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

FRIDAY, 4 AUGUST 2006

C A N B E R R A

BY AUTHORITY OF THE SENATE

INTERNET

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

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

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

SENATE

EMPLOYMENT, WORKPLACE RELATIONS AND

EDUCATION LEGISLATION COMMITTEE

Friday, 4 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 9.15 am

CHAIR (Senator Troeth)—I declare open this public hearing of the inquiry into the provisions of the Independent Contractors Bill 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006. On 22 June 2006 the Senate referred these bills 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 the parliament's committees. Parliament must function without obstruction and people must be able to give evidence to its committees without prejudice to themselves. Any act by any person which disadvantages a witness as a result of evidence given before the Senate or any of its committees 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.

[9.17 am]

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

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

CHAIR—I welcome the witnesses from the Master Builders Association. The committee has before it your submission. Are there any changes or additions?

Mr Harnisch—Just for the record, I would note that on 3 August we provided a revised submission amending some typographical errors but not the substance or content of the submission.

CHAIR—Yes, and I understand that we have the detail of those as provided by you. I now invite you to make a brief opening statement before we begin questions.

Mr Harnisch—Thank you for the opportunity to appear before the committee. Master Builders supports the two bills but suggests a number of amendments, which are set out in our submission. Master Builders is a strong advocate of the subcontracting system, and that is why in our submission we have devoted a considerable part of our argument to explaining the benefit of the system.

The use of subcontractors is a very productive and cost-effective method of building. It also, importantly, exemplifies the principles of freedom of association, enterprise, competition and independent endeavour. It is a system where earnings are directly related to labour efficiency and productivity through task based remuneration and one in which an efficient tradesperson can maximise their income. Far from being exploitative or unfair, contracts negotiated in this context are beneficial for principals, contractors and their subcontractors. Arguments that you might hear to the contrary we believe are misconceived.

Given the limited time, we now intend to highlight two areas where we believe amendments to the bills are required. First, our observation of the benefits of the subcontracting system immediately leads us to the element of the Independent Contractors Bill which reverses the unwarranted intrusion into freedom of association that occurs via the deeming provisions in state and territory workplace laws. Freedom of contract goes hand in hand with freedom of association to assist the operation of an efficient economy. Where these principles are subverted inefficiencies are created that cannot be justified. This impacts upon the building and construction industry in particular where, for purposes of, for example, section 5(3) and schedule 1 of the Industrial Relations Act 1996 New South Wales, deemed employees include carpenters, joiners, bricklayers, painters, plumbers and plasterers. We deal with this issue in part 7 of our submission where we support the bill's reversal of the current law.

The bill does not, in our view however, go far enough. In essence, clause 8(2) of the bill is expressed so that the elements there described are taken not to be workplace relations matters. Therefore, state and territory laws on those matters—including OH&S, workers compensation, elements of taxation and a range of other matters—continue to operate unaffected by the proposed legislation. That is the major effect brought about by clause 7(1)

of the bill. In our submission we have sought a number of changes to this part of the bill. In particular, our suggestion in paragraph 7.3 to exclude workers compensation from the ambit of the Independent Contractors Bill 2006 should be reconsidered. If it is not possible to rectify the bill at this point we would highlight this is an issue that should be given future consideration.

The rationale for the Master Builders suggestion for a closer examination of deeming contractors to be workers under workers compensation law derives from the need to simplify the system so that contractors are not deemed to be employees under workers compensation laws when they are clearly contractors for the purposes of the legislation. To use an example from New South Wales law again, this possibility arises from the deeming provisions in clause 2 of schedule 1 of the Workplace Injury Management and Workers Compensation Act 1998. Under this provision, where a contract is made with a contractor who neither sublets the contract nor employs a worker, the contractor is taken to be a worker employed by the person who made the contract with the contractor. It is this sort of provision that creates uncertainty and additional costs for the subcontractors and it is an issue that will continue to dog the small business legal landscape when it is already overburdened by red tape.

In essence, we are pointing out to the committee that there will remain unacceptable areas of deeming that will create a disjunction between the new legislation and state and territory based provisions. These have also been articulated by other employer associations, and we certainly indicate our support for the ACCI submission in this regard.

The second area that we believe requires attention as a priority is the offence regime proposed under the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006. We are concerned by the way that these offence provisions have been structured. We believe they are too broad and too harsh and should only be prosecuted by an independent third party and not trade unions. Clauses 900 and 901 of the bill make unlawful misrepresentations about the nature of an employment relationship, or an independent contracting relationship, as a strict liability offence punishable by a penalty of up to $33,000 for a corporation. This notion of strict liability is inappropriate as the intention of the parties is not a determining factor in establishing whether or not, at common law, a contract is one of employment or otherwise. The intention can be overridden by other factors. Because of this issue, it would be wrong to eliminate from the offence the need for there to be an intention to misrepresent the nature of the relationship.

Similarly, the offence under section 902 should be substantially restructured. It creates a new offence of dismissing a person who is an employee where the whole or dominant purpose is to engage them as an independent contractor. In the building and construction industry, particularly under the daily hire system, a worker may have the status of an employee and subsequently be engaged as a contractor, dependent upon the project, the nature of the work and the agreement reached between the parties. Hence, in our submission we have recommended that the purpose prescribed must be the sole reason for the dismissal as often there are other legitimate bases for that course of action. We believe this problem is compounded by clause 902(3), where the person bringing about the dismissal is presumed to be acting for an unlawful purpose unless they can prove otherwise. We believe this will create an administrative nightmare and should therefore be dropped.

