry after giving 24 hours notice.

The second time, she went back with the other union official and again the employer refused to let them on the site. They said, 'We have rights to enter the site.' They explained and provided their permits. Then, after some considerable time, where they had been abused and sworn at by the employer, in what I would call a very aggressive manner, he eventually said, 'I will bring the workers into the showroom.' They were seeking to enter the factory and go into the lunch room. He then dragged the workers into the showroom, refused to leave the showroom and said, 'Here they are. What do you want to say to them?' Of course, the workers were not able to speak. The meeting was very short and the officials left the site. They received a phone call that night from one of the workers who went on to explain that they

were very pleased that they had seen them, but they could not speak because they were afraid of intimidation and they did not want to identify who was a member. Some of them wanted to join the union, but they did not want the employer to know they were joining the union. The reasons that he would not let them into the workplace were that there was a considerable problem with the power outlets, there were health and safety issues to do with all of the machines going through one outlet, there were no proper sanitary arrangements in the toilets, et cetera. There were also issues around specific underpayments and this employer having stated that he would never pay overtime penalties and would never give them bereavement leave.

My example shows that, in that one phone call and that one visit, the issues that the officials were dealing with ranged from the need to investigate breaches, the need to hold general discussions and the need to provide advice around health and safety to the need for those workers to be able to approach the union about joining the union. It is not an unusual occurrence that you cannot neatly split what goes on and definitely, if you add the overlay of workers who are not confident in English, it is a complex area of work that you are doing when you are trying to assist people. So I suppose my response, and it may have been a bit longwinded, is that I do not think you can neatly separate the two. Also, I do not think that some, I suppose, more reasonable provisions on the issue to do with discussions and recruitment would fix the fundamental problems that would still exist in terms of investigation.

ACTING CHAIR—Let me go back. A number of the employer organisations this morning complained about 'fishing expeditions'—unions going to a workplace to deliberately find problems. I think that what you are describing to us is that you do not actually have to go in and find problems, so to speak; the problems are there and they need to be brought out. The employer organisations call them fishing expeditions. What do you call them? Is there anything actually wrong with that?

Ms O'Neil—I think it is a healthy thing to create an environment where people can ask questions and be told what their rights are. I do not think there is anything intrinsically wrong with an opportunity for workers to say, 'I don't know if this is right or not. I got paid this when I worked on Saturday, is that okay?' They often do think of asking that until they see you there. That is part of the role of unions—it is a healthy thing. People can have you, with some expertise as an official, present and they can say, 'I've been worrying about this for a long time. I don't know if this is okay. Can you tell me?' That is a lot of our job. In some cases we say, 'That is right. You are being paid correctly,' and that is the end of it, or 'That's right. They can send you home in these circumstances.'

The issues we deal with are so broad. We often go into workplaces on things like transmission of business issues. Where would that fit under these amendments? Workers contact us and say, 'The company's just changed its name. It used to be on our pay slip saying that we were employed by so-and-so and, suddenly, we're employed by someone else. We don't know whether we're going to get our long service leave, we don't know what's happened, we don't know who the owner is, we don't know what that means.' That does not neatly fit into an investigation of a particular breach, but you can understand, from a worker's point of view, why they are concerned and want some advice about what is happening. The

answer to your question is that it is a good thing to have some independent expertise available to workers to advise them on questions. If the fact that you are in their workplace and accessible to them means they think of asking a question and that leads to them understanding it better, or some degree of underpayment or exploitation is fixed, then I think that is a good thing to happen in society.

ACTING CHAIR—The question put to us this morning was why, given the technological advancement of our community, we need face-to-face contact. If your members have concerns and worries, why can't they contact you through your webpage or communicate with you via the internet or ring you up? Surely there is not a need for face-to-face contact anymore. How do you respond to that?

Ms O'Neil—It is not the world I live in. My members by and large do not have access to the internet. They definitely do not have access to the internet in their workplaces. Some would fit demographically into the lowest portion of the Australia community in terms of having internet access at home. Some do have it, usually via their children. Occasionally we have members who ask their children to contact us in that way. But for the great bulk of our members that would mean that they would not have any capacity to get information or to reach us with a query. I have already explained the problem with phone contact with people whose first language is not English.

The thing I would add to emphasise the importance of one-to-one contact is that we are often dealing with people who are really distressed. We are dealing with workers who are about to lose their job, have just been told that they have lost their job, have just faced some sort of harassment or discrimination or have some personal or private concern. It is appropriate that people have the ability to speak confidentially on a one-to-one basis with a real person, and that that is not something they are constrained in doing.

Senator CROSSIN—Have there been any instances where officials at the TCFU have been taken to the commission and had their permit revoked?

Ms O'Neil—No. There have been no instances of that that I am aware of. We have run numerous cases of right of entry provisions that have been breached by employers. A couple of examples are mentioned in our submission. I mentioned one to you today. The other one I was going to mention is that when we did that compliance check last year I decided to spend some time going to these places with the officials. As union secretary I do not usually do as many inspections as I would like. I went into a workplace where we were only allowed to enter the employer's office. He would not give us access to the shop floor or the workers. In the process of us trying to get access to the records to investigate some breaches, he pulled out a very large knife. He explained to me that the reason he was brandishing his knife and showing it to me was that it had his brand name written on it and he was trying to say that he was not just a clothing manufacturer; he had other business interests as well. I am not easily startled, but it was pretty clear to me that the brandishing of the knife was not just about showing a brand name. Our experience of right of entry is that there are numerous examples where officials of my union have been chased, threatened or harassed and we have had to call the police to assist us in entering a workplace.

Senator CROSSIN—What recourse do you have in that instance?

Ms O'Neil—It is often about the word of one person over another. We have taken cases and we have been successful in them. They are documented in the report. We have had the commission give orders about us being able to see workers in their lunch rooms and being able to get access to records. We have on occasion had some great assistance from the Victorian Police.

Senator CROSSIN—This bill restricts entry into a workplace twice a year. I have heard no convincing argument today as to why it ought to be twice a year. In fact one employer group this morning said that the current restrictions are too flexible and too liberal—excuse the pun—but twice a year might be just too restrictive. You are saying to us that you do not believe that the current system is broken or in any way deficit or that there needs to be any change.

Ms O'Neil—One thing I would seek to change is that one of the problems for us is the phenomenon of disappearing workplaces. With the requirement to give 24-hours notice, it is not uncommon in our experience that we find a sweatshop or a small clothing factory, we provide the 24-hours notice that we intend to be there the next day and then the next day it is gone. So I would say that the unworkable provision in the current right of entry is the requirement for 24 hours—

Senator CROSSIN—Is it an empty shed or something the next day?

Ms O'Neil—Moved out, packed up, gone—a bolt on the door and nothing inside, and the previous day it was full of machines and machinists. This is not an unusual occurrence; this is not a one-off.

Senator CROSSIN—So what recourse do you have in that instance? I suppose you would like the act strengthened in other ways.

Ms O'Neil—Where I see the deficiencies in the current act is that it actually limits our capacity to properly ensure that workers are being treated fairly and have their right conditions. It encourages that sort of activity where people literally disappear and there is no scrutiny of what is going on. So any amendment that I would be looking for would be going in the opposite direction, which would be that it should be fair and reasonable—as long as we show our permit and behave in a reasonable manner, which we do—to be able to turn up and say, 'We would like to speak to the workers and see what is happening here.'

Senator CROSSIN—That is all I have got.

ACTING CHAIR—Thank you, Ms O'Neil. Thank you for your submission and your presentation today.

[10.36 p.m.]

