COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

Reference: Independent Contractors Bill 2006; Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006

THURSDAY, 3 AUGUST 2006

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SENATE

EMPLOYMENT, WORKPLACE RELATIONS AND

EDUCATION LEGISLATION COMMITTEE

Thursday, 3 August 2006

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

Substitute members: Senator Murray to replace Senator Stott Despoja.

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

Senators in attendance: Senators Bernardi, G Campbell, Hutchins, Marshall, Murray, Sterle and Troeth

Terms of reference for the inquiry:

Independent Contractors Bill 2006; Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006.

WITNESSES

Committee met at 9.04 am

COOPER, Mr Colin, Acting National President, Communications, Electrical and Plumbing Union of Australia

EASON, Ms Rosalind, Senior National Research Officer, Communications, Electrical and Plumbing Union of Australia

CHAIR (Senator Troeth)—Good morning. I declare open this public hearing of the inquiry into the provisions of the Independent Contractors Bill 2006 and Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006. On 22 June 2006 the Senate referred this bill to the legislation committee for inquiry. The committee is due to report on 25 August. This legislation is intended to allow independent contractors to enter into commercial arrangements outside the framework of workplace relations laws. The independent contractors bill overrides state and territory laws where they are in conflict with this bill, but continues the operation of state laws which protect owner-drivers in the road transport industry in New South Wales and Victoria and outworkers in the clothing and textile industry. The legislation also provides for new contract review processes. Amendments to the Workplace Relations Act 1996 are required as a consequence of the independent contractors bill and provide for, among other things, penalties for bogus contract arrangements.

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 that disadvantages a witness as a result of evidence given before the Senate or any of its committees may be regarded as contempt and dealt with accordingly.

These proceedings are public. The committee may agree to conduct part of the hearing in camera if a witness so requests. I welcome any observers to this public hearing and I welcome out first witnesses from the Communications, Electrical and Plumbing Union. The committee has before it your submission. Are there any changes or additions?

Ms Eason—No.

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

Mr Cooper—Thank you, Senator. The CEPU fully supports the submission of the ACTU and the recommendations that they have put forward. The CEPU also recognises that independent contractors are part of the economic arrangements in this country and seeks to put forward suggestions to address what we perceive as difficulties within our industry. In this submission we have largely concentrated on our experiences in the telecommunications industry which we believe illustrate how the current laws are not working in the interests of the workers in the industry and generally the quality of service in the industry. We do cover wide ranges of contractors. We believe that a lot of the issues that affect other members are dealt with in other submissions and we will largely focus on the telecommunications industry and our experiences there.

We consider that contractors are workers in the industry. They have largely, in the telecommunications industry since 1996, replaced large numbers of permanent full-time employees. It is our belief that there is clear evidence that companies such as Telstra, Optus and Foxtel—which is a subsidiary or a joint venture of Telstra—have embarked on a program to largely replace its permanent workforce with contract employment.

The peculiarity with this industry is that you have a company such as Telstra dominating the conditions of employment and the contract arrangements. We believe that the legislation, as proposed, should be strengthened to protect what we think have been some clear difficulties for the workers that are employed as contractors. I would like to illustrate the point. When Telstra and Foxtel move the work from their permanent workforce, they have a head contractor. That head contract is subject to various tenders and the only sort of variable is cost. We do not believe that those tenders are subject to much more scrutiny by companies such as Telstra or Foxtel, other than what is going to be the cost. Quality of service to customers and protection and integrity of the telecommunications network are, in our view, not really considered. It is about which head contractor can provide the cheapest cost. So the cheapest head contractor gets it. They then transmit their lower tender price down to undermining the conditions of people who are now virtually locked into that form of employment.

We have a large influence in that area because many of them are ex-Telstra employees who were in fact laid off by Telstra—deliberately, in our view—to provide that reasonably skilled labour force to compete with its own workforce. What we find is that those people are not really able, under current legislation, to have the same rights as other workers and to bargain collectively. Attempts by us to assist people to do that have not been very successful, and we basically believe—and the point of our discussion is—that the legislation should provide for people such as those contractors, particularly, as I say, in the situation of telecommunications where you have one large employer governing the industry, which is not the same in all industries. They should have a right to bargain collectively, the same as other workers that we represent.

We would actually like to have better than the current conditions that we are able to bargain with for our workers. They do not even have what I would say are the very minimal provisions in the Workplace Relations Act: the ability of association and to organise, and collective bargaining. They do not even have the very minimal protection of the Workplace Relations Act on minimum conditions of wages, leave et cetera. There is none of that and, because this is becoming such a part of the industry work, somehow the legislation, in our view, should be able to provide for minimum conditions; we would obviously argue far in excess of what is provided in the Workplace Relations Act.

We also believe that contractors do not have any practical way to address any difficulties that they have, particularly with the contracts. A common practice is, as you realise, that these people are locked into Foxtel or Telstra; they have purchased capital equipment, vehicles et cetera. When a new head contract is issued, they are in a very difficult position to bargain. This is now their livelihood. As I say, in other industries they may be able to move to somewhere else, but because they are locked into the one employer it is very difficult for them. We find practices where, if a subcontractor is fairly active at raising issues and probably

seen to be a bit of a coordinator of activity with the subcontractors, they simply do not get work, and there is nothing that they can do about it.

So there is an inability in these circumstances for individual contractors to be able to organise and they can be penalised because they attempt to organise. There is no ability for that to be redressed, and we do not think that is at all fair. We also believe that the sham arrangements covered in the Workplace Relations Act do not give any real ability to people to address issues that they have to raise and that there should be proper redress for people, whether reinstatement or compensation, where this is able to be pursued.

There also should be a process that is realistic and practical where, via a tribunal, the subcontractors and contractors can take their issues and have them properly resolved. Most of these people do not have the financial resources to pursue matters in the Federal Court et cetera, and there should be some tribunal that allows them to address these issues.

In summary, we have highlighted what we think are particular problems that are emerging. I think they will emerge in more industries which virtually have a monopoly control of the contract work and an ability to seriously undermine the rights, entitlements and income of people who are dependent on that source of work from one particular company. We think that may not be unique, but it is something that has emerged largely with the deregulation of Telstra and the change of employment practices. The number of full-time Telstra employees is now down to 37,000—I think that was the last figure. It varies almost on a daily basis, but downwards, not upwards. In 1996 I think the figure was 76,000. A large part of that workforce has been replaced by this contract type of work; not all of it—some of it has been because of technological change et cetera.

We would also like to highlight, as part of our experience, that it is not only happening with Telstra but with Optus. Recently we have seen a large number of Optus full-time employees laid off and virtually told to move to contract work under inferior conditions, so we are not just highlighting Telstra here. Telstra and Optus are the two main operators in the telecommunications area, and Telstra is obviously much bigger than Optus. These are the practices we think should be recognised as not proper and not fair to contractors and I think that this committee should amend the bill to address those issues.

CHAIR—Thank you, Mr Cooper. Ms Eason, do you wish to add anything?

Ms Eason—No. I will wait until questions come.

CHAIR—Thank you. Firstly, in your submissions and from what you have said, you have tended to talk about the communications industry. However, your union also encompasses the electrical and plumbing union. Do you wish to comment on the way in which these arrangements will affect those workers?

Ms Eason—As we said at the beginning, obviously in those two industry sectors historically there has been a mix of employment forms, and the union recognises that. There are genuine independent contractors in electrical and there are genuine independent contractors in plumbing. The nature of the market allows for that. If you have seven million households you can be an independent electrical contractor and make a good living. You can be a price setter, as we all well know. Those tradespeople often are price setters, particularly in times of skill shortages.

In the communications industry we have a different phenomenon and one that we think warrants the committee's and the government's attention. That is why we have focused on it. That is a case where independent contractors are clearly price takers, because of the concentrated nature of the industry, and they are clearly dependent. Our argument is that the government's legislation, which is in front of us—and, indeed, its industrial relations strategy—does nothing to address that.

CHAIR—You would agree then that, at present, there appears to be a skills shortage, both in the electrical and the plumbing trades.

Ms Eason—We believe that is the case, yes.

CHAIR—In that case, wouldn't contractors in those industries tend to benefit from these arrangements then?

Ms Eason—I do not think that there is any particular benefit to them in the legislation that is in front of us. Certainly they are enjoying a position in the market right now where they can exert a degree of leverage, but that is irrespective of anything the government is proposing to do for them. For instance, our plumbing members do not support the removal of the deeming provisions in New South Wales, where plumbers are deemed to be employees.

CHAIR—What about the electrical trades?

Ms Eason—The electrical trades are not deemed, so that sort of issue does not immediately affect them one way or the other. But the electrical section of our union certainly supports the general thrust of this submission.

CHAIR—Mr Cooper, you also mentioned that many attempts to bargain collectively have failed. Why is that so?

Mr Cooper—We cannot; and that is the problem we have. We have a lot of communication with the contractors who work for Foxtel or Telstra, because many of them are ex-members of ours, but we do not have the ability to represent them. In the last round of Foxtel attempts, I think ABB tried to push down their rates. We were not able to represent them. All we could do was to provide them with some assistance, some training on negotiating. They had to take it up for themselves, and they cannot collectively bargain, in our understanding, without the permission of the ACCC.

CHAIR—I see.

Mr Cooper—We are not able to. Again, we are not dealing with the trade practices legislation here and we are not able to represent them. That is a great disadvantage in their ability to be able to take their case and have it bargained.

CHAIR—But do you have a role in educating them or training them in the way to bargain?

Mr Cooper—We do that because that is what unions do, but we cannot represent them. That is our understanding. Because they are so dependent on the head contractor for employment, it is very difficult for individuals, on their own, to go and bargain. Simply, as I say, some of the people just do not get work if they are considered by the head contractor to be agitators or whatever.

CHAIR—But in regard to individual agreements, is it not the case that the worker can take a union representative with them?

Mr Cooper—I do not think that is correct under the current trade practices amendments. We are very cautious. I have to say that we talk very closely with our lawyers because we are concerned. The law is fairly strict on what we can and cannot do. We do not want to finish with some sort of legal position. We have already had special attention from the trade practices body—the ACCC—and lectures about things we may have done. We are very cautious not to break the law. My understanding, from our legal advisers, is that we could not go and bargain collectively on their behalf, and we did not.

CHAIR—You also mentioned how difficult it will be to discover sham arrangements. Is it not true that in this legislation there is a civil penalty to provide a sanction to employers found to be disguising genuine employment relationships?

Ms Eason—We paid some attention in our submission—albeit it is a brief submission—to looking particularly at that sham arrangements provision. We cited, as you will know, the material from our earlier submission to the House of Representatives inquiry, where we focused on the case of Visionstream. We used that as a kind of test as to whether the sham arrangements had any real teeth—the sham arrangements provisions of the workplace relations amendment bill.

CHAIR—Yes.

Ms Eason—In our view, quite clearly Visionstream would not have been caught in any way by the sham arrangements provisions. It depends, I suppose, on what you call a sham. Quite clearly, Visionstream decided to take its full-time employees and turn them into subcontractors in order to beat down the price of labour. They knew that is what they were doing and those people had no choice because, essentially, they had no other form of employment. Again, we come back to the concentrated form of the industry; there were not another 20 companies who were doing work on broadband roll-out.

They were dependent; they were vulnerable; they had their conditions undermined, and those conditions have continued to be progressively undermined, as we traced in our House of Representatives submission. If you look at the sham arrangements provisions, there was nothing to stop that. It was not perhaps fraudulent in any kind of gross and palpable way, which is what the sham arrangement provisions really address. Did Visionstream knowingly put to these people a proposition that they knew would be to their disadvantage, as we say here: working on piece rates?

Visionstream wrote on the whiteboard, 'Here's how you can make a fortune.' Was that fraudulent? That depended on how many jobs per week, per month, those people got. When it came down to it, they did not find themselves getting that. Five years later they are squeezed to the point of poverty. But Visionstream, in our view, would not have found themselves in breach of these provisions, so what we say about the sham arrangements provisions in that bill is that they are next to useless, frankly, and moreover they do not allow any redress to somebody who has been a victim of a sham arrangement.

CHAIR—I will read out to you what those circumstances are that this bill covers. If you misrepresent an employment relationship as an independent contracting relationship or you

attempt to do so at the time a contract is entered into, if you make statements to an employee to persuade or influence that employee to become an independent contractor where the employer knows the statement to be false, and if you dismiss or threaten to dismiss an employee with the sole or dominant purpose of re-engaging them as an independent contractor, there will be civil penalties, and, as well, the Office of Workplace Services will pursue these matters on behalf of the employees. Don't you consider those to be reasonably strong arrangements?

Ms Eason—No, Senator, we do not, because the proviso of 'the sole or dominant purpose' is a very big gateway in that particular clause that the employer can escape through and, as I just said, the 'knowingly make a false statement' with a view to pressuring an employee to become a contractor is also wide enough to drive a truck through, and that is exactly the point that I made in relation to the Visionstream contractors. They were told that they would make a very large amount of money. That was not in fact the case, but, given the inherent uncertainties of the contracting life, how could one prove that that was a knowing misrepresentation by the employer? You take your chances out there. You might make a fortune; you might go bust.

CHAIR—Yes.

Ms Eason—Really, these are not robust provisions or safeguards.

CHAIR—Nevertheless, Visionstream is something that has happened in the past and these are new provisions which we will take up if and when this legislation passes into law.

Ms Eason—They are better than nothing, but they are not sufficiently robust to address the phenomenon that we have described, in our view.

Senator GEORGE CAMPBELL—Mr Cooper, you said that these contracting arrangements commenced in your industry in 1996. What drove those changes?

Mr Cooper—My personal view is that largely it was to help deunionise the company, Telstra, because we doubted the cost effectiveness of some of the early practices, and we think that was to help. We had a very strongly unionised labour force with, I suppose, fairly good conditions compared to the rest of the industry as a result of a lot of good collective agreements that the union negotiated, and I think it was clearly an attempt to do that and to set up an alternative labour force to the permanent staff. That is why there were so many large redundancies. There was an enormous amount of money paid out in redundancies to Telstra employees, who were then the core business for the contractors. Unfortunately, a lot left the industry. It was a gamble in many ways, and I think it is one of the great tragedies that a great deal of skill and experience has been lost to the industry, because a lot of people were so set back by the experience that they just went to other things.

Senator GEORGE CAMPBELL—Have the conditions under which those contractors were engaged in 1996 changed, subsequent to that period?

Mr Cooper—There have been some changes, but basically there is a head contract, whether it is Skilled Engineering or ABB, or any one of a whole list of them—Visionstream was one—and then they subcontract out. We then had a third tier: there was a head contractor, a contractor, then a subcontractor. I think that practice has largely gone now. Everyone got a

bit, but the poor person at the end of the chain got very little, and that is one of the inefficiencies of the industry. Everyone got these layers of contractors and everyone gets a bit, and to me it is not efficient. That is why I think sometimes it is ideologically driven rather than being about efficiency for the industry. Customer service and integrity of the network are not issues. It is about trying to drive down labour costs, and I suspect there is an ideological issue here—in fact, in my mind very clearly—to have a deunionised workforce, and that is why the trade practices amendments et cetera preclude the union involvement.

Senator GEORGE CAMPBELL—Is there any evidence to demonstrate that wages have been driven down over that 10-year period as a result of these new arrangements?

Ms Eason—As we were pointing out in response to some of the other questions, these people are now commonly paid on piece rates, so it is not so much a question of wages going down as of the piece rates going down, and I would refer you, Senator, to page 28 of our submission. You will see a diagram there that shows the pressure on subcontractor rates and what has happened as the head contractors compete for the Telstra contracts. They do that by cutting their contract costs, of course, and then passing those cuts down to the actual subcontractors.

We are seeing the piece work rates being pushed down. What we are not seeing is the effect of inflation on the costs that the subcontractors are bearing because they are paying for their own equipment and so on. The degree of squeeze on these people is not fully reflected in this graph, but you can see the trend.

Senator GEORGE CAMPBELL—Is it fair to say that over the period from 1996, the net return to these contractors has been diminishing?

Ms Eason—Absolutely.

Senator GEORGE CAMPBELL—How are disputes resolved within the industry? If there is a dispute between the contractor and Telstra or the contractor and the principal contractor, how are those resolved, and does Telstra provide any assistance with the equipment purchase?

Mr Cooper—I do not think there is any real dispute resolution procedure. If our contractors have a dispute with their head contractor, we do have some enterprise agreements across the union with some of those head contractors. We are finding, since the changes to the Workplace Relations Act, less enthusiasm to have union agreements and there is a real trend since March this year not to enter into agreements. There was a certain amount of protection there where they were direct employees of that contractor; but there is really no dispute settlement procedures.

Senator GEORGE CAMPBELL—Does Telstra provide any assistance with the equipment? Are these contractors required to drive in Telstra vans?

Mr Cooper—No.

Senator GEORGE CAMPBELL—They are not? There is no badging?

Mr Cooper—No. They work for a head contractor, and they use their own vehicles. Telstra—and I think it is quite deliberate—do not supply vehicles for them, nor any uniform.

They work under the contractor badge and I think that is a quite deliberate strategy by Telstra because they do not want any bad practices of the contractors to reflect on them.

Senator GEORGE CAMPBELL—Are you familiar with the tendering processes in the industry? Is there competitive tendering or competitive contracting for these contracts with Telstra? For example, does Skilled Engineering bid for the contract against Visionstream or other labour hire companies?

Mr Cooper—Yes. I think they are for around three years. They bid for territory, things like that, but in our view it is strictly on who will provide the cheapest cost.

Senator GEORGE CAMPBELL—And are they required to exclusively work for Telstra over that period or are they able to service Telstra's competitors, like Vodafone and Optus?

Mr Cooper—I am not sure of that because we are not privy to the contracts, but I think generally they are committed; some of the companies are committed to provide exclusively to Telstra. But I cannot be absolutely sure on that.

Senator GEORGE CAMPBELL—One final question, because I know your union is very efficient at keeping statistical data on this industry. What has been the impact on service delivery since the move into contracting in 1996?

Ms Eason—This is a very vexed question, Senator, in terms of the statistical data. You will be aware that the Australian Communications and Media Authority keeps extensive data on customer service standards, and we have something called the customer service guarantee in the industry, which measures how long it takes Telstra to fix a fault or provide a new connection and so on. Generally speaking, that data has shown, with certain ups and downs, fairly high levels of compliance by Telstra with customer service standards.

But sitting underneath that is the reality of a declining network in terms of fault levels, and this is something that we have talked about a lot in other fora and parliamentary inquiries. I will remind the Senate of the Boulding incident in Victoria, where a boy died after an asthma attack. The inquiry that looked into that showed that there were recurrent faults on that line, and that went, in our view, to the question of current work practices, which are driven by short-term solutions because of labour shortages and pressures on remaining staff.

There is no simple statistical answer to your question, unfortunately, but I think if you drilled down it is not hard to see the impact of cost cutting within Telstra, increased pressures on permanent staff and quick fixes also by contractors, because they are working on piece rates and the more jobs they can do a day the more money they get. There is a cost that we are paying nationally for those practices.

Senator GEORGE CAMPBELL—What has the impact been on skills in the industry and skills development? Who does the training of the next generation of technicians?

Ms Eason—A cynic would say no-one. There has been a rapid falling off of training in the industry since the mid-nineties. Optus, to their credit, had a period of time when they did quite extensive training, but I think that has now tailed off to a degree. Telstra has just now, after a decade-long drought, announced a training program for more of the sort of high-level skills associated with the next generation network development.

But out in the area that we are describing—that is, training for basic network maintenance, customer premises work and so on—there has been a collapse of training. This is one of the issues we raise in our submission: that you cannot separate skill formation issues from employment forms. The more you drive people into essentially what are dependent contracting arrangements, the more problems we believe the economy is going to have with skill shortages in some of these areas, because people just do not have the money or the time to train themselves.

Senator GEORGE CAMPBELL—Would you have the figures, Ms Eason, of the number of technicians in training, say, pre-1996 when this contracting came into effect as against the number of technicians in training today?

Ms Eason—I do not have them at my disposal, but I am happy to take that question on notice and see what we can provide to the committee.

Senator GEORGE CAMPBELL—Thank you.

Mr Cooper—I think we put in our submission that when Visionstream actually did take up a training program they virtually stopped it because other contractors who were not providing training just poached people. Part of the problem with this has been that a lot of contractors do not provide training and would rather take people from those who do, so there is not the incentive that there is with permanent employment.

It is interesting to see that Telstra's new management has recognised that previous managements had really run down, and people need the training because of the new technology. So we are watching with some interest what happens here, because they tell us clearly that they are not going to train people to go to other employers. There is a real problem and whether they are going to adequately address it remains to be seen.

Senator GEORGE CAMPBELL—And, of course, as your technology develops, that will be exacerbated.

Mr Cooper—Yes.

Senator BERNARDI—Mr Cooper, I have a couple of questions for you; firstly about the skills training. That is a generic issue applicable to all workers across many industries in Australia, and there is no real evidence that it has been in decline because of independent contracting arrangements. Certainly, this bill is not designed to address the skills training within your particular industry. It is a completely separate issue, and I wonder if you have a comment on that.

Mr Cooper—Our comment—and this is sort of a national interest comment—is that when we had a permanent workforce in Telstra, there was a lot of emphasis on training. It was not lifetime employment but it was employment. For instance, I was trained for five years as a technician. I tell people that now and they do not believe it. People were able to adapt to new technologies as they came along. The profile of Telstra is that the average age of their workforce is about 47, nearly 50 years old, and the people that were trained well within the permanent workforce are coming close to the end. That is part of the problem. I think it is just a fact of life that the contractors have not provided the training. What they do is very limited in some cases.

I know this bill does not address the problem of training, and it would be good if it did, in some ways, and put an obligation on the head contractors to provide at least some training, but that is obviously beyond the scope of what the parliament intends. It is just a product of contracting out that the skill base is dropping, because there is no incentive to train anybody.

Senator BERNARDI—Am I right then in saying that this bill is not going to affect the current training regime in any way, shape or form than what has happened over the last 10 years?

Mr Cooper—I think it will, in effect, because it allows for vastly inferior employment conditions for workers if they are employed by contractors as permanent staff. It attempts to drive down labour costs, which will be reflected in lower incomes for the contract staff and also contractors cutting costs on training. It is just a product of this bill. Because it does not give people any redress—even collective bargaining—to address those problems, training is going to suffer. There is no incentive. In fact, there are incentives not to train people. That is what this bill does.

If you can address some of the injustices in the system and allow people to bargain collectively and allow people to have minimum conditions and minimum rates, higher levels of training will be a product of that. Because it does the opposite, it actually undermines the skill base in the industry.

Senator BERNARDI—We could debate that all day, I am sure, and I do not intend to, but you have that on the record. The other thing you mentioned was about disputes and the dispute resolution system between independent contractors and firms. Currently the IRC is a very expensive and time-consuming process for many individuals to go through. Wouldn't you support a more streamlined mediation process through the Magistrates Court to resolve disputes between independent contractors?

Mr Cooper—Without being too cynical, the dispute resolution procedure at the moment is that if you complain you do not get any more work. That is basically how it works. These people are very close to the margins on business. Taking the time to prepare their case—and they may need some assistance to do it—is very difficult. I do not think the average contractor, who is up at six in the morning to try and get jobs and who works all sorts of hours, is going to have a lot of time or ability to pursue those matters. If they could collectively bargain, with the assistance of the unions, yes, that would make some of these procedures a bit more real, but it is just fallacy. It says you are going to provide some justice and some fairness for these people, but it does not. The reality is that, if you complain, there are no more dockets, no more tickets for work that come through to you. That is how it works.

Senator BERNARDI—Basically, under this bill we are improving the system of dispute resolution by offering other avenues to provide for independent contractors. I suggest you cannot really disagree with broadening the opportunities available to independent contractors and making it easier for them. Or can you?

Ms Eason—As we said in our submission, we have not had a lot of experience in the state jurisdictions, but we do note the ACTU's view that, in fact, the dispute resolution or the unfair contracts provisions in this bill are going to be less favourable, in their view, towards independent contractors than those, for instance, in New South Wales. Certainly, in terms of

making things easier, we notice that there is no role for industry associations or unions in this process—it is a one-to-one. We question whether that is really to the advantage of the individual contractor, denying them access to forms of expertise and support which they might reasonably be entitled to under any ordinary freedom of association provisions.

CHAIR—That is all. Thank you very much for your appearance.

[9.46 am]

MACKENZIE, Mr Robert (Bob), National Manager, Industrial Relations, TNT Australia Pty Ltd

McMASTER, Mr Hugh, Corporate Relations Manager, New South Wales Road Transport Association

CHAIR—I now welcome our next witnesses from the New South Wales Road Transport Association. Do you have any comments to make on the capacity in which you appear?

Mr Mackenzie—Yes. I am also a member of the New South Wales Road Transport Association.

CHAIR—The committee has before it your submission. Are there any changes or additions to that?

Mr McMaster—No.

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

Mr McMaster—Thank you. The New South Wales Road Transport Association has represented road transport operators since 1890, and is the peak industry body in New South Wales. For about 25 years the association has supported a role for the New South Wales Industrial Relations Commission in setting freight rates and other conditions which govern the business relationship between principal contractors and subcontractors in the road transport industry. However, the association has detected a loss of support for the contract determination system amongst members.

Given that the Australian government intended to introduce independent contractors legislation, the association resolved to assess the views of members. The association interviewed representatives of members in large companies who engage subcontractors based in New South Wales under the contract determination system. Some of those members also engage subcontractors in other jurisdictions, in interstate operations, and in areas of New South Wales where the contract determinations do not apply.

Members interviewed covered 23 different categories of freight in areas as diverse as couriers, containers, bulk commodities such as grain and coal, dangerous goods, food and beverages, as well as steel and building products. This ensured a broad cross-section of views. The focus in the questions put to members was to understand how their business relationship would change if the contract determinations ceased and whether there is any validity to claims that subcontractors would suffer a loss of goodwill and/or would need to work longer hours to remain viable.

There were commonly held views across the membership. In summary, members said, firstly, principal contractor/subcontractor relationships evolve because of irregular and unreliable volume of work due to cyclical and seasonal factors in other industries. This encourages principal contractor/subcontractor relationships because they offer greater flexibility. Secondly, principal contractors tender for work on commercial terms. Business can

be won or lost because of tender provisions or for other reasons. Thirdly, while abiding by the relevant contract determination, there is strong support for a business relationship between principal contractors and subcontractors that is based on commercial terms. Fourthly, very few subcontractors in road transport are entitled to goodwill. This is because the principal uses resources to acquire the work, bears the commercial risks, including loss of business at short notice, and delegates the work to subcontractors. There does appear to be goodwill in a very small minority of contracts. Its value should be determined by the market. Finally, concerns subcontractors would work longer hours to remain viable if the business relationship was based on commercial terms are unfounded. All agreed it is in the interests of both parties to have fair and reasonable contract terms. Some business relationships are unreasonable under the contract determination system. Enforcement is viewed as being ineffective.

There are claims that deregulation of the principal contractor/subcontractor relationship will have adverse road safety consequences. However, in New South Wales—the only state where the contract determination system has more fatalities per capita in crashes involving trucks than the national average—an analysis of the results of coronial investigations shows that in almost 80 per cent of such crashes either another party is deemed to be at fault, or fault cannot be attributed to any party. Fatigue is a significant road safety issue. However, it should be dealt with by relevant government departments, not an industrial tribunal.