We have pointed out in our submission other issues with the offence regime that should be taken on board by this committee as a priority. In all, the direction of the legislation is commendable and the legislation should be passed, but with the changes that we recommend in our submission.

CHAIR—Have you done any sort of survey or asked for any feedback from the members of your organisation on this legislation?

Mr Harnisch—Yes, we have. Our submission was prepared through our industrial relations committee, which is made up of all the states, and the consultation then went through the state level. So the views that are contained in our submission represent the collective view of the members of Master Builders.

CHAIR—Did the recommendations for the changes that you would like made for the legislation come from your members also?

Mr Harnisch—They did. We have, once again, a quite consultative and wide-ranging internal committee process, and the views have been collected and formulated in the submission.

CHAIR—How many members does your association have?

Mr Harnisch—We have 28,000 members.

CHAIR—Are they represented at the consultative level by businesses or by individual members?

Mr Harnisch—By both, but the vast majority are individual businesses.

CHAIR—Would you like to describe for us the particular advantages of this legislation for your members? Yesterday we had some discussion with the Communications, Electrical and Plumbing Union on why this was bad for their members, but some members of the committee hold the view that in the particular skills shortage that we have at the moment the legislation could be advantageous. You might like to give us your views on that.

Mr Harnisch—The context of why this is advantageous for our industry is how the building industry operates. It is very much a project based industry. While in a boom period there may be continuous work, but even in a boom period various businesses do not necessarily have continuous work. The subcontract system has been in place for a long time in the building and construction industry. It has proved to be efficient in terms of allocating of resources, in terms of specialisation and also from the business point of view in providing a cost-effective way of production. For the subcontractors a benefit certainly is that it provides the opportunity for people to maximise their income. It provides them the opportunity to specialise in that particular industry and therefore maximise their own personal benefits in terms of being an independent contractor. They are what we would argue are the key benefits for the industry and for the individuals involved in that industry.

Senator MARSHALL—Following on from that, you said it provides an opportunity for independent contractors to maximise their income by virtue of being a contractor rather than an employee—can you explain how that happens?

Mr Harnisch—The independent contractor is able to negotiate with the head contractor a rate or a price for a particular piece of work that satisfies both the independent contractor and the head contractor. Certainly in the boom times, those rates are quite advantageous to the independent contractor. The latest boom is a clear example of where those market forces operate.

Senator MARSHALL—I can understand that if it was in fact a genuine contractor, because they would be able to negotiate that contract. But when a contractor then wants those who would normally be employees to work as contractors for them, how are those people able to maximise their income?

Mr Harnisch—By similar arrangements. The people who work for the subcontractor do so voluntarily. They are not forced into that situation; they come to an agreed contractual arrangement in terms of being part of that team or a gang.

Senator MARSHALL—I am an electrician by trade; I have some knowledge of the industry. I hear what you say, but that is not what actually happens on the job, is it? People are told: 'I want this job done. The terms and conditions I want to employ you under will be as an independent contractor. I do so because I don't want to be mucking around with workers compensation, I don't want to be mucking around with superannuation, I don't want to be mucking around with any of those employee/employer relationships or responsibilities. So I want you to carry all of that burden, and I'll employ you as a contractor.' In effect, they are really an employee. That is what happens across the board, isn't it? Are you saying it does not happen?

Mr Harnisch—My understanding is it is two things. The intent of this legislation is to remove that uncertainty. The other point I would make is that, where that occurs, the independent contractor is compensated by a higher rate of—I will not say pay, but in terms of a price for the particular contract.

Senator MARSHALL—I missed that in the legislation. Can you point me to the legislation where it says that if you are an independent contractor you are compensated with a higher rate of pay than—

Mr Harnisch—No, I did not say that. What I said—

Senator MARSHALL—I thought you were telling me this is what—

Mr Harnisch—No, I made two points. The first point I was making was that we believe that this bill will remove the grey areas about where someone is an employee or an independent contractor; it will give greater certainty. The issue about the value the contractor is paid is a separate issue. My comment there is that there is an arrangement between the head contractor and the subcontractor in terms of an all-up rate, which takes into account all of those other things that would normally be paid to an employee, plus another commercial rate for operating as a business.

Senator MARSHALL—Can you give us some examples of that, because the evidence we have had so far is that that does not happen. We have heard that people are declared independent contractors normally because the employer wants them to be employed under those conditions and actually are not properly compensated when you take all of the other

normal employee conditions into account. You do not provide any evidence to the committee that people actually are compensated with more money?

Mr Harnisch—I can only give you examples I am aware of, which is to the contrary—that is, they do get compensated and get paid more money.

Senator MARSHALL—Can you give me any examples where that is the case?

Mr Harnisch—The current situation is a classic one. I was advised of an example in Brisbane. Less than six months ago, because of the skills shortage, a painter was being paid an all-up rate, as I recall, of $70 an hour to do so-called—I will not say simple painting, but non-complex painting. I am not a tradesman, so I do not know what the jargon is. That is way above what the normal rate has been. It is a classic case of where that particular person was being paid way above what the so-called market rate was, and certainly way above what the wages rate would have been.