CALVER, Mr Richard, National Director, Industrial Relations and Legal Counsel, Master Builders Association

HARNISCH, Mr Wilhelm, Chief Executive Officer, Master Builders Association

ACTING CHAIR—I welcome our next witnesses from the Master Builders Association. The committee prefers all evidence to be given in public. It will consider any requests for all or part of evidence to be given in camera. The committee has before it submission No. 1. Are there any changes or additions to your submission?

Mr Harnisch—No, there are not.

ACTING CHAIR—Thank you. I now invite you to make a brief opening statement and then take questions from the committee.

Mr Harnisch—Thank you for the opportunity to appear before this committee. The building construction industry in particular welcomes the reform relating to the union right of entry. As evident from our written submission, we have been a strong proponent of it. However, concerning our submission, also note that in terms of state based unions' rights of entry under OH&S legislation, the laws are not affected by this bill. We believe having that incorporated would certainly strengthen the effectiveness of this bill.

In the context of the building and construction industry, the overwhelming evidence presented to the Cole royal commission a couple of years ago was that industrial disruption on building and construction sites followed union officials entering sites as a result of the exercise, or purported exercise, of the statutory entitlement to be there. We believe that in order to restore the rule of law that Commissioner Cole found in his report, certainly entry and inspection provisions must be fundamentally reformed as one of the key elements of that reform process and restoring the rule of law.

I will give an example of what is typically an everyday occurrence in the way the union in our industry uses safety illegitimately in terms of right of entry. This might assist the senators' understanding of where we are coming from with regard to this particular bill. Allow me to read to make sure that I have all the facts right. Recently, a brake on a crane on a Western Australian building site began to fail whilst a load was being lowered. The failure resulted in the load not being able to be stopped, with it impacting on a scaffold. Luckily, no injuries occurred. WorkSafe WA attended the site through both the departmental safety inspectors as well as the crane owners who inspected the crane. The investigation revealed the crane's brake pads had worn down to a point of not being effective and preventing the load from going into a free fall.

The CFMEU attended the site and sent the work force off site——the site's work force was about 15 men—over alleged safety concerns. This was despite WorkSafe saying the site was okay and there were no further safety risks present. The crane was quickly repaired and able to be used safely once again. The work force attended the site the next day. The CFMEU attended the site on the third day and again sent the work force off site for alleged safety reasons. When questioned by the site manager, the union organiser said it was because

WorkSafe had not presented him or the union with a written report about the incident two days before. Notably, WorkSafe have no obligation to present the union with a written report or any report at all about this irrelevant issue to the union.

Given WorkSafe's tick-off of the site's safety, one has to ask this question about what we see—and certainly the owners of the site see—as the union's draconian action: were the union's actions directed towards an innocent party, the builder? If the union had an issue with the department, why not take it up with the department? This is an example among many in our industry where the builder has a legal remedy but does not take it up in order to avoid more disruption.

Right of entry therefore needs to be regulated as one of the tools to minimise disruption to the work place in our industry. It is certainly the Master Builders Association's policy that applications for permits under the Workplace Relations Act shall be conditional on an organisation disclosing whether or not a person has previously had a permit revoked and on the registrars being satisfied that the applicant is a fit and proper person to be issued with a permit, taking into account the purposes for which the permit is to be issued.

We also believe that the proposed permit system should be extended to regulate rights of entry under OH&S laws, as we have previously indicated. We also propose that OH&S be stipulated as a ground for entry to premises. An appropriate permit should be held by the official or employee of the union, with the disciplines created in particular by proposed section 280F of the proposed bill applying to the relevant permit holder.

Can we make it quite clear that it is certainly not our intention—and it never has been, even though we have been accused of it—to denigrate the role of unions in OH&S or in the building industry. It is also not our intention to label all of their interventions as an abuse of power. However, in too many instances that I hear about alleged OH&S disputes become elevated into industrial disputes or are used as a mask for the application of different agendas. We have focused on OH&S but there are other abuses of the right of entry that obviously concern us and that is why, in conclusion, I say that we support the bill. But we believe that the bill would be more effective if OH&S was also included. Those are our opening comments.

ACTING CHAIR—Thank you. So the motivation for supporting the bill is really that if there are not union officials present on sites there will be less industrial action on site. Is that what you are saying to the committee?

Mr Harnisch—Our submission states that we are concerned that unions use the right of entry legitimately. The experience of our members is that rarely is it used for legitimate purposes. The purpose is to cause a disruption, which in many cases causes significant economic harm.

ACTING CHAIR—So every time a union official visits a site there is a dispute?

Mr Harnisch—The reports I am getting from my members say that 90 per cent of visits to a site by a union official result in disputation.

Senator MURRAY—That is 90 per cent?

Mr Harnisch—Yes, 90 per cent—nine out of 10.

ACTING CHAIR—Across Australia?

Mr Harnisch—Generally, yes.

ACTING CHAIR—So how many union officials are there in the building and construction industry?

Mr Harnisch—I cannot answer that. Mr Calver might be able to.

Mr Calver—We will take it on notice.

ACTING CHAIR—Give me a guess.

Mr Calver—If it is a question that you want a considered answer to, we will give you the figures.

ACTING CHAIR—Let us work backwards. How many building sites are there in Australia? If 90 per cent of them are closed down, how often are they closed down?

Mr Harnisch—I will take those statistical questions on notice.

ACTING CHAIR—Ninety per cent of visits of union officials to building sites result in the building site closing down? Let us say that across the building and construction industry my guess might be 250 or maybe 300 union officials in the country visiting three or four sites a day. I am amazed, based on your evidence, that there is anything going on ever.

Senator JOHNSTON—That could be right.

ACTING CHAIR—It is not right, Senator. Those of us who went through the references inquiry saw the industry booming, and that was certainly the evidence put to us.

Mr Harnisch—I refer to previous royal commissions.

ACTING CHAIR—All right. So you simply rely on the royal commission as your evidence.

Mr Harnisch—No, we rely on members' experiences. I certainly did not come to this inquiry without factual basis or comments I have got from my members.

ACTING CHAIR—You said to me that 90 per cent of visits of union officials result in a site closing, and I do challenge the veracity of that claim.

Senator MURRAY—Just to check, did you say closing or a dispute?

Mr Harnisch—Disputes. I never said closing.

ACTING CHAIR—I thought I put to you closing. What do you say a dispute is, then?

Mr Harnisch—Where the unions are basically causing disruption, where work is halted for a short period of time. That is very critical in the building industry, where things are very critical in terms of scheduling of work. If you hold up one bit of work, you are holding up not only one trade but potentially 30 trades down the track.

ACTING CHAIR—I want to be clear on what you are saying to me. Wouldn't it be the case that union officials attend a site at the request of a member or shop steward or group of members because there is an issue that needs to be dealt with?

Mr Harnisch—Sometimes that is the case, but I have been informed that many times there is what our members would call a bogus OH&S issue that is deemed to be on the site. Having got onto the site, other issues are then raised and other disputes arise.

ACTING CHAIR—We just heard evidence from the TCFUA, for which you were here. It is not an uncommon occurrence that once a union official gets to a site other issues are raised and dealt with. I do not think that ought to surprise anybody. Your submission is that if people cannot get to the site there will not be other issues raised and therefore there will not be disputes. Is that the logic you are putting to us?

Mr Harnisch—Based on the comments I am receiving from my members, that would be a logical outcome on the basis that from most visits there result disputes, so it would logically follow that if there were fewer what we call illegitimate visits from unions there would be fewer disputes. We are not denying the right for unions to legitimately have right of entry. At no point in our submission have we ever stated that, and I put it on the record that this is not about stopping unions legitimately exercising their right of entry.