The major problem with the contract determination system is that it is not relevant to the market. An industrial tribunal is not set up to determine contract conditions between businesses. Not surprisingly, there is no role for an industrial tribunal, either, elsewhere in Australia, with respect to business relationships in road transport. Most principals agree there is a need to develop the skills of subcontractors in areas such as contract negotiations, understanding contracts, financial management, and obtaining legal advice. Allowing the market to determine principal contractor/subcontractor relationships in the road transport industry, supported by the development of the business skills of subcontractors, should form the basis of a better business relationship between those parties.

CHAIR—Good. That is all, Mr McMaster?

Mr McMaster—Yes, thank you.

CHAIR—Thank you. Mr Mackenzie, do you wish to make a statement?

Mr Mackenzie—No, thank you.

Senator BERNARDI—Mr McMaster, can I just confirm how many members you have, or how many people your body represents?

Mr McMaster—The association has about 600 members.

Senator BERNARDI—Six hundred members, representing how many—

Mr McMaster—Effectively, they probably own or have the oversight of 30,000 to 35,000 trucks. They range from single owner-drivers right through to the largest companies that operate in the industry.

Senator BERNARDI—And you have identified yourself as a peak industry body in New South Wales.

Mr McMaster—Yes.

Senator BERNARDI—One of the issues that you touched on was road safety; in particular, driver fatigue. The current system of regulation in New South Wales essentially applies to greater metropolitan Sydney. In greater metropolitan Sydney, I would not think that driving from one end to the other would be a major contributor to driver fatigue. I just wonder whether driver fatigue is, rather, an issue for long-haul drivers.

Mr McMaster—Certainly driver fatigue is more of an issue in the long-haul sector of the industry. It is probably fair to say, too, that there is a higher proportion of fatal crashes per capita in non-metropolitan areas of New South Wales and other parts of Australia.

Senator BERNARDI—There is a high proportion of them?

Mr McMaster—A higher proportion per capita of fatal crashes would occur in non-metropolitan areas than in urban areas.

Senator BERNARDI—Is it fair to say that your organisation has changed its opinion of independent contractor legislation in recent times?

Mr McMaster—Yes, it certainly has. We put a submission to the House of Representatives inquiry last year. The submission was one that, I guess, was evenly balanced for and against the continued role of the industrial relations system in New South Wales in determining subcontractor rates and conditions. But, as I have said, the association has sensed a change in the mood of the members. We felt that it was important to try and gauge that mood. We have, and that has led to the submission that has been put to you.

Senator BERNARDI—Do you believe that there is any rationale to maintain the price-fixing arrangements for the greater Sydney area?

Mr McMaster—No, we do not. The main reason for that is that we see that they do not necessarily reflect the market. There is a strong view across the membership that commercial terms should apply. There is a view within the membership that the current system constrains that, although members—certainly where they can—try and ensure some type of commercial component is provided in the rates and conditions that they pay, while at the same time abiding by the requirements of the determinations.

Senator BERNARDI—Thank you.

Senator HUTCHINS—Mr Mackenzie, your company is TNT?

Mr Mackenzie—That is right.

Senator HUTCHINS—You have contract agreements with your lorry owner-drivers on a collective basis?

Mr Mackenzie—Predominantly with our PUD—pick-up and delivery—drivers, yes.

Senator HUTCHINS—And your company does not seek to change that?

Mr Mackenzie—Over time, if the legislation were enacted, then we—

Senator HUTCHINS—Hasn't your company given an undertaking to its drivers that it does not seek to change it?

Mr Mackenzie—Under the current agreements.

Senator HUTCHINS—Yes.

Mr Mackenzie—We have committed to maintain the current agreements for the duration of those agreements.

Senator HUTCHINS—Could you explain to us, Mr McMaster or Mr Mackenzie, the formula used to put together the contract determinations. What is the formula?

Mr Mackenzie—The formula is basically in two parts: the first part reflects a labour component in the formula, and the second part reflects what we call a truck component. The truck component has a number of aspects: the capital cost of the vehicle; the running costs of the vehicle; the insurance, depreciation. There is some provision in terms of recognition of sick leave and annual leave for the drivers, maintenance of the vehicle et cetera.

Senator HUTCHINS—Is that an agreed formula?

Mr Mackenzie—It was an agreed formula many years ago.

Senator HUTCHINS—Even as late as the last contract determination increase? Was that an agreed determination?

Mr Mackenzie—Yes. The formula itself in the determination is an agreed formula.

Senator HUTCHINS—Is the determination clearly that you must work on hourly rates?

Mr Mackenzie—No. You can work on an hourly rate or a piecemeal rate, depending on the determination that you are talking about, Senator.

Senator HUTCHINS—What is collectively agreed in the particular enterprise?

Mr Mackenzie—No. There is a general carriers contract determination; there is a courier and taxi truck determination. As I said, it depends on the determination.

Senator HUTCHINS—It does not specify that you must work on an hourly or any other rate. It allows for a lot of flexibility, doesn't it?

Mr Mackenzie—There is certainly the opportunity to end enterprise agreements to set up an enterprise agreement that allows you to work on either an hourly rate or a piecemeal rate.

Senator HUTCHINS—Is the basis of the determinations the full cost recovery? Is that the intention?

Mr Mackenzie—Sorry, full cost recovery for who?

Senator HUTCHINS—For the lorry owner-driver.

Mr Mackenzie—I think that is a fair comment, yes.

Senator HUTCHINS—Does the minimum in the determinations provide for overtime?

Mr Mackenzie—Again, it depends on the determination that you are talking about. If you are talking about the General Carriers Contract Determination, it is based on the assumption that the driver actually drives 25,000 kilometres a year. It is based on those kilometres. Whether it takes a driver 10 hours to drive that 25,000 kilometres on a daily basis, who knows?

Senator HUTCHINS—But the basic hourly rate does not change, does it? It is the minimum for that class of truck, isn't it?

Mr Mackenzie—No, up to 10 hours, it depends if they are working on an hourly basis.

Senator HUTCHINS—No. What I am saying is the hourly rate, the component: you have got the labour component and then the vehicle component.

Mr Mackenzie—Yes.

Senator HUTCHINS—The labour component is based on the basic hourly rate for a 38-hour week, isn't it?

Mr Mackenzie—No. In our organisation it is—

Senator HUTCHINS—No. I am talking about the determination.

Mr Mackenzie—In the determination, yes, it is.

Senator HUTCHINS—There is no provision for penalty rates in the determination, is there?

Mr Mackenzie—No, there is not.

Senator HUTCHINS—Or minimum hours of work?

Mr Mackenzie—No, there is not.

Senator HUTCHINS—And the ability for incentive payments is clearly enunciated through the determination, isn't it? If you want to work on, say, a box rate or if you work at the waterfront—

Mr Mackenzie—If you are working on a piece rate basis, yes, there is, but if you are working on an hourly basis, no, there is not.

Senator HUTCHINS—With the determinations, there is a car carriers determination. Is TNT a party to that one?

Mr Mackenzie—Our TNT Logistics business is, which is a separate business to the Express business. I am sorry but I do not have a great deal of knowledge about the car carrying determination.

Senator HUTCHINS—Mr McMaster might know. The current contract, the car carriers determination: has the association, with the union, made an application to vary the terms and conditions of that?

Mr McMaster—Can I take that on notice and come back to you?

Senator HUTCHINS—We will have the union here tomorrow. They can probably help us on that. I understand that you have supported that—

Mr McMaster—I understand that that is so. Yes, that is right.

Senator HUTCHINS—In relation to safety, have you seen the union's submission?

Mr McMaster—No.

Senator HUTCHINS—Okay. I will go to the union's submission. It refers to a number of areas in its submission. Are you aware that there have been a number of judicial and coronial inquiries into safety in the last few years?

Mr McMaster—Yes, I am.

Senator HUTCHINS—Are you aware of Inspector Campbell v James Gordon Hitchcock [2004] NSWIRComm 87—

Mr McMaster—I have some knowledge of that matter.

Senator HUTCHINS—where the recognition of low rates of pay and poor conditions led to speeding and other unsafe practices and fatigue and thereby contributed to road fatalities?

Mr McMaster—I am aware that that is one of the matters raised in it.

Senator HUTCHINS—In the Hitchcock matter Vice-President Walton said—and I would like your comment on this:

… "beyond reasonable doubt, that driving whilst fatigued is a risk to health and safety" since "Fatigued drivers have a higher risk of crashing." His Honour also found that "driving whilst fatigued" was clearly exacerbated by requirements of "directed delivery and pick up times" for truck journeys "in the context of a clear monetary incentive to drive for excessive hours" in combination with "excessive workloads".

In light of your earlier comments, would you like to contest what His Honour said?

Mr McMaster—I certainly do not wish to contest what His Honour said. Our association certainly agrees with the Transport Workers Union that fatigue is an issue for the industry. We certainly do not condone payment systems which encourage excessive driving hours, excessive speed, and dangerous driving conditions. You may be aware that the National Transport Commission earlier this week issued draft model legislation that proposes to extend what is known as 'the chain of responsibility' across the supply chain so that consignors, schedulers and others in the industry also bear responsibility for the type of problem referred to in that matter.

We support that and we believe that all parties in the chain should do whatever they can to ensure that fatigue is better managed. But our view is that that is best handled through road law or, as an alternative, through pay rates initially.

Senator HUTCHINS—But rates, as His Honour Justice Walton said, are connected to fatigue. Are you aware of what the Deputy State Coroner Magistrate Pinch said in her findings in relation to the deaths of Barry Supple, Timothy Walsh and Anthony Forsyth? Again, I would seek your comment, and I am reading from the TWU submission:

… the Deputy State Coroner found, that fatigue was the underlying factor in all three fatalities, that all three drivers had been consistently driving in excess of the legal hours and that they had been encouraged to do so by the system of remuneration in place at the company in question.

Mr McMaster—Certainly no system of remuneration, as I said, should encourage excessive driving hours, or excessive speed. The last thing the association wants to see is a situation arising where subcontractors feel they have to work in unsafe—

Senator HUTCHINS—I am not saying the association would encourage that at all. What I am saying is that both these instances connect rates with unsafe driving practices. Are you aware of Professor Quinlan's report—

Mr McMaster—Yes, I have seen that.

Senator HUTCHINS—which also refers to that area?

Mr McMaster—Yes, I am.

Senator HUTCHINS—Also there was a House of Representatives inquiry which was entitled 'Beyond the midnight oil', which again connected rates with excess fatigue and driving hours.

Mr McMaster—Yes, I am aware of that inquiry.

Senator HUTCHINS—In relation to goodwill, the association says that there are isolated incidents of goodwill. In fact, you say it is only in two areas that you are aware of: beer cartage and concrete cartage. That is correct, is it not, to the knowledge of your members?

Mr McMaster—No, what the association said was that as a result of the survey, those examples came to light. There may well be others. I think in our submission we refer to it in relation to aspects of the cartage of beer, in the concrete sector of the industry and also in relation to some sectors of the courier industry. The point we are trying to make is that in most instances it is the principal who bears the commercial risk, who arranges the work and then delegates that work, but there are some instances where goodwill has been a factor in the purchase of a business, and a vehicle associated with that business. Our view is that where there is value demonstrated by the market, that should be respected by the market, and that should apply across any area of road freight transport.

Senator HUTCHINS—But it is not just isolated to those two instances. The history, as you may be aware, Mr McMaster and Mr Mackenzie, goes back many decades, with the involvement of goodwill. Mr Mackenzie, I am not sure if goodwill exists in your company at the moment. Does it?

Mr Mackenzie—I think the term 'goodwill' is loosely used. In terms of the strict sense of the definition of 'goodwill', there is no goodwill that subcontractors have in our business. However, there are circumstances and areas where there is no doubt that a subcontractor has sold his run—that is, his vehicle—plus a premium to come into our business. There is no doubt about that.

Senator HUTCHINS—And you are aware of it?

Mr Mackenzie—In the past, yes, and certainly over the last five and a half years that I have been with the organisation we have worked very hard to make sure that does not continue. That does not mean that there are not people that are still subcontractors in our business that have actually bought a truck and paid a premium for that.

Senator HUTCHINS—Some people might just call that goodwill.

Mr Mackenzie—Some might call it goodwill, yes.

Senator HUTCHINS—There is a tribunal in New South Wales where lorry owner-drivers can go and seek claims on goodwill, isn't there?

Mr Mackenzie—There is chapter 6 of section 106 of the New South Wales—

Senator HUTCHINS—Who are the Road Transport Association members of that tribunal, the conciliation tribunal? Are you aware who they might be?

Mr Mackenzie—I cannot tell you because our organisation has not been involved in any disputes in that area.

Senator HUTCHINS—Not recently.

Mr Mackenzie—Not in the six years that I have been there, no.

Senator HUTCHINS—But it would not surprise you, Mr McMaster, that there has been a series of goodwill disputes in New South Wales over the last few years, would it?

Mr McMaster—I am aware of that, yes.

Senator HUTCHINS—Are you aware of the Truckbug Pty Ltd v Blue Circle Southern Cement Ltd case?

Mr McMaster—I am not too familiar with it, no.

Senator HUTCHINS—I will use the TWU's submission. It states:

> In this case the company alleged that the owner-driver was guilty of serious misconduct and terminated his engagement and thereby denied him the capacity to recover the goodwill he had paid—

et cetera. The tribunal found the termination unfair because the company, amongst other things had required "blind adherence (to policy) without regard for developing circumstances." The tribunal awarded $70 000 payment for investment in goodwill paid upon entry to the business. There is the case of Quintrell and Belprana v Monier Roofing Pty Ltd. There is the case of Visy just recently. Are you aware of the recent Visy case, Mr McMaster?

Mr McMaster—No, Senator, I am not.

Senator HUTCHINS—So people like Blue Circle Cement would not be members of your association?

Mr McMaster—No, they are not members of our association.

Senator HUTCHINS—Nor Monier?

Mr McMaster—No, none of those companies are members of our association.

Senator HUTCHINS—Visy would not be. Bowral Brickworks?

Mr McMaster—No, they are not members.

Senator HUTCHINS—They are not members of your association.

Mr McMaster—No, they are not.

Senator HUTCHINS—There have been a number of settlements over the years with the concrete companies—who are not members of your association either, are they?

Mr McMaster—No.

Senator HUTCHINS—In your submission, you say that your members said that there was a trend for lorry owner-drivers to not be painted any more. They were using decals, or they were having their names put on the side of the vehicle. That was what your survey said, wasn't it?

Mr McMaster—In round terms, yes. Yes, that certainly is a trend in the industry.

Senator HUTCHINS—I live out in western Sydney and I could not see one unpainted wagon with any lorry owner-driver's name on it—say, with S. Hutchins of Glenbrook on it. I could not see it anywhere. We have a great freight task out in western Sydney and I could not see one. All I can see is that there are plenty of painted wagons. You make your lorry owner-drivers paint their wagons, don't you?

Mr Mackenzie—Yes, we do. But we do not make them. We actually paint them at our cost.

Senator HUTCHINS—But that is a requirement.

Mr Mackenzie—That is part of the requirement.

Senator HUTCHINS—They cannot work for anybody else, can they?

Mr Mackenzie—It depends on the nature of the contract. Referring back to point 1.1 of the association's submissions, TNT has representative contractors in all of those relationships.

Senator HUTCHINS—The overwhelming majority of your owner-drivers would be direct employees of yours, wouldn't they, or directly contracted to you?

Mr Mackenzie—Lorry owner-drivers are probably not, in the PUD fleet—that is, up to five tonnes, pick-up and delivery of freight.

Senator HUTCHINS—You might explain to everybody what PUD is.

Mr Mackenzie—Sorry. There are probably three major tiers in our transport business. There are the one-tonne courier vehicles that are a time-sensitive task. There is from one tonne up to five tonnes that do basically pick-up and delivery of freight, including box work. Then, above that, there are lorries doing long-distance type of work. We have contractors in each one of those three areas. In the courier area they are required to provide a white one-tonne van and we then paint 'TNT Delivery' on the van. The same thing predominantly happens in the PUD fleet. In the lorry owner-drivers they provide a white prime mover and we attach 'TNT' to it.

Senator HUTCHINS—The degree of those sorts of relationships with the company is also governed by who is covered by a contract determination and who is not, as well, isn't it?

Mr Mackenzie—The couriers are covered by a contract determination. The pick-up and delivery subcontractors are covered by a determination, and there are various arrangements for the lorry drivers because it depends on whether you engage an independent lorry owner-driver or you engage another company to provide that service for you.

Senator HUTCHINS—But how they are remunerated is not necessarily determined by an industrial instrument, is it?

Mr Mackenzie—No, it is not.

Senator HUTCHINS—I have one final question. Is Allied Express a member of the association?

Mr Mackenzie—No.

Senator HUTCHINS—Have you seen their submission to the inquiry?

Mr Mackenzie—No.

Senator HUTCHINS—They make it clear that they support the current determination. They say they have 400 owner-drivers in New South Wales. I do not have any more, Madam Chair.

CHAIR—Senator Campbell.

Senator GEORGE CAMPBELL—How long have the current provisions existed in New South Wales law?

Mr McMaster—I think about 25 to 30 years.

Senator GEORGE CAMPBELL—Over that period of time, on how many occasions has your association made representations to the state government to have changes made to the law?

Mr McMaster—We have made no representations to make changes to the state law.

Senator GEORGE CAMPBELL—Do I assume from that that for the past 25 to 30 years you have been satisfied with the arrangements governing the employment of owner-drivers or lorry drivers in New South Wales?

Mr McMaster—It is probably fair to say that we supported the system that was in place. But, as I said earlier, in more recent times we have sensed a change in views amongst our members.

Senator GEORGE CAMPBELL—What is it specifically about this proposed legislation that has borne on you to change your mind in respect of preferring this legislation over the legislation that has existed for 25 to 30 years?

Mr McMaster—It is not so much the views of myself, it is the feedback that I have sensed from the membership. Talking to members, I have sensed a change in their position. That has led us to investigate the matter further and, as a result of that, the survey was conducted and the findings are in front of you.

Senator GEORGE CAMPBELL—How many members do you have in New South Wales, Mr McMaster?

Mr McMaster—About 600.

Senator GEORGE CAMPBELL—How did you poll those members?

Mr McMaster—We tended to approach larger companies and conduct face to face interviews. The objective was to try and pick companies that worked across a broad range of freight tasks, that were engaged in a wide range of work: local work within, say, metropolitan Sydney; country route work; interstate work; work in large metropolitan areas outside Sydney—Melbourne, Brisbane et cetera—so we tried to pick companies that were aware of and understood the operating environment and the regulatory environment in states other than New South Wales, as well as inside New South Wales.

Senator GEORGE CAMPBELL—How many out of the 600 members were polled?

Mr McMaster—About 15.

Senator GEORGE CAMPBELL—Fifteen out of 600?

Mr McMaster—Yes, thereabouts.

Senator GEORGE CAMPBELL—Would they have been a fair representation of the 600 members or were they at the top end of the—

Mr McMaster—They tended to be larger companies or companies that were prominent in a particular industry sector. They may not have been large companies of themselves but they

may have been companies that were reasonably prominent in one sector or another of the industry.

Senator GEORGE CAMPBELL—So you are not aware of what the attitude of the other 585 companies is?

Mr McMaster—We have not directly approached them but we have certainly made them aware of the views we have put forward to this inquiry.

Senator GEORGE CAMPBELL—Did you have a questionnaire which you asked them to fill in?

Mr McMaster—What I took with me—and I conducted the face to face interviews myself—was a prepared questionnaire, and I worked from that. The objective of the questionnaire was to try and sense the degree of support or otherwise for the present system, the reasons for the position and how they felt the relationship would change, in terms of the business relationship, should the contractor determination system cease.

Senator GEORGE CAMPBELL—Can you make a copy of the questionnaire available to us, Mr McMaster?

Mr McMaster—Certainly. Yes, I am happy to do that.

Senator GEORGE CAMPBELL—Thank you.

Mr McMaster—I have a spare here I can leave with you or, alternatively, I can email one.

Senator GEORGE CAMPBELL—I am happy for you table it.

CHAIR—If you would like to table that for the committee, that would be good, thanks.

Mr McMaster—Yes, I can do that.

Senator GEORGE CAMPBELL—Mr McMaster, in what way will these new provisions alter the relationship between your companies and their drivers in such a way that these 15 companies believe there will be a substantial benefit to the industry?

Mr McMaster—I think the collective view expressed would be that it would enable the relationship to operate on a more business-like basis, bearing in mind that the key to business success is that both parties are happy with the relationship so that there is some mutuality in terms of benefit arising out of the relationship. That also has regard for the varying nature of the market for freight in various types of road freight operations: local, long-distance, car-carrying versus containers versus food and beverages et cetera.

Senator GEORGE CAMPBELL—But I presume that, given that the current provisions have been in operation for 30 years without complaint from your association, they must have been working to the mutual benefit of all parties. What is there specifically in this legislation that your members see, if implemented, will bring a major benefit to the industry that is going to improve the relationship?

Mr Mackenzie—I think the problem that our industry has at the moment is the complexity of regulation in the industry. As I said, I move back to 1.1 of the submission—

Senator GEORGE CAMPBELL—What type of regulation?

Mr Mackenzie—Industrial relations.

CHAIR—Just a moment, Senator Campbell. You were answering, Mr Mackenzie; if you would go on with that answer.

Mr Mackenzie—It is the fact that the industrial relations regulation in New South Wales is different to other states in terms of contractors. The fact that we engage subcontractors in other states and we do not necessarily have the same complexity in terms of the industrial framework that we have in New South Wales makes it—the industry itself is trying to, in my view, simplify the relationship so that everyone understands what the rules are. One of the benefits we see of the independent contractors legislation is that it does simplify it and standardise it across Australia.

Senator GEORGE CAMPBELL—Certainly the people in New South Wales would be pretty familiar with the legislation. It has been in operation for 30 years.

Mr Mackenzie—It is very complex legislation. Anyone that reads it and tries to understand it, unless they have some expertise in that particular area, I would say struggles.

Mr McMaster—As I said earlier, we deliberately chose companies who may operate in, say, Queensland or Victoria. They are familiar with the environment in those states and they have an ability to compare and contrast their ability to operate in those states as opposed to New South Wales.

Senator HUTCHINS—The Western Australian and Victorian road transport associations do not support your position, do they?

Mr McMaster—The Victorian association, as I understand it, supports the retention of the recently introduced legislation in Victoria. I do not know what the Western Australian position is, although obviously I have been talking about this—

Senator HUTCHINS—The Western Australian government is about to introduce legislation, isn't it, to mirror—and these are my words—legislation that applies in New South Wales and Victoria? That is, I understand, supported by the Western Australian road transport association.

Mr McMaster—The legislative environment in New South Wales differs from Victoria, for a start. Based on discussions I have had with Transport Forum WA, my understanding is that they support the notion of legislation that is similar to the Victorian legislation. As far as the legislation in Victoria is concerned, we do not have a view one way or the other. We just know we have some problems with the existing arrangements in New South Wales.

Senator HUTCHINS—But not in the car carriers determination, which you are supporting.

Mr McMaster—We are operating within a different framework. We are not going to the Industrial Relations Commission and saying, 'We do not support this determination.' We have to work within the system in place at the moment. That drives our thinking as far as the present environment is concerned. The position that we put before you relates to the direction in which we would like to see policy heading.

Senator HUTCHINS—Mr Mackenzie, in talking about complexities, to what are you referring? What actually are the complexities? You outlined labour and the non-labour components and fixing a rate, whether it be on hourly or unit or incentive. Most of the 15

operators who replied to Mr McMaster's survey are experienced transport operators. They know how to cost, for example, moving that box from there to there, how much it costs in wear and tear on their vehicle and in running costs et cetera. What complexities are you referring to that they do not understand already?

Mr Mackenzie—Chapter 6 of the New South Wales Industrial Relations Act is a complex piece of legislation.

Senator HUTCHINS—You said that, but in what area specifically?

Mr Mackenzie—In its entirety. It is a complex piece of legislation.

Senator GEORGE CAMPBELL—Why is it complex, Mr Mackenzie?

Mr Mackenzie—It is complex in terms of the restrictions that it places on employees to engage contractors. There are not have the same restrictions in other states and we, in fact, have very good relationships with our contractors in other states. I am not suggesting we do not have good relationships with our contractors in New South Wales, but the point is that in our pick-up and delivery fleet, for instance, we have not engaged new contractors because of the complexities of the industrial legislation that govern those contractors.

Senator GEORGE CAMPBELL—I can understand you saying—

CHAIR—Just a moment. I want to allow Senator Sterle to ask a question so that we can finish on time. Perhaps if you have more remarks to add to that, Mr Mackenzie, you might like to provide those in writing to the committee, to illustrate the answer.

Senator GEORGE CAMPBELL—Can we just finish the question so that he knows what we are asking?

CHAIR—The last question.

Senator GEORGE CAMPBELL—Mr Mackenzie, I understand what you are saying—that the New South Wales act may not allow you to do what you want to do—and I would have thought that was quite simply understood. It does not allow you to do it. What is so complex about it?

Mr Mackenzie—Can I explain it by giving you an example: a subcontractor in New South Wales can seek a claim in the Industrial Relations Commission under section 106 of the act for a whole range of things, and one of those is that the contractor can make an application for unfair contract and then go back three or four years—in terms of making an assessment—as to whether the rates he has been paid for those three or four years are equivalent to an employee paid under an award. It is very complex. It takes you into a situation where not only has the subcontractor, or his agent, got to do the analysis of whether they were or were not paid equal award rates, but the employer also has to do the same analysis, and that was not the way the individual subcontractor was engaged in the first place.

Senator GEORGE CAMPBELL—But that would not be any—

Mr Mackenzie—There are legal complexities in terms of that which—

CHAIR—If you have further—

Senator GEORGE CAMPBELL—But that would not be any different—

CHAIR—No, Senator Campbell—

Senator GEORGE CAMPBELL—Can I just finish the question?

CHAIR—I am sorry—

Senator GEORGE CAMPBELL—It would not be any different from an employee who had been underpaid award wages—

CHAIR—I am sorry, I need to ask Senator Sterle.

Senator GEORGE CAMPBELL—There is no statutory limitation on how far you can go back to make an assessment as to how much they had been underpaid.

Mr Mackenzie—No, I am not suggesting there is.

CHAIR—Mr Mackenzie, could you answer that in writing, please. Senator Sterle, you have a question?

Senator STERLE—Thank you, Chair. Just so that there is no perception of an ambush here for Mr McMaster and Mr Mackenzie, I wish it to be on the record, through you, Madam Chair, that for 16 years I was in the transport industry—11 years as an owner-driver—and those 16 years were at TNT. I spent 14 years as an organiser with the Transport Workers Union as the Western Australian owner-driver organiser. I noticed in your submission at point 14, Mr McMaster—'Incorporation'—that you were very heavily requesting government, or hinting to government, that it should have a policy that would favour, or even mandate, incorporation. For the committee's benefit, could you explain why your members wish to have incorporation mandated for owner-drivers?

Mr McMaster—The view is that it is the preferred business model that they would like to see to govern the relationship that they have with their owner-drivers.

Senator STERLE—Mr McMaster, be very measured in your response, please. Why do they want that? Why is it the preferred business model? I know why it is, but I would like to hear your association's reasons.