Senator MARSHALL—If an employer says to you: 'I want to employ you as an independent contractor. I want you to have an ABN,' and those are the conditions of getting the job, but you then believe that you are an employee, how is that determined under the act? How does an employee, who may be described as an independent contractor by the person who engages them, determine their employment status if that is in dispute?

Mr Calver—It would depend on why they are making that statement. If it were in relation to a difference between the wage rates that they might otherwise have been paid and the contract rate that was stipulated in the contract then they would make a claim for the underpayment of wages and declare themselves an employee, as happens now with many claims for the underpayment of wages where there is some ambiguity as to that. The issue here, though, is that, if there is conduct which is of a kind which seeks to exploit that, there are some fairly hefty sanctions that come with trying to push people into contracting arrangements. Whilst we support the notion that sham arrangements should be shattered, there is plenty of law about it at the moment and this bill reinforces that. We think that goes too far. These are very onerous provisions that relate to employers. The employee would have the civil penalty regime behind them and the normal operation of the laws that currently exist.

Senator MARSHALL—But how does an employee get to the point of enforcing that? You said that they would make a claim for the underpayment of wages.

Mr Calver—The Office of Workplace Services is one phone call away. They will take up the cudgels for an individual employee. That would be the first port of call. Even though there is some controversy around that office's operation, that is their statutory function and has been since 1996.

Senator MARSHALL—But they have not been given the role of making the determination of whether you are an employee or an independent contractor, have they?

Mr Calver—I am sure that they would assist the employee in those circumstances. They would investigate that. That is certainly part of their function, in my view.

Senator MARSHALL—We do not think so.

Mr Calver—If I ring up and make a complaint to OWS, they investigate whether or not I have a cause of action and seek to conciliate with the employer. That is the way they operate.

Senator MARSHALL—They can seek to do all they like, but how do you actually get the issue determined? That is the point I am making. You could ring anyone. People could ring me and I could give them advice. If the employer says, 'I say you're an independent contractor,' and the employee says, 'I'm not; I'm an employee and that's the way I want to be treated,' where do you go to have that determined? That is the question I am asking.

Mr Calver—The Federal Magistrates Court.

Senator MARSHALL—Do you know how much that might cost?

Mr Calver—Not off the top of my head. I have not taken a matter there. That is probably not the only place that you could take action for the underpayment of wages. In Victoria, say, there is a very low-cost jurisdiction in the Magistrates Court that I have had some involvement with when I was in private practice in Victoria. It is a very low-cost jurisdiction and matters of that kind can be dealt with quite easily under the small claims processes that they have.

Senator MARSHALL—But they do not determine whether you are an employee or an independent contractor.

Mr Calver—They would determine the underpayment of wages claim and that would follow from whether or not you were an independent contractor or an employee. There are mechanisms of the law now that this legislation reinforces, and it does that by consolidating that law at the federal level. Proper and genuine contracts are governed by commercial law, and notions of industrial law do not attenuate those provisions. That is one of the reasons that Master Builders supports this legislation.

Senator MARSHALL—Are you aware of anyone who has done any calculations on what it would cost for an individual to challenge their employment status in the Federal Court?

Mr Calver—It would depend on the matter that was being adjudicated: whether or not it was an underpayment of wages claim, the threshold of that; whether or not you were pursuing that matter in order to shelter under the workers compensation policy of a particular person at the point you were injured. The cost will depend on the underlying legal remedy rather than on the status you achieve as an employee or an independent contractor. I am not trying to elide your question. I am saying that the cost will follow the remedy that you seek. Nothing changes in that regard.

Senator MARSHALL—At what point is a sham arrangement determined? I am asking for your view of the act because I am unclear about how the act deals with this issue in practical terms. How is a sham arrangement determined? Does it rely on the individual employee challenging this in the Federal Court to get relief and for a decision to be made on whether it was a sham arrangement or not?

Mr Calver—Let us start from the basis on which you would allege that. You would allege that it was a sham arrangement if you were in one of the circumstances that I have previously outlined; that is, you are making an underpayment of wages claim or you are seeking to shelter under an employer's workers compensation policy. So you would allege that. You could do it by taking your own action and contemporaneously saying to OWS that this is a breach of the legislation, and a civil penalty action would occur. So these offences that are

articulated would be in addition to the remedies you already have. They are there, like most civil offence penalties, to discourage that form of behaviour—in order to stop sham arrangements. So, in a sense, this legislation is important in that it reinforces that what the ACTU yesterday called 'disguised employment' is to be discouraged.

Senator MARSHALL—I understand that that may be what is said, but I am trying to understand how this will practically work on the ground. It is not the Office of Workplace Services that will make this decision to apply the penalty, is it?

Mr Calver—They will make a decision as to whether or not to prosecute the offence, but under the legislation that decision could also be made by a trade union taking that civil penalty action on behalf of its members. One would imagine that if the provision stays unamended that is the basis on which a lot of this material will be advanced to the courts.

Senator MARSHALL—I am interested in an individual who wants to exercise their rights. Really, their remedy is to take it to the Federal Court.