ACTING CHAIR—Doesn't the bill do that in many respects? Wouldn't it limit union officials to a visit once every six months? Are you say to me that your members wouldn't exercise that?

Mr Calver—That is only for recruitment, isn't it, those six monthly intervals? What it seeks to do is to regulate the other rights to enter within proper boundaries. We are supporting the establishment of those boundaries and ensuring the legitimacy of the functions that they fulfil when they are on the site. It is not just us that talks about using OH&S. For instance, using Mr Harnisch's opening statement as an example, in the report produced by the Interim Building Industry Task Force, as it was then known—it is now the Building Industry Task Force—*Upholding the law: one year on* there is a section on misuse of OH&S.

ACTING CHAIR—I have read that.

Mr Calver—Good. Thank you. I was going to refer you to page 12 of that report. It is not something that Master Builders has dreamed up. It was established in Cole. The taskforce that was set up after Cole has shown that to be categorically the case. We are reinforcing that by providing a fairly quotidian example of the sort of disruption that follows when unions become involved.

ACTING CHAIR—But I did ask Mr Harnisch whether he is relying on the royal commission.

Mr Calver—Subsequently as well, the Master Builders members are relying on that report and all the evidence that has come out.

Mr Harnisch—Plus, obviously, lots of anecdotal evidence from our own members. What I am saying is that, if you walked around the building industry circle, no-one would disagree with these sorts of things.

ACTING CHAIR—That is not the case, because I have done that. We had a references inquiry into the royal commission, and I must say we did not receive much evidence around that. We did some site inspections and it was not the stuff I heard everywhere. Certainly from the peak organisations that is what we heard, but we did not hear it everywhere.

Senator JOHNSTON—I come from Western Australia.

Senator MURRAY—You are not the only one!

Senator JOHNSTON—Yes, my good friend and colleague Senator Murray comes from there too. I—I will not speak for him—am inundated by your membership, who want to tell me about the anarchical state of industrial relations in the commercial construction industry in Western Australia, predominantly relating to the CFMEU, and the use of the right of entry as a mechanism firstly to harass your members. But they use it to obtain leverage in some form of levy negotiation. For instance, in Western Australia we have the CFMEU's construction and training skills centre, and I think that is something like a 10 per cent or 13 per cent levy from commercial constructors. Then there are wage considerations that come up in terms of pattern bargaining scenarios. The best tool that the CFMEU has, in my understanding, is the use or abuse of rights of entry provisions. Having said all that, the most important thing that I am aware of is that your members are in terror of coming forward with those allegations.

Mr Harnisch—Correct.

Senator JOHNSTON—Firstly, can you tell me whether that is true. If it is, why is it true?

Mr Harnisch—The answer is true. The reason for that is simply that they fear retribution. They fear having that site continuously subjected to disputation in a way which is perhaps not escalated to a court matter but which is enough to cause significant economic harm through delays. Because of economic harm, builders are locked into fixed price contracts with often onerous liquidated damages provisions for not finishing on time. They then make a commercial judgment: 'I'll turn a blind eye; I'll concede or accede to the union. I won't lodge informal complaints.' Their experience has been unsatisfactory in having that dealt with in the Industrial Relations Commission. Even when orders are given, they are simply ignored. They go through a very expensive process, only to be once again threatened and intimidated. The culture has been, 'Silence is better; let's get on with the job,' because they feel helpless in terms of the current legislation and the processes that they thought were there to help them.

Senator JOHNSTON—I have been talking to the chamber of commerce, which is a different constituency to yours, about some of the aspects of this amendment bill. I want to take you to a couple of points, because I think you are the principal beneficiary of these points and I want to make sure that we have not misfired in the drafting. Section 280F says that a permit is not to be issued to anyone other than a fit and proper person. The wording is:

> The Industrial Registrar must not issue a permit to an official unless the Industrial Registrar is satisfied that the official is a fit and proper person to hold the permit.

The words 'fit and proper person' are further expanded in subsection (2), where it says that the Industrial Registrar 'must have regard to' various matters. Someone has said to me that that means he does not have to take them on notice, but the fact is that the standards of statutory interpretation mean, for instance, that if a person has ever been convicted of an offence—I am looking at (b) now—against an industrial law the Industrial Registrar cannot give him a permit. There are a whole host of others that fit this mould.

I am not sure that I am jumping at shadows here because I think that in other industries good relationships build up between the unions and the employers. In the dark old days a union man might have had a transgression and had an offence against him such that he would

fit into one of these categories in some shape or form. What I am worried about is this: do you perceive that there are good relationships with any union organisers and permit holders such that this would adversely impact upon your members? Do you understand what I am saying?

Mr Harnisch—I know what you are coming at.

Senator JOHNSTON—It is a pretty cut and dried test. I am worried that some construction company may have a relationship with a permit holder that is working satisfactorily, but because he has, for instance, a condition put on the permit by a state imposed condition—I am looking at (f) now—the registrar is precluded from renewing that permit

Senator MURRAY—Automatically.

Senator JOHNSTON—Yes, automatically. He is bound by the 'must'.

Mr Harnisch—There is no discretion.

Senator JOHNSTON—There is no discretion. I just want you to be careful about that and have a look at that. I draw it to your attention. I am not sure that I really want you to comment about it now.

Mr Harnisch—Can we take that on notice?

Senator JOHNSTON—Yes. I support this legislation because, as the chairman has said, we have been through a references committee—I am sure you have seen the *Hansard*—with a long litany of pain and suffering and abuse of process, particularly in Victoria in Western Australia.

The other section I want to take you to is 280J. We have a concept here of abuse. It says:

If the Commission is satisfied that a union, or any official of a union, has abused the rights …

I am worried that the word 'abuse' is a litigious expression that has not been defined. I would think that, at the gate of the site, that is open to an interpretation which is impractical in terms of the negotiation, if you follow me. What we are looking for is to maintain a right of entry but to have it effective and to have it work for both sides.

In 280M we have the concept of 'suspects, on reasonable grounds':

If a permit holder for a Commonwealth union suspects, on reasonable grounds, that a breach has occurred …

What I want to know is: what is the test that you think is satisfactory in order for there to be reasonable grounds? As I put to the chamber of commerce: is it a statutory declaration? The words are 'suspects, on reasonable grounds'. Suspicion may be a gut feeling; the reasonable grounds may be that it is a legitimate gut feeling, if you follow what I mean. All I am looking to do is to eliminate potential grey areas so that we can get on with the job.

Senator MURRAY—And unintended consequences.

Senator JOHNSTON—I just draw your attention to that and ask that you consider those matters such that we can get this legislation functioning. The last question I want to raise with you is: do you see that a unitary system across state borders that removes the opportunity for jurisdiction shopping and for abuse of state occupational health and safety provisions is going

to be of benefit to you? I ask you in the context that the second of those two aspects is not dealt with. That concerns me.

Mr Harnisch—In our submission, that is the view we have got. Certainly our members are saying that the dual jurisdiction is causing a whole lot of confusion, not only amongst employers. They purport that that confusion is then exploited by union officials. It certainly gives grave problems to the police, who may be called in from time to time. There is a famous case in WA, which is cited in our submission, where—

Senator JOHNSTON—Is it BGC?

Mr Harnisch—No, it was another one. It was the Magistrates Court, where the magistrate chastised the police for not knowing the law and getting involved in rights of entry. Those sorts of things are unfortunate. We believe the unitary system will provide greater clarity. Therefore, we believe that is a much better system than what we have got.

Senator JOHNSTON—But there is not much point in having a unitary system that deals with right of entry that does not scoop up the abuse of occupational health and safety provisions in the states.