CHAIR—Just let Mr McMaster answer the question, please, without any direction.

Mr McMaster—We just asked them what model they preferred, rather than why they preferred it, as I recall the question.

Senator STERLE—But as the CEO of the major—

Mr McMaster—I am not the CEO.

Senator STERLE—Sorry, what is your title?

Mr McMaster—Corporate relations manager.

CHAIR—It is on the sheet in front of you, Senator.

Senator STERLE—I understand, Chair, but time is running out and you want to stick to the time limit, so I am trying to circumvent matters and get to it quite quickly. Do you know why it is the preferred model of your members?

Mr McMaster—I can take that on notice. I am happy to ask those whom I have surveyed to provide me with that advice and to provide a further submission.

Senator STERLE—I appreciate that. Mr McKenzie, on that issue, for your company I know that is your preferred model for incorporation.

Mr Mackenzie—Yes, it is.

Senator STERLE—Why is that?

Mr Mackenzie—Because it puts some legal framework around the relationship between the subcontractor and the principal contractor.

Senator STERLE—Because they are not a collective for both?

Mr Mackenzie—No. Because if they are not incorporated, basically they can be anyone. It gives some legal status to the formal relationship between the principal contractor and the subcontractor.

Senator STERLE—I do not want to put words into your mouth, but would it be fair to say that if they are incorporated it will just be another, shall I say, vehicle to avoid any form of determination?

Mr Mackenzie—No, we do not see it like that. We see it more that the individual understands the insurance issues that the subcontractor has to be involved in; that they understand the technical relationship in the contract between the principal and the subcontractor. It is more structured. There is some certainty in that relationship if someone is incorporated versus if they are not incorporated.

Senator STERLE—In my home state of Western Australia I have had many dealings with TNT, but I do not think I have had the pleasure of meeting you before. We might have met, but it must have been cordial!

Mr Mackenzie—I think we have met before, Senator.

CHAIR—Last question, Senator.

Senator STERLE—I know your company has requested incorporation in your priority fleet.

Mr Mackenzie—Yes.

Senator STERLE—When it came to discussing safe and sustainable minimum rates of pay, we could not have the conversation as a collective; therefore, it undermined any chance of, shall we say, a level playing field as the determination in New South Wales provides.

Mr Mackenzie—I am not aware of the circumstances that you are raising.

Senator STERLE—Would you take that on notice and come back to the committee on that?

Mr Mackenzie—Yes.

CHAIR—Thank you very much, gentlemen, for your evidence today.

Proceedings suspended from 10.33 am to 10.53 am

[10.53 am]

JONES, Mr Don Clark, Assistant Director-General, Office of Industrial Relations, Department of Commerce, New South Wales Government

PETROVIC, Mr George, Acting Principal Analyst, Office of Industrial Relations, New South Wales Government

STEVENS, Ms Rebekah, Acting Assistant Director-General, Industrial Relations Analysis and Partnerships, Office of Industrial Relations, New South Wales Government

CHAIR—I welcome our next witnesses from the New South Wales Government. The committee has before it your submission. Are there any changes or additions?

Mr Jones—No, there are not.

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

Mr Jones—Thank you for making the time to see us this morning. I wish to provide an apology from our minister, John Della Bosca, who has a commitment in New South Wales and cannot be here today. The New South Wales government's policy perspective on this legislation is set out in the submission. We make it clear that we support independent contracting as a legitimate way of doing business. It has clear benefits for businesses and for workers, and we recognise, as well, that some workers choose to be independent contractors.

For approximately 80 years, New South Wales has enacted and regulated that partition between employee and independent contractor in a range of areas and, as a result, we bring 80 years of regulatory experience in dealing with that particular gap. We have a concern that this proposed legislation, while it has a focus on independent contracting, lacks a focus on fairness in bargaining and bargaining structures.

We also wish to point out in general terms—as is made clear in our submission—that we believe that Australia has probably in the order of 800,000 contractors working at any particular time. Some of those people might also be employees in other parts of their lives, but it is in the order of 800,000. If you take a slice of it, New South Wales will have about a third of the contractors, so of all the states we probably have the most contractors and we have the longest period of time in regulating contract arrangements.

Our submission is in four parts. The first part, from paragraphs 9 to 44, covers the background; part 2, which is paragraphs 45 to 84, summarises the content of the legislation as the New South Wales government sees it; part 3 summarises three legal issues—the common law test, the New South Wales legislation that is overriden or proposed to be overriden by this legislation, and the constitutional basis of these bills; and part 4, paragraphs 159 to 274, summarises the issues that the government considers need addressing.

Paragraph 159 notes the full practical effects of the legislation for New South Wales contractors and employees, which we see are in four areas: firstly, it overrides the New South Wales deeming provisions which have been a feature of our legislation for in the order of four decades; it provides transitional arrangements for workers subject to the state deeming provisions; it eliminates the state unfair contracts jurisdiction for corporations in favour of a

national services contract review scheme; and it introduces penalties for sham contracting. The New South Wales government maintains a strong objection to each of these four elements.

We would like to address you very briefly on each of those but also to make two general points: one is the New South Wales government view that the legal framework that the bill seeks to put in place runs directly contrary to the approach adopted by the ILO in its employment relationship recommendation. The ILO's recommendation is aimed at protecting employees from the effects of disguised employment arrangements, while the bill appears to be aimed at protecting independent contractor relationships, real or otherwise, and a full text of the ILO's submission is appended to our submission for that reason.

We are also concerned that the bills are founded on the common law test as a means of distinguishing between employees and independent contractors. This legislation provides an opportunity to put some signposts around what is an employee and what is an employer, and that opportunity is not addressed in this legislation as it stands presently. The limitations of relying solely on a common law test are well documented and, in our submission, the New South Wales government believes that this limited approach is questionable both in policy and practical terms.

In terms of the deeming provisions, the New South Wales laws have had deeming provisions for a range of occupations for approximately 45 years, and those provisions have been well established and settled and have attracted bipartisan support in New South Wales for the greater period of time. It has been recognised as an essential policy tool to correct clear imbalances in certain areas where the law has been unclear or the case law has been unclear. It is consistent with the ILO's approach. It is also balanced by protections for bona fide contractors, and that is made clear in the deeming provisions.

The New South Wales government's position is that, by ending these deemed employment provisions, the new bills will disturb what has been uncontentious and settled for years, will bring uncertainty to affected people, and increases the potential for litigation in the coming years. We believe that the transitional provisions for deemed workers are overly complex, particularly in relation to sequence contracts, that there is a built-in bias against existing employees, and that it is onerous and unfair that the existing employees' entitlements may well evaporate at the end of the transitional period if there is not subordinate legislation put in place.

As to the unfair contracts jurisdiction, we believe that the replacement of the state jurisdiction with the federal jurisdiction is not a simple one-for-one replacement and that the state jurisdiction has a broader test involving public interest considerations, and the expertise and power of the New South Wales Industrial Relations Commission to craft acceptable and lasting settlements on these issues through the use of awards and agreements is something that is absent from the Commonwealth legislation.

In relation to sham contracting, the bills produce new provisions which are said to provide protection from sham arrangements. We have particular concerns about the twin hurdles that the applicant carries: the onus to show that there was in fact an employment relationship and that it also has to demonstrate what appears in the mind of the other contracting party.

Before I finish, I note that some submissions to this inquiry have strongly criticised the New South Wales owner-driver provisions, which the bill leaves untouched for the moment, at least. These submissions have advocated the removal of relevant provisions from the bill and the consequent overriding of owner-driver provisions. I would like to take this opportunity to place on record the New South Wales government's total opposition to such a proposal.

The New South Wales government is strongly committed to the retention of owner-driver protections currently in the New South Wales Industrial Relations Act and they will apply to non-constitutional corporations, obviously, if this legislation goes through. Any attempt to override these provisions will be opposed to the maximum possible extent. We believe that the provisions that exist in the Industrial Relations Act are a reasonable set of minimum rates and conditions, they are a safety net and they are not a break on bargaining in New South Wales. That concludes my statement.

CHAIR—Thank you for that. I take it from your statement that you obviously would prefer litigation in the New South Wales Industrial Relations Commission.

Mr Jones—We would prefer no litigation, because we think that the law should be clear about who is an employee and an employer. Perhaps I can explain where I sit in the New South Wales Office of Industrial Relations. I am responsible for our inspectorate area, so every week we have people turning up who think that they might be contractors or might be employees, and think that they deserve the protections of an award. We have to explain to them that, under the New South Wales legislation, if you fall within the deeming provisions then you are clearly an employee. If we remove those deeming provisions, then the best we can tell people is that they have to go to court to find those sorts of things out for themselves. While the courts and the common law tests provide us with indicators about the possible outcomes of those court cases, the final answer for these people will be through the court system.

CHAIR—Which court system would that be?

Mr Jones—They will have to go to the New South Wales commission or, indeed, a Federal Magistrates Court, if they are seeking to enforce what they believe their entitlements are as an employee under a federal agreement or a federal award.

CHAIR—Do you think there is a basis to assert that litigation in the New South Wales judicial system would be any quicker or cheaper than that in the Federal Magistrates Court?

Mr Jones—From my personal experience I can tell you that we have a small claims process in the New South Wales Industrial Relations Act which is as non-litigious as the court system can be. You do not have to have sworn evidence. You can present your case from the bar table. Both parties are encouraged to be unrepresented, so it is the two parties and the magistrate hearing the matter. As I understand it, the Federal Magistrates Court approach does not allow for that in relation to these sorts of claims at the moment, although I can be corrected on that matter. It is a more formal court system.

CHAIR—Right.

Mr Jones—The great simplicity of the small claims process under the New South Wales Industrial Relations Act, I think, is one of the strengths of our legislation.

CHAIR—Is there any other avenue for complainants other than the Small Claims Tribunal?

Mr Jones—It runs as an adjunct to the Local Court system, so wherever a Local Court is in New South Wales they conceivably can sit before a magistrate or an industrial magistrate and have the matter heard that way.

CHAIR—If a person preferred to use a solicitor or a legal representative, would there be any reason to suppose that the use of those services would be quicker and cheaper than the Federal Magistrates Court?

Mr Jones—I have no evidence to say that it would be quicker than the Federal Magistrates Court, or slower.

CHAIR—So you have no data to illustrate that?

Mr Jones—No.

Senator GEORGE CAMPBELL—Mr Jones, the previous witnesses we had here, the New South Wales Road Transport Association, raised the issue of the complexity of the law. I think they said section 6 of the Industrial Relations Act was a prime reason why they were changing their mind to now argue for this legislation to be adopted. They opposed it originally when they made submissions to the House of Representatives committee. I asked them whether or not they had made any representations to the New South Wales government with respect to this section of the law. They said they had not. Has anyone else made any representations to the government to your knowledge in respect to the law in this area being too complex?

Mr Jones—In 1995, with the review of the former legislation and the creation of what became the 1996 legislation, the Road Transport Association, and I also believe the Courier and Taxi Truck Association—which is appearing before this committee—were involved in those discussions. From memory, there were suggestions about how to improve the jurisdiction and they were taken on board in the rewrite of what became chapter 6 of the Industrial Relations Act 1996. Those sorts of things went to the capacity for associations of employers to be recognised and for contract agreements to be recognised as part of the New South Wales industrial relations system. So there has been a consultative period. Indeed, in 2001 we had as part of the legislation a five-year review and the parties have an opportunity to put their proposals to government on a five-yearly basis about the legislation. But I am not aware of any outstanding issues that they have raised in more recent times. I thought they had general support for what was in chapter 6.

Senator GEORGE CAMPBELL—And you are satisfied that the issues they raised in 1996 were accommodated by changes to the act at that time?

Mr Jones—I believe so.

Senator GEORGE CAMPBELL—Okay. I will not ask you to answer me, but can you take it on notice: perhaps you could provide us with the changes that they sought and the alterations you made to the act in order to accommodate those changes?

Mr Jones—Yes.

Senator GEORGE CAMPBELL—It might just help to understand the extent to which they have seen complexities in this area. They said that they interviewed 15 of their members out of a membership of 600. How representative would that be of the industry generally across New South Wales; their members and other transport workers?

Mr Jones—Just from our perspective, for the New South Wales transport industry there would probably be in the order of tens of thousands of people who work in the industry. I do not seek to denigrate what the 15 people believe. Obviously they hold those views genuinely. They are perfectly entitled to put those views to government at any stage. I am just not aware that they have put their views to government.

Senator GEORGE CAMPBELL—I think you mentioned in your opening address that there are around 800,000 independent contractors in New South Wales or Australia?

Mr Jones—In Australia.

Senator GEORGE CAMPBELL—In Australia. That would seem to be consistent with figures produced by the Productivity Commission, where I think they said there were 843,000 in 1998, which was 10.1 per cent of the workforce and 739,000 in 2001, which was 8.2 per cent. In 2004 the numbers held steady at 8.2 per cent, so it seems to have levelled out. In fact, some academics have suggested that it is even much lower; that it could be as low as 400,000. I suppose it depends how you define an independent contractor. But that stands in stark contrast with the claim by the Minister for Employment and Workplace Relations that there are 1.9 million independent contractors. Where would such a figure come from?

Mr Jones—That would include people who would be owner-managers, such as local shopkeepers, who would not employ people but they would be operating a business on their own. Around that 1.9 million figure is when you add contractors plus this second group of people together. Those people may or may not employ people. They may or may not have contractors. They are likely to be working directors of small businesses.

Senator GEORGE CAMPBELL—So it is possible?

Mr Jones—Yes, but we believe it is about 800,000. We support what the Productivity Commission came forward with as a figure. We think that perhaps, while the numbers of independent contractors are growing, they are growing no faster than the rate of growth in the labour force generally, so the percentage figure stays pretty stable.

Senator GEORGE CAMPBELL—Given that it has been stable for some four or five years, is that an indication that there is a fairly clear understanding out in the workforce generally as to what constitutes an independent contractor?

Mr Jones—In New South Wales we would say that the legislation has given greater clarity to those sorts of things. I would not say that the 800,000 is a static number of people. There are obviously employees moving into contracting arrangements and out of them.

Senator GEORGE CAMPBELL—Sure.

Mr Jones—In recent times we have seen a growth in security areas post September 2001. It reflects the growth in the industry. Transport appears to be a growing area, but contracting in some areas of manufacturing—in clothing manufacturing, for instance, in New South Wales—has gone the other way.

Senator GEORGE CAMPBELL—What are the likely implications, certainly in this area, if we move to a common law definition of 'independent contractor'? Is that going to make it clearer, or is it going to muddy the waters in terms of who is an employee and who is not an employee?

Mr Jones—What it means is that regulators cannot tell people with any certainty whether they are a contractor or an employee. You can only find out by going through the court system, perhaps many years after you have started that contracting arrangement, so it is retrospective. That is our great concern about the loss of the deeming provisions where we could provide people with certainty and say, 'You are an employee unless you set up a bona fide contracting arrangement, and then that will take you back out of employment and into an independent contracting status as a carpenter or the like.' That will no longer be available.

Senator GEORGE CAMPBELL—Is that likely to lead to increased litigation in this area over the definition of who is and who is not?

Mr Jones—I am not sure many people have the time or the capacity to take this sort of litigation through the court system, or as many people as perhaps would need to if we went to this common law definition. Can I just give a very practical explanation? Obviously, the case of Vabu, which was referred to in our submission here, went to the High Court. Through the court system on the way up to the High Court, of course, there were varying positions going one way and the other. So at any stage if the applicant had decided not to press a claim, the outcome would be different from what we now have in Australia in terms of a High Court precedent for Vabu.

But the Vabu precedent only goes so far, so if a contract cleaner or a security guard turns up to one of our office's counters next week and says, 'Am I an employee or a subcontractor?' I can give them the best advice as to what we think, using the Vabu test, but really to find out, they have to press the matter themselves. Whether they will do that or not is a different matter. Whether they will seek to enforce their rights is a matter for the individual.

Senator GEORGE CAMPBELL—The reality is that, for the vast majority of employees or independent contractors in the classes that you have identified, it would be financially beyond them to press a case of that nature, wouldn't it?

Mr Jones—Perhaps I can say, as a workplace regulator, that the people that we are talking about, in what we would describe as 'at-risk' areas—transport, cleaning, security and things like that—do not even know where to start to press their claims. They do not know what jurisdiction to start their work in. That is why we have the role that we have.

Senator GEORGE CAMPBELL—Can you explain to us how your deeming provisions operate in New South Wales.

Mr Jones—It is a schedule to the legislation and it nominates a range of occupations. It gives, in most of those occupations, an opportunity for a bona fide contracting relationship to be established, which is then set outside the deeming provisions, but the onus is there to create that bona fide contracting arrangement through other methods. Then, by deeming the work—the occupation—as that performed by an employee, the commission can make awards in relation to minimum conditions and pay rates. It can also deal with industrial disputes that arise in those workplaces, without concern about whether the unions or the commission have

jurisdiction to deal with those matters. We believe it is not just a safety net for employees within the industry but it is also a way to minimise industrial disputation in those areas.

Senator GEORGE CAMPBELL—Do these new provisions have implications for independent contractors in New South Wales in respect to the operation of your workers compensation?

Mr Jones—It calls into question what the definition of a worker is, and the New South Wales WorkCover Authority has spent quite a bit of time recently—in the last couple of years—working through the definition of 'employee' and 'worker' and how far the OH&S and workers comp laws cover it in New South Wales. We will have to wait until this legislation is passed to review that, I suppose. It is a matter for conjecture at the moment as to just what impact it will have.

Senator GEORGE CAMPBELL—So there is a question mark over whether or not people may be disadvantaged in respect to workers compensation.

Mr Jones—They may be.

Senator GEORGE CAMPBELL—Can you explain to us how your unfair contracts jurisdiction operates? You have an unfair contracts jurisdiction, don't you?

Mr Jones—Yes, we do. The submission deals with it at paragraphs 114 to 128 . Very briefly, the unfair contracts provisions were originally placed there to allow people who were performing work that, in the ordinary sense of the word, we would see as an 'employee' performing work, and gave the commission the power to investigate the contract to make a ruling about its fairness, or whether the parties' behaviour under the contract had become unfair. It also gave the commission a public interest power to see whether any aspect of the contract would offend the public interest, even though the interested parties may not be so offended.

It also provides a power for the commission to make awards as a result of decisions it has made, so that, if there is a test case, it can make an award which would then cover subsequent matters, and it has been used in high-profile cases. Recently, the government moved to place a cap of $200,000 on the remuneration of a person who may access the New South Wales Industrial Relations Commission, recognising that matters that fall above that sort of cap are more appropriately dealt with in the state Supreme Court system, or in a District Court arrangement.

Senator GEORGE CAMPBELL—Is that because of the famous case which Channel 9 reported?

Mr Jones—Several famous cases involving footballers and Microsoft executives.

Senator GEORGE CAMPBELL—Would this area of unfair contracts cover, for example, outworkers?

Mr Jones—Yes. The strength of the unfair contracts provision is that you can be an employee or you can be a contractor and you can still bring a claim under this. It is more about the unfairness of the contract and less about the status of the person who is bringing the unfairness claim, so you can look at the work that is being performed under the contract.

Senator HUTCHINS—Is there a difference in the deeming provisions for, say, an outworker and which jurisdiction they could go to for relief? You can be deemed an employee. Is that different to being an outworker in the current New South Wales jurisdiction?

Mr Jones—No. Rebekah will answer that.

Ms Stevens—The deeming provisions include clothing outworkers as one of the classes of workers deemed to be employees for the purposes of the IR Act.

Senator HUTCHINS—But can you be a contract outworker at the same time?

Ms Stevens—You can be a contractor. You are just deemed to be for the purposes of the Industrial Relations Act, not for the purposes of other legislation.

Senator HUTCHINS—I see. Thank you.

CHAIR—Last question.

Senator GEORGE CAMPBELL—Mr Jones, cases in respect of unfair contracts are pursued through the Industrial Relations Commission. Is there a cost to the individual to promote that, or is it done as part of the service of the commission?

Mr Jones—The individuals obviously have to bring the case and promote the case through the commission. But, once the matter is in the commission, the commission has an obligation to attempt to settle the matters through conciliation. It is worth noting that the number of unfair contract cases is in the order of hundreds each year. While there are a couple of high-profile ones, most of them involve ordinary workers who believe that the contract has become unfair during the course of it, or that some particular aspect of it is harsh or unjust.

Senator GEORGE CAMPBELL—What is likely to happen to that provision if this new law is enacted?

Mr Jones—There will be some uncertainty, obviously, if people who are contracting in relation to a corporation will be able to go to the Federal Magistrates Court and follow the new national contracts review process. It will be a different process and, from my reading of the legislation, it is not as broad. It is more of a party-party approach, rather than looking at the public interest in relation to the unfairness of contracts.

But once again, because the state laws will still apply, it will be incumbent on the applicant to determine whether the other contracting party is a constitutional corporation. It is quite clear in some cases, obviously, if you are dealing with large corporations, but if it is a small construction project you may not be aware of whether the person that you are contracted with is a corporation, or was a director of a corporation in that capacity, or whether they contracted with you in their private capacity as an individual; therefore, you would still have rights under the New South Wales legislation. That degree of confusion is something that now will be placed into perspective by this legislation.

Senator GEORGE CAMPBELL—So there will be more complexity instead of less.

CHAIR—Order, Senator Campbell! I am calling Senator Bernardi now.

Senator BERNARDI—Mr Jones, in your submission from the New South Wales government you confirm that labour markets have evolved over a period of time and that the legislative framework needs to evolve in accordance with that.

Mr Jones—Yes.

Senator BERNARDI—Can you explain to me what parts of this current bill you do actually support, or how you would like to see the labour laws evolving.

Mr Jones—As I said, the submission says that we do not support this legislation in its current form.

Senator BERNARDI—At all?

Mr Jones—At all.

Senator BERNARDI—By streamlining the appeals process, or the dispute resolution process, and taking it away from, say, the Industrial Relations Court and allowing people to enter into mediation, or to go through a magistrates system—or, indeed, as you do in New South Wales, the small claims court—how does that disadvantage individual workers or contractors?

Mr Jones—As I explained, there is the obvious small claims process in New South Wales but, as I just answered the other senators, within the New South Wales commission process there is a conciliation process as soon as the matters are brought into the commission. So you cannot go to the commission and argue your case without attempting to settle it and to have the matters resolved between the parties in an informal setting. It is obviously an independent tribunal. I do not have data on the percentage of cases which are settled at that stage. However, from anecdotal evidence that I am aware of, a number of cases are resolved at a very early stage because of the conciliation emphasis in the New South Wales commission.

Senator BERNARDI—You also mentioned in your submission the additional layers of complexity that you believe this is going to add to the existing arrangements in New South Wales. How does it add complexity when it is only going to provide clarification across a broad range of state government jurisdictions?

Mr Jones—I am not sure that 'complexity' is the right word. People will be uncertain about their rights, and they may not be in a situation where they will be able to find out what their entitlements are, particularly for deemed employees, for the next number of years. The uncertainty that comes from it is that at some stage their employer can make an opt-out arrangement under the transitional provisions and move that person from an employment relationship—or give them the option of moving from an employment relationship—to a contracting arrangement or bring the employment relationship to an end. This, matched with Work Choices and the restrictions on people being able to take unfair dismissal actions, will mean that in some cases the employees will be in a situation where they have to take the offer that is being made to them or their employment ceases and they will not have any redress.

Senator BERNARDI—I understood that they could not be forced to accept an independent contracting arrangement.

Mr Jones—Yes, but at the end of the transitional period they end up with nothing. At some stage the employment relationship comes to an end, whether it is during the transitional period or at the end of it, so their backs are against the wall in their negotiating on that.

Senator BERNARDI—Are you aware of the submission by the Textile Clothing and Footwear Union of Australia? Are you familiar with that?

Mr Jones—No, I am not.

Senator BERNARDI—It goes to the scope and number of people employed who now work through independent contracting arrangements. The union in that particular submission maintains that the number of outworkers is grossly underestimated, and they believe that in their industry alone there is in excess of 329,000 outworkers. I wonder how that supports the claim that there are only 800,000—

Mr Jones—In relation to New South Wales, those outworkers are employees, so they are not independent contractors.

Senator BERNARDI—The TCFU is maintaining that these people will be disadvantaged.

Mr Jones—It is the position of the New South Wales government that this legislation and Work Choices, when read together, will disadvantage outworkers.

Senator BERNARDI—You do not believe that within the framework of this legislation there are existing mechanisms for them to protect their rights?

Mr Jones—The position of the New South Wales government is that the legislative arrangements that have been put in place over the last several decades in relation to outworkers in New South Wales are the most appropriate. That obviously involves arrangements providing a safety net to the workers but also providing a chain of responsibility for remuneration for the outworkers so that under our legislation—under the ethical clothing trades legislation in New South Wales—the outworkers do not necessarily need to prove an entire chain of production to seek to recover their remuneration if they are not paid for the work they perform.

Senator BERNARDI—Under the existing legislation, if we change the industry for a little bit and the owner-driver provisions, do you believe that your legislation as it currently stands supports price fixing for commercial contracts?

Mr Jones—No, I do not believe it does force price fixing. What it does is provide reasonable remuneration for the person driving and it also provides reasonable compensation for the vehicle; the cost of the vehicle and the maintenance of the vehicle. In New South Wales the government sets the tribunal and the parties argue where the level of that remuneration sits. The association that gave evidence this morning conceded that in most cases these are actually consent agreements, or consent contract determinations, and they have a strong history in that industry of reaching consent over the terms and conditions and the compensation that should be paid.

Senator BERNARDI—Is there a reason then that these arrangements only apply to the greater Sydney area?

Mr Jones—I think you are thinking there of the contracts of bailment, which relate principally to taxi drivers. The government made amendments to the industrial—

Mr Petrovic—Originally the legislation applied in that way to taxi drivers and private limousine operators. There was a restriction in fact to Sydney, Newcastle and Wollongong, and that was amended out of existence in 2003. That restriction no longer applies.

Senator BERNARDI—Just to taxi and limousine drivers?

Mr Petrovic—That never applied to freight carriers and the like under contract determinations.

Senator BERNARDI—Thank you for that clarification. I appreciate it. You were talking about historically and the provisions in it—goodwill for owner-drivers. How has that evolved over the course of time, initially from the legislative framework?

Mr Jones—The legislation that introduced the compensation tribunal as part of the Industrial Relations Act was passed by the former government in the early 1990s. Obviously, in the early years there was a larger number of cases than there is now. As I understand it, the legislation is working well and, until I heard otherwise this morning, it had bipartisan support from major industry and from the unions in New South Wales. I was not aware of any criticism of the tribunal as it works now.

Senator BERNARDI—But the legislation itself has evolved over the years. Is that right?

Mr Petrovic—I do not think the goodwill aspects of it have been amended in any particular way in recent times.

Mr Jones—No. The legislation, as passed, is an enabling provision which creates a tribunal with jurisdiction to deal with goodwill matters, hear cases on the merits of those matters and attempt to resolve those cases before the parties go to a formal hearing. It is a facility provision for the commission.

Senator BERNARDI—Are there other protections within the New South Wales regulations to protect independent business operators or the contracting arrangement?

Mr Jones—Not within the New South Wales Industrial Relations Commission, but that would be a matter that would then fall into the Supreme Court's jurisdiction.

Senator BERNARDI—That would be the fair trading provisions—

Mr Jones—Yes.