Mr Calver—No; as I said earlier, the place where the matter is litigated will depend on the remedy that you seek. This legislation does not—

Senator MARSHALL—But if the remedy is to have yourself described as an employee—

CHAIR—Can you let Mr Calver finish, please?

Mr Calver—This legislation is not intended to create a range of new causes of action for employees in those circumstances. Yesterday Mr Sutton conflated the notion of debt collection with the purpose of this legislation. The unfair contracts jurisdiction as it currently exists does not deal with debt collection per se, and he was talking about people who were owed $4,000 or $5,000. That is not a relevant consideration in the context of this legislation. It is not the justiciable issue. The issue is whether or not this legislation will help reinforce those causes of action that are taken in other places, and they do. They would certainly make it clear that the behaviour that is proscribed is punishable by a civil penalty, and therefore there is likely to be a grey area between employees and contractors. Secondly, they consolidate the unfair jurisdiction to benefit small business, particularly those who are unincorporated. Those are the purposes of the legislation.

Senator MARSHALL—But that is what I am trying to understand. When does the penalty actually apply? I understand there are penalties in the act, but, again, does it act as a practical disincentive? Will it ever, in real terms, be used in the workplace? I asked you about the relief, and you are the one who is also confusing this by saying that if it is underpayment of wages it really comes back to the debt-collection process that you said Mr Sutton confuses it with. But what I have been asking you about is simply an employee trying to get their employment status. Forget about underpayment of wages. Someone says: 'Look, I'm an employee. I am directed how to do the work. I should be paid by hours. I'm not necessarily saying I'm being underpaid; just put that to one side. But I want annual leave, I want workers compensation—I want normal entitlements that I would have as an employee.' How do you determine that?

Mr Calver—It would have to proceed to the Federal Magistrates Court.

Senator MARSHALL—And the person to do that would be the person complaining about that.

Mr Calver—That is right.

Senator MARSHALL—Okay. To run an unlawful termination, the average cost I think was evidenced from the department—$28,000. Maybe you are the wrong person to ask but you can offer an opinion. I am trying to work out the ballpark figure it would cost an individual to have that question determined. You may not know.

Mr Calver—I am not in private practice any longer.

Senator MARSHALL—Would you think it would be comparable to what an unlawful termination case would cost?

Mr Calver—I do not know. It would also depend, as I said before, even though you do not want me to focus on it, on the underlying cause of action that took you to that particular jurisdiction.

Senator MARSHALL—I understand that there are variations.

CHAIR—As there are no further questions, that concludes your evidence. Thank you very much for appearing before us today.

[9.47 am]

PHILLIPS, Mr Kenneth Norman, Executive Director, Independent Contractors of Australia

CHAIR—Welcome. The committee has your submission before it. Are there any changes or additions? I do note the sheet that you have just handed us and you might like to explain it.

Mr Phillips—That was a replacement for page 1. At the bottom we had an incorrect reference to clauses in the bill. It was for clarification.

CHAIR—Could you say what those changes are?

Mr Phillips—It was a reference to the two clauses down the bottom there—that is the reference in front of me.

CHAIR—So we are talking about clause 27 and clause 904(3)(c)—is that correct?

Mr Phillips—Yes. I had incorrectly described them in the original.

CHAIR—In describing their subject matter—is that correct?

Mr Phillips—Yes.

CHAIR—So you have made a change to the subject matter of those two clauses?

Mr Phillips—No, it was just the description of them in the bill. That is all.

CHAIR—And those are the only changes or additions?

Mr Phillips—Yes. It does not alter the substance of any of our arguments.

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

Mr Phillips—Thank you for the opportunity to participate in this inquiry. Independent Contractors of Australia is a strong and vocal supporter of the proposed independent contractors act. We have a number of suggestions for enhancements to the bill. Our main points are as follows.

The principles of the bill are clearly in accord with the latest International Labour Organisation labour standards established by the ILO in June 2006. The 2006 ILO recommendation specifically covers the issues addressed in the Independent Contractors Bill. In substantially being in accord with the ILO recommendation, the bill is probably a world first.

There is a direct fit between the bill and the 2006 ILO recommendation. The ILO standard holds that employment law should not interfere in the commercial contract. This is historically significant for the ILO. The bill achieves conformity with this ILO standard and overrides state laws that are in conflict with this ILO standard. The use of common law as the definition in the bill is consistent with the ILO recommendation. In 2005 the first ever ILO international survey reported that dependent contractors are employees and that independent workers are independent contractors. Common law was found to be an established process for identifying the differences. The bill is a world first in applying specific sanctions against sham or disguised employment. This is a primary objective of the ILO recommendation. The bill's

arrangements in this respect are extremely strong. Some submissions to you have suggested they are too strong.

The purpose of the bill is narrow. It is specifically aimed at processes to identify and make solid the difference between the employment contract and the commercial contract. Its intent is little more than this. It is not a catch-all bill to resolve all unaddressed policy issues concerning independent contractors. ICA considers that, once the bill is law, more needs to be done, starting with the Commonwealth in relation to superannuation, and the states and the Commonwealth in relation to workers compensation and OH&S.