Mr Harnisch—That is our proposition in our submission.

Senator MURRAY—I want to draw you an analogy, if I may. When you came to the building today, did you notice all the very expensive and extensive roadworks around this building?

Mr Harnisch—Yes.

Senator MURRAY—Or security works, I suppose. You would agree with me, wouldn't you, that the actions of a few dedicated lunatics have resulted in the denial of right of entry and access to the Parliament of Australia or the restrictions on right of entry and access to the Parliament of Australia by hundreds of thousands of visitors every year? I am told it may be up to a million but certainly it is hundreds of thousands.

Mr Harnisch—To certain parts of the grounds of Parliament House.

Senator MURRAY—Do you agree that there are restrictions compared to the past?

Mr Harnisch—I certainly would. You would have to deduce that there are certainly more restrictions than there were in the past.

Senator MURRAY—So the analogy is good with respect to your industry. If I were the rest of the union movement—two million of them—I would be outraged that a few people in the union movement of the building industry have occasioned much more restrictive right of entry legislation.

Mr Harnisch—But isn't that the case with most legislation, in that, where we have legislation in place to deal with perhaps the more extreme in our society—not only in IR but outside IR—that does not mean that the rights of those who do behave lawfully are therefore infringed. There are, for instance, laws about murder. I do not feel constrained as a citizen because of those laws.

Senator MURRAY—You take it too far. Right of entry is a practice engaged in by certainly thousands of union officials interacting with thousands of employers. The point I

want to make to you is this: both Senator Johnston and I, and probably other members of the committee, are alert to the fact that abuses need to be dealt with but that people whose existing relationships are effective, workable and operating well may well be affected deleteriously as a consequence. I want to ask you as a result of that discourse: in the bill, which are the most important things for your industry which address the most serious issues?

Mr Harnisch—There are probably a couple. We have already mentioned OH&S, or the abuse of OH&S—but let us not talk about OH&S. For us it is a matter of lawful behaviour once the unions gain legitimate access and have rights of entry. There are numerous examples where union officials, even where they had legitimate entry, behaved in obnoxious, violent and threatening ways. In that regard the fit and proper persons test would certainly be something that we would look at. It is very important in our industry that we have some redress in terms of permit holders and that builders have the capacity to challenge the legitimacy of union officials when they behave improperly.

Senator MURRAY—You did not mention the single jurisdiction issue, which is the BGC case.

Mr Calver—Our policy is that there should be a unitary system relating to right of entry.

Senator MURRAY—I was not asking you about your policy, I was asking: what is most important in the bill?

Mr Calver—After the permit system it would be having one system of regulation for all aspects of entry—occupational health and safety under the state system and under the federal system. Going back to the Magistrates Court decision that Mr Harnisch mentioned, because of the sort of confusion in the mind of even official bodies like the police, where it came to the magistrate feeling that he had to criticise them for lack of knowledge, the Cole royal commission said that it is not only that the police have that lack of knowledge but also that union officials do not feel constrained to be trained in this area, and that permit system will require training. Combined with the permit system that Mr Harnisch talked about, consolidating all the bases upon which legitimate rights of entry can proceed is a very high priority for our industry.

Senator MURRAY—I ask you that on the record because I have had it said to me by an MBA official in WA that the dual jurisdiction did not matter much to him and to his members. I was really taken aback. But he said that I should recognise that many of the sites are under only the state system because they are small building sites and so on. The practicalities were that it is only a few sites where this occurs. Is that right?

Mr Calver—Where you have very large infrastructure projects and the unions are fighting about coverage—

Senator MURRAY—Is it a few sites?

Mr Calver—If it is only a few sites, they are very significant sites because they tend to be the large infrastructure projects, of which there are many in Western Australia, because Western Australia is booming. Whilst they might be small in number they are economically very significant. That is to our knowledge at this time. The BGC case is one instance of a large infrastructure project.

Senator MURRAY—The point I am making—you probably have not understood where I am going—is that it therefore does not matter much if the federal jurisdiction takes over those rights, because for most of the sites it makes no difference. The argument that the states put against this—you really have to think like a politician, Mr Calver—is that this is an infringement of their state rights. The arguments that some of the unions put—but not strongly, I might say—is that it should be allowed to continue for a case-by-case situation. I am simply saying to you that it does not matter that much to either of those cases because the resolution of that problem is a practical and efficient one and it will not alter much the way in which the average site operates.

Mr Calver—Let me come at it from a different perspective. Part of the reason that we are pushing for occupational health and safety to be part of this permit system is that we do not want that duality of state and federal systems, so that you won't get the confusion: are you here to deal with a safety matter or are you here under the permit system?

Senator MURRAY—I am on side; you do not have to persuade me.

Mr Calver—We hear what you are saying but it is so important to our industry that there be a unitary right of entry system.

Senator MURRAY—Except that your MBA official said that it was not.

Mr Calver—I think that that might have been a comment that we are not aware of and one that we could not endorse. It is highly important that there be a system that is uniform throughout Australia in respect of this very sensitive topic for our industry.

Senator MURRAY—It seems to me, in interpreting both your submission and your oral evidence, that essentially what you are saying is that you want a permit system which excludes from the outset people with a record of bad conduct and bad behaviour in an industrial circumstance and, where that is not apparent from the outset but it becomes apparent whilst they operate with permits, that there should then be a mechanism for revoking their permit which is more effective than the mechanism at present. Much has been made of the statistic—I do not look to the statistics but I accept them—that the number of permit revocations is very low. Is it your evidence that the existing revocation regime is just ineffective or inefficient or is it that your members are afraid to come forward and apply for the revocation of a permit? If it is the latter, how will changing the law stop that? If they were afraid before, they will be afraid after.

Mr Harnisch—I am conscious that somebody is going to ask me for evidence if I say one way or the other, but the feedback I am getting from my members and the reason that—

Senator MURRAY—Let us just put that to bed. Members of this committee are experienced and they know that much of the evidence put to us from both the union and the employer side is based on anecdotal evidence, so I do not think you need to get oversensitive or defensive.

Mr Harnisch—The overwhelming feedback I am getting from members is that, firstly, they fear retribution and, secondly, they fear retribution on the basis that they are unlikely to be successful.

Senator MURRAY—Let me just stop you there. Are they are unlikely to be successful because it is an ineffective and inefficient system now?

Mr Harnisch—The sorts of comments I am getting are that some have tried and it has not been a very successful process.

Senator MURRAY—And when it is not successful the retribution follows thereafter—is that what you are saying?

Mr Harnisch—Those are the sorts of experiences they are having. With all their years of experience the old warriors have decided that the best action, because the law, the system, is not there—it is incapable of supporting them—is to just work around it. You therefore live with it and you take other commercial steps to deal with it.

Senator MURRAY—I accept that there is fear in your industry, because I have had people come to me on that basis—and not just on the employer side but on the employee and worker side. What I am concerned about is that we might change the law but fear may still result in the law being ineffective.

Mr Harnisch—I accept that.

Mr Calver—The registrar will at least be able to scrutinise their conduct and where there is an incidence of poor conduct under the state system that is something we can take into account in issuing a permit—or vice versa in the federal system. So once they have behaved badly in the federal system and they have been excluded, they cannot do what they do now, which is to get state rights of entry. Taking that a step further, we say that they should not then be able to get right of entry under OH&S law. Fear of retribution is documented for our industry in the task force report that I spoke of.