Senator BERNARDI—or unconscionable conduct or those sorts of things.

Mr Jones—Where there is no work performed and it is more of a commercial arrangement and you are talking about goodwill and commercial arrangements.

Senator BERNARDI—Thank you very much.

CHAIR—Senator Hutchins.

Senator HUTCHINS—By way of opening remark, I suggested to the chair that I should make it known that Mr Jones and I had worked on a review of the act back in 1994.

CHAIR—Thank you.

Senator HUTCHINS—I am aware, Madam Chair, as Mr Jones is, of some of the decisions behind the review. I am just a little unclear about the position of outworkers in New South Wales. Mr Jones, if I am an outworker in New South Wales and I get deemed an employee, I am not sure which courts I would go through to get compensation for being underpaid or not being paid workers comp. Could tell us what happens currently under the New South Wales system, if that occurs. You have referred to it in what you see might happen

under the proposed independent contractors bill. What would be the journey currently under New South Wales law, and the journey as proposed in the current bill?

Mr Jones—As it stands now, a clothing outworker is a deemed employee and is covered by the Clothing Trades (State) Award in the work they perform. Under that award they would have rights and entitlements. They would also have responsibilities, as would the giver-out of work, who would have responsibilities in keeping employment records, records in relation to the work that is performed, and things like that. That is an important part of the process, in that it gives people information about the work that they are performing which they can then use if they believe they have been underpaid.

Under the New South Wales Industrial Relations Act, if they believe they have been underpaid they can take a small claim process through the Local Court and that is initially conciliated. It is a simple process of a clothing outworker or a number of clothing outworkers joining together and saying that they have been underpaid and they believe that they are owed a particular amount of money. The magistrate hears from both sides, attempts to settle the matter and then can make an order in favour of those employees, or not if they have been paid correctly.

Added to that is a relatively new development, in that employers further up the chain—the retail fashion houses and things—can be nominated as the apparent employer by the clothing outworker, so in those circumstances where the person who has given out the work to the outworker has disappeared, or is unable to be found—which, I am afraid, is part of that industry and the way it works sometimes, because there are a lot of small operators—the claim then lies higher up the production chain with the warehouse or the retailers who produce the clothing.

In New South Wales, because of good work by a number of employer organisations and unions in that area, and the government, we have been able to actively promote a voluntary code which encourages retailers to ensure that the goods they have manufactured in this state are produced by people who are paid the proper rate of pay. That has been signed by the major retailers and it has worked well. I will pass to Ms Stevens to talk about the relationship and how it will work under this legislation.

Ms Stevens—One of the key concerns is that outworkers under the proposed legislation—because those laws are then overridden—cannot go further up the chain; they can only seek to redress any underpayments from the immediate contractor.

Senator HUTCHINS—That would have a substantial impact on a poor migrant woman somewhere in western Sydney.

Ms Stevens—Absolutely.

Mr Jones—In some cases the person further up the chain is best placed to identify the intermediary who has disappeared.

Senator HUTCHINS—In the New South Wales legislation, the onus is on someone in the chain to contest that you are an employee.

Mr Jones—That is right.

Senator HUTCHINS—You understand, under the proposed legislation, that if you are an employer you can say, 'I didn't know,' and that is a defence, is it, as you see it?

Ms Stevens—Yes. Under the proposed legislation, if the employer or the principal contractor held a view that it was a contracting arrangement and not an employment arrangement, then that is a defence against any of the supposed protections against sham arrangements, as well.

Senator HUTCHINS—You comment that the mechanism for redress in New South Wales is the local courts or the commission. Under the proposed legislation someone in this predicament would have to go to the Federal Magistrates Court. That is correct, isn't it?

Ms Stevens—Yes.

Mr Jones—Or the Federal Court.

Senator HUTCHINS—Is that commented on in your submission?

Ms Stevens—I believe so, yes.

Mr Petrovic—Yes.

Senator HUTCHINS—And at that point, in your opinion of the bill, if it is a case where the employer says, 'I genuinely thought they were an independent contractor'—

Ms Stevens—Again, it is a two-stage process. The outworker would have to first prove that there was, in fact, an employment relationship and not a contracting relationship, and then—as Mr Jones indicated before—go to the question of what was in the mind of the contractor at the time.

Senator HUTCHINS—But under the bill, as I understand it, if the employer says, 'I genuinely thought they were an independent contractor,' that is enough of a defence for the employer. Is that correct?

Ms Stevens—That is correct.

Senator HUTCHINS—Which is not the case in New South Wales.

Ms Stevens—No.

Senator HUTCHINS—I do not know if you are aware, but, because we are talking about the chain of responsibility: has the New South Wales government made a submission to an application for an award by the Transport Workers Union, called the transport industry mutual responsibility state award and contract determination?

Mr Petrovic—Yes, they did.

Senator HUTCHINS—Did the government support the union's application?

Mr Petrovic—No, it did not. The government took the view that the matters in the application were properly dealt with by legislation under the New South Wales OH&S Act. Indeed, there was a new set of regulations put in place in May of this year which went to those issues: driver safety, fatigue, what was termed 'professional drug taking', and the like. The minister's view was that, at the very least, that regulatory framework should be allowed to be established and run its course to some degree before looking at other mechanisms and, in any event, those matters are properly handled by legislation rather than the award system.

Senator HUTCHINS—Thank you very much, Mr Petrovic.

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

[11.42 am]

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

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

CHAIR—I welcome our next witnesses from the Australian Industry Group. The committee has before it your submission. Are there any changes or additions?

Mr Smith—No, Senator.

CHAIR—I now invite you to make a brief opening statement before we proceed with questions.

Mr Smith—Thank you, Senator. Ai Group welcomes the opportunity to express its views to the committee about these two bills. We support the bills, with the amendments outlined in our submission. The bills enhance protection for genuine independent contracting arrangements and deserve the support of all political parties. Genuine independent contracting arrangements are a legitimate way for work to be performed. Many people prefer to work as independent contractors because it suits their lifestyle, income and other preferences, and because it gives them the ability to establish and build their own businesses. The bills complement the important changes made within the Work Choices legislation—which Ai Group strongly supported—that prevent workplace agreements and awards containing provisions which restrict the engagement of independent contractors.

With regard to the independent contractors bill, we support the bill's approach of leaving the common law to deal with the distinction between employees and independent contractors. We also support the bill's exclusion of state and territory laws which deem independent contractors to be employees for the purposes of various workplace relations matters.

The bill has been drafted to avoid harsh outcomes for outworkers, and we support those provisions. We also support the bill's exclusion of state and territory unfair contract laws. The unfair contracts provisions in New South Wales, in particular, have proved to be highly problematic. They have become a de facto unfair dismissal system for senior managers wishing to challenge the quantum of their termination payments.

With regard to the Workplace Relations Legislation Amendment (Independent Contractors) Bill, we do have a concern about the $33,000 maximum penalty for those who are a party to a contract or proposed contract with an individual and who misrepresent that the contract is a contract for services rather than a contract for employment. We believe that that offence needs to be restructured to bring it in line with recognised principles of justice and that the penalty should only apply where a person has intentionally sought to avoid obligations under a contract of employment and that the onus should be on the individual who alleges that misrepresentation has occurred to prove that the offence has been committed, not the reverse onus of proof that is in the legislation at the moment. We urge the Senate to pass the bill without delay, with those amendments as set out in our submission. Thank you.

CHAIR—Thank you, Mr Smith. Earlier this morning the CEPU, which deals with electrical workers, plumbing workers and communication workers, seemed to be talking

about the fact that this bill will go against what industry is at the moment and how those particular trades have evolved. Could you give us the AiG's view on how working conditions in those industries have changed, with a view perhaps as to why this bill is necessary.

Mr Smith—I cannot understand why the CEPU would have that point of view. This bill leaves the common law to deal with the issue of who is a contractor and who is not, and that is consistent with the approach that has been in place, so I do not see this bill dramatically changing the nature of contractual arrangements in the electrical industry. There are, of course, many contractors in that industry, and there will continue to be many contractors. The Ai Group does not think that this legislation removes any of the protections that are there for contractors in the electrical industry.

CHAIR—With regard to your comments on the $33,000 penalty for deliberately structuring a relationship to look like an employee when it is really an individual contractor, or vice versa, could you explain in more detail why you think that offence should be restructured.

Mr Smith—There are some very well recognised principles when it comes to issues relating to offences, and those principles are common throughout numerous areas of the law. We think it is fair that, where someone alleges that there has been an offence committed, the onus should be on that individual to prove that the offence has been committed. The onus should not be on the party that it is alleged has been guilty of an offence to prove that they did not commit the offence. We think it is a very long-recognised principle of justice that that should apply.

The issue of reasonableness is built into the legislation, but given that the common law is being left to determine whether a party is a genuine independent contractor or not—and we believe that that is appropriate; it is a lot more flexible; the tests have developed over many years—it could be the case that, quite genuinely, a contract might be found to be a contract of employment rather than a contract for services, and a principal could quite legitimately have acted fairly and have genuinely believed that they had done the right thing, and we believe that, unless there is a clear intent there to avoid obligations, what is a very significant offence should not be an offence that they are exposed to.

CHAIR—The $33,000 penalty is, of course, for incorporated businesses, and I think there is a $6,600 fine for individuals. If the clear intent was there to avoid doing what should be done, do you think that that is a reasonable penalty?

Mr Smith—We acknowledge that it is consistent with the level of penalty in the workplace relations legislation for numerous other offences. We are not opposing this particular offence in total but we have a strong concern about the way that it is structured.

CHAIR—Thank you. Senator Campbell.

Senator GEORGE CAMPBELL—Mr Smith, what struck me in your submission was the very simple comment, 'We'll take what we can get; that'll do.' Your organisation represents a lot of employers who operate in the New South Wales state system. We have heard from the New South Wales government that those provisions covering independent contractors have been in their state act for some 30 years. Has your organisation at any time over that 30 years made representations to the New South Wales government to have the provisions of that state

act amended to meet some of the concerns you are now expressing in respect of the operation of those laws?

Mr Smith—Dealing with the first point, our submission is a fairly simple one, but that does not mean that our usual rigorous analysis did not go into it. We read every word in this legislation but, in terms of our view on it, it was more simply expressed than our view on some of the other legislation.

Senator GEORGE CAMPBELL—But I like reading your rigorous analysis.

CHAIR—It gives you plenty of opportunity for questions, that's why, Senator Campbell!

Mr Smith—We have participated in all of the reviews that have been conducted over the years with the New South Wales legislation and we have expressed views on it over time. In terms of this issue of, for example, the deeming of contractors to be employees, we have been expressing concern about this for some time. We made a lengthy submission to the House of Representatives inquiry. We also made a lengthy submission in response to the ministerial discussion paper, so it is not a new issue that is in this submission, it is something we have been concerned about over time.

We have members in a lot of industries that employ a lot of independent contractors—the IT sector; the construction sector; a growing membership in the transport sector; the security industry and so on—where these provisions are very much impacting upon their businesses.

Senator GEORGE CAMPBELL—I do not know if you were here when the New South Wales government officers gave evidence, but they said that their belief was that, if you moved to this common law definition of an independent contractor, that would put a substantial onus on individuals who may have a dispute over the nature of their employment. They would be forced to pursue cases through the Federal Magistrates Court or some other court, which would presumably engage them in considerable cost, in order to have the definition of their employment established before they would even be able to take a case for pursuit of payment or whatever it is that they particularly are pursuing.

Why would any government, including this one, want to make the rules unnecessarily onerous for employees that are earning $480 or $500 a week and who would not have the capacity to initiate legal challenges to those definitions in a court such as the Federal Magistrates Court?

Mr Smith—We think one of the key arguments here goes to the issue of national consistency. If you look around the country, some states have these deeming provisions and some do not. New South Wales certainly has the most extensive set of deeming provisions.

There is no evidence of significant disadvantage anywhere that we have seen. We cannot see why the list of parties that have been deemed to be employees in New South Wales is a legitimate list. What is so different about those types of occupations and contracts compared to any other? We just see that this is an area where these are commercial contracts which have been entered into freely between the two parties. They should be dealt with as commercial contracts rather than artificially being turned into employment contracts, which they are not.

Senator GEORGE CAMPBELL—But it is an assumption that they are, and have been freely entered into, and that they are contracts of the nature that you have describe. There may

well be individuals who believe that they are on a different type of contract. I understand that the Victorian government and the West Australian government are introducing provisions in this area as this inquiry takes place; this month in Western Australia, and it is on the go in Victoria.

Mr Smith—Senator, we think our position is very fair because this legislation includes provisions which deal with scenarios like that. There are penalties there that we are not opposing. We are opposing the structure of one of them. But there are penalties there for circumstances where contracts of employment are misrepresented as something else. There is also an unfair contracts jurisdiction. So we believe it is a package that does provide the appropriate protection, and we just cannot see any reason why, artificially, in different states different types of occupations are deemed to have 'employees'. It makes no sense to us. It is a level of complexity that should be removed.

Senator GEORGE CAMPBELL—There seems to me to be a contradiction, Mr Smith, in your argument for the removal of the fines, or the change of the onus. On one hand you say we ought not to have these deeming provisions, we ought to leave it more open, and it should be determined by the court as to what the employment relationship or the contractual relationship is. But then in respect to the fines you want more certainty for the employer in terms of the onus being shifted, presumably onto the person who is engaging in the contract rather than the person who is letting the contract, to prove that they have been misled. You want certainty in one area, but you are quite happy to have that certainty removed in the other. Why would you not want certainty and consistency applied in all areas?

Mr Smith—But all we are asking for is the same type of arrangement that is there, for example, with the unfair dismissal laws where, if a party alleges that they have been unfairly dismissed, they have to come along and they bear the burden of proving that the employer has unfairly dismissed them. It is a very common principle, that the applicant does bear that burden, and we think it is appropriate in this area as well. There is nothing unusual about it. If they make a claim, of course, the claim will be treated in the usual way and justice will prevail.

Senator GEORGE CAMPBELL—But that is not the issue I am raising. I am really raising the issue of why wouldn't not be beneficial to all parties to have more certainty about what the contractual arrangement is, and why wouldn't you endeavour to give that certainty to individual employees so that they do understand the contractual arrangements they entered into and they have some way of gaining that advice? As we heard from the New South Wales state department, they are able to give people pretty precise advice now as to whether they are an employee or an independent contractor. If that is removed they will not be able to give advice with any degree of certainty to individuals who might seek it. Why wouldn't it be in the interests of all parties to have certainty about what the arrangement is?

Mr Smith—If two parties have entered into a commercial contract, then you would have to assume that those parties have freely entered into that contract. If they have not, if there is some other situation present, then there are remedies available to deal with that. It just seems very strange and inappropriate that in some states you have certain commercial contracts that are deemed to be something else. It makes no sense.

Senator GEORGE CAMPBELL—But, Mr Smith, be fair. I do not know and understand contract law. Mr Baragry is a person who has practised in the law for a long period of time. I presume it is an area of some complexity. I enter into contracts all the time, but I am not too sure what sort of contract I have entered into. That is for the lawyers to sort out. How is an independent contractor, or an individual employee, supposed to understand what the nature of a contract is that they have entered into? And why in those circumstances wouldn't you endeavour to present them with the greatest degree of certainty you can as to the nature of the contract they have engaged in?

Mr Smith—But we do not see that that is an argument to preserve these deeming provisions in one or two states. The argument has been run by certain parties in the various inquiries that we need to have some statutory definition of what is an independent contractor and so on. We think that that creates more problems than it solves because wherever you try to draw the boundaries you then cause all sorts of difficulties, and the common law is in a better position to provide the necessary flexibility for all of the parties involved in the contractual arrangement. Those common law tests have been developed over a very long period of time, and we think there is an important principle here about national consistency. There is no evidence about why things are not working in other states and are working in New South Wales because there is this long list of deemed occupations, so we are supportive of the legislation's approach of creating that national consistency in the areas of concern that we have raised.

Senator GEORGE CAMPBELL—In New South Wales these laws have been in place for some 30 years. Can you point to specific cases—specific evidence in New South Wales—to demonstrate that the provisions that have existed under those laws have made it more difficult to operate than would have been the case if you had been operating under the common law?

Mr Smith—No, I cannot point to any specific cases that identify, for example, why a person could not be engaged under those laws versus arrangements if those laws were not in place, but we do hear consistently from employers in New South Wales that they would prefer not to have those laws in place because of the flexibility that would be there if they were not.

Senator GEORGE CAMPBELL—We know employers would like to have a lot of laws not in place. That has been a view for a very long period of time. But what I am really asking you is: is there any evidence that employers, or employer organisations like your own, have been knocking down the door of the New South Wales government, or successive New South Wales governments, to have these provisions changed because they have been causing such complexity and difficulty in terms of the operation of the system? I suggest to you there is no evidence to demonstrate that at all.

Mr Smith—We have raised the issue, as I said, in a couple of recent inquiries. It is of concern and the position that we are putting today is a consistent one.

Senator GEORGE CAMPBELL—How hard did you press it? With inquiries in New South Wales or just inquiries generally here?

Mr Smith—Inquiries generally here. I would have to go back to see what our submissions were in those earlier reviews of the legislation.

Senator GEORGE CAMPBELL—I presume you would have participated in the 1996 review of the act in New South Wales. Could you have a look and see what your submissions were in respect to that review in 1996 and whether or not you made any specific submissions in respect to this area of the law.

Mr Smith—Certainly. I cannot answer off the top of my head, but I will check.

Senator GEORGE CAMPBELL—I am happy for you to take that on notice. Thank you.

Senator BERNARDI—The New South Wales government indicated that the owner-driver provisions only apply to the greater Sydney area in the taxi and limousine industries as they were enacted. In your submission you oppose the preservation of the New South Wales and Victorian state laws relating to owner-drivers. Would you care to expand on your opposition and the reason why you oppose them, if they only apply to the taxi and limousine industry?

Mr Smith—Again, it goes back to this issue of consistency. In considering the New South Wales and Victorian provisions there does not seem to be anything different about the transport industry that requires a different approach to be taken from other industries. We can certainly see a difference with outworkers in the textile, clothing and footwear area, because it is commonly recognised that that group is particularly vulnerable. But, when it comes to owner-drivers, we cannot see any reason why a different approach needs to be taken. So, consistent with our broader view that we need to have national consistency here, why would there be laws in New South Wales and

Victoria that preserve certain arrangements that we see as being totally inconsistent with not only this legislation but with the approach taken in the Work Choices legislation, for example? It is a very collective approach to things under the New South Wales laws, for example, and we are not convinced that there is a need to retain those provisions. We think a consistent approach is a better way to go.

Senator HUTCHINS—In relation to Senator Bernardi's question, I am not sure I got that impression from the New South Wales answer. There are 25 determinations. One that they are specifically referring to relates to what is called the County of Cumberland in Sydney and the other ones would have application throughout New South Wales. It is more than just the one that deals with general carriers and taxi drivers. There are 23 others which, like car carriers, would apply outside Sydney, from my knowledge anyway. I will talk to you privately, but I am just saying there is more to it.

Senator BERNARDI—Yes, I will take that, but I will have a discussion with you later.

Senator HUTCHINS—Mr Smith, you have told us you have gone through both these pieces of legislation line by line. I am sure you have gone through the Work Choices legislation probably line by line, as well. I want to ask for your opinion in relation to these three pieces of legislation. Would you agree that, if an outworker was called a 'contract outworker' under part 4 of the independent contractors bill, that outworker would not be entitled to any of the federal protections for outworkers retained by the government after amendments to the Work Choices legislation, other than the minimum wage?

Mr Smith—We are happy to take that on notice. It is a very specific question.

Senator HUTCHINS—Yes, I understand that. I was being a bit tongue-in-cheek about 'line by line', but I thought perhaps you might have, because that is certainly a concern that has been expressed to us: that the government amended its Work Choices legislation to specifically protect outworkers and that, in fact, an unintended consequence of this independent contractors bill may be that these outworkers—whom the government sought to protect—may be put in a more difficult position. I just wondered if that had been raised with you or come to your attention.

Mr Smith—No, Senator. The opposite is the view that we have of the situation, but we are happy to look at it.

Senator HUTCHINS—If you could take that on notice and give us a commentary, it would be appreciated.

Mr Smith—Yes.

Senator HUTCHINS—Certainly we will be asking the TCF tomorrow—and also the department—a similar sort of question.

Mr Smith—Thank you, Senator. We are happy to do that.

Senator STERLE—Mr Smith, how many companies do you represent that are involved in transport?

Mr Smith—A very large number, if you include the users of transport, as opposed to the transport companies, but we do have—

Senator STERLE—Let us talk about transport companies.

Mr Smith—In the transport industry we do have some members who are involved in road transport. We have numerous members in the airline industry, for example. We—

Senator STERLE—Let us talk about road transport.

CHAIR—Senator Sterle, just allow the witness to answer the question, please. Had you finished, Mr Smith, or would you like to go on?

Mr Smith—Thank you, Senator.

CHAIR—Please do.

Mr Smith—I could not put a figure on it. We have some 8,000 member companies and I have never seen a list anywhere of those that are in the road transport industry. We certainly do have members in that industry, but certainly not the level of membership, for example, that the Road Transport Association has, even though we do work with the RTA in New South Wales. We have put in joint submissions in numerous cases, like the Secure Employment Test Case, and over the years there has been a group of employer associations—which Ai Group has tended to take the lead in pulling together the positions for—and the RTA has been one of those.

Senator STERLE—You might want to take it on notice and provide that information to the committee, if you could, because in your submission I noticed you stated:

> … and transport industries which engage a high proportion of their labour as independent contractors.

Could you be more specific, because in reading your submission I was of the impression that you were a major player representing transport companies who engage contractors. I have probably read that wrongly and not digested it in the way you have just explained, so could you provide us with that information? I do not want to know their names, just—

Mr Smith—I can provide it now. Just to explain that: we have a large membership in the IT sector, we have a large membership in the construction sector, hundreds of companies in both cases. The transport industry is a major sector for us, but we define that industry to include rail, road and airlines. We provide industrial relations services to every airline that flies in and out of Australia. All the major international airlines are members. So we call 'transport' something much broader than road transport. We are not a major player at the present time in the road transport industry but we do have some members in that industry.

Senator STERLE—Thank you. That has answered the question I first put and has made it very clear for me. In Western Australia in late 2004 the peak employer body, the Transport Forum—and there are many members of the Transport Forum who are probably members of your group, or members of the chambers of commerce and industry, or whatever—together with the union that covers contractors in the road transport industry, actually approached government, as I think you would be aware, and pleaded with it to have some legislation that could put some framework around a dispute resolution procedure, safe sustainable rates, fair contracts and all that sort of thing. Back in 2004 it was a major step forward for both sides of industry, to approach government requesting that to be taken on board. The government—and credit to the state Labor government—has done that. That leads me to ask you: if that is the case, if the industry has requested that, the owner-drivers through their union—and bear in mind there are a lot of owner-drivers who are not members of that union—have requested that, and they have been working their backsides off for the last nearly two years to achieve that, what right would that give another group to come in and say, 'Those representatives of employers and contractors have no right to do that'?

Mr Smith—There is another very important group that you have not mentioned there, and that is the users of transport services. As I have said, our organisation represents thousands of companies—manufacturers, for example—that are extensive users of transport services. They have a legitimate interest in the arrangements in place within the transport industry, particularly if those arrangements have an impact on prices and so on, so I think there is another party that is legitimately involved in this debate. That is what we have said in our submission: that this is a position we are putting about national consistency, but the users of transport services need to be considered in this debate as well.

Senator STERLE—Is there a fear from users of transport that, if there were an agreed position where there would be some safety net, safe sustainable rates, it just comes down to an argument of price for transport users?

Mr Smith—It comes back to a weighing of all of the interests of all of the parties. We think the legislation provides that protection. It preserves genuine contractual arrangements. It provides remedies for unfair contractual arrangements, it provides penalties for misrepresentation and termination of contractual arrangements and so on, and we are not convinced that there is a need for any special approach in the transport industry. We believe the interests of principals in that industry, and owner-drivers and so on in that industry, are

adequately protected through the other elements of the legislation, and that also is in the best interests of the users of transport services.

Senator STERLE—I appreciate your honesty, Mr Smith, and I will leave it on that, because you have answered my question—thank you very much—which is that prices are a major factor in this argument; the price that transport could cost users if there was safe sustainable rates, safety nets or the like.

Mr Smith—We are certainly not putting a position that there should not be fair arrangements in place, but we think that fairness is delivered through the provisions of the legislation more so than collective arrangements that are inconsistent with the approach taken in other industries and inconsistent with the approach taken in other states within that industry.

Senator STERLE—That is all, thank you.

CHAIR—Thank you very much for your appearance today, gentlemen.

[12.16 pm]

FARY, Mr Geoff, Executive Director, Industrial Relations, Association of Professional Engineers, Scientists and Managers, Australia

RICKARD, Ms Kim, Executive Officer, Connect, Association of Professional Engineers, Scientists and Managers, Australia

CHAIR—I now welcome representatives from the Association of Professional Engineers, Scientists and Managers, Australia. Do you have any comments to make on the capacity in which you appear?

Mr Fary—Yes. I am the acting chief executive of the association and I have with me today Ms Kim Rickard who is the national information officer for the association.

CHAIR—Thank you. The committee has before it your submission. Are there any changes or additions to that?

Mr Fary—No.

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

Mr Fary—Thank you, Senator, and we will keep it brief. We understand full well that we are all that stands between you and lunch, and we think that is probably a dangerous place for us to be.

CHAIR—A very dangerous position, that's correct!

Mr Fary—We will be as expeditious as is humanly possible. We appreciate the opportunity of having made the submission to your committee and appearing before you this afternoon. I think you are aware that our association is the peak employee body that represents technology based professionals in Australia, with more than 25,000 members. We celebrate our 60th anniversary this year.

Concerning the legislation that you are considering, of our 25,000 members, some 3½ thousand are employed as consultants or are self-employed or are contractors. So a substantial percentage of our members are covered by this legislation, and we believe that that will be a growing proportion.

APESMA has a long history of being a progressive and forward-thinking organisation. We recognise that the employment landscape in Australia is changing and we certainly do not have a position of blanket opposition to the use of contractors, nor any opposition to legislation to codify the use of contractors. In our submission to you we address a couple of the concerns that we have, and Ms Rickard would like to take the opportunity to elaborate briefly on those.

We note that there is provision in the legislation for protection against sham contracting arrangements, which would enable employers to avoid their legitimate employment obligations. We flag that we are yet to be convinced that the Office of Workplace Services, which has the responsibility for policing those sham arrangements, has at this stage the resources or the ability to indeed do that. That is something which we will be watching closely as this legislation unfolds.

A particular concern that the association has—and we believe that this legislation has the potential to impact upon it—is the crisis that we say is emerging in the Australian economy with a shortage of skilled professionals, particularly technology based professionals. Given your wish that we remain succinct in our opening remarks, I do not propose to give you line, chapter and verse as to where those shortages are, but I would be happy to elaborate, should you wish me to do so, during the examination.

The other particular concern that we would like to draw your attention to is the intersection between this legislation and the personal services income legislation. This legislation will inevitably mean that more and more people will be designated to be contractors. We have a concern—a concern which we have expressed to government on repeated occasions—that the application of the PSI legislation by the ATO actually has the effect of discriminating, in a sense, against those people who are legitimate independent contractors but who are unable to successfully claim taxation deductions for the expenditure that they incur in the pursuit of their legitimate contracting business. If you approve, I would like to now hand over to Kim Rickard, who I believe can elaborate on that.