The exclusion from the bill of owner-drivers in Victoria and New South Wales is not in accord with the ILO recommendation. Independent Contractors of Australia is opposed to this exclusion. The Victorian owner-drivers act has provisions which create a process to facilitate price controls under commercial contracts for owner-drivers. Further, the act removes itself from the Trade Practices Act, which is proof in our view of the price control intent of the Victorian act. ICA opposes these price control processes. The Independent Contractors Bill should immediately override the Victorian owner-drivers act.

Chapter 6 of the New South Wales Industrial Relations Act declares owner-drivers to be employees, thus creating employment style control over owner-drivers' commercial contracts. This is not in accord with the ILO 2006 recommendation. The New South Wales provisions have been in place for some 30 years and did have industry support, most notably from the New South Wales Roads and Traffic Authority, but they have changed their position. The evidence is in that the New South Wales owner-driver laws do not affect road safety. It transpires that the New South Wales owner-drivers provisions do not legally apply to interstate or intrastate long haul. The New South Wales RTA submission presents data that heavy vehicle fatalities are marginally higher in New South Wales than in Australia generally. The use of road safety arguments to justify the New South Wales owner-driver laws is not valid. There is no provable link between the IR laws and the incidence of road accidents. The New South Wales owner-driver laws should be overridden by the bill. However, we recommend a phased process over, say, two years to give commercial arrangements time to adjust.

ICA support the sham contract provisions in the bill, with modifications. In relation to presumption of guilt, we are troubled. The justifications in the explanatory memorandum are puzzling. We ask that your committee carefully consider the justice issues in relation to presumption of guilt. Unions should not be able to undertake a sham contract prosecution. The allegation of a sham contract is extremely serious, amounting to an allegation of fraud. Only an appropriate government authority should undertake such a prosecution. The bill allows for other independent contracts to be excluded from the act via regulations. This regulation power should be removed. If additional exclusions were proposed, these should occur only via legislative amendment to ensure full public debate.

In relation to other submissions to the inquiry, I draw your attention to the submission by the Post Office Agents Association Ltd. This is an excellent case study, which demonstrates all the policy dilemmas and resolutions. POAAL represents 5,500 mail delivery contractors, who all have one client—that is, Australia Post. POAAL describes how some of the contracts and some Australia Post managers' behaviours could possibly constitute exploitation, yet

POAAL does not suggest IR style regulation to resolve the problems. Their answers are far more simple and practical. They ask for small claims type dispute resolution processes similar to those that operate in other parts of Australia Post. They say this would resolve the majority of problems. ICA strongly supports this approach. Most problems independent contractors experience relate to non-payment of comparatively small amounts. Small claims processes similar to consumer affairs processes fix a huge quantity of such problems. To this purpose, ICA requests that the committee consider extending to all independent contractors the small claims processes made available to clothing outworkers under the Independent Contractors Bill.

However, ICA would not want such a process to remove the access of independent contractors to the state trader-to-trader small claims processes. Both jurisdictions should be available to independent contractors. To this purpose we ask you to consider part 5 of the Victorian government's submission. Their submission expresses concern that the Victorian trader-to-trader small claims provisions could be nullified by the existing drafting of the Independent Contractors Bill. We do not feel qualified to judge the legal accuracy of the views put, but we ask that this issue be looked at carefully to ensure that non-IR type small claims processes for independent contractors are secure.

CHAIR—Our thanks, Mr Phillips.

Senator BERNARDI—I have a few questions. When was the Independent Contractors of Australia formed?

Mr Phillips—It was 2000 or 2001.

Senator BERNARDI—How many members do you have?

Mr Phillips—I have a sheet here which gives additional information on our structure, our membership base and our finances. I have had these questions before.

CHAIR—You can table that sheet, with the agreement of the committee.

Mr Phillips—I have had strings of questions on this issue in the past. I hope that covers most of the questions.

Senator BERNARDI—I have not read it yet, of course, but what is the scope of your responsibility and your role?

Mr Phillips—We are a network and we are in the business of being a lobby organisation and an education organisation. Our website is principally orientated towards helping people understand the issues and it is a forum for our lobby activities.

Senator BERNARDI—What is the geographic scope of your membership?

Mr Phillips—Australia.

Senator BERNARDI—Does it include a number of types of different business organisations?

Mr Phillips—Right across the board. Because people register on our website and become subscribers and we do not check who they are—we are not interested in checking who they are—sometimes they indicate where they are from, sometimes not. We can gauge from the

number of emails that we receive through the website on issues such as IT and transport that it is just all over the place.

Senator BERNARDI—Is contractworld.com.au your website?

Mr Phillips—Yes.

Senator BERNARDI—Do you accept responsibility for the contents?

Mr Phillips—Yes.

Senator BERNARDI—You are then obviously familiar with a document called 'Kill the bill'.

Mr Phillips—Yes.

Senator BERNARDI—There are a number of claims made in that document which have been contradicted by some of the evidence that we have heard before. I would like you to address three of them, if you do not mind. You have made reference to point 8 of the ILO 2006. This was raised yesterday with the ACTU. Contrary to what you have put here, that it is a key clause in that agreement, the ACTU said, 'If it was a key clause it would be higher up the list, but it is No. 8.' How do you respond to that?