Senator MURRAY—But as you know, and I am interrupting because we are short of time, I have consistently argued that the problem is with regulation—in other words, the regulators are not out there policing. The police withdraw and the state and federal departments are of varying quality—mostly insufficient. Even if we pass these laws, I am not convinced that that will necessary iron out those who are genuinely of a criminal, defiant or aggressively militant nature. I have read what those people have had to say. They say that they do not care what the law says, what is done to them or how the law is changed; they will carry on doing what they are doing.

Mr Harnisch—I think what you are alluding to is that there perhaps needs to be another process by which this can be tested and enforced. If there is another mechanism by which that can be achieved to make this effective, then we would certainly support it.

Senator MURRAY—I will conclude by saying that I am really concerned that a change in the law which might affect two million union employees might still not have the beneficial effects for your industry that one would hope for on the face of it. Then what would it be worth? I think it is very important that, following the passage of this legislation—which will either pass now, amended, or in four months time; that is the reality—your industry carefully monitor the consequences.

Mr Harnisch—We will certainly take your comments on board.

Senator MURRAY—You cannot keep tightening up the laws—it is like the parliament—so that people never have right of entry which is meaningful. Eventually we have to stop the criminality or the unpleasant militancy at its source, which is the people.

Mr Harnisch—I accept that as well.

Mr Calver—But this will be an improvement in many ways other than tightening the law. It will, for example, for the first time put a proper civil penalty on the sorts of people that the TCF union were pointing to as well, because there is an employer sanction in there now. So it is not just a ratcheting up or tightening of the laws that affect our sector. We would not characterise it like that.

ACTING CHAIR—Thank you for submission and your presentation today.

Proceedings suspended from 3.16 p.m. to 3.32 p.m.

BENNETT, Mr Robert Leslie, Assistant Secretary, Workplace Relations Legal Group, Department of Employment and Workplace Relations

CULLY, Mr Peter, Director, Organisations, Freedom of Association and International Section, Workplace Relations Legal Group, Department of Employment and Workplace Relations

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

ACTING CHAIR—I welcome our next witnesses from the Department of Employment and Workplace Relations. The committee prefers all evidence to be given in public. It will consider any request for all or part of evidence to be given in camera. The committee has before it submission No. 16. Are there any changes or additions to your submission?

Mr Smythe—No.

ACTING CHAIR—I now invite you to make a brief opening statement and then take questions from the committee.

Mr Smythe—I thank the committee for inviting the department to appear at this hearing today and for the opportunity to make an opening statement, as I always do. On behalf of the minister, I would also like to take the opportunity to thank all of the organisations that have taken to make submissions on the bill.

I would like to begin by broadly outlining the major approach of the bill. The bill has two main goals. The first is to enhance the current provisions of the Workplace Relations Act and provide a better balance between the right of unions to represent their members in the workplace, hold discussions with potential members and investigate suspected breaches and the right of employers and occupiers of premises to conduct their businesses without undue interference or harassment. Secondly, the bill seeks to simplify the system by providing that, as far as possible, only a single scheme for right of entry will apply to workplaces. At present, some workplaces are subject to a complex regulatory web of differing right of entry standards under concurrent federal and state industrial laws and instruments. Companies with premises in more than one state may have to deal not only with differences between federal and state systems but also with differences between state systems.

The bill implements a commitment made in the coalition's 2004 election statement entitled 'Flexibility and Productivity in the Workplace: the Key to Jobs'. The provisions of the bill are based on the existing provisions of the Workplace Relations Act but also introduce a number of new provisions to address deficiencies in the current scheme.

A number of submissions to this committee have suggested that the current system works well and that there is no need for reform. In support of this argument, the number of applications for revocation of permits is cited. However, the extent of problems with the existing scheme cannot be gauged solely by reference to applications for revocation, although the number of revocations is not insignificant. Fifteen federal right of entry permits have been cancelled in the last three years. The department has received anecdotal evidence of right of entry being a problem for business across a range of industries. I would refer the committee to

submissions made by the AMMA and Rio Tinto, which provide specific examples of right of entry problems. The government's concerns are also supported by statistics from the Office of the Employment Advocate and the building industry task force. The Office of the Employment Advocate, over the period 1997 to 2004, dealt with 284 right of entry matters. As at September 2004, 68, or 14 per cent, of the total reactive investigations undertaken by the building industry task force have involved right of entry issues.

Quite apart from these and other specific concerns addressed directly in the bill, the government also draws the committee's attention to the ongoing problem with persons entering private premises without a federal permit or any legal authority whatsoever. In our view, many of the submissions to the committee overstate the extent to which the scheme proposed by the bill differs from the current regime. For instance, some submissions have referred to the requirement to provide 24 hours notice of entry. This is not a new requirement but has been a feature of the scheme since 1996.

Several submissions also criticise the provision that limits permit holders to inspecting the records of union members when investigating a breach. The government considers that union access to non-member records should be constrained, consistent with the role of unions as membership based service organisations. This approach does not leave non-union members without any recourse if they believe that they are not receiving the correct entitlements under their award or agreement. In both the federal and state jurisdictions there are government agencies that investigate and seek to rectify breaches of industrial instruments.

An attempt has also be made to create the impression that entry to premises is essential for a union to be able to recruit members. The government does not share this view. There are multiple means by which unions may seek to persuade employees to become members of their unions. For instance, in businesses where there are already union members or a union delegate, a union delegate or member could carry out a recruitment role at the workplace.

Some submissions suggest that the bill will overturn existing cooperative relationships that unions have with employers. This is not the case. It is important to note that the bill only deals with minimum enforceable rights to enter premises. There is nothing in the bill that would prevent an employer from consenting to union entry to premises without compliance with the requirements set out in the bill. This is made clear in the explanatory memorandum to the bill.

The government believes that there is no justification for delaying the introduction of this bill, particularly as recent high-profile cases have highlighted the need for legislation. For example, the bill would effectively override a recent court decision that determined that unions could rely on state laws to enter work sites where all of the employees were on AWAs. However, this does not mean that the government is unwilling to consider appropriate amendments to the bill. Following a number of concerns raised by submissions to this inquiry, the minister has decided to consider some possible amendments to aspects of the bill. These aspects are the limitation in the bill on a permit holder being able to engage in recruitment conduct only once every six months; the maintenance of the existing rights of union officials to enter premises, pursuant to the Victorian Outworkers (Improved Protection) Act 2003; and the requirement that notice of entry must be provided during working hours. The department is not yet in a position to provide any details of the precise nature of these amendments. That concludes my opening statement.

ACTING CHAIR—Thank you. I welcome the indication from the minister that he is prepared to consider some amendments, but then he limits them to those three items which you identified. I am surprised that he would not have waited for the Senate committee to report on its inquiry into this bill before he would make such a statement and limit amendments to those three areas. Having said that, we at least welcome the initial flexibility from the minister.

Senator MURRAY—Mr Smythe, please take me to the place in the explanatory memorandum where it says that it does not alter the common law ability of parties to consent to right of entry provisions.

Mr Smythe—I will ask one of my colleagues to draw your attention to that part of it.

Mr Cully—It is 1.31, on page 7 of the explanatory memorandum.

Senator MURRAY—It says:

The rules in this Part do not apply to entry by consent. In such a case, it is the consent that authorises entry, not the provisions of this Part.

Mr Cully—And there is a similar one in regard to entry for discussion purposes.

Senator MURRAY—My question is the obvious one: why wouldn't that be part of the law and, if necessary, a note within the act?

Mr Bennett—It is part of the common law that—

Senator MURRAY—I understand that, but think to yourself of a person who is a non-lawyer who may keep a copy of the act but wouldn't keep a copy of the explanatory memorandums of the various 30-odd bills or whatever that have been produced over time. That is why notes are used sometimes as a cross-reference. So accepting the legal validity of what you have said, the practical question is a reason why it would not be in the act itself.