Ms Rickard—Thank you. I will briefly run through a couple of the services that Connect offers so that you are aware of what we do. APESMA's Connect program provides a range of services to contractors, including advice on managing the transition from employee to contractor, help with calculating hourly rates, referral to discounted professional indemnity insurance, business mentoring, networking services, help with locating clients and a professional development scholarship. Connect also offers advice and information on the alienation of personal services income, or PSI, legislation, including help with drafting terms of a contract for service and a legal check of contract documents by our in-house solicitors.

APESMA is particularly concerned about the interface between the PSI legislation and the contractor legislation. We believe that the PSI legislation can operate as a disincentive for those considering the contracting option. With Productivity Commission estimates suggesting that over 10 per cent of contractors are professionals, this is an issue which is very important to our membership.

Very briefly, to explain the PSI rules, if 80 per cent or more of a contractor's income is from one source, a test known as the results test must be passed. If less than 80 per cent comes from one source, the contractor will be accorded business status if they can pass either the results test, the unrelated clients test, the employment test or the business premises test. I will not take up your time now by defining those tests, but I can certainly provide information if that is required.

I would like to take you through a few of the comments from some of our members on the legislation, and I will keep them brief because I know we are short of time. These comments relate to the 80-20 rule—that is, if 80 per cent or more of a contractor's income is from one source—and there are four comments. Comment 1:

> I feel that I'm being penalised only because my work takes about 2½ years to complete, whereas if I was doing nine-month projects I would be fine.

Comment 2:

I am a contract engineer and my contract generally runs for more than one year, as my clients frequently continue to offer jobs when one project finishes because they like my performance. The tax rule forces me to reject new contracts from my existing client if I have been with them for more than, say, 10 months and forces me to look for another project elsewhere.

Comment 3:

Recently I got a role with Acme to help with their $500 million project, which may run for three years. The tax regulation will consider me an Acme employee, but I am a true contract engineer.

Finally, comment 4:

The PSI arrangements are unfair. The reason that I've been caught up in this situation is that I've provided a service to my client that was well received, effective, reasonably priced and timely. Consequently, the client demanded more of my services, to the point where almost 100 per cent of my company income was derived from this single client.

The following comments—and there are just three of them—relate to problems with satisfying the results test, particularly in the IT industry:

I could not meet the results test as I get paid for hours performed, not results. I'm usually required to use the client's premises and hardware and software and have to attend during normal business hours, as that is when the rest of the team that I work with is in attendance. I cannot delegate, since I have been contracted based on my own experience and qualifications, and I'm not liable to correct mistakes. But in no way am I considered an employee.

Comment 6:

We enter into contracts for payment for our services on a daily rate basis rather than for a tendered amount to complete a defined task.

The final comment, comment 7:

These new rulings fail to deal with the reality of the contract market, particularly in the IT area.

We did try to get some transparency from the ATO in the form of a fact sheet on how custom and practice in the IT industry were to be taken into account in judging contractor status over a period of about two years, but we were not successful. The best we got was an acknowledgment that it was a grey area. What we have currently is a situation where ATO officers—not the AAT, not a court nor an industrial tribunal but the ATO—are interpreting contracts for service against the Hollis v Vabu judgment to determine the substance of a contractor's business status. We contend that in many instances the judgments being made by the ATO are questionable.

So these instances are not problems which may happen. They are happening now. The tension between contracting and being an employee in terms of taxation and covering work related costs is real. If the estimates are that up to 400,000 individuals are dependent contractors, or largely working for one client, then this is going to be a significant emerging issue. The comments of our members highlight the reality and the complexity of commercial contracting arrangements and the unintended consequences of the PSI legislation.

To summarise our concerns, in effect you could have an employee opting to move into contracting, thereby losing entitlements such as leave, workers compensation, superannuation and professional indemnity cover, being engaged as self-employed contractors and covering the costs formerly covered by an employer and more, but then having the ATO refusing them

business deductions on the basis that they do not consider them legitimate businesses. APESMA has a major concern about the uncertainty that this double whammy creates. What we propose is that the unusual circumstances provisions of the PSI legislation be extended to provide specifically for projects of a duration greater than 12 months, and the flexibility to accommodate custom and practice in particular industries, such as the IT industry. This will allow professionals operating as contractors to self-assess with some degree of certainty.

If you have any, I will certainly try to answer any questions you have about the PSI, but it is a fairly complex area for me. Of course, we would be more than happy to answer any questions you have about any other area. Thank you.

CHAIR—Good. Thank you for that.

Mr Fary—Thank you, Senator. We probably should have made the point at the outset that the Connect program that Ms Rickard is referring to is a special program that the association runs for those of its members who are contractors or self employed.

CHAIR—Thanks for that. I wanted to ask you about your comments on the sham arrangements proposals in this legislation which empower the Office of Workplace Services to pursue those matters on behalf of employees. I think you said that the resources provided simply were not enough, or you had no faith in the way in which that would be administered—something along those lines?

Mr Fary—To cut to the chase, the Office of Workplace Services is a relatively new organisation. There was some controversy surrounding publicity given to investigations that it allegedly undertook a couple of weeks ago to some people who had alleged that they had been unfairly dismissed. It did so without in fact checking with those people. So from our point of view as a user, we would say that they are not off to a terribly good start from the point of view that we have confidence that they will deal with matters fairly and impartially. We are aware that it is a very new organisation and it is still coming up to speed. Folk will need training and so we will watching with interest as to how well it will be able to police these sham arrangements which will occur inevitably in this sort of legislation.

CHAIR—Are you aware that in the federal budget this year extra funding of $6.2 million was allocated over the next four years to enable it to carry out these specific functions?

Mr Fary—Yes, we are aware of that, and we are aware that there will be a small—perhaps not quite even a small—army of inspectors appointed.

CHAIR—Indeed.

Mr Fary—But the concern that we have is the training that those inspectors have, and the brief that they have in terms of impartially and objectively going about their business.

CHAIR—I also understand that extra funding on top of what I mentioned has been provided for training and education facilities.

Mr Fary—Yes.

CHAIR—So I do assure you that, although it is a new organisation, it will be coming up to speed. The other thing I wanted to ask about is that, in both the first page of your submission and on page 3, and also in Ms Rickard's remarks, both of you implied that, by moving across

to contractual arrangements, professionals will lose employment entitlements such as annual leave, workers compensation, superannuation and professional indemnity cover. It is my understanding that this bill deals only with industrial relations matters, and does not affect the requirement for a business to comply with its commercial, workers compensation, payroll tax and superannuation obligations, so that this bill does not override that obligation also to comply with relevant state OH&S and workers compensation legislation.

Mr Fary—Yes, indeed. The other legislation that you speak of applies to employees. Contractors by definition are not employees and therefore have to make provision for their own health insurance, their own workers compensation, their own income protection and their own superannuation arrangements.

Ms Rickard—And professional indemnity.

CHAIR—And professional indemnity cover. All right. I will be taking that up with the department tomorrow when we meet with them.

Mr Fary—Thank you.

CHAIR—By the comprehensiveness of your statement you have obviously covered everything, Mr Fary and Ms Rickard. Thank you very much for appearing before us today.

Mr Fary—Thank you. We appreciate the opportunity.

Proceedings suspended from 12.31 pm to 2.00 pm

REICHMAN, Mr Peter, Committee Member, Courier and Taxi Truck Association

ROBERTSON, Ms Kathy, Chief Executive Officer, Courier and Taxi Truck Association

TAYLOR, Mr James, Director, Australian National Couriers; and President, Courier and Taxi Truck Association

CHAIR—The committee will resume. Our next witnesses are from Australian National Couriers and the Courier and Taxi Truck Association. The committee has before it your submissions. Are there any changes or additions to be made?

Mr Taylor—No, thank you.

CHAIR—I invite any or all of you to make a brief opening statement before we begin our questions. Mr Taylor.

Mr Taylor—Thank you for allowing us to appear before you today. The courier and taxi truck industry, in general, support the introduction of the IC bill. We have been, for a long time, dominated by independent contractors in our industry, and the industry welcomes this type of reform, recognising independent contractors. However, the courier and taxi truck industry do oppose the exclusion of owner-drivers from the IC bill. There are a number of reasons: we believe it creates a pseudo third class of worker that is not an independent contractor and not an employee; it creates a paradox in New South Wales and Victoria, in that courier and taxi truck independent contractors have their own businesses, yet have more industrial relations regulation than that of an employee.

The New South Wales and Victorian IR laws assume that they provide so-called protection for courier and taxi truck drivers. The New South Wales laws also suppress the true commercial rates that could be negotiated by courier and taxi truck contractors, and hence our rates are already at the bottom level. The Courier and Taxi Truck Association has conducted some 2,000-odd interviews in the past 24 months and the results show that the net earrings of courier and taxi truck contractors have not increased with the so-called minimum rates in place. The suppression of the reward, we believe, has accelerated the decline of the industry and accentuated the very problems that the IR regulations sought to rectify in New South Wales.

The New South Wales laws take away the ability for owner-drivers to negotiate and the protections that are there are presented as minimums but, in reality, they have become maximums. The result of this also compromises safety because it causes the principal contractors to load up the underperforming contractors beyond their ability to get them over these minimum so-called rates. We also believe that, with the minimum rates, the hourly minimums are discriminatory because they are averaged over an eight to nine-week period and it excludes people who only wish to work part time and not full time. In a skills shortage this is a serious problem for our industry and does not encourage flexibility.

The exclusion in New South Wales and Victoria also maintains—especially in New South Wales—the TWU monopoly on representation of courier and taxi truck independent contractors, and there is no freedom of association, no choice and no flexibility for them. The TWU also has the right of entry into all principal contractors for inspection of records, for all

taxi truck independent contractors, regardless of union membership or not and, in the past, this power has been abused. The exclusion will also magnify the confusion that is currently in the industry. We have people that are their own businesses, yet they have employee type provisions. The exclusion also does not help for national consistency and it does not give them choice, as I have already implied.

The other point is that the New South Wales regulation is very costly to comply with. Australian National Couriers spend some $50,000 to $60,000 a year just in compliance. We do not have those sorts of costs in other states. The TWU representation of the courier and taxi truck independent contractors: with fuel being increased some 20 per cent in the last six months, the union has yet to make any application for an increase in rates in the New South Wales IR system, which shows that the remuneration and the rate of remuneration is very slow to apply.

Regarding the industry itself, we are often confused with the long-distance and heavy transport industry. The courier and taxi truck industry have short trips, we are on demand, we are multiple hire, we work in normal commercial hours and we do small loads in major metropolitan centres. We are often confused with, or lumped into the general transport and the long-distance transport sector. We do not have the same problems as the long-distance and heavy vehicle transport industry. We do not have the safety and fatigue issues; we do not have the same levels of bankruptcy or exploitation; our independent contractors go home at night; and they do not have the same types of borrowings as the heavy industry does.

There have been numerous investigations. The TWU commented in their submission about the numerous investigations into the transport industry since the 1960s. It should be noted that, without exception, all of these investigations and inquiries were focused on the heavy vehicle industry and the long-distance industry and there was very little comment about the courier and taxi truck industry.

It should also be noted that the courier and taxi truck determination in New South Wales is probably the most litigated of all of the determinations. The principal reason for that is because it does not work. The Courier and Taxi Association and Australian National Couriers would like to see all owner-drivers included in the bill. If the exclusion of owner-drivers was to remain then the choice for the courier and taxi truck independent contractors is to either remain under state jurisdiction or come under the federal IC bill giving them choice and flexibility. In addition, if the exclusion of owner-drivers was to remain, then a more sensible limitation of the TWU powers is for the right of entry for financial members only and not for all independent contractors, irrespective of membership. Thank you.

CHAIR—Thank you for that. Before I ask Senator Bernardi to ask some questions, are you aware that there is going to be a review of the state protection for your types of associations later this year and early next year?

Mr Taylor—Yes.

CHAIR—You would imagine that the government would hardly be going to replicate, in any consequence of that review, what exists at present; so long term, you can probably anticipate an improvement in the sorts of defects that you have already mentioned. Would you agree with that?

Mr Taylor—I think we are balanced on a bit of a knife edge. I think the courier and taxi truck industry have been roped into the problems associated with the long-distance industry and we tend to get buried in those sorts of discussions. I understand that the inquiry is coming up next year, but we are a small and fragmented voice.

CHAIR—I suspect that that is one of the reasons why your interests have been excluded from this particular legislation, so that the particular interests that you represent can be looked at in a very intensive way.

Mr Taylor—We would welcome that focus on the courier and taxi truck industry, yes.

CHAIR—That is good.

Senator BERNARDI—Mr Taylor, in your submission you talk about the TWU having the right of entry into New South Wales principal contractors, and has the sole right of entry. In your specific business, have you had that right of entry exercised and, if so, do you have an experience that you would care to relate to this committee?

Mr Taylor—Yes, Senator. We have had a number of inspections. In the last five years we have had, say, six inspections; three of them have been done by the New South Wales Department of Industrial Relations, because we hold a portion of the New South Wales state government courier contract. Part of that contract requires an audit process and we have had those audit processes occur over the period of the contract. From those audits we have had no significant issue or problem raised. We had one TWU inspection maybe three years ago, where they inspected some records, and there was no problem found at all.

More recently, we had a very extensive investigation, where we had TWU members in my office for more than three days. The level of aggression and the accusations that were fired at me were just astonishing. At one point, after a number of days, I asked the question, 'Why is this occurring?' and the response was, 'In recognition of the IC bill coming up in the next 12 months.' It was said that I had influence over the courier industry as president of the association, and I should influence my members to sign common law agreements with the union to allow them right of entry after the bill passed. If I did not do that, it would cost me hundreds of thousands of dollars in the Industrial Relations Commission.

Senator BERNARDI—Is part of these audits—whether it be by New South Wales Industrial Relations or the right of entry of the union—what your $50,000 compliance annual bill is referring to?

Mr Taylor—In one of those audits I had to provide a whole number of records. I supplied some 40,000 to 50,000 pages of documentation. Subsequently, we provided another 5,000 or 6,000 pages of documentation and, since that time, I have had not one letter, question, phone call or anything else saying that we had any form of breach whatsoever or that there were any problems with our records or payments to our contractors: not one thing in 12 to 18 months. So after supplying 50,000 pages of documentation, I have to query why it occurred. There was not one suggestion or comment at all.

Senator BERNARDI—Whilst you are an individual company, I will address this to you, but it may be equally pertinent for Ms Robertson or Mr Reichman to answer. Were the 2,000 interviews that you conducted both within your company and across the entire industry?

Mr Taylor—I think Kathy might be more suited to answer that, Senator.

Ms Robertson—During the last 18 months I have personally conducted face to face interviews with contract couriers and taxi truck owners throughout the spectrum—not just one company but a range of companies—to find out, in their own words, their costs and safety and how they are going. It has been across the board.

Senator BERNARDI—Are you based in New South Wales?

Ms Robertson—We have membership throughout Australia but our industrial relations registration is in New South Wales.

Senator BERNARDI—You are subject then to the New South Wales Industrial Relations Act, obviously.

Ms Robertson—That is correct: registered under the act.

Senator BERNARDI—We have heard that the state act provides enormous protections for the more vulnerable and also that it reduces complexity and is a very simple system to get across. I have received conflicting stories—that is my word—and I have sought an explanation as to the application of chapter 6 of the act to owner-drivers. I have received an indication that it applies in the greater metropolitan area of Sydney, within that radius, to taxis and limousines only. I have since had clarification from one of the other senators here. What is the impact of chapter 6 on your industry? Does it provide adequate protections? Is it simple and easily applied, as was maintained by the state government?

Ms Robertson—There is no way in the world that you could say that chapter 6 is a simple system. It is a very complex system and it has layer upon layer of complexity. These 2,000-plus contractors that I have interviewed would definitely tell you that their rates and conditions have in fact gone down significantly since the introduction of regulation in this industry. Initially, it was to be introduced in 1984 under the general carriers determination. That was appealed, and then it became its own determination, the Courier and Taxi Truck Contract Determination.

When we talk about complexities, 'greater Sydney' is not actually the terminology. The legislation provides for determination and contract agreements to be made right across New South Wales. However, the wording in the determinations is what controls the area, incidence and duration of such determinations: for example, it is 'the County of Cumberland', and if you do not think that that is complex enough, the next thing is 'contracts of carriage within a 50-kilometre radius'. Perhaps the best way I can put it is, if you imagine a map of New South Wales with endless numbers of circles drawn, representing a radius of 50 kilometres and, wherever the radiuses are, at the point of commencement of a contract of carriage or a contract job you will find that that is also covered by the determination. So it is complex.

Then you have the contract agreements, which can be made with principal contractors of the union or the union and associations such as CTTA and the New South Wales Road Transport Association. You can have those covering specific industries or you can have them covering right across New South Wales. It is very complex.

Senator BERNARDI—I just want to confirm with you—because I am confused, quite frankly, by your answer—that it does apply, as has been represented, to trucks, semitrailers, prime movers, trailers as well as couriers?

Ms Robertson—Absolutely.

Senator BERNARDI—It does?

Ms Robertson—Yes, it does. But not just in the County of Cumberland, because of these radiuses that are layered on top of that.

Senator BERNARDI—To put it in layman's terms, if I went to Dubbo, and I was a courier and picked up a package that had to be delivered—you said a 50-kilometre radius?

Ms Robertson—Yes.

Senator BERNARDI—If it had to be delivered 70 kilometres away, would I be covered under that award?

Ms Robertson—No, you would not; not for rates or for conditions.

Senator BERNARDI—But 49 kilometres I would be.

Ms Robertson—As a radius, yes.

Senator BERNARDI—Okay. How do you respond to the issue of improvement in road safety by having this exemption?

Ms Robertson—Perhaps the principal contractors would be better answering that.

Mr Taylor—The New South Wales contract determination has minimum hourly rates that are averaged over an eight- to nine-week period. The result is that, to get some contractors who do not wish to work all the time over those minimum hourly rates, the principals have to load them up with consignments. It may not be within their ability to perform those consignments, but the result is that with these minimum hourly rates, to get them over the hourly rates, you have to load them up with consignments, causing safety problems. When the consignments were placed on a flag fall and kilometre rate of reward, rather than an hourly rate of reward, we did not have that sort of problem. This problem has manifested itself in the last decade and, while it is a very emotive argument to say that the minimum rate should promote safety, it actually has the converse effect.

Ms Robertson—Absolutely.

Mr Taylor—You end up placing more pressure on the people that maybe do not have the ability to perform the work as fast, because not everyone is the same in the industry. You have people who are high achievers and people who are not so high achievers, like in any industry, in any employment situation or any contractor situation, so you have people with differing ability.

Senator BERNARDI—How is the minimal rate calculated?

Mr Taylor—Over the nine-week period?

Senator BERNARDI—Yes.

Mr Taylor—That is quite complicated. It begins when the first job is allocated and the contractor commences to travel to pick up the first job and it ceases on that day when the last job has been completed or the last job of the day has been picked up, and it might be being held overnight. Then you have to exclude breaks in the middle of the day and that sort of thing. If they go and get a wheel changed or if they go and have lunch or a break or whatever, you have to exclude those times. Then you have to average all of those times over a nine-week period and average them against the hourly rate, which for a one-tonne vehicle is $25 an hour. So it is very complicated.

Ms Robertson—Currently the CTTA has an application before the New South Wales Industrial Relations Commission. We have four parts to the application, three of which we have already succeeded in. The fourth part is to be heard next month in a four-day hearing, so it is not a simple thing, to give you an idea of the complexity, and that is just to find out what the starting time of the safety net is. As Mr Taylor said, you have the completion, and even that has an addition to it. It is not just the completion of the last contract of the day. In fact, since we have had the hourly rates—1998—the definition as described by Mr Taylor is that it is a two-step process.

I will put it to you this way: the courier company will allocate a job, say, at eight o'clock in the morning. The contractor does not move off straightway unless it is what is called a VIP job or an urgent job. They wait, naturally, so that they can get two, three, four or five jobs. That is where the multiple hiring factor comes in. This is the complexity of the courier determination at the moment, and for all of those years. If you allocate the first job at 8 am and the contractor decides to wait, as the company wishes them to, then there are four more jobs allocated between eight and 8.30 and now it is time to move, the last job that was allocated was the VIP, so it has to be picked up first because of the urgency. the time sensitivity. Then suppose that the route to be taken means that jobs 4, 3 and 2 are done before you commence to travel to the pick up of the first job that was allocated. Maybe it has taken an hour, so it is 9.30. The commencement time is the time at which the contractor actually starts to travel to pick up the first job.

Nowhere in the determination is there a requirement on the principal or the contractor to let the other know what time that is. So the starting of the safety net is unclear, to the point where a senior judicial member of the Industrial Relations Commission, in a decision on 28 March this year, said, 'The hearings will be about establishing a mechanism to start the safety net, and the safety net is the sole method of payment.' If that is not complex, I do not know what is.

Senator BERNARDI—Thank you. The TWU has indicated that this guaranteed minimum pricing applies to only a small number of people. Is that your experience?

Ms Robertson—Sorry, Senator?

Senator BERNARDI—The safety net, as you describe it—I have described it as 'agreed price fixing'—applies to only a small number of people. How many people in your industry benefit from this guaranteed pricing?

Ms Robertson—No-one benefits from the guarantee or the minimum price fixing that is there, for which the government has trade practices exemption to price fix. In fact, what

happens is that the people who are earning, say, above the current $25 just do not get increases and have not had increases for eight years. It does not assist them at all. As far as price fixing, I think I need to take the words of the legal representative Mr Charlie Heuston from the New South Wales branch of the union, who has told the commission on transcript that very few of the industry contractors would be covered by the minimum.

Senator BERNARDI—Thank you.

CHAIR—Senator Murray, you have some questions?

Senator MURRAY—Thank you. My apologies for this morning. I was downstairs with a petrol inquiry, and that is why I am late. My question is to both organisations. I have been lobbied for many years about the contractors issue, from both sides. Both of you have said that the TWU exclusion should be done away with and that they should fall under the provisions of the bill. Regardless of whether you are a supporter of or an antagonist to this bill, isn't that simply a recognition that this area is so complex that the government believes it still has not got it right and it needs to adopt a precautionary principle and leave that sector of industry where it is? Isn't it a sign that they feel that this legislation just will not cover off all the difficulties attached to the conflict about whether someone is an employee or a contractor?

Ms Robertson—In answer to that, a huge problem arises because our association was of the view that the owner-drivers would be covered by the bill. That is why both organisations have requested that the former intent of election promises and inquiry outcomes be kept. We do not know what was in the mind of people who made the exclusion, but surely there are many industries that would claim similar sorts of uniqueness. That is the first issue. We have created this third tier of worker. You have employees, you have independent contractors and then all of a sudden you have owner-drivers in New South Wales and Victoria. It just does not make sense.

Senator MURRAY—Whatever one might think of the government, it is composed of people who are intelligent and able and who will examine the issues. It seems to me that, if they recognise that the state regimes as they are at present provide protections and safeguards which, if they were put under this legislation they would lose—and they are convinced by the arguments to them that, despite their election promises, they should pay attention to that—that signals that this bill still does not have it right in terms of splitting out properly those who are genuine contractors and those who are not.

Ms Robertson—I think that is the politics of the bill. What we are saying is that they are independent contractors. The other thing we would make a strong point on is that the so-called vulnerability is really in relation to the heavy vehicles; the long-distance vehicles. That is where all of the inquiries since 1960 have been focused. They are certainly not focused on the lighter end of the industry, the courier and taxi truck operators—not at all. Hopefully, as the chairperson has already indicated, there is an inquiry to commence next year; indicated also by Minister Andrews. We would see that as an opportunity to put the other side of the case. Certainly the government has not heard the message from enough people who are going to be covered by the exclusion.

Senator MURRAY—I look at it a little differently. I am not inclined to believe it is politics, because this is a government that has shown great strength and determination in

annoying as many Australians as it can, through Work Choices legislation and other things. They are not short of courage, so I do not think this is politics, and I ask you whether it in fact reflects a bigger problem, and that is that for genuine contractors themselves there are not sufficient protections at general law. I mean, for instance, with respect to regular hours. I mean with respect to pricing. We already know that the Trade Practices Act is weak and defective with respect to section 46 protections for small business, and small business is often a contractor.

I would suggest you actually cannot shift people out of the state regimes with their highly regulated, and sometimes complex, protections until such time as contractors at large have better in-built protections. I would suggest that is probably why the government has left owner-drivers under the New South Wales and Victorian legislation.

Ms Robertson—The only thing I can say in response is that, first of all, there is no established coverage or protection in Victoria yet. The act is a new act and it is not, as such, up to the level of New South Wales. New South Wales legislation was brought in under the Wran government because of the Razorback blockade, and that was to do with long-distance vehicles. The fact of the matter is that there are probably 10 contract determinations registered before the commission and they do not protect the contractors. They do not provide remuneration that covers their costs.

When costings are done and they are put before the commission, organisations such as the New South Wales Road Transport Association and ourselves will question those costings. It will take 12 months to get through the commission, and it is not done on the basis of the formula, it is done on the basis of a deal.

Senator MURRAY—Ms Robertson, I happen to agree with you that the protections provided for owner-driver operations, whether contractors or employees, are insufficient and inadequate; that if they were not, you would not have the terrible stories we all know about. But I ask you again, have you considered approaching this from a different angle and saying to yourself—and the gentleman sitting next to you can join in—that if you as an organisation want owner-drivers who are genuine contractors to be under a national contracting law, what else should be added to national law that would allow that to happen, with respect to occupational health and safety, guarantees towards their future such as the provision of superannuation, the regular hours issue and the fair trade/fair pay issue?

Ms Robertson—I think it is fair to say that Senator Hutchins knows of the Courier and Taxi Truck Association very well, and knows that we have long fought for safety issues and for the issues that you have raised. Are you asking, 'Put owner-drivers back in the independent contractors bill but what do you put in place'?

Senator MURRAY—No, I am saying you cannot put them back in until you have those protections in place. My view is that at the national level—because it has not typically been a function of Commonwealth law—the protections that should be there are not there, and the government has recognised that. That is why they have left it in the state legislation.

Ms Robertson—The concerns regarding safety and road crashes et cetera are already entrenched in every state and territory law regarding the road rules—your Motor Traffic Act,

your policing act. If we are having problems there, those acts are failing. It is not the fact that they are being paid or not paid pursuant to regulation.

Senator MURRAY—It seems to me that you have not argued your case sufficiently in your submissions—and I apologise for the fact that I might have missed your earlier representation—because you have simply argued that, because of a promise made by the coalition, owner-drivers should be under this legislation, without recognising that for the coalition to have changed its mind it must mean that it was persuaded of the case for leaving them in, and if it was persuaded of the case for leaving them in, it means there are greater protections and safeguards for those people under the existing regime.

What I am asking you is: if that is the case—and I am presuming it is the case, because I do not think it is just politics—then what should be added to the contractor law at large—not necessarily this specific bill—which would allow for owner-drivers to move across into a national scheme?