Mr Phillips—The ILO documents are written in a fairly convoluted fashion, so you have to read the totality of it to pick it all up, and the order of appearance of the clauses does not necessarily indicate the order of priority. One needs to look at the wording in the recommendation. In relation to clause 8, it says 'national policy shall'. The other clauses that the ACTU representative referred to yesterday, in particular the one in relation to presumption of employment, read along the lines of 'national policy should consider the possibility of'. Clause 8 says 'national policy shall'. So the construct of the clauses makes the consideration of the possibility of presumption of employment subject to national policy, and the statement of national policy is 'shall not interfere in the commercial contract'.

Senator BERNARDI—How do you respond to the claims, as provided in the ACTU submission, that independent contractors encourage the illegal practices of tax avoidance and tax evasion?

Mr Phillips—What we have to do is consider the bill in relation to that question and whether the bill goes to that issue. The Ralph review and the reforms subsequent to the Ralph review were all about the tax issue, obviously. The Ralph review highlighted the potential or the belief that there was tax rorting going on. How that occurred and the allegations that related to that are very clear. PAYE legislation historically only gave the tax commissioner the power to require withholding of tax if there was a common law employment. The rise of independent contractors meant that the commissioner's legal power to require withholding was reduced. PAYG has resolved that problem 100 per cent, because the PAYG legislation requires withholding at law under three legs, the first leg being for employees, directors of companies and so forth; the second leg being for independent contractors direct, and that is administered through the BAS system; and the third method is through the labour hire provisions under PAYG, which require the labour hire entity to withhold income tax.

Personal services income tax legislation addresses the other part, which is effectively the rates of tax that apply and the deductabilities that you are entitled to. Both the PSI legislation

and the PAYG legislation make it quite clear within the legislation that it is tax law and tax law only, and has no implications across to any other form of law. The bill in front of you makes that same statement and makes it quite clear that this bill has no implications for tax law. So there is no crossover between the two.

The PSI legislation in relation to independent contractors separates independent contractors into three potential categories. A person can be a personal services business and fall under all the taxation rules related to business and obtain all of the deductions that any business is entitled to within that framework. A person can be a personal services income earner. The deductions that they are entitled to and the rates of tax that they receive are the equivalent of being an employee, even though the tax act recognises that they are not an employee. The third category is a personal services business, which is in between the other two. The tax act in that respect gives personal services business entitlement to most deductions, but seeks to address and continue to address the issue of splitting of income and the retention of profit within a company structure. The tax office has a program being conducted through the courts of reviewing that constantly and resolving those two issues. In relation to tax for independent contractors, our view is that both the PAYG and the PSI legislation has resolved the issues to about 95 per cent. There is a small issue still related to withholding of profit in a company and splitting of income for entities that are in that personal services business category.

Senator BERNARDI—Referring to the same document, and I asked before whether you took responsibility for the content of it, there is an allegation. It says:

ICA has evidence that the allegations of $3-60 per hour are false and that some supporters of this figure are on the record as liars in this regard. Evidence of lying for the purposes of public relations stunts can be produced.

This is in relation to the clothing outworkers and the minimum rate of pay. It is a very strong comment, and I ask you to elaborate on it.

Mr Phillips—I do not make a comment like that without the evidence. I have the tape in my bag here. A Channel 7 *Today Tonight* program a few years ago conducted a raid with the TCFU on an alleged sweatshop. They raided this place where there were people who only spoke Vietnamese. At that time I was working within the Asian community as a jobs placement officer and knew a large number of outworkers and was working with outworkers on their issues.

The raid on this small alleged sweatshop, with about six or seven people working in it, involved Channel 7, with the union, rolling in with an interpreter. On tape they harassed the owner of the small company. He did not speak English. They were saying to him, 'How much do you pay the workers?' Then there was an exchange between the interpreter, the owner and the people who had done the raid. The owner made a reply to the interpreter. The interpreter replied in English—and it is quite clear what the interpreter said on the tape—to the people who had done the raid. The people who did the raid then said, '$5 an hour.' The show continued for several minutes to continue the allegation of the $5-an-hour pay. I received a phone call from Vietnamese people who said, 'They lied, because the owner said to the interpreter in Vietnamese, "$13 an hour".' When you listen to the tape, you can quite clearly hear the interpreter saying to the people who did the raid, '$13 an hour.' They lied.

CHAIR—When you say 'a few years ago', what was the exact date of that?

Mr Phillips—I could find out the date. It was certainly subsequent to 2000. It would be three years ago. I have to say the tape is getting a bit old and worn at this stage.

CHAIR—Do you have a transcript of the tape?

Mr Phillips—I would have to get it and supply it to you.

CHAIR—Could you do that?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—Thank you for the material on your organisation. You say that your organisation was formed around 2001?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—You currently have about a couple of hundred voting members; is that correct?

Mr Phillips—That is correct.

Senator GEORGE CAMPBELL—What fee do those voting members pay for membership?

Mr Phillips—I would say $5 a year or something; it is a token fee.

Senator GEORGE CAMPBELL—Is that on top of the subscription of $50 a year for access to their website?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—So they pay $55 a year?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—How many of those members are owner-drivers?

Mr Phillips—I have never asked. I do not know.

Senator GEORGE CAMPBELL—What information do you require when they seek membership?