Mr Bennett—The drafters obviously did not think it was necessary to put it there, but that is something that we could also explore with the minister at some stage.

Senator MURRAY—Does the answer mean that there is no in-principle reason why it could not be considered? I am trying not to trap you.

Mr Bennett—The answer means that we have not considered it but we may consider it.

Senator MURRAY—It has a connection—and you will recognise where I am going with this, Mr Smythe—to the issue of the certified agreement. You will recall the discussion over the Electrolux bill and what I thought was a very good outcome—but I would say that. Really, the determination was that if a matter is about wages and conditions and relevant employment issues, then it is legitimate to be in the certified agreement. I would have thought that right of entry could, or should, be there. If by consent anyway those conditions which are already in certified agreements could continue but would now be a common law agreement outside of the certified agreement, does that not get a bit messy? Isn't it better just to leave right of entry provisions if they consent in certified agreements?

Mr Bennett—That bill does not actually disturb existing right of entry provisions that are in current certified agreements.

Senator MURRAY—But those are—

Mr Bennett—There is a difficulty at the moment. You would be aware that there are a number of flow-on matters as a result of the Electrolux decision whereby the commission is looking at whether particular types of right of entry provisions are, by virtue of the Electrolux decision, already excluded. We do not have those decisions if those decisions are expected shortly, so it may well be that what happens is that some of the ones that are there at the moment go and some stay, depending on how close a connection there is with the terms and conditions of employment or whether they are just a union promotion type clause. So there is that aspect.

I suppose, in terms of whether or not they go into a certified agreement, if they become a pertaining matter for certified agreements then there is something which people can bargain about and engage in protected action. The government's position is that we prefer that people not have protected disputes about right of entry provisions. I think that also goes back to the original rationale in 1973 when the Hon. Clyde Cameron first moved to a legislative basis for having right of entry provisions in the act rather than dealt with under awards. You are setting a minimum floor, and therefore that was providing a simple basis whereby—as you were suggesting with the issue of the note—people could go there and look at the law and see that that is what it is. Maintaining those provisions in certified agreements, allowing people to bargain about them and having various forms of certified agreements and clauses drafted up on sites at the time is likely to further complicate the law. The government's position is that it would prefer to have a simpler regime.

Senator MURRAY—Except that allowing right of entry clauses to be within a certified agreement does not alter government policy, which is that, if they want to have additional right of entry provisions, they can do so in a common law agreement. The simplification of the law issue does not arise, because essentially you have said that, whether it is common law or this provision, you can have more than one right of entry regime.

Mr Bennett—I think there is a third option, which is the one that most of the witnesses today have canvassed. They have talked about the good relations that are enjoyed between employers and unions in relation to certified agreements and that people would let people come onto the site on a nod-and-wink basis anyway.

Senator JOHNSTON—But you cannot certify that agreement.

Mr Bennett—You could at the moment reduce all of those particular circumstances to writing if you had the time and the will to do so. You could either reduce them to a certified agreement or you could try and enter into some sort of deed under the common law.

Senator JOHNSTON—The Schefenacker decision says that you cannot, doesn't it?

Mr Bennett—I have not seen the final decision in Schefenacker, if it has been handed down.

Senator JOHNSTON—It might say that you cannot.

Mr Bennett—It might indeed say that you cannot.

Senator JOHNSTON—Certainly the Electrolux decision says that you cannot.

Mr Bennett—Electrolux has certainly put all of these issues in play. The third option is that of the gentlemen's agreement. I think that is what most people have been describing this

morning. That is where they do not actually have a common law agreement in the sense that people have formally sat down and reduced something to writing or said, 'This is our'—

Senator MURRAY—But, as you know, common law agreements can be oral.

Mr Bennett—Yes, but they do not even have an articulated common law agreement in that sense; they have a nod-and-wink understanding. The evidence we have heard today is that that system works reasonably well. It seems that, on the basis of some of the testimony that the committee has heard today, that would almost seem to be the dominant form of arrangement that operates. The government does not want to disturb those arrangements.

Senator MURRAY—If I may say so, it does strike me as unnecessarily complicating the issue. It would seem to me that an agreement between the employer and employee can have as a basis the right of entry regime in the act and you should be able to be flexible. But we will leave that for discussion at another time. I welcome the remarks on the record concerning recruitment and servicing of members' issues. I think that did need some relief, for no other reason than practicality. I am glad to see the government responding positively to the submissions made to it. The issues of concern, I would suggest, boil down to fairness of the system and the avoidance of unintended consequences with respect to the application for and revocation of a permit. Mr Bennett, I think you would have heard some of the discussion earlier between Senator Johnston and me, and also other senators at the table. You were here for much of that time. I am sure it was a great education.

Mr Bennett—It was.

Senator MURRAY—If you took some notes on that discussion could you respond to some of the views, or would you prefer direct questions?

Mr Bennett—I think that, in relation to the line that Senator Johnston was pursuing, his first possible concern relates to the insertion of the word 'reasonable' before the word 'suspicion'. I think I recall him making a comment along the lines that this would turn it somehow into a lawyer's feast. He was concerned about whether the civil standard of proof or the criminal standard of proof would apply. The reason the word 'reasonable' has been inserted is to make it clear that it is an objective test. I see that Senator Johnston is returning.

Senator JOHNSTON—I am sorry.

Mr Bennett—Senator Johnston, Senator Murray has invited me to answer a couple of your questions from earlier today. I have started by trying to give an explanation of why the word 'reasonable' has been inserted before the word 'suspicion' in terms of when people seek entry onto premises to investigate a suspected breach of an award or certified agreement.

The reason that has been inserted is to provide what the lawyers have described as an objective rather than a subjective test. It is not just a matter of the permit holder having it in their mind that they have some suspicion that something might be going on; rather, they have to have some objective basis which they should be able to demonstrate to the commission in relation to an application in a dispute regarding right of entry. I also mentioned Senator Johnston's concern that this might turn into a lawyers' feast—

Senator JOHNSTON—If it isn't already.

Mr Bennett—To the extent that it is a lawyers' feast, it takes place in the commission rather than in a court. The commission is charged with hearing these matters on their merits rather than taking technical legal points as to the meaning of the word. The other point I would make about the meaning of the word 'reasonable' is that it is used in other contexts in relation to securing right of entry under, I think, the Corporations Law and trade practices law to make it clear that the person is applying for the permit to come onto private property, whether they are an individual or a government inspector—in those cases they would be a government inspector. They have to establish that they have a solid basis for coming onto the premises, not just an inkling that something might be going on.

Senator JOHNSTON—In practical terms, is that the way it is going to work? I think these permits have a duration of three years.

Mr Bennett—That is right.

Senator JOHNSTON—So it is not going to be a one-off application for a specific thing in the normal course of events—I hope Senator Murray doesn't mind me interrupting here—

Senator MURRAY—Carry on; I think I have used up my time.

Senator JOHNSTON—The point is that the permit holder has to disclose—you say it is an objective test; let us put it in layman's terms—the subjective commodity of 'reasonable grounds supporting a suspicion'. He rings up and says, 'I think this is happening.' He thinks it is reasonable, but the bloke on the other end of the phone has no chance of thinking it is reasonable.

Mr Bennett—It is up to the commission.

Senator JOHNSTON—But I do not want to go to the commission.

Mr Smythe—He has to provide written notice of his grounds.

Senator JOHNSTON—So it is a written notice; it is not a sworn statement.