Ms Robertson—Again, I cannot answer you as to what made the government decide that an exclusion in two states—one for a law that is not up and operating and another one that is—should be made. Secondly, to presume that the regulation in New South Wales works is exactly that: a presumption. It does not. You did miss the fact that we have undertaken interviews face to face with over 2,000 contractors in the last 18 months, and if the regulation was supposed to provide reimbursement of rates and safety, then it certainly has failed miserably. We would be happy to provide you or the committee with any further documentation to further argue our case, as you put it.

Senator MURRAY—Thank you.

CHAIR—Yes, that would be helpful, thank you—perhaps not quite the 50,000 pages, Mr Taylor, that you were mentioning before, but a delineation of some of that would be very helpful.

Ms Robertson—Thank you, Senator.

Senator HUTCHINS—Have you seen the Allied Express submission to the inquiry?

Mr Taylor—Yes.

Ms Robertson—Yes.

Senator HUTCHINS—Is Allied Express a member of the association?

Mr Taylor—It is indeed.

Senator HUTCHINS—I quote from their submission and you may wish to comment:

> Allied Express Transport supports retaining the Courier and Taxi Truck Contract Determination in New South Wales, as a way to ensure that owner drivers receive a minimum payment for the services that they provide. In addition, our business this—

it is poorly worded here—

> with a incentive based structure of payment, to ensure that individual owner drivers can achieve a higher level of earnings.

One of your members does not agree with your position.

Mr Taylor—With all industry associations we do not have a complete consensus of view. Allied certainly would like to see the determination in New South Wales phased out over a period of time. Their concern is about a sudden and rapid change overnight, and that is a very sensible view to take.

Senator HUTCHINS—Would Allied be the biggest courier company in New South Wales?

Ms Robertson—It would be the largest independently owned courier company in Australia.

Mr Taylor—Yes, that would be correct.

Senator HUTCHINS—Is Toll a courier company in New South Wales?

Mr Taylor—They have Toll Express, which is a division, yes.

Senator HUTCHINS—They are not a member of the association?

Mr Taylor—They are not a member of the Courier and Taxi Truck Association.

Senator HUTCHINS—Are Yellow Express a member of the association?

Mr Taylor—Yes, Yellow Express are.

Senator HUTCHINS—They have an agreement with the union, don't they?

Mr Taylor—Not that I am aware of, Senator.

Senator HUTCHINS—We can ask the union tomorrow. It is in the union's submission that they do have an agreement.

Ms Robertson—They had an agreement with the union. The business was sold some four or five years ago and nothing has been redone under the new—

Senator HUTCHINS—We can ask the union that tomorrow.

Ms Robertson—Yes, please do.

Senator HUTCHINS—Mr Taylor, how many owner-drivers do you engage in your company?

Mr Taylor—In New South Wales we engage about 200.

Senator HUTCHINS—How many employee-drivers do you have?

Mr Taylor—One.

Senator HUTCHINS—What does he drive?

Mr Taylor—A standard one-tonne van, a HiAce van.

Senator HUTCHINS—In the $50,000 to $60,000 it costs you to comply, how do you pay your owner-drivers? Are there various rates? I think you were talking about the VIP.

Mr Taylor—Yes.

Senator HUTCHINS—Does the owner-driver get paid more to do a VIP job, like you do?

Mr Taylor—Yes. There are a number of structures. We have the averaged hourly rates over the nine-week period that we calculate, and we have an enormous amount of technology and

computer systems to calculate that. As you can imagine, the number of transactions we are talking about is very large. Then, on top of that, we have an incentive based flag fall and kilometre rate, because under the contract determination we are allowed to pay any particular way we like, and we look at those two over the average nine-week period. We have different rates for different types of consignments.

Senator HUTCHINS—So you do have the flexibility that you are almost saying to us now you do not have?

Mr Taylor—No.

Senator HUTCHINS—What don't you have in flexibility? What I understand, from what you are saying, is that the difficulty you have is making sure you comply with the minimum payments over that period.

Mr Taylor—Yes. It is complex, yes.

Senator HUTCHINS—Is that the crux of the concern?

Mr Taylor—No. It is just a matter of infrastructure. The more infrastructure you put towards it, you can calculate it, but it is expensive and it is very complex to do. It makes it almost impossible for a contractor to walk through my door and say, 'Here are my earnings over the past nine weeks, and you owe me $100'—or $500 or $5,000—because it is so complex.

Senator HUTCHINS—If someone turns up in a vehicle, I assume they have to put your colours on their vehicle. Would that be correct?

Mr Taylor—No, they do not have to.

Senator HUTCHINS—How many do not? Of the 200, 60 do not, 70 do not?

Mr Taylor—We probably have about a 60 per cent take-up of the uniforms and signage.

Senator HUTCHINS—Do you give them the uniforms?

Mr Taylor—Yes.

Senator HUTCHINS—Do you paint their wagons?

Mr Taylor—Yes, we pay for all of that—and removal.

Senator HUTCHINS—And the removal?

Mr Taylor—Yes.

Senator HUTCHINS—I suppose they give the uniforms back, too, do they?

Mr Taylor—Sometimes.

Senator HUTCHINS—When you look in a Sydney newspaper, there are always advertisements for either people to deliver pizzas, or courier drivers. When they get interviewed by you, do you say to them, 'I can guarantee you X amount of drops a day,' or, 'I can guarantee you $600 a week, irrespective of whether you turn a wheel'? Do you give them any undertakings at all?

Mr Taylor—No, we do not give them any guarantees whatsoever. We stand upon our reputation.

Senator HUTCHINS—That you can get work?

Mr Taylor—Yes. I suppose the biggest problem with the contract determination is that it is used by the industry as a maximum set of rates. I am not suggesting that is the way I approach it. I am just saying by the industry it is used as a maximum set of rates. You average these earnings across the nine-week period and, as you get towards the end of that nine-week period, if you have a contractor that on average is earning, say, $50 an hour and another one that is earning $15 an hour, you will shuffle work from the higher achiever. If a fellow is earning $15 an hour—and do not forget that it is averaged and they may only work half a day, two days a week—it might be because of ability. For instance, we have a one-armed courier driver, so you can imagine his ability to carry heavier loads is somewhat limited, so there is only a certain type of work that he can do. Some people are semi-retired. The determination discriminates against those people, unfortunately.

Senator HUTCHINS—How does it discriminate? As you said, you have flexibility in any of the schemes, whether it is via incentive or something else. I am sure none of your drivers are on an hourly rate, or are they?

Mr Taylor—Yes, quite a number of them are on hourly rates, depending on the consignment. For some consignments the pay is hourly based.

Senator HUTCHINS—Because that is the nature of your client.

Mr Taylor—That is the nature of that type of work.

Senator HUTCHINS—So, say, the state government work might be—

Mr Taylor—They might.

Senator HUTCHINS—You know how much work you are going to get out of them each day, roughly, and you can consign so many owner-drivers there.

Mr Taylor—No, we do not do it like that. It might be on a consignment basis. If I am a contractor, I might be moving this water jug from A to B and I might be paid a flag fall and kilometre rate for it, but also on the back I might have a box that the client is paying an hourly rate for and we are paying the contractor an hourly rate to move. There might be multiple hiring between hourly rates and incentive based rates.

Senator HUTCHINS—You have that system now. Is that correct?

Mr Taylor—Yes, we have that system now.

Senator HUTCHINS—And that seems to work for you, does it?

Mr Taylor—Yes, it does.

Senator HUTCHINS—Except when you have to do the nine-week—

Mr Taylor—The incentive based rates work for us, yes, absolutely.

Senator HUTCHINS—But that is not disputed in the determination. There is incentive based. You can do that, can't you?

Ms Robertson—No, that is not how it is structured.

Mr Taylor—The only method of payment in the determination is hourly, averaged over nine weeks.

Ms Robertson—That is correct.

Senator HUTCHINS—But, provided you get agreement, you can do it by incentive, can't you? There is flexibility in there, isn't there?

Mr Taylor—As long as they get over the minimum. But you asked before about the discriminatory aspect of it: we have quite a number of contractors that I would describe as semi-retired people. They have left their professional work and they want to do something but they do not necessarily want to work full time. It is difficult for some of those people. They do not have, necessarily, the drive or the enthusiasm, or whatever it might be, and they are very selective about the work they choose, and it is difficult for them to be covered under the determination because they do not make the minimum.

Senator HUTCHINS—Would they be the 40 per cent that are not painted, mainly?

Mr Taylor—No, there would be a mixture. I could not tell you what the break-up would be there.

Senator HUTCHINS—But in the end, it is in your interest to make sure that they get full cost recovery, isn't it, otherwise you have to find someone else to do that work tomorrow? Isn't that where you are coming from, as well, in your point that you think they need full cost recovery but you are just not sure that this is the way to go?

Mr Taylor—The determination, and the quagmire of the industrial relations around it, results in confusion. The contractors do not know where they stand and a lot of principals do not know where they stand. My business has resources and I am sufficiently large enough to do that, but this is an industry that has a large number of people in it, and a lot of the businesses are small. When you have a piece of industrial relations stuff that is 45 pages thick and you have to be—

Senator HUTCHINS—Have you seen Work Choices?

Mr Taylor—I will not even go there, Senator. But it makes it very difficult. That is why the determination is so litigated. It fundamentally does not work.

Senator HUTCHINS—But don't you think that that responds to the nature of the clients in the industry in which you work? If you are talking about, say, carting a document from A to B, and it is for Blake Dawson Waldron, going to BHP, you are probably going to get what you could demand for it. But if you are talking about getting, say, a toy delivered for a kid, from Canley Vale to Cronulla, they are not going to pay as much, are they? We may not agree on this, but it seems to me that the clients and the industry are dictating the terms of rates and pay and conditions, and you are just responding, and the determination is trying to respond, to the nature of the industry you are in. If you look at the concrete determination—which is based entirely on a different formula, as opposed to one that Mrs Robertson will recall where there used to be a tied tonnage rate for interstate vehicles that was declared illegal by the Trade Practices Commission, as I recall—it would seem to me that you have the flexibility that you are seeking already. We may not agree on that.

Mr Taylor—They are good points that you raise. The flexibility is not the flexibility that I seek; it is the flexibility that the contractors seek. They do not have that now because they are mired by this. They do not have a true commercial contract; it is not perceived as a true commercial contract. They have employee type provisions. If we were in a situation where the labour market was very free and there were lots of people available, then it would be a different situation. At the moment, we value contractors more than clients. I do not have problems getting clients, so the clients are not dictating rates. We regularly pump clients that we find difficult, who do not pay enough, or we cannot get the right rates out of them. That is the kind of market that we are in and have been in for a long time.

Senator HUTCHINS—Mr Reichman, in your company, how many employee-drivers do you have?

Mr Reichman—Four.

Senator HUTCHINS—How many lorry owner-drivers, couriers, do you have?

Mr Reichman—About 333 employed.

Senator HUTCHINS—Thank you. Ms Robertson, you mentioned the introduction of this legislation in 1978.

Ms Robertson—Yes, Senator.

Senator HUTCHINS—You have read the TWU's submission, haven't you?

Ms Robertson—Yes, I have.

Senator HUTCHINS—You have seen the submission where it talks about the section 88E and section 88F inquiries?

Ms Robertson—Yes.

Senator HUTCHINS—They were conducted in the 1960s. So this has been a matter that you have been aware of for a long time as well, isn't it?

Ms Robertson—Absolutely.

Senator HUTCHINS—In most of the determinations and the inquiries, you have supported the TWU position on whole—

Ms Robertson—Yes, absolutely. In the past, that is what we have done. What has happened over the period is that, as soon as you go into an hourly rate and you make this individual, more like employee, provision—we have a system now where the industrial relations system is broken and it cannot be fixed, and I would suggest to you that a partner, if I could call it that, in previous years, also noted in the TWU submission, was the Road Transport Association. Basically, there were times when we would oppose the union, but it was always agreed between the TWU and the RTA. Even they have made a very significant turnaround on the 100 years of their being to now come out and say, 'We've spoken to members. It's broken. It doesn't work. We need a commercial basis.'

Senator HUTCHINS—Except when they talk about the car carriers determination, which they are supporting an application for.

CHAIR—Senator Sterle.

Senator STERLE—Thank you, Chair, just very quickly: Ms Robertson, I would like to have asked you a number of questions about your submission, because I found it rather confusing. You mention that contractors enjoy the same entitlements as employees, so I was ready to put in my application in a few years time, should I need to, to come and work as a courier in New South Wales. But that is not the case; they do not receive all of that.

Ms Robertson—They do, Senator.

Senator STERLE—Holiday pay? Penalty rates? Sick leave?

Ms Robertson—Holiday pay; two hours of overtime a week is the—

Senator STERLE—What if they work five?

CHAIR—Senator Sterle, Ms Robertson is—

Senator STERLE—I am aware of this, Chair.

CHAIR—answering the question; if you would allow her to finish, please.

Senator STERLE—Sorry.

Ms Robertson—There are four weeks annual leave added into the costings for the determinations; there is a Picnic Day; long service leave pro rata. There is a redundancy application before the commission at the moment that is based entirely on the payments that would be applied to an employee being part and parcel of the owner-drivers. Sections 343 and 344 distinctly say, as we put in the submission, that where you see in chapter 6 'contract carrier', read 'employee'. When you see 'principal contractor', read 'employer'.

Senator STERLE—I understand that from the basis of coming up with a minimum. But that was not the question, Chair.

CHAIR—You asked for one, Senator Sterle.

Senator STERLE—Yes, and I just made a comment. But I am going to ask this quick one because—

CHAIR—You will have to put another question on notice.

Senator STERLE—Ms Robertson, you said drivers over the minimum cannot get a wage rise. Why not?

CHAIR—I am sorry, Ms Robertson, we are out of time.

Senator STERLE—Why can't your members just give them a wage rise?

CHAIR—Senator Sterle will put his question in writing. Could you return the answer to us, thanks.

Ms Robertson—I am happy to do that, Madam Chair. Apologies, Senator.

Senator STERLE—What a shame we ran out of time.

CHAIR—Thank you for your attendance here today.

[2.57 pm]

SUTTON, Mr John, National Secretary, Construction, Forestry, Mining and Energy Union

CHAIR—I welcome the representative of the Construction, Forestry, Mining and Energy Union. The committee has before it your submission. Are there any changes or additions?

Mr Sutton—No.

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

Mr Sutton—Thank you for the opportunity to appear before you. The CFMEU has traditionally represented large numbers of subcontractors in the Australian building industry, particularly in the form of building tradespersons. We have represented those people over many decades in the predecessor unions to the CFMEU and continue to enrol and represent large numbers of such members today. We also have members who are independent contractors in areas such as the people who own and operate machinery in the building industry, in the mining industry, in the forestry industry; we have also independent contractors who operate in the forestry industry in a number of different capacities. I would estimate that across the CFMEU we would have at least 10,000 such members, so we have a long history of genuinely representing these people.

In relation to the legislation before you, the bill in our view is all about right-wing ideology and little else. It is simply about implementing a pure free-market theory which will, of course, be of little value to real subcontractors out there in Australian industry. The bill will do little more than help big business and diminish the bargaining position of small subcontractors. The bill, in many ways, is a result of a noisy right-wing think tank that has appeared on the political horizon in the recent period, called the Independent Contractors Association. They have a prominent figure who does their spruiking by the name of Ken Phillips, who gets access to the newspapers to pursue their right-wing theories. They seem to have inordinate influence in the current government.

The same organisation I mentioned does not seem to represent any real contractors in practice. We are struggling to find any real industry or sector where they represent real workers and, of course, when you do not represent real workers or have real members, the question arises about where the funding comes from for this right-wing think tank. Our view is that they are purely the agents of big business and that their funding naturally comes from that sector, and the policies that they are pursuing are simply about aiding big business.

The last thing I will say about that organisation is that, besides Mr Phillips, there is another prominent character, who is the president of that organisation, Bob Day: these are vocal people pursuing these theories. Their credibility was dealt a very serious blow recently when they widely announced that there were 1.9 million subcontractors out there in Australian industry. I recall them also celebrating the two-millionth subcontractor out in Australian industry some few months back and, of course, the Productivity Commission came out—literally weeks ago—and announced that there were not 1.9 million or two million but there

were 800,000 subcontractors out there in Australian industry. So in our view, the credibility of the main spruikers, the main protagonists for these right-wing theories, leaves a lot to be desired.

The bill before you does nothing to assist genuine subcontractors, nor employees that are, in reality, dependent contractors or disguised employees. As far as we can ascertain, the central purpose of this bill is to strip these workers of valuable protections that have existed in state legislation over many years. The so-called protections that are found in the bill before you are much inferior to the protections that exist in state industrial legislation in places like New South Wales and Queensland. The provisions, of course, in places like New South Wales have a long history, a 50-year history, and have done a great deal to assist small subcontractors—real subcontractors—in New South Wales. Of course, the Queensland legislation is more recent, but it also is a valuable protection for small subcontractors.

The provisions in the bill before you are inferior in the following ways: the remedies that small subcontractors have in this legislation involve them having to go to the Federal Court, or before a federal magistrate; they force the small people to go to a fully judicial forum; they force these people to go to a high-cost jurisdiction; they force these people away from arbitral solutions which, in many ways in the past, have been low-cost solutions. For example, where a subcontractor in the industry I am familiar with says they are owed $5,000 or $8,000 by a building company, in the past—if they were members of the union—we could represent them, of course, before the relevant state tribunals or, if they were not members of the union, they could go to a state tribunal and pursue their matter in a non-judicial manner in a low-cost jurisdiction.

What we have before us will almost inevitably force people who are owed sums like I have just mentioned to refrain from or give up pursuing that kind of money in a judicial forum. I am well aware of what many subcontractors have done in the distant past in the building industry. Where they could not get any justice, they resorted to methods of getting square with the building company that none of us would like to see occurring, such as pulling down the brickwork, or pulling down the frame of the cottage, or destroying the work they had done because they could not get justice from a building company. I am afraid a lot of small Australians, people that are battlers, will be forced back into that kind of uncivilised behaviour.

Of course, one of the criteria in this bill which we find pretty appalling is that, when somebody seeks to pursue what they regard as an unfair contract in this new judicial forum, the judge is able to take into account if other subcontractors, doing a like class of work, are also paid what you might call lousy payments—there is a bit of Australian vernacular—poor or inferior payments that patently are unfair. Then, apparently, in this legislation that can form a justification or a rationalisation for the worker in question also being paid on an unfair basis. Of course, when these matters were pursued in the New South Wales Industrial Commission, there was no such criteria that the judges or arbitrators in the New South Wales commission or, indeed, the Queensland commission, could have regard to. We also see, in this legislation, that where an employer is party to an unfair contract—or lousy payments as I have called them—or unfair payments, then the employer can plead a defence that they did not understand or have a belief that they were making an unfair payment, and they can run this

argument that there was no intent. Okay, on its face it might prove to be unfair, but that was not their intent and, therefore, as I understand it, they escape penalties because belief cannot be demonstrated. The whole approach of strict liability goes out the window.

Some other aspects I would highlight: we see this legislation relying on the common law definition and that is a patently inadequate definition. We have seen the tax debate unfold over the last five or six years and we have seen the recommendations of the Ralph report about the need for a genuine 80-20 rule to be adopted in relation to the alienation of personal services, and we, of course, have seen the result of the debate between then Treasurer Costello and then Minister for Small Business Reith, and we saw the 80-20 rule watered down to its current irrelevant or very unuseful status. Our suggestion, of course, is that we go back and look at what John Ralph said, and we pick up a genuine 80-20 rule, not just in relation to tax but we pick it up for purposes of trying to determine who is a genuine independent contractor and who is an employee.

CHAIR—Mr Sutton, I do not wish to constrain you and I do appreciate the length of your remarks, but perhaps you could briefly summarise the rest of your statement. I feel sure that many of your points will be brought out in questions.

Mr Sutton—Okay. There are three last points I will make. We are very worried about what this legislation may do to important security of payments legislation that small players rely on in the building industry in at least three states. In New South Wales and Victoria, the security of payments legislation which is there is there for a very good purpose in that small subcontractors have very often been ripped off in the past by building companies, and not paid. We are very worried that this legislation scoops up and overrides that valuable security of payments legislation and we would like to see the legislation clarified to ensure that is not the case.

We are worried about the regulations to this legislation where the minister may well have the capacity to ban trade unions from making applications on behalf of their members in the Federal Court. We hope that is not the case. We would like to see the legislation repaired in that regard. Lastly, we would draw to your attention that the ILO recently made a lengthy recommendation about these issues and we would draw to your attention the table at the end of our submission which shows that this legislation badly fails the ILO recommendation. I have seen the propaganda of our friends, the independent contractors, who believe it is on all fours and it meets the ILO test. That is a case of trying to describe black as white. Patently, this legislation fails the ILO test in many ways. I will leave it at that.

CHAIR—Thank you very much.

Senator MURRAY—Mr Sutton, my feeling is that this legislation will not resolve the issue of who is a genuine contractor and who is not and that there will continue to be major disputes about that. Why isn't it a better route for the Commonwealth to simply say, 'Look, if you're not an employee under the alienation of personal service income test, the tax office says you are not an employee, and if you pay your own superannuation, and if you self-insure for injury, then you are entitled to be considered an independent contractor'? If you do not pass those three tests, you are not an independent contractor. Why isn't there a general

principle approach which the Commonwealth can take and then leave the states to get on with whatever else is not covered by that?

Mr Sutton—We say the current alienation of personal services income tests are farcical. We say that there are a great deal of people out there that would be found to be employees if the courts put them under the microscope and looked at them, applying common law tests.

Senator MURRAY—We have to be careful with 'ifs' of course, but let us assume that the alienation of personal services income test was improved and that it was a requirement, of course, that anyone who passed that test as not an employee would have to have a certificate to that basis, so that it was not a secret between them and the tax office, and that they paid their own superannuation and they insured for self-injury, surely that would be enough, and the law could then proceed as it should?

Mr Sutton—No, definitely not. There are many Australians today working for large corporations where, at law, the corporation should be covering those people for workers compensation payments and should be deducting employee tax out of them. Your third leg was?

Senator MURRAY—That you should insure for self-injury.

Mr Sutton—Yes, they should be covered under workers compensation. They should, of course, be receiving a range of employee entitlements, but because of ignorance, because of lack of knowledge of the law, these people are being treated as contractors and denied a range of entitlements. Of course, these people can come back later, at law, if they wish to pursue the matter and recoup a large amount of entitlements. That is not the most desired method.

You also have a very large number of people running around out there, as you know, with ABN certificates including apprentices and unskilled labourers; people who are ignorant of the law. They think they are a contractor. They have been told to get this ABN number—you and I can go on line and get one in five minutes—and they are being taxed as genuine contractors when they are nothing of the sort. That is a very parlous and unsatisfactory state for our law to be in.

If you took Treasurer Costello's original proposition before it was amended, before it was watered down, and if you looked at his original proposition that came out of the Ralph report, we would think that genuine 80-20 rule is the best method in relation to taxation and, really, probably the best method in relation to industrial law of determining and defining who is an employee.

Senator MURRAY—Reading through all these submissions, they frequently refer to—with which I agree—where someone is a sham contractor and not genuine, that risk is essentially being shifted to that person. But I also think as big an issue, perhaps even bigger, is that risk is shifted to the state, because if a person should be an employee and is not having their superannuation paid, the state is going to have to pick that up in the future.

Mr Sutton—That was your third leg that I forgot to mention.

Senator MURRAY—If the person is not self-insuring and should be covered by workers compensation as an employee, that is a risk for the state. I have not seen, incidentally, anyone do the sums—and I wish somebody would—to calculate what the cost of this practice is to

society, if I can put it that way. What I have been looking for and thinking about with respect to independent contractors for a long time is how you find tests which very clearly delineate the dividing line between the two. Of course, I am aware of how complex it is. I have read all of Stewart's stuff; I have read acres of the stuff. But to me it comes back to this point: there still is not an easy measure which can be determined without going through the costly process of accessing the courts or tribunals and all that sort of thing. This bill does not provide for that.

Mr Sutton—No, indeed, it is a very complex area. I have had a long experience in this area. In fact, I did a university thesis on it. I have been working on this area for some 30 years, so I almost regard myself as an authority in this area. I regard the 80-20 rule, as first proposed by Costello, coming out of the Ralph report, as the best recipe I have seen. To reinforce your point, there are hundreds of thousands of Australians, particularly in my industry, who are breaking their back, being paid inferior money, whose bodies are ruined by their mid-40s, and who are extremely hard-working Australians. They work enormously long hours and are not being covered at all for superannuation; people who need superannuation. They are not covered for workers compensation when their bodies break down, as they do. For the long hours that they are working, if you divide them up and compare them to a unionised worker on a union project under a union EBA, they are greatly underpaid. These are all the reasons. Of course, they pay substantially less tax.

A carpenter under the circumstances I have mentioned, who is working in the housing industry doing carpentry, compared to one working as an employee under a union agreement in commercial construction—just focusing on their tax—doing similar work, one of those Australians pays a great deal less tax than the other one. You know which one it is: it is the one who is characterised as a subcontractor. That is another blow to revenue. That is another reason why John Ralph said that the hole that has been opened up in what was then the PAYE tax take by the fraudulent mischaracterisation of people as contractors, when they are not, is a serious problem to our tax base. They are the words. That is paraphrasing the words of John Ralph. So you are right to say that there are a great deal of problems coming back and revisiting the government and the general taxpayer because of the spread of abuses that are going on out there.

Senator GEORGE CAMPBELL—Mr Sutton, your industry is one that is characterised by lots of subcontractors and independent contractors. It is well known for it. The law as it has existed in New South Wales for the past 30-odd years, to what extent has that assisted to resolve the issues in your industry in terms of the definition of contractor through the deeming provisions and so forth? If it has worked effectively to sort out some of those complex issues, then why would it not be a better proposition for the government to pick up that type of legislation than to go the route in which they are proposing under this bill?

Mr Sutton—It has worked to a fair extent. It could have been a lot better, but it has worked in places like New South Wales in addressing harsh and unconscionable contracts, and where small contractors—be they genuine contractors or be they disguised employees or sham contractors—were able to go along to the New South Wales industrial commission, put their case in a low-cost jurisdiction and get a substantial measure of justice. Where the laws in New South Wales have never been up to the mark, nor federally, was in the capacity for these

workers to be able to collectively bargain. I do not know if this committee is looking at that area—the trade practices law; these Dawson report suggestions—but with the exception of the Transport Workers Union, there never has been a mechanism that has allowed small subcontractors to collectively get together and bargain, and achieve fair rates.

My union and I have been intimately involved in many negotiations over the years, largely informal negotiations, to strike rates and achieve rates and conditions on a collective basis for classes of contractors in the building industry. I have been intimately involved over many years with employers who are quite happy to go through that to keep their workforce happy.

Most of that has now broken down. Certainly, we have never been able to do it in the way the Transport Workers Union has, by being on all fours with either the New South Wales legislation or the Queensland legislation; nor indeed with, I think, section 127A that was introduced in the federal arena. Again, we were not able to access that because it was not user friendly; nor, of course, are these Dawson suggestions and the previous trade practices requirements. They are not friendly.

The previous requirements under the Trade Practices Act had existed for 30 years. I think the Transport Workers Union would be the only institution in Australia that once got approval under that—and it was very costly—but I do not think it did them a whole lot of good. The chicken farmers got it recently, I think, but then got knocked over in the Federal Court. There is not much history in this country of subcontractors legally being able to collectively bargain against big corporations. Of course, you will not see any support in this legislation to assist these small guys. There is a lot of rhetoric from the current Australian government about helping small guys, but in practical terms there is nothing there to help them; it is all about equipping the big corporations in their bargaining position vis-a-vis the small guys.