Mr Phillips—They put in an application. We have a look at it, give them a phone call and have a chat. So far we have not rejected an application.

Senator GEORGE CAMPBELL—But if you are an organisation representing independent contractors, how do you establish their bona fides if you do not know whether or not your members fall into the category of independent contractors?

Mr Phillips—It would probably follow similar processes that political parties follow.

Senator GEORGE CAMPBELL—I do not know what that means.

Mr Phillips—You tend to accept the membership. We are not going to dig into the background of people.

CHAIR—Mr Phillips, I will make a statement on behalf of the Liberal Party. We research the background of any potential member before they are accepted into membership of the party.

Mr Phillips—I apologise if I have overstepped the mark in that respect.

CHAIR—I am sure I speak also for the Labor Party.

Mr Phillips—We look at what they have sent to us and take it at face value.

Senator GEORGE CAMPBELL—You come here, present us with a submission purporting to represent independent contractors of Australia, yet you cannot tell me—and you have only 200 members—which of those voting members are owner-drivers, what category of independent contractor they fall into. How can you expect us to legitimately accept what you say to this committee?

Mr Phillips—It is for you to make your decision.

Senator GEORGE CAMPBELL—You are the executive director; is that correct?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—How are you appointed?

Mr Phillips—It is a volunteer position.

Senator GEORGE CAMPBELL—So you are not paid?

Mr Phillips—No.

Senator GEORGE CAMPBELL—Are you paid a stipend? Is it an honorary position?

Mr Phillips—No, I endeavour to get my costs covered.

Senator GEORGE CAMPBELL—You endeavour to get your costs covered?

Mr Phillips—My costs being the expense of coming up here and that sort of thing.

Senator GEORGE CAMPBELL—I understand what you mean by your costs. Are you engaged in employment elsewhere?

Mr Phillips—I am engaged as an independent contractor.

Senator GEORGE CAMPBELL—As an independent contractor?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—Who with?

Mr Phillips—A wide range. I had income from probably 20 sources last year. I write articles for newspapers. I do consultative work for companies on their OHS issues, looking at whether or not their procedures fit with proper requirements. I consult to them on their contractual arrangements, on whether they are conforming with the proper contractual arrangements—a wide range of activities.

Senator GEORGE CAMPBELL—So you sell your services as a consultant?

Mr Phillips—Absolutely.

Senator GEORGE CAMPBELL—In the industrial relations field?

Mr Phillips—No.

Senator GEORGE CAMPBELL—The human resources field?

Mr Phillips—No, I refer to it as the non-industrial relations field. I have a commercial focus.

Senator GEORGE CAMPBELL—What are your qualifications?

Mr Phillips—I have a Diploma of Teaching, Primary, and a Bachelor of Arts degree.

Senator GEORGE CAMPBELL—You say your organisation has a constitution.

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—Does that provide for a committee of management?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—How many members are on the committee of management?

Mr Phillips—Twelve.

Senator GEORGE CAMPBELL—How are they selected?

Mr Phillips—Like any normal committee, they nominate, and there is an election each year.

Senator GEORGE CAMPBELL—Who conducts the ballot?

Mr Phillips—We do.

Senator GEORGE CAMPBELL—You do yourself?

Mr Phillips—Yes, we follow the procedures required under the South Australian incorporations act, which we are registered under, and the procedures that we follow are from the constitution that is recommended under that act.

Senator GEORGE CAMPBELL—And you act as the returning officer?

Mr Phillips—No, we get one of the committee members to act as the returning officer.

Senator GEORGE CAMPBELL—So someone independent conducts the ballot?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—Are all these members resident in South Australia?

Mr Phillips—No, they are resident around Australia.

Senator GEORGE CAMPBELL—So, of the 12 people who are on the committee of management, how many reside in South Australia?

Mr Phillips—I think two. We have people in Western Australia, South Australia, Tasmania, Victoria, the Northern Territory, Queensland and New South Wales.

Senator GEORGE CAMPBELL—How do you conduct your meetings?

Mr Phillips—Mostly by phone hook-up.

Senator GEORGE CAMPBELL—How are you appointed?

Mr Phillips—By the committee.

Senator GEORGE CAMPBELL—By the committee of management? Are you appointed on an annual basis, or a three-yearly basis?

Mr Phillips—Annual.

Senator GEORGE CAMPBELL—How was the submission put together that you have presented here this morning?

Mr Phillips—How was it put together? Research; a number of us get together and talk about the issues. I am the chief draftsperson of it. We review it. We make alterations to it and then bed it down.

Senator GEORGE CAMPBELL—Did you canvass the views of your 200 members?

Mr Phillips—I canvassed the views of the committee.

Senator GEORGE CAMPBELL—You did not canvass the views of the 200 members?

Mr Phillips—No.

Senator GEORGE CAMPBELL—You did not seek their views?

Mr Phillips—No.

Senator GEORGE CAMPBELL—So this submission does not reflect the views of the membership of your organisation?

Mr Phillips—It reflects the consistent views of the Independent Contractors of Australia, which has a massive amount of information on the website, which has caused people to be attracted to join us. They want to join us because they know the consistency of the views that we put, and the submission reflects the consistency of those views. You will note in the submission a very long list of submissions that we have made to government inquiries over a considerable period of time. There is a consistent, central thrust to all of those views that have been put, and the submission that you have received is consistent with that.