Mr Smythe—The employer says, 'Okay, that's fair enough,' or 'I'm sorry, you can't come in, I don't think that is reasonable grounds.' Then the union goes to the commission and says, 'You decide whether it's reasonable or not.'

Senator JOHNSTON—What I want is not to have to go to the commission. I want a definitive threshold that is in clear terms, such that you have got defined thresholds. That might be too much to ask, but I would have thought that a sworn statement that identifies a clear issue with an allegation substantiated by one or more facts would have been enough to have the employer say, 'Okay, you know more about it than I do; come on in.' But I think to have this written on a piece of paper is just another recipe for grey areas. That is my fear in this. 'Reasonable suspicion' worries me. I do not think suspicions are necessarily ever reasonable; they are just suspicions.

Mr Bennett—As my colleague has pointed out, the notice requirement provides that particular grounds will have to be set out for coming onto the site. The difficulty for the person seeking to come onto the site, as I think the union witnesses who were here earlier today and the various submissions that have been made have pointed out, is that their suspicion might of course turn out to be correct. The legislation is about providing a balance

between the individual right to enjoy private property and the right of the unions to protect the awards and agreements that they have entered into, and it is imperfect—I would be the first to concede that it is imperfect. What I would suggest is that by inserting the word 'reasonable' we improve the position as it is at the moment. At the moment anyone with a vague suspicion does not have to justify that vague suspicion. By inserting the word 'reasonable' you move to a slightly harder test for them.

Senator JOHNSTON—With 'reasonable' you are inviting an adjudication which would provide a body of precedent such that you will get a pro forma in the medium term. I am not certain how you avoid that, but my way of avoiding that is that you have to have some empirical facts in the belief. It has got to be a belief on reasonable grounds; not a suspicion—there is a subtle difference in that.

I am worried that the amendments are superfluous and vestigial, given that we do not address state occupational health and safety abuse. So we are just going to shift all of the abuse over to occupational health and safety, as the CFMEU practise with great dexterity in Western Australia as we sit here now. What have we done to try and prevent that?

Mr Bennett—The government's response at this stage is that there have been submissions on this both ways. We are aware that certain employer groups in particular industries are concerned about this issue. But at this stage, the government is prepared, in line with the incremental approach that the minister spoke about in his speech on the 14th, to proceed this far. The concerns raised by the employers are that this is being used as a cloak for something else. I suppose the government will keep the matter under consideration.

Senator JOHNSTON—We have gone for a unitary approach with respect to right of entry for recruitment and surveillance of terms and conditions; we have not gone for occupational health and safety.

Mr Smythe—The reason for that is that at present there is not a Commonwealth occupational health and safety regime outside of Commonwealth employment.

Senator JOHNSTON—We do not have officials who know how to police that ourselves, and it is a state jurisdiction.

Mr Smythe—We do not even have any regulations.

Senator JOHNSTON—That is a practical impediment to us. Why have we not in those circumstances carved out the commercial construction and housing industries and the minerals processing industries, because it is really only one union, isn't it? It may be two: ETU occasionally but not often but the CFMEU—Victoria and Western Australia.

Senator MURRAY—The Rio Tinto submission points at the same union, doesn't it?

Mr Bennett—This is an issue that has been raised a couple of times today. We have various lists of the disputes and major court and commission matters dealing with right of entry over the last few years. We also have anecdotal evidence based on our soundings of the four major legal providers to the government for this department and what their clients' main concerns are. If you go down the list of unions that have been involved and the anecdotal evidence we have, it is not confined to one or two industries or one or two unions. The reason the government is adopting—

Senator MURRAY—Give them to us.

Senator JOHNSTON—Convince us because I think we need convincing.

Mr Bennett—Do you want the list? I can happily read out the list of the unions involved.

ACTING CHAIR—I am happy for you to do that briefly but I think what is being asked for is the documentation. Are you able to provide that to the committee?

Mr Bennett—I could provide you with one copy at this stage. It is a working document. We can provide you with that.

ACTING CHAIR—Can you quickly go through those unions. I am conscious of time but I think we are making progress, so we will keep going.

Senator JOHNSTON—The department's view is that it is across the board, not just the commercial building and construction and minerals processing industry.

Mr Bennett—To be fair, it is across the board but in some areas it is more of a problem than in others. I think the two you have identified have been more of a conspicuous problem than others. We have the Rio Tinto submission and the Cole royal commission report.

ACTING CHAIR—It probably begs the question: is the system as it is now capable of dealing with the problems outside of those two areas that have been mentioned?

Mr Bennett—Raising the issue of whether the system at the moment is capable of dealing with the problems takes us back to some of the comments that Mr Smythe made in his opening statement, which is that some of the problems are not squarely addressed by this bill and cannot be squarely addressed by this bill. The two primary issues are, firstly, where people simply come on site without a permit. They are just trespassing; they just turn up and run in the gate. Secondly, it is where—and it is partly addressed by this bill—people hold state and federal permits, they come on site and are told, 'You can't be on here.' They say, 'Well, I've got a state permit.' If that does not confuse the issue enough and they get prosecuted they say, 'You're prosecuting me for a breach of the federal law; I was actually coming in under the state law.' That is the classic problem of overlapping jurisdictions.

Senator JOHNSTON—But we solved that.

Mr Bennett—We can address that.

Senator JOHNSTON—That is good.

Mr Bennett—But there are still concerns when people say, 'We do not want to set the bar too high in terms of what we are actually doing here.' People still have concerns. Employers have occupational health and safety concerns. Employers also have a concern about people just coming in without a permit.

Senator JOHNSTON—I want to draw one thing to your attention. CFMEU have not made a submission. I think that is significant.

Mr Cully—I think the Victorian construction division did.

Senator JOHNSTON—To you?

Mr Cully—No, to the committee.

Senator JOHNSTON—I have not seen one. I do not know where that is. You have heard me discuss this business in 280F about the permit not being able to be issued to a person who is not a fit and proper person.

Mr Bennett—Correct.

Senator JOHNSTON—The way I read this is that the Industrial Registrar must have regard to—reading subsection (2) down—where someone has committed an offence or is in breach of (a) through (g), or is bound to knock them over.

Mr Bennett—No. The Industrial Registrar is bound to have regard to those factors.

Mr JOHNSON—No, they must have regard.

Mr Bennett—They must have regard to, but how much weight the Industrial Registrar decides to place on any adverse factors is up to the Industrial Registrar.

Senator JOHNSTON—I had this argument with a colleague of mine this morning. Where you seek to define a fit and proper person, that definition is an in or an out definition. You have sought to portray what is a fit and proper person. It says, 'He must have regard to the following matters'. When he has regard to them, why is he having regard to them? He is having regard to them because he must not issue a permit to an official unless he is satisfied he is a fit and proper person. A fit and proper person is defined as a person who has appropriate training—which reminds me that we have not dealt with that. That is a bottomless pit: what is appropriate training? We have convictions with no reference to time.

Mr Bennett—Is that moving on to (4)?

Mr Smythe—No, it is still (2). But they are not prohibitions; they are simply matters that he must have regard to. They do not have to be conclusive. He could have regard to them and still issue a permit.

Senator JOHNSTON—You have dressed this up to say that he must not issue a permit but he must have regard to these things. If you say they are not binding, why do we have 'must' everywhere?

Mr Smythe—Because he must have regard to them. When he is considering whether or not to issue a permit these are things he has to take into account, but he can still issue a permit.

Senator JOHNSTON—The employers are just going to say, 'He's had regard to them but he still granted the permit.'

Mr Smythe—For instance, you raised the point of time. If, for instance, someone had had a conviction but it was 15 years ago, the registrar might say, 'Yeah, he did have that conviction, but it was a long time ago, so I will issue a permit.'