Senator GEORGE CAMPBELL—You have talked about the Ralph report and the 80-20 rule that was proposed through that. The deeming provisions that apply in New South Wales, don't they go a long way to achieving what the 80-20 rule would achieve, in your view, if it were applied in the way in which Ralph originally designed it?

Mr Sutton—The 80-20 rule was intended to apply for tax purposes. It was subsequently watered down with all these loopholes, so it simply applies for tax purposes. There has never been an attempt in this country to apply the 80-20 rule for industrial law purposes. I am suggesting that that would be a very useful technique for industrial law purposes, rather than simply the common law tests. That is what I am suggesting.

Senator GEORGE CAMPBELL—If the common law case is adopted as proposed in this legislation, what do you see the likely impact of that being on an industry like your own where there is substantive use of contractors? What is the potential for that to generate litigation in terms of people testing what the relationship is between individuals?

Mr Sutton—Of course, this bill will not aid the position of small subcontractors at all. What it does is to make remedies—remedies such as they are in our current law, through the state systems—so much more difficult for the small guy to access. What is the small guy in my industry, who is in dispute with Boral—a multinational corporation—faced with? He is faced with asking, 'Do I go to the Federal Court or the federal magistrate's jurisdiction and

pursue my $5,000?' They will not do it. It just simply strengthens the hand of the big corporations vis-a-vis the little guys.

There is a lot of rhetoric out there from some of these right-wing idealogues who say, 'Pure free-market theory will fix all this. If you just remove all government restrictions, pure free-market theory will fix it.' The trouble is—I think the economist's terminology is that we are in an imperfect marketplace—the bargaining position of Boral vis-a-vis a small fencing contractor, or Boral vis-a-vis a timber getter, is like a giant to an ant. This legislation does nothing to assist the bargaining position and nor, of course, do the Dawson suggestions. Dawson may well have assisted but, of course, our ideological friends from the HIA came along and were able to convince this government to ban trade unions from representing those workers. So where are those workers going to get support to be able to pursue their case? The HIA is happy to enrol these people but who do you think is on the board of the HIA? Who do you think is at the highest levels of determining policy of the HIA? It is the big corporations, not the little guys.

Senator GEORGE CAMPBELL—In terms of New South Wales, in your industry again, are the disputes that do occur with your independent contractors, in the main, over remuneration?

Mr Sutton—Absolutely.

Senator GEORGE CAMPBELL—What percentage—50 per cent; 70 per cent; 90 per cent—finish up before the commission for resolution? Do they all relate to remuneration in one form or another?

Mr Sutton—Yes, harsh and unconscionable contracts provision, 106. People that go there use that because they say that they are being bound to a harsh contract. It is all about remuneration.

Senator GEORGE CAMPBELL—Do you have any idea what value some of these claims would go to? What is the sort of average value of a claim?

Mr Sutton—I have not looked at the 106 jurisdiction in terms of statistics of late. I used to be familiar with the old 88F, for those of you who were around in those days, and it was a valuable tool for us in those days.

Senator GEORGE CAMPBELL—In many respects, it could be a minimal amount of money.

Mr Sutton—You are not talking about large sums of money. Other people have come along and are using 106 for other purposes. There are medium sized businesses and executives who want to use 106 for other purposes, and that has been the subject of a lot of debate in New South Wales. It is not relevant for your purposes. But the kind of jurisdiction that has existed in New South Wales and Queensland has been valuable for the small subcontractor because it was a low-cost jurisdiction and we could have an industrial officer for the union go there and represent you. We cannot send an industrial officer from the union to represent someone in this high-cost jurisdiction that is introduced via this bill.

Senator GEORGE CAMPBELL—I suppose the point I am trying to understand is to what extent, in fact, this is going to act as an impediment to people seeking genuine redress, if

the cost of pursuing a claim far outweighs the result of any success arising from the claim; in other words, the cost of actually getting the money could be far greater than the money that is eventually obtained.

Mr Sutton—I do not want to exaggerate or be emotional, but a lot of building contractors are great workers with their hands and they are fine Australians who work their guts out, work with their hands: many of them would vote for the Liberal Party, for instance. They have worked very hard. When they are not paid, there are different reactions. I have seen many who resort to illegality and civil disobedience and go and knock down the brick wall that they built.

We also have an industry where there is a very high rate of suicide. I do not want to exaggerate, but if a subbie is owed a lot of money and it means everything to his family, it means bankruptcy if he does not get the money that is owed to him and he has no remedy—you know, I do not want to paint the picture further, but this legislation will not help ordinary Australians. Quite the opposite.

Senator GEORGE CAMPBELL—Presumably if they pursue their claims with some vigour, then the potential also for them to get future contracts may be put in jeopardy.

Mr Sutton—There is a very active black list that works in the housing industry. If you are known to have combined with the union and agitated your position with the union, you will find great difficulty working for other housing companies. You might hear rhetoric about freedom in the housing industry, but it is a very tightly controlled industry by big corporations who brutally control that industry and use very undemocratic methods.

Senator GEORGE CAMPBELL—Thank you, Mr Sutton.

Senator STERLE—Mr Sutton, I just want to talk about an incident a few years back in my state of Western Australia. I had no involvement, but I certainly watched it with interest on a day to day basis. The Western Australian building cottage industry, as you are aware, is on fire. It is absolutely mad, and it is no secret that to get quality tradesmen—or to get any tradesmen—in Perth is a major difficulty: building houses can take up to two years. There was a group of workers I read about, the roof tilers, and I think they were seen as the poor relations. It got to the situation—and I only read this in the papers and through the media, listening to interviews on television and current affairs—where this group of workers were all employed as contractors, or engaged as contractors, through the three major roof tiling companies in Western Australia. I will not go on, but I did follow it. Can you give this committee a brief run-down on the result achieved and, if this bill got up, compare that to where these workers would be in the same situation?

Mr Sutton—The union got actively involved in that dispute because the roof tilers argued that their rates had been suppressed for many years. The bulk of those workers did work for large subcontractors, as you know, and there was disputation. There was some withdrawal of labour. The union represented members of our union and we were able to get a very satisfactory settlement in terms of increasing the rates. That is not unknown; we have done that many times around this country. Of course, you are right to say that the market in a particular part of the country can be hot at times and it can be very cold at other times.

I would point to the Sydney market at the moment, and Melbourne—the east coast—where rates are plummeting, and people that work extremely long hours are having to work for money which is much inferior to what they were working for three years ago when the boom was on. Our view is that there should always be a decent floor. We are a trade union that is interested in there being minimums. We are not interested in ceilings, we are interested in minimums, so that people can always expect some kind of a regular income. We do not want to rely on the pure free market because the pure free market can have winners sometimes but it can have terrible victims at other times.

But you are right to say that we regard the roof tilers' dispute as a very successful dispute. The workers themselves, if I had brought them here today, would tell you that they regarded that as a very successful outcome, it has not sent any companies broke, and that is the sort of thing that we have been doing for at least 30 years, to my knowledge, and I have been involved in a lot of it.

Senator STERLE—Importantly, as part of this dispute—

Senator MURRAY—Sorry. The second part of your question was, how will this bill change it? I did not hear that.

Senator STERLE—Thank you, Senator Murray.

Mr Sutton—This bill I do not think outlaws it, but if you go to the Trade Practices Act, see the Trade Practices Act, see the current provisions or the Dawson provisions, I do not think we can conduct that dispute under those provisions. There are hierarchies that work here: the guy down the bottom who does the physical work, puts the tiles on the roof, might be four or five steps down the chain, with people taking money out all along the way and the one down the bottom is the one that works extremely long hours and breaks their body; it is a terrible job being a roof tiler, to be honest.

But to be honest with you, under current law, if the tile manufacturer at the top or any of those contractors further up the chain wanted to go off to the common law courts and block it, they can use the Trade Practices Act. They can certainly block our union, and go our union for heavy penalties for seeking to represent those workers, so it does not fit neatly with current Australian law.

Senator STERLE—I think that the significant part of that dispute—and correct me if I am wrong, Mr Sutton; you were a lot closer than I would ever be—

Mr Sutton—You are a West Australian, Senator.

Senator STERLE—I am West Australian, yes. This was an industry that was not unionised. I am led to believe that this was an industry that did see themselves as purely subcontractors, but I am also led to believe that, after years of banging their heads against a brick wall—and they did not enjoy the ability, as mentioned on some websites and in some submissions, that market forces will allow great contract negotiations—they had nowhere to go.

Mr Sutton—Yes.

Senator STERLE—When all is said and done, they only had one avenue to turn to, and that was the union that could represent them and negotiate for them and the outcome was

successful. But on that, too—and I would like to get your views on this—it is an industry that we have not heard a peep from. As West Australians, we have not heard any complaints and, as you did say, no-one has gone broke and I believe the contractors are actually being rewarded properly now.

Mr Sutton—I can but agree with what you have said. In the housing industry, our membership waxes and wanes with the fortune of the subbies. At some time they are banging on the union's door because they have been getting a terrible deal and they want the union to come in.

You have to ask yourself which organisations exist in and around the building industry that have got resources and some bargaining clout. Really, there are only two kinds of organisations: there are trade unions or there is the HIA and the MBA et cetera. The HIA regards the cottage industry as their turf. Of course, there are some subtrade groups, made up of employer bodies. Most subcontractors realise it is an enormous conflict of interest to expect the HIA to agitate to lift the rates of roof tilers when the roof tilers are manufactured by Boral or one of these other companies who just happen to sit on the board and pay much larger fees and control organisations like the HIA. So naturally the worker, the one physically doing the work, has a much greater identification with a trade union.

That is not to say that they always keep up their membership: some do. Some let it wax and wane and they come and knock on our door according to their fortunes at a particular stage in the marketplace.

Senator STERLE—Thank you.

CHAIR—Senator Bernardi has a question.

Senator BERNARDI—I have an observation, Madam Chair, plus a question. I found it interesting, Mr Sutton, that you reject entirely the use of common law for dispute resolution amongst contractors, and yet you seem to advocate it to determine the person or service's income; the bona fides of that for independent contractors. My question to you is: would you support access to a small claims procedure for independent contractors who are in dispute, under the jurisdiction of the Federal Magistrates Court, for claims or disputes up to say $10,000, as is applicable in most states today?

Mr Sutton—To add to your last question, I would if that were the only alternative available. I say to you that the current prescriptions that exist in those states that have remedies are vastly superior to this bill. If the alternative were the bill before us, and there were a proposal to have a small claims tribunal—by the way, that has existed in the building industry before; we have had that in state jurisdictions—that would be a useful tool and definitely something that would be of advantage to small subcontractors.

To pick up your first question, I must not have been clear. We support a genuine 80-20 rule, as agitated by Treasurer Costello in the first instance. We support his original proposal, before it was watered down, both for tax purposes and for industrial law purposes.

Senator MURRAY—Which means it is determined administratively by the tax office and not by a court; therefore, it is not a common law adjudication.

Mr Sutton—Yes. But in the event of a dispute I am sure it would go off to the courts. Similarly, in the industrial law realm, if someone believed that the 80-20 rule resulted in one thing as opposed to another, they could agitate their position in a court.

CHAIR—Thank you very much, Mr Sutton, for your appearance today.

Proceedings suspended from 3.39 pm to 3.57 pm

ANDERSON, Mr Peter, Director, Workplace Policy, Australian Chamber of Commerce and Industry

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

CHAIR—I welcome our next witnesses from the Australian Chamber of Commerce and Industry. The committee has before it your submission. Are there any changes or additions?

Mr Anderson—There are two further documents that I would like to supply to the committee, Chairperson. One is a printed version of the submission which puts it in a more readable form, as the committee wishes to go through it. The second document is a summary of the amendments to the bills that ACCI is putting before the committee, which are outlined in the content of the submission but, for ease of reference, we have summarised them into a dedicated document.

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

Mr Anderson—Thank you. The Australian Chamber of Commerce and Industry thanks the committee for the opportunity to come before it and address the committee on these two important pieces of legislation before the Senate and, in fact, before the parliament. The ACCI, as a peak council of employer and business organisations, seeks to bring before the committee in its submission a collective view of Australian industry on these bills. A number of members of the ACCI are separately putting submissions before the committee and appearing before the committee, and we support the submissions of those organisations as well.

The submission was developed by ACCI in conjunction with business organisations. We established a dedicated working party of business organisations upon the introduction of these bills and that has given rise to the submission before you. The submission deals with legislation which, as our submission points out, is substantial legislation.

It is the first national legislation of its type and it is likely to be around on the statute books, if enacted, for some time. In that context, a review of these bills by the Senate is very important. This is precisely the type of legislation that really does deserve good, close examination by the Senate through this committee process because it is legislation that is the first of its type and likely to be around for some time.

Our position on the legislation, as we summarise in our submission, is that the bills are on the right track but they do require some amendments. In some areas we believe that the government has gone too far, and that proposition we put before the committee is driven by the fact that this bill is not just about distinguishing between contractors and employees. There are many substantive provisions in these two bills that deal with the relationship between principal and contractor. In that sense, there is new business regulation in this legislation, and that new business regulation needs to be closely examined, because in an attempt to develop legislation that distinguishes between employee and contractor—and many aspects of the legislation on that front we agree with—there is business regulation about how

principals deal with contractors, whether it is unfair contract legislation or whether it is the new offences that are being created in the supplementary bill, and those pieces of legislation are business regulation and they need to be looked at in that context.

Our submission, in its executive summary, draws the committee's attention to 10 principles that we believe should govern the consideration of legislation of this type. We make a number of specific recommendations, and they are summarised in the executive summary. The bills should be approached on the basis that contracting is an important and beneficial feature in the Australian labour market. Our submission makes it clear that we are not seeking to change the balance between employment and contracting. This legislation should not seek to do that and does not. Contracting is not for every person, it is not for every type of work, but the law of the land—whether it is legislation or through the common law—should be neutral in terms of expressing a view as to whether employment is better than contracting, or contracting is better than employment because that is simply not the path that legislators should go down.

It is also important to be aware of this legislation. In our view it does not fill a vacuum. It is not as if commercial contracting relationships have not been the subject of a legal regime until now: they have been the subject of a legal regime. A lot of that legal regime has been through the common law process, but not all of that through the common law. There are a range of other laws that bear on the relationship between contractors and principals, or distinguish between contractors and employees. We largely support the exclusions from state legislation that the bill would provide for. We do not support the fact that the bill does not exclude owner-drivers in New South Wales and Victoria from the framework of the legislation. We believe that that excision from the provisions of the bill is not justified, and we do not believe that the committee should leave those provisions unamended.

Finally, in my opening statement, I will just touch on the supplementary legislation which is dealing with 'sham' contract arrangements. We support the underpinning principles that govern those offences, but we raise two questions in our submission. Firstly, is current law inadequate, or so inadequate that it requires the creation of these new offences? Secondly, even if you answer yes to that question, the offences as they have been drafted are too broad and will have some counterproductive effects. Our submission goes into those issues and we would urge that those offences be redrafted to take into account what, in our submission, are a number of defects in their structure, the most significant defect being that the offences carry reverse onus of proof. The offences are effectively of a strict liability character, and the proposed section 902, in its current structure, does unreasonably intrude into what could be genuine commercial business restructuring. That is the conclusion of my opening statement.

CHAIR—Thank you. On that note of the offences, do you consider that the civil penalties, which can be applied if an offence is deemed to be committed, are suitable both for incorporated firms and individuals?

Mr Anderson—We do. These are significant penalties. These are significant new offences. If these laws are enacted they will be on the statute books for a long time. There are very few other countries where you will find such specific offences dealing with contracting and employment relationships. The penalties of up to $33,000 for each offence by a body corporate is a significant penalty. They are penalties in line with the increased penalties in the

Workplace Relations Act. There is no sense at all in which those penalties will be seen as inadequate.

CHAIR—What about the follow-up activities by the Office of Workplace Services? Do you think that this is giving the penalties and subsequent investigation enough teeth?

Mr Anderson—It certainly gives teeth to any prosecutions. The purpose of offences is not, though, just to prosecute where prosecution is necessary. It would supposedly be trying to remedy inappropriate behaviour. You then have to ask the question: where does that inappropriate behaviour exist? The work of the Office of Workplace Services is best achieved in this area if it is targeted to specific industry sectors where it is seen as a problem. I know the government has committed large amounts of money to the OWS for the purposes of enforcing this legislation. Our view on that is that that money would not be well spent if it is just a scattergun across the economy. History tells us that where there are problems, whether it is in the clothing trades area or whether there are particular areas of vulnerability of contractors, then targeted approaches, based on proper information, are most effective by an enforcement agency.

CHAIR—I should also correct the record this morning. The witness from the Association of Professional Engineers, Scientists and Managers did say that the Office of Workplace Services was a very new institution, and I should point out that it was first set up in 1997. Could I also ask you about your association's view on the onus of proof. You have recommended that it be reversed. Why have you made that recommendation?

Mr Anderson—There is both a fundamental principle and a practical application. The fundamental principle is that a person should not be required to prove their innocence where they are charged with and prosecuted for an offence. There is no basis for a presumption that an individual is guilty of these offences unless they prove their innocence, and I think that is a fundamental underpinning of our law and it is a fundamental underpinning that should be accepted by this committee. Only in the most exceptional of circumstances should legislators contemplate reversing that fundamental underpinning, and we cannot see any of those exceptional circumstances even approaching the justification in the context of this legislation.

The practical working out is such that a number of these offences—take the misrepresentation offences, which I think are 901 and 900—as they are structured, are effectively strict liability offences as far as the prosecutor is concerned. A person is guilty if certain facts are established, and in those offences if you make a false statement that a person is a contractor when in fact they are an employer, or vice versa, you have committed an offence.

The difficulty with a strict liability offence in that context, and the reverse onus, is that—as we all would, I think, need to acknowledge—there are areas of grey between an employment relationship and a contracting relationship that can arise, and you have to be in a position where, in the practical operation of business, you make a good faith judgment based on the best available knowledge that you have. The way the offences are structured, if your judgment is incorrect, even if it is undertaken in good faith, you are committing an offence, and you are only then able to extricate yourself from the offence if you can go along to a court and

discharge your burden of proof to prove that you were acting in good faith and prove the information on which you were acting and seek to convince a court of that fact.

I think that places an unreasonable burden on people in an area where the law is not always precise, and will never be precise, whether we use the common law definitions or the statutory definitions, where you are always having to draw lines around circumstances. You are going to have people who, in good faith, make judgments about a relationship, believe it to be what they have agreed it to be but where subsequently a court may find that not to be the case.

CHAIR—You yourself have mentioned this—and I am not indicating that you are a critic of the legislation but I am talking about the insufficient differentiation between dependent and independent contractors. How do companies make that distinction, in your experience, and how are such differences reflected in the terms and conditions of contracts?

Mr Anderson—It is not a distinction that should find its way into the legal framework. The issue is not whether you are a dependent contractor or an independent contractor, the issue is whether you are an employee for a contractor. That is the question the bill puts before the Senate. That is a fair question to be put before the Senate, and that is the question that needs to be answered. Dependency is a product of the factual circumstance at a particular point in time for a person that has entered into a commercial contract, and those factual circumstances can change.

For a period of time I could have a relationship—even an exclusive relationship—with one principal party, and one may say there is a dependency there, but, provided I am a commercial contractor and exercising my own business judgment about who I will engage with and whether I will engage with one party alone or numerous parties in conducting my business, the law should not pass judgment on me, so long as I am remaining within the parameters of what is a contract relationship. If I am an employee, on the other hand, and the legal tests for employment are met in terms of my relationship, there will be a relationship of dependency. That occurs in an employment relationship, and that is how the law should treat that distinction.

There is simply no basis for treating it within contracting relationships. For that matter, I can advise the committee that in recent debates at the International Labour Organisation that I have been involved in on this question the issue of dependent and independent contractors was raised and the recommendation produced by the ILO, even though we have cause to question aspects of it—and I can go into that if we need to—does not draw this distinction between dependency and independency.

Senator MURRAY—So the title of the bill is wrong?

Mr Anderson—I think that the title just reflects the generic expression people use, 'independent contractors'.

CHAIR—Yes.

Mr Anderson—I see that title as relating to contractors who are both dependent and independent. In that sense, it could be just as much a contracting bill. The independence comes from the fact that they are independent of an employment relationship.

CHAIR—Yes, and I should have phrased my question better. I did mean the inference was that there were employees and contractors. That was what I meant but I should have used a different term. Thank you for that.

Senator MURRAY—Just on that point, the difficulty that is raised of course is that the title of the bill is reflected in the bill itself. For instance, the objects, at 3(1)(a), say 'to the protect the freedom of independent contractors'.

CHAIR—Yes.

Senator MURRAY—The problem, if that is adopted as the terminology, is that you are then entitled to raise, as a legislator or indeed in law, the question that this is designed for independent and not dependent contractors.

Mr Anderson—I can see that confusion arising. The way that I reconcile that confusion, to the extent that it needs to be reconciled, is to see the reference to 'independent' as being independence from the employment relationship. So a person who is a contractor, whether dependent on one principal or not dependent on one principal, is independent of the employment relationship.

Senator MURRAY—Neither the EM nor the second reading speech says that.

Mr Anderson—No. In our general language we talk about contractors as independent contractors, and I think you would have to ask the government why that phrase is used but it seems to be the colloquial phrase that is used.

CHAIR—Thank you for that. Senator Murray.

Senator MURRAY—Thank you. Mr Anderson, I must put my bias on the table. As you know—but not everyone does—right back to 1996 I was a strong supporter of separating out genuine contractors from employees. Indeed, I and my party actively supported contractors not having to comply with unfair dismissal legislation, for instance. I lead in that way because I am concerned that this bill still does not solve the problem. You see, in the discourse you have had with the chair you have put your finger on something which is a problem, if I may suggest. Quite often a franchisee is a dependent contractor—absolutely dependent—but still is entitled to be regarded as a contractor.

Secondly, my view is that, because this bill does not sweep up the entire field—it does not cover the field because people like owner-drivers are excluded—it is a recognition that the bill is not effective in largely resolving the problem.

Thirdly—and you can verify whether you think I am accurate—I think it is still possible for a person under this bill to be thought to fall into the category of independent contractor at law but for the tax office still to classify them as an employee because they will not pass the alienation of personal service income test. With those three elements, my question to you is, why do you think this is good legislation? Why do you think it actually achieves what should be achieved?

Mr Anderson—To answer the generic point, it is good legislation to the extent that it draws this distinction between contractor and employee. It has its own inbuilt limitations, though, and you have pointed to one. There are certain categories of contracting relationship which the legislation says are outside its framework and to be left to other forms of

regulation, particularly the owner-driver provisions, which are left to regulation by the relevant state legislatures, and those regulations built into that relationship some significant elements that ally to the employer-employee relationship. You are correct to point to the limitations of the legislation, but, to the extent that the legislation does cover contracting relationships, it does draw the distinction between those contracting relationships and employment and industrial regulation on the other hand.

You make the point about trying to assess franchising relationships, for example. Franchisees are in a dependent relationship but franchisees are classically small business people that have established themselves as a small business. Whether they are caught by this legislation will depend on whether the franchise contract is a contract for services within the meaning of the bill. That then takes you to the definition of contract for services and extends the definition to natural persons and bodies corporate, to the extent that the work is performed by a family member of the body corporate. So there will be some of those business relationships within the framework of this legislation. We do not put before the committee that you should be extending this legislation right up the chain of franchising relationships.

Senator MURRAY—I used it as an illustration because I accept your point that dependency is not necessarily the delineating line between being an employee and a contractor. It is perfectly reasonable for someone who has a car cleaning franchise, just an individual with a bucket and a mop and so on who has a uniform, to be a contractor, even though they are dependent on the franchisor. That is a completely acceptable thing. I am concerned that this bill actually will not solve the problem—that is at the nub of my remarks—because it is insufficiently decisive about what a contractor is and about what an employee is, and it shows that in the way it is framed.

Mr Anderson—You have to effectively define what 'the problem' is in your question. To judge whether the bill solves the problem, you have to define the problem. We know that the bill solves some issues. The principal issue that it solves is that it says where a person is a contractor, within how it defines contracting, then that relationship is governed by the framework of this bill and not governed by the framework of state laws, which might drag it into the industrial system, so the bill has efficacy in those areas. Are there other problems that the bill should resolve? If there are other problems, then you have to identify what they are and how they might fit within the framework of the legislation.

As I said in my opening remarks, it certainly deals with a range of issues dealing with a business relationship between a principal and a contractor, so in that sense it is not dealing with problems at all of definition of contract as an employee. It is dealing with contracts fair or unfair between principals and contractors and the like.

Senator MURRAY—You see, this bill has been criticised for its motivation. People are saying, both in their submissions and generally, that the motivation for this bill is to legitimise the lower price and the risk shifting which places the onus on someone who is a sham contractor. Against that, of course, are the provisions of the bill which say, 'If you do that, you're subject to very strict penalties and liabilities.' The argument does not follow all the way through the legislation.

I put a question earlier in the day, and it still concerns me, that with respect to genuine contractors, I do not think the tests or the requirements are strong enough. I am one of those who think greater obligations should be put on contractors. For instance, they should be able to prove that they are putting aside superannuation. They should be able to prove that they are self-insuring for injury, because if they do not do those two things, that cost shifts to the state in the future when they are old or when they get injured. I do not think you qualify to be a contractor unless you at least cover those two things off; and there is the tax issue as well.

To me, the motivation for the bill is questionable—I am not personally resolved in my own mind about that—and it does not solve the problem, which essentially is to have a flexible marketplace where individuals can choose to be employees or to work for themselves as contractors and are entitled to take the risks and engage in the market reflective of that. I am not content that the bill covers off all the problems which I have seen exist.

Mr Anderson—To the extent that the problem is that a person should have the freedom to work as a contractor, as distinct from an employee, then the bill largely does solve that problem by overriding laws that would deem a contractor to be an employee. That is a problem that is identified and resolved by the bill. To the extent that there are other problems in terms of the rights and obligations of contractors—and you mentioned superannuation, insurance and the like—the bill does not deal with those. We would argue that the bill does not need to deal with those.

Senator MURRAY—If, by disengaging people from the deeming provisions, you are removing them from safeguards and protections that exist, my view is that you should substitute at least those safeguards and protections which are relevant to the shift in risk, even if you do not agree with the range of deeming provisions. That has not happened, so what they have done is said, 'There's a problem. We're going to disengage you from the deeming provisions but leave you without the safeguards and protections that exist.' Some of those safeguards and protections must surely be valid.

Mr Anderson—The assumption in that analysis is that the act of deeming appropriately conferred safeguards on the individuals; and I would question that assumption.

Senator MURRAY—What about superannuation?

Mr Anderson—Superannuation and the superannuation obligations of contractors should be determined by superannuation law. They should not be determined by creating the artifice of placing onto that contract the status of employee so they pick up superannuation obligations from employment.

Senator MURRAY—So where is the cognate bill with this which says, 'If you are a contractor, you will pay superannuation'?

Mr Anderson—That begs the policy question that has to be answered: should there be a cognate obligation on contractors to set aside moneys for superannuation purposes in the way that there is on an employer to set aside money for an employee's superannuation? The bill does not answer that policy question, it does not seek to answer that policy question, and, I would argue, should not answer that policy question, and certainly not while the bill is being put forward.