ACTING CHAIR—What if it was 10 years ago?

Mr Smythe—That is something he would have regard to. In the circumstances he might say, 'It was for murder and mayhem on the site so, even though it was 10 years ago, I still won't issue the permit,' or he might say, 'It was 10 years ago and it was for something very minor, so I will.'

Senator MURRAY—Just for clarification: if somebody were to conceive an amendment which said that none of these bar you from getting a permit, which is my shorthand for what you have just said, you would not object to that.

Mr Smythe—Except that it would be otiose because 'must have regard to' does not mean 'shall not issue a permit if any of these criteria are not met'. It simply says 'must have regard to'.

Senator MURRAY—It may be otiose, but it would not be wrong. It might even be obtuse, never mind otiose.

Mr Smythe—Senator, as you have said before, we like to keep our legislation as short as possible. Repeating ourselves unnecessarily lengthens it.

Senator JOHNSTON—What problems do you see in acknowledging as a certifiable document an agreement between the parties that is consensual? In other words, they make their own document up and the commissioner must refuse to certify an agreement that does not comply. Aren't we trying to solve Electrolux and Schefenacker? Why wouldn't we put into (2)(b) the capacity to have the commissioner review an agreement between the parties? Then we would go a long way towards appeasing a lot of innocent participants in the industrial relations process, because they could simply do an agreement. We want to focus on the CFMEU and the recalcitrants and abusers of the process. If you can do an agreement, wouldn't we want to encourage that and certify it?

Mr Smythe—The government does not see a problem because if the employer has no difficulty with the union person coming onto the premises, then you do not need any document at all. This bill does not say, 'You can't come onto the premises unless you have a permit.' It just says, 'If you've got a permit, you can.' If you have not got a permit, but the employer is quite happy for you to come onto the premises there is no problem.

Senator JOHNSTON—Let me give you an example. If you have a framework that has appropriate training to get a permit, the employer's insurance company is going to stipulate, every single time, that no-one without proper training or a permit is going to come on. We can get a permit if we have a certified agreement that works, has been approved by the court and is registered. That avoids the problem to some great extent. Then you can lodge something that completely enforces and maintains the status quo in a regime that you want to encourage—that is, the certification of agreements. That is what we are looking to do: certify all agreements so we all know where we stand.

Mr Smythe—There is a permit system in place at the moment. I am not aware of insurance companies requiring permits for insurance.

Senator JOHNSTON—As soon as they find out that you have to have appropriate training to enter sites that are dangerous and that have threshold occupational health and safety courses to get on—

Mr Smythe—But you do not.

Senator JOHNSTON—You will not get onto a lot of mine sites without—

Mr Smythe—That has nothing to do with having a right of entry permit.

Senator JOHNSTON—appropriate training.

Mr Smythe—Yes, but you do not have to have a permit to enter. This just says, 'If you've got a permit, you can enter.'

Mr Bennett—In this case, the appropriate training relates to the quasi inspectorial role—

Senator JOHNSTON—To exercise the right.

Mr Bennett—That is right. It is the rights in relation to discussion purposes and ensuring that people are actually getting their correct rate of pay or conditions. It is not occupational health and safety type issues involved in that. It is not necessarily an insurance issue, unless someone can find some particular connection with how a permit holder coming on, under this regime as opposed to the current regime, somehow causes an insurance risk. I just do not think that in a practical sense it does.

Senator JOHNSTON—You are going to set up a duality of common-law enforceable, black-letter law, judges in the Federal Court enforceable, agreements—commercial contractual agreements—on the one hand in the face of this regime.

Mr Bennett—That is if people decide to try and enter into common-law agreements. There are enforcement problems in relation to collective agreements in any event in the common-law courts, which is why people do not tend to do them. We do not envisage that that will be a problem. We do not envisage there will be a rush to common-law agreements. What we envisage will happen is that people will stop putting right of entry provisions in their certified agreements because they cannot and that people will enter into gentlemen's agreements and the sorts of things we heard described earlier today. In terms of the comment about going off and somehow getting the sort of regime you seem to be suggesting, Senator, the problem with that is it actually introduces more bureaucratic steps than we have at the moment.

Senator JOHNSTON—It defeats unitary systems—correct. You can have a body of law develop about a contractual relationship about right of entry. It is going to be trespasser, invitee and licensee. That is what you are going to be back to. I would have thought you would not want to do that.

Mr Smythe—I do not understand why you think that would arise. It is not happening at the moment.

Senator JOHNSTON—What is going to happen is that the union, who has a good relationship with an employer group with a number of work sites, is going to say, 'Do we really need to go down the permit path? You know Fred Bloggs. He's been into your site so many times, let's do an agreement.'

Mr Smythe—Why wouldn't he say, 'Just let him on the premises'?

Senator JOHNSTON—Because if it fails, if there is a dispute, you do not have the imprimatur of the industrial relations system. You are off into the common-law courts. That is probably good and bad, but you are setting up a separate regime. Many people will find that regime convenient, I suspect, and will want to do it. But when it breaks down there will be no arbitration. There will be no conciliation. There will simply be lawyers and we all know where that leads to.

Mr Bennett—To summarise your concerns, Senator, you are saying that, by making the changes the government is proposing, employers and unions will feel obliged to go and enter into a large number of common-law type agreements.

Senator JOHNSTON—If they want to codify their own relationship without having the permit system operating—and what we have heard today is that they are mortified by the permit system, and yet there is only a couple of industries that have a problem.

ACTING CHAIR—That reflects the practical reality on the ground. We bandy around terms like 'good relationship'. It is not as if they cuddle each other. A good relationship is one based on maturity and honesty but it is still a combative relationship. In the normal course of events, between negotiating or bargaining periods there will not be a problem but when there is a bargaining period the combative nature of the relationship is at the extreme. The union parties will certainly seek to ensure that they have the same rights and that their right of entry is not denied as a bargaining tool through the negotiating period. My view would be that the union parties will seek to codify whatever arrangements are put in place so that they have consistent access, and not only when it suits the employer. I suspect the practical reality is that people will go and make common-law agreements.

Mr Smythe—Senator Johnston, would your concerns be met if right of entry provisions were included in the certified agreement?

Senator JOHNSTON—Yes. I will tell you why. What I want, and my learned friend next to me might not like this, is for 280J to apply. If you have reached an agreement and then you breach it, I want this to apply:

... then the Commission may make whatever orders it considers appropriate to restrict the rights of the union, or officials of the union, under this Part.

I want an agreement that can be made in a comfortable atmosphere of mutual obligation with quid pro quos flowing across the board but if it is breached I want the commission to be able to take rights away. I do not want to have to go through all the length and breadth of the common-law court system, if you follow me.

Senator MURRAY—Since I was brought into the discussion obliquely, I will say for the record that I do not at all mind strong action against officials. I am just a bit concerned about a union as a whole.

Mr Smythe—What you would do—and I am not giving any guarantee to the government; I am just testing an idea—is that you would say that you can include right of entry provisions in a certified agreement but you would put some parameters around what those provisions in a certified agreement would say so that you could give access to the commission and ensure appropriate regulation of that.

Senator JOHNSTON—The commissioner looks at it, he certifies it and if it is breached we get the benefit of the act, we do not have to go to see the lawyers. Our industrial advocate can run the case.

ACTING CHAIR—The benefit of having a small committee room and close proximity to the witnesses seem to have borne significant fruit in today's inquiry. I thank the department for their submission and their valuable contribution in the discussion today.

Committee adjourned at 4.13 p.m.