Senator MURRAY—It is germane, because at the moment the deeming provision says, 'You will, on behalf of society, have superannuation paid for you.' If you are deemed an employee, that is what happens. Superannuation is put forward, in the national interest, into a scheme for later on. If you cut people off from that, the risk shifts to you and me; it shifts to society. It does not shift to the individual in the short term. Surely, if superannuation is accepted as a national policy, which it is, if you are going to take people out of the superannuation system, you should ensure that that element at risk is at least covered off. That is why I think it should be a cognate bill, as an example.

Mr Anderson—If you follow the logic of that proposition, you end up saying that this bill should deal with the obligations of contractors not just to pay super but to pay workers compensation insurance; to pay tax.

Senator MURRAY—That is right.

Mr Anderson—Those issues are not dealt with in a bill of this character. They are dealt with in legislation that is specific to those subject matters; I think that is the better place to do that. Your analysis of cost shifting is a fair analysis but you then have to ask the question: should a contractor have imposed on them by the state the obligation to set aside a percentage of their income for superannuation purposes?

Senator MURRAY—Absolutely.

Mr Anderson—That is a policy question. That is not a policy question that should be decided by reference to whether they are an employee or not; it should be decided by reference to whether or not the state should place that obligation on an individual who has established themself as their own businessperson.

Senator GEORGE CAMPBELL—Mr Anderson, I want to come at this from a slightly different perspective. They may well be the same issues that Senator Murray has raised. I have seen your document that you have tabled with some proposed amendments to the bill, but I presume in general terms that you support the bill, with those amendments. You would be satisfied with that outcome. The legislation that exists in New South Wales in respect to contractors has been some 30-odd years in its development, and I think it is fair to say that it is probably the most advanced law that exists in the Commonwealth in respect to the issue of contractors. What is it that you say is wrong with that law and that approach and what is it about this law that will correct those errors of judgment that have been made by successive governments in New South Wales?

Mr Anderson—You are right, Senator, to say that we support the thrust of the legislation, but with a range of amendments that need to be made to it. The New South Wales unfair contracts laws have been around since, I think, 1959—a long time. They are laws which differ in a number of ways from what are proposed here. These laws as proposed have some better elements, from our view. I will give you one example. Under the New South Wales legislation, a court can review a contract and alter the terms of the contract, or declare it to be unfair and effectively alter the terms of the contract, by reference to events which occur during the life of the contract. Effectively, a person during the life of the contract can say, 'Well, I'm now going before a court to say that this contract is unfair because it is not working out the way in which I wanted it to.'

This legislation—and certainly with an amendment to it that we propose—would drive a court to consider the fairness or unfairness based on the circumstances at the time of entering into the contract. There is a real difficulty in our view—and it is not something which is even adequately addressed in the bill; it needs amendment—with an unfair contracts jurisdiction which allows a contract to be rewritten by a court, based on a person's claim that the contract is unfair because of events that are occurring during the life of the performance of the contract.

There needs to be a clear principle accepted here—that is, when you enter into a contract, the law of contracts says it has to be without duress and coercion, so we are assuming that it is intelligent people making these contracts, that is what the law requires, and they are doing it freely. If that is the case, then there is, I think, a real question for public policy if a person is allowed to walk away from those rights and obligations during the life of the contract, simply because it has become too hard or they do not agree with it or they think that it is working out unfairly. Unfairness, to the extent that there should be a cause of action of unfairness, should be based on the circumstances at the time of entering the contract and what is reasonably foreseeable, not on the basis of a person changing their mind six months later or 12 months later and saying, 'I shouldn't have entered into that contract.'

That latter area is the direction in which the New South Wales law has gone. Courts have developed some principles to say, 'We won't just declare a contract to be unfair because a person has changed their mind.' So the New South Wales courts have tried to put some check on that but the legislation does not compel that check to be placed on it.

Senator GEORGE CAMPBELL—Do you have any specific examples where these sorts of decisions have been made by courts in respect to contracts; where they have reviewed or rewritten a contract on the basis of subsequent examination of unfairness—I mean unfairness that has arisen in the context of the labour contract, not unfairness that may have been inherent in the contract when it was written?

Mr Anderson—That is the distinction that we are drawing. To the extent that there is unfairness inherent in the contract as it was written and agreed, that is an area where public policy could accept that the remedy should exist.

Senator GEORGE CAMPBELL—Do you have any specific examples of cases where—

Mr Anderson—Not that I have put before you. But if we go back and look at the New South Wales jurisdiction as it has developed, there are those examples. The courts have, in many cases, intervened in the terms of contract to provide what it sees as remedies based on the way in which the contract is working out. As I said, because that is obviously a proposition that is open to abuse, they have drawn some lines around the proposition that you cannot just change your mind and go to the court and ask the court to overturn the contract.

Senator GEORGE CAMPBELL—You made the point that the contract law has been there from about 1959. It has evolved over that period of time. That has involved the arbitration system in terms of dealing with contracts in the workplace. We heard this morning from people representing the Department of Industrial Relations in New South Wales that they have periodic reviews; they have had periodic reviews of the legislation, I think they said, about every five years. The last one might have been 1996. I presume that your then

state counterpart would have participated in those reviews, would have made recommendations and submissions to those reviews. Are you aware to what extent the current law reflects a substantially different position than that sought by your organisation in those reviews?

Mr Anderson—There has certainly been concern from the business organisations in New South Wales about the way in which the jurisdiction has, in their view, been too broad and open to abuse. You are right to say that the New South Wales government has reviewed that jurisdiction from time to time. An example of where the business organisations had some serious difficulty with this was where highly paid executives would go before the New South Wales tribunals, effectively seeking large payouts on their contractual arrangements, on the grounds that existing remuneration arrangements were unfair. That was an area of excess and abuse.

There were some amendments subsequently made to the New South Wales legislation. There were also some amendments made a couple of years ago that deal with limiting access to the jurisdiction, where a person had standing to make an unfair dismissal claim, for example. The legislation had to be reviewed because the breadth of it has been too broad.

Senator GEORGE CAMPBELL—It would be fair to say that they substantially modified that by putting the $200,000 cap on it.

Mr Anderson—They did. I think there would be a number of business organisations who may not think those modifications were sufficient or went far enough.

Senator GEORGE CAMPBELL—Yes, sure.

Mr Anderson—But what it illustrates is that in the initial construction of the jurisdiction you need to place limits, and I think what we have before us here is a proposed national jurisdiction. It is not a national jurisdiction for the first time, because we have had some comparable provisions in the Workplace Relations Act for a number of years, although they have been very rarely used. But, if we are going to focus on a national jurisdiction and one which may well be much more widely used than the previous provisions were, we want to make sure that it does not have wide boundaries which then open it up to abuse, because what we have seen is that, if you create a very broad cause of the action on the ground of unfairness, then you will have people coming into the jurisdiction to try it on, and that then puts pressure on the parliaments to bring the jurisdiction back, and that is not the ideal way to have to develop legislation. I think it is better to try and focus on the lessons that have been learnt from the New South Wales jurisdiction and make sure they are not repeated in the initial iteration of this jurisdiction.

Senator GEORGE CAMPBELL—I understand what you are saying, but I would have thought one of the inherent benefits in the New South Wales jurisdiction is what appears to me to be the easy access to the system, a low-cost remedy where there are disputes, or whether or not a person is a contractor or an employee, or disputes over whether or not payments are entitled to be made or not made under contracts et cetera. We heard earlier from, I think, Mr Sutton that the vast majority of disputes—in his industry, anyway—that occur between principals and contractors relate to payments of fairly small sums of money. It is a low-cost, quick-remedy type of situation. Why wouldn't that type of approach be attractive in

a bill of this nature, yet it is not provided for? In fact, it appears that the bill is going to make it much more difficult now for people to get a remedy, and much more costly to get a remedy if they want to dispute a contract, or payments under contracts.

Mr Anderson—I would answer that by drawing on two propositions. Firstly, I think that it is important that you do, in this legislation, something different from the New South Wales law. The New South Wales law directs these cases into an industrial tribunal; an industrial tribunal that is established primarily to deal with the employment relationship. I think it sends the wrong signal to have an industrial tribunal, dealing with the employment relationship, adjudicating on the fairness of commercial relationships. I accept that there is relatively easy access into the jurisdiction in New South Wales, but I think there is an overriding reason why that should not be the type of jurisdiction that we put in place here.

Senator GEORGE CAMPBELL—But if I accept your argument that it should not be—because you were arguing a narrow focus of the Industrial Relations Commission, that it ought to be in a body that deals with contractual law; Federal Court, Federal Magistrates Court—that does not remove the argument that, even if you put it into that jurisdiction, you should still maintain a low-cost, readily accessible system for the participants, to ensure that there is a quick remedy and redress, where disputes occur in relation to contract.

Mr Anderson—I would agree with that. I think that the law needs to be sensitive to the fact that in commercial relationships where there is litigation, or a falling-out of relationships, and there is a legal claim for moneys due or the like, you should have accessible forms of justice ultimately. It is an issue that has been grappled with by, I think, the Senate for a number of years in terms of the accessibility to justice generally. This bill would move the jurisdiction into the Federal Magistrates Court, not purely the Federal Court.

The Federal Magistrates Court, on the face of it, is a jurisdiction that would be more accessible than the Federal Court. Certainly you have claims in the ordinary course of commercial business where debts are due or moneys are owed to people for breach of contract, which is effectively what those cases are based on. They are brought in the civil courts and many of them are pursued in the magistrates courts and the issue there is simply whether or not there is a backlog of matters in the magistrates courts. It is not a question of the capacity or lack of capacity of the courts to deal with claims for relatively small sums in an efficient way. They are dealt with in an efficient way, provided there is not too much pressure on those courts.

Senator GEORGE CAMPBELL—But it is a much more legalistic system; therefore, the cost of prosecuting a case would be substantially greater than in the commission.

Mr Anderson—We find that in some of the magistrates courts that deal with claims for sums due they have reasonably low cost procedures. I think that there would be a proper question to be asked of government here as to how it would envisage the Federal Magistrates Court dealing with claims for small sums.

Senator GEORGE CAMPBELL—I am intrigued by the statement:

> Governments should not be in the business of deciding what working arrangements suit a business or individuals.

Does that mean you have changed your mind about Work Choices?

Mr Anderson—I think you would need to expand your question for me to be able to answer that. I am not sure whether we have enough time to debate the full dimension of that question.

CHAIR—We will take that as hypothetical, I think, Mr Anderson. Thank you very much for appearing before us today.

[4.45 am]

BISSETT, Ms Michelle, Industrial Officer, Australian Council of Trade Unions

CHAIR—I welcome the last witness for today, the representative of the ACTU. The committee has before it your submission. Are there any changes or additions?

Ms Bissett—No, there are not.

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

Ms Bissett—Thank you, Senator. The ACTU welcomes the opportunity to appear here before the committee with respect to this piece of legislation. I should say at the outset that the ACTU accepts that there are a number of legitimate forms of relationships that occur in the workplace. Clearly, the most traditional form is the employer-employee relationship, but we do recognise that independent contracting is a legitimate form of what I might call non-standard work.

We do not believe, though, that independent contracting or contracting for services should be supported where the arrangements that have been put forward are no more than sham arrangements that are designed to avoid or undermine basic employment rights. In seeking to regulate independent contractors, in our view the parliament should be aware of the capacity of independent contractors to negotiate a fair contract; the propensity of contracts for service to often disguise basic employment arrangements—the employer-employee arrangements; the desirability of contractors having access to a jurisdiction with the power to make declarations about the status of a contract arrangement; the need to provide protection of employment for workers forced into sham contract arrangements; the need to protect deemed employment arrangements that provide some contractors with basic rights and obligations and that provide a workable definition of an independent contractor.

When looked at in this light, it is our view that the independent contractors bill fails to meet the test. It does nothing to protect the employment rights of workers; it does nothing to ensure that contracting arrangements are not operating as disguised employment arrangements; it does nothing to enable contracting parties to achieve quick, inexpensive, accessible declarations of employment status; it does nothing to protect the employment of workers forced into sham contracting arrangements; and it does not provide, in our view, a clear workable definition of an independent contractor. In that respect, it does nothing to assist in overcoming the blurred line in that definition and delineation between an independent contractor and an employee.

At its worst, we have to say that the bill in particular makes the position of outworkers in the clothing industry much worse than it has been up to date and strips away over 10 years of very hard work in terms of trying to improve the working arrangements for one of the most vulnerable groups of workers in the country.

We believe that the bill is poorly drafted and, if it goes forward in its current form, it will lead to confusion across the board and confusion that inevitably only gets sorted out through expensive litigation. By any measure, we say that the bill is not a good piece of legislation. It does nothing to address critical issues surrounding confusion for independent contractors and

employees. I do not need to tell senators the responsibility of the parliament in terms of making good law, and we do not believe that this bill will achieve that. Thank you.

CHAIR—Thank you. I would like to refer you to your comments about the outworker protections. You will be aware that last year during the industrial relations hearings, when the outworker union had made all senators, I think it is fair to say, aware of their concerns with Work Choices, specific provisions were put into the Work Choices bill to protect the rights that outworkers already had. How do you feel now, when you have made a statement to say all those rights are being stripped away?

Ms Bissett—We are concerned that this legislation, in its operation of the exclusion of state laws, actually removes the deeming provisions that operate in a number of states with respect to outworkers, and this is part of the poor drafting of the legislation. While the legislation, certainly under section 7(2)(b), in theory preserves outworker provisions, what is preserved with respect to outworkers from that exclusion of state laws is not what is excluded from state laws. So the outworker provisions that are preserved by the legislation in section 7(2) are much narrower than the state laws that are excluded by section 7(1), and we believe that the dual operation of those two provisions will leave outworkers in a much more precarious situation.

CHAIR—I can assure you it is the policy intent of the government that the protections which have up to now been afforded to outworkers not be diminished. If you still feel that that is the case, I would ask you to put that proposition to the minister's office or to the department so that that does not happen.

Ms Bissett—That is absolutely our view. My understanding is that the Textile Clothing and Footwear Union, who will be appearing before the committee tomorrow—

CHAIR—Yes, that is correct.

Ms Bissett—have a number of proposals with respect to amending the legislation to ensure that their members do not go backwards through this process.

CHAIR—Yes, and I know that they are talking to the minister's office about that. I am sure all senators would hope that that does not happen.

Ms Bissett—We would absolutely hope so.

CHAIR—What is your attitude towards the sham arrangements provision which the government has endeavoured to provide in this bill? Do you feel that the possibility of a genuine employment relationship being misrepresented is still possible, even given the penalties that will be applied?

Ms Bissett—Just because penalties are provided for in legislation does not stop people misrepresenting what the legislation may be about. If it did, life would be a lot easier, I expect. While we welcome the formulation of the provisions with respect to the sham arrangements and the penalties that are imposed on those who would misrepresent the arrangements, one of the concerns in those provisions is the lack of protection of the employee. For example, the provisions that prohibit termination of employment solely for the purposes of turning someone into a contractor actually do not provide any protection for the employee who has their employment terminated in the middle of the process.

There are certainly penalties that are imposed on the employer, if I can use that term, in terms of undertaking that process of trying to put someone onto a contract, but by the time the court processes—the penalty processes—are in train the employee has lost their job and there is no protection for them in the process. There is nothing here that says that that employee gets their job back. Our reading of the legislation is that the employee would be required, if they could, to access the unlawful termination provisions of the Workplace Relations Act, but then there is only one head in the unlawful termination provisions that might be accessible to the employee in those circumstances and it is not clear that those provisions would be accessible. So the concern about the sham contracting arrangements is the protection for the employee and the lack of remedy for the employee who loses their job in the process of misrepresentation.

CHAIR—So you do not think the fact that the onus of proof is on the employer and the reasonably significant deterrence of $6,600 for an individual or $33,000 for an incorporated company is sufficient deterrence?

Ms Bissett—I do not have a problem with the penalties, nor do I have a problem with the reverse onus of proof that is in place. What concerns me is that someone has potentially lost their job and what happens to that person. There is nothing in the legislation that requires that person to be re-employed as an employee. There is nothing in the legislation that protects the employee and that guarantees them access to a jurisdiction to have their termination of employment dealt with, so there are provisions in the legislation to deal with the employer for misrepresentation but no protection. If the imposition of penalties were enough of a deterrent to bad behaviour, then we could deter all bad behaviour easily. We would just impose sufficient penalties.

CHAIR—Yes. We could probably prolong this for some time. Nevertheless, the reason for the termination of the position and the way in which that works is also outside the scope of this legislation, is it not? The process is what I am talking about here.

Ms Bissett—Processes need to have purpose, and if the purpose is not the protection of people affected by the misrepresentations then I am not sure what the purpose is. To put a deterrent in there that has no beneficial result for the person adversely affected does not seem to make much sense.

CHAIR—I guess we have to differ on that, but thank you. Senator Murray.

Senator MURRAY—Ms Bissett, I have heard in other submissions—both oral, as a witness, and written submissions—from the ACTU quite strong representations with respect to civil liberties matters, including the issues of reverse onus of proof, strict liability provisions and so on. Yet your submission makes no complaint about those provisions in the bill, and I wondered why. You might not have it because it has just been handed around now, but the ACCI have asked the committee to consider amendments which would eliminate reverse onus of proof, which would require intent to be a specific defence and which would remove strict liability provisions in a number of cases. Do you take issue with that? Do you have a view on that?

Ms Bissett—I would have to take advice on that.

Senator MURRAY—Could you perhaps come back to us on that?

Ms Bissett—Certainly.

Senator MURRAY—It may not be inconsistent, but it just strikes me as a little inconsistent.

Ms Bissett—Yes, I will

Senator MURRAY—Thank you very much. If I understand your case with the outworkers correctly, if Work Choices and the state laws were allowed to continue in tandem, as they are at present, the protections for outworkers would be greater than if Work Choices and this legislation stand alone and the state reviews fall away. Is that correct?

Ms Bissett—Yes, that is our view.

Senator MURRAY—The ACTU has a general bias—which is nothing to be ashamed of—and it was outlined in the executive summary of your submission to the House of Representatives standing committee, when they inquired into independent contractors. You have the view that non-standard work arrangements are not legitimate and should not be supported where they are used to avoid or undermine the employment relationship. But the reverse of that, of course, is that the ACTU have never opposed genuine contractors, have they?

Ms Bissett—No. As I said in my opening, we do not oppose genuine contracting arrangements.

Senator MURRAY—All right. You have been in the room for some time, I think. Did you hear my questioning of the ACCI witness?

Ms Bissett—I heard some of it.

Senator MURRAY—My concerns are not that the government is attempting to make more definite who is a genuine contractor and who is not; my concern is that I think this bill does not do that and we are still going to be left with a problem of definition of determination and, I think, of justice. Would you agree with that?

Ms Bissett—Yes. One of our strong views is that the legislation fails to take the opportunity to better define the issue of independent contractors; it actually leaves that totally in the air.

Senator MURRAY—A second leg of my examination has been with respect to risk. As a person who has probably taken far too many risks in this life, I know a bit about it. The willing assumption of risk by an entrepreneur, or an individual who wants to run their own business or their own life as a contractor, is perfectly reasonable, but if that risk is pushed across as a result of a sham arrangement, then it is to be deplored. But I also think that there are certain social and economic obligations that we are now applying as a society, where if people are moved out of a deemed employment relationship to a contract definition, they may lose those conditions which assist society in terms of society's risk. I am thinking of superannuation and the right to self-insure in particular.

You have, if my memory is correct, remarked upon the shifting of risk from the employer to the employee. You have not remarked, as the ACTU, on the risk to society where large numbers of people, who were formerly covered with respect to workers compensation and

superannuation, will no longer be covered, which means that society picks up that risk. Do you have anything to say on that subject? Have you tried to assess, at any time, the scale of costs that could be involved?

Ms Bissett—To take the last question first, I do not know that we have attempted to do any assessment of the scale, as you put it, of the loss or the additional risk that would be assumed by society. It is probably well known here that the ACTU, in terms of matters such as superannuation, has been a rather large supporter of superannuation funded both by employers and employees. What you raise highlights some of the problems with the bill, in that it attempts to deal with some matters associated with independent contractors but fails to deal with those other matters that you rightly suggest may well fall onto the public and society in general.

I cannot recall whether we dealt with the matters in our submission to the earlier House inquiry on independent contractors, but certainly the ageing of the Australian workforce, the ageing of the population generally and the effect that has in the longer term on the capacity of the remainder of the population to support people in retirement and so on is an issue that has been well canvassed, both within and outside the parliament, by a whole range of people. It is an issue that I do not think has been canvassed—and I do not know that this bill necessarily invites the canvassing of it—with respect to independent contractors and how they behave in that particular area. It is perhaps an area that should be canvassed, and needs to be looked at.

I do not know whether I agree or disagree with Mr Anderson from ACCI at this particular point on the matter. Whether it is superannuation by independent contractors is a matter that properly belongs in an independent contractors bill, or in a superannuation obligation bill. That piece of legislation, I think, is a matter for debate, but one would think it is a matter that requires some consideration. If there are substantial increases in independent contracting, then it raises issues about future liability.

Senator MURRAY—I support the government's view that there should be national legislation covering contracting, even though I might have criticisms of this particular legislation. Is the ACTU absolutely against, or for, or 'it depends' with respect to that issue? Would you oppose national legislation if it were differently framed?

Ms Bissett—I think the question always comes down to content.

Senator MURRAY—So you are not opposed in principle.

Ms Bissett—I do not think we are opposed in principle.

Senator MURRAY—My last question has arisen from an interesting interchange with Mr Anderson of ACCI. Do you think that dependent contractors will fall outside of this bill; will not be covered by this bill; will not be subject to this bill?

Ms Bissett—The term 'dependent contractors' is a bit of an oxymoron. I think we said this in our submission to the House inquiry: a dependent contractor is a disguised employee. In that respect, the lack of provision in the bill for easy determination of the status of the relationship is a failing of the bill. There is a concern that those dependent contractors may well fall through the gaps in the process. I think the bill is deficient in that area.

Senator MURRAY—For clarity's sake, do you think that the government should amend this bill to say dependent contractors are employees for all other purposes?

Ms Bissett—Yes.

Senator BERNARDI—Ms Bissett, in your submission you have related that the evasion of taxation is—I use the term rampant—one of the main motivators for the use of contracting to disguise employment. Evasion of taxation indicates to me that it is a question of illegality. I fail to see how illegality can be addressed in any legislation, given that there is always going to be a preponderance of people—employers, employees, whether they be contractors or traditional employees—who cheat on their taxation arrangements. There is always going to be a proportion of people, I suppose; yes. I just wonder whether it is truly a legitimate gripe, given that illegality occurs in all industries. Do you have a comment to make on that?

Ms Bissett—Absolutely. That illegality occurs is not a reason to not try and stop it. That you cannot stamp out the illegality 100 per cent is not a reason to not try and stamp out 50 per cent or 80 per cent of it or 10 per cent of it. I think that, if contracting arrangements are being entered into for the purpose of avoiding tax, that is a matter that should be of great concern to the Senate and to the parliament; and, as a taxpayer, it is of great concern to me. I think that what the bill needs to do, if you are going to have a properly structured bill, is minimise the opportunities and the capacity for the illegality to occur. I do not suggest that you can stamp it out altogether—you stamp out one piece of illegality and people find perhaps another way around—but you can make it clear that the illegality is not an acceptable behaviour.

Senator BERNARDI—The question of taxation and responsibility for taxation is one that is addressed by the tax act. Accordingly, everyone has an obligation, however they are employed, whether they be an independent contractor, a business owner, an employer or an employee, to comply with that act. I find it a little difficult to accept that the evasion of taxation—that is the correct terminology—is the main motivator. People are entitled to minimise their taxation obligations in accordance with law but to simply say that independent contractors' main motivation for it is to evade tax I think is quite inflammatory.

Ms Bissett—I think that the purpose of a bill that deals with independent contractors is to ensure that the independent contracting arrangements are legitimate arrangements. You look at it from one word in a lengthy submission and I would say that what I look at it from is what the purpose of this bill should be. And I say that the purpose of the bill should be to ensure that the independent contracting arrangements are legitimate arrangements. In doing that, you minimise the chances and the opportunities for tax evasion, tax avoidance—call it what you will—or any other aspect of law-breaking that may occur through the inappropriate use of contracting arrangements.

Senator BERNARDI—I just make the point that avoidance and evasion are both illegal activities.

Ms Bissett—Yes.

Senator BERNARDI—Accordingly, I think that this bill does go some length to addressing the sham arrangements. We have discussed that already. In regard to the International Labour Organisation: obviously that covers a lot of ground, but clause 8 is the

one that specifically has been highlighted to me from the recommendation in 2006 which sets the parameters under which the other 23 clauses effectively operate. Basically it says that employment regulations should not intrude into commercial contracts.

Ms Bissett—Can I just say that I do not know that clause 8 sets the framework within which the rest of the recommendation operates. It is the eighth clause of the recommendation and, if it were the primary scene-setting, I would expect it to be a bit higher up the list. We do not disagree. We were much greater supporters of the recommendation of the ILO as it passed through the processes of the ILO than other Australian parties to the ILO. What we say about the ILO recommendation is that what it importantly does is say, 'When considering the relationship that occurs, you start from a presumption of employment, then you work from there.' It says, 'The presumption is that there is an employer-employee relationship,' and it says, 'If there is not, these are the tests that you should then go through to determine whether that is not the case.' It does not start from a presumption that the relationship is a contracting, commercial or otherwise relationship. It starts from an employment relationship basis. And we think that is a reasonable framework to start from.

Senator BERNARDI—That is all, Madam Chair.

CHAIR—Thank you. Ms Bissett, some submissions have said that the protections against unfair contracts in clause 15 of the bill are inadequate. Do you think that is a fair comment when the court is required to not only have regard to remuneration between the contractor and employees performing similar work but also contractual rates payable in agreements between other contractors and principals?

Ms Bissett—I have to say that this is another aspect of the bill that is a bit confusing, because in terms of subsection (2) of that section, we are not particularly clear on what it means. The explanatory memoranda do not make it any clearer. It sounds like, in making decisions about whether the contract is unfair, as long as there are lots of other contracts for similar work that are just as unfair, then it is okay. It is a legitimate reading of that section of the bill. That is what it says. It says, in considering the contract versus remuneration paid to an employee, the court should have regard to other service contracts relating to performance of similar work in the particular industry and what those arrangements are. So, if everyone is being treated badly under cleaning contracts, does that make this individual contract fair and reasonable?

CHAIR—I am not as versed as you are in industrial law, but I would have taken it to mean that the court is required to consider a wide variety, within certain parameters, of similar contracts and arrangements and then, bearing those in mind, determine whether or not the arrangements are unfair.

Ms Bissett—I think that the bill is deficient in that it does not say clearly what is the purpose of viewing other contracts for the performance of similar work in that particular industry. You can clearly see a purpose in looking at the remuneration that is paid to an employee doing similar work. That gives you something to measure up against. But the purpose of looking at other contracts then seems to have almost a counterintuitive or a reverse balance on that first consideration, and the purpose of that consideration is not clear.

CHAIR—Perhaps that is something we need to explore further. Thank you for your appearance here today.

Committee adjourned at 5.17 pm