Senator GEORGE CAMPBELL—Mr Phillips, with all due respect, that is not the question I asked you. I asked you whether or not you had canvassed the membership—

Mr Phillips—And I answered that question, Senator.

Senator GEORGE CAMPBELL—of the organisation and you said, 'No.'

Mr Phillips—I answered the question.

Senator GEORGE CAMPBELL—You said that the committee of management put together the submission. Did the committee of management put the submission together or did you put it together?

Mr Phillips—I have answered the question.

Senator GEORGE CAMPBELL—I am sorry, Mr Phillips; you have not answered the question.

Mr Phillips—I will repeat the answer.

CHAIR—Perhaps Senator Campbell could ask you the question again.

Senator GEORGE CAMPBELL—The question is: did you canvass the views of your 200 paying members in respect of your submission, or did you write the submission on behalf of the organisation?

Mr Phillips—This is the second time that you have asked that question, and I will give you the answer again. We did not canvass the views of the 200 members. We did a round of research. We drafted it. That went to the committee. We discussed it. There were alterations made to it. We then finalised it and submitted it.

Senator GEORGE CAMPBELL—When you say 'we drafted it' do you mean that you drafted it?

Mr Phillips—There always needs to be a draftsperson, but that is always done in conjunction with other people.

Senator GEORGE CAMPBELL—And that was signed off by the committee?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—Without reference back to the 200 members?

Mr Phillips—Correct.

Senator GEORGE CAMPBELL—How can you purport that that represents the views of Independent Contractors of Australia if you have not consulted them?

Mr Phillips—I would have thought—

Senator GEORGE CAMPBELL—In fact, you do not even know whether your 200 members are independent contractors.

Mr Phillips—that the process that I have described is a fairly common process in relation to submissions before you. There would be nothing unusual in the process that we have conducted in terms of putting together the submission. It would have applied to anyone who has put a submission to you.

Senator GEORGE CAMPBELL—Does your organisation have conferences?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—Do members attend?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—How often are these conferences held?

Mr Phillips—In the last two years, we have had two.

Senator GEORGE CAMPBELL—And they have been about what? Were they to discuss the running of the organisation?

Mr Phillips—They were specifically to discuss the Independent Contractors Bill 2006 and what that should do. We had a range of speakers. We talked about the issues. We also have our AGM.

Senator GEORGE CAMPBELL—Could you present us with the agenda for those conferences?

Mr Phillips—I can. You will find the full details of the conferences on our website.

Senator GEORGE CAMPBELL—And the minutes of the conferences?

Mr Phillips—Mainly, you will find all of the papers spoken to by the various people who attended and put their views.

Senator GEORGE CAMPBELL—Do you publish an annual report?

Mr Phillips—Yes, and that is publicly available on our website.

Senator GEORGE CAMPBELL—What is the relationship between the ICA and the IPA?

Mr Phillips—None.

Senator GEORGE CAMPBELL—There is no relationship at all?

Mr Phillips—No. The connection—

CHAIR—For the committee's benefit, what is the IPA?

Senator GEORGE CAMPBELL—The Institute of Public Affairs.

Mr Phillips—I am an independent contractor who does a range of work across a range of things. As I explained, last year I earned income from 20 different sources. Part of the work that I do is work with the Institute of Public Affairs.

Senator GEORGE CAMPBELL—So you do work directly for the Institute of Public Affairs.

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—Research work?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—Writing?

Mr Phillips—Yes.

Senator GEORGE CAMPBELL—Does the ICA have any statutory requirement for financial disclosure?

Mr Phillips—Under the provisions of the South Australian incorporations act, if you have a turnover exceeding a certain amount—it is several hundred thousand dollars—you are required to submit an annual financial return to the appropriate authority in South Australia. We do not exceed that amount and therefore we are not required under the act to submit a return.

Senator GEORGE CAMPBELL—In the preamble to its recommendation, the ILO says the following:

> Considering the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application, and Noting that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due, and

Recognizing that there is a role for international guidance to Members in achieving this protection through national law and practice, and that such guidance should remain relevant over time, and

Further recognizing that such protection should be accessible to all, particularly vulnerable workers, and should be based on law that is efficient, effective and comprehensive, with expeditious outcomes, and that encourages voluntary compliance ...

How can the ICA claim that the definitional differences between employees and independent contractors were found by the ILO to be clear and consistent across the globe?

Mr Phillips—In 2003—and I referred to this in our submission to you—the ILO came to a conclusion. The ILO operates on a cascading series of criteria. There is a convention, a recommendation, a conclusion and various other steps. Conclusion is a step towards achieving a recommendation or a convention, and the recommendation in 2006 was based on the conclusion of 2003. On page 7 of our submission to you I refer to a key statement in the 2003 conclusion, which reads:

Self-employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.

It was that conclusion that set the stage for 2006.

I also refer in there to the investigation that was then done by the secretariat of the ILO, which conducted an investigation in 2004 and made a report in early 2005 in preparation for the 2006 debate. It issued a very lengthy report, and at least half of the report gave the results of the first-ever international survey conducted of the definitions of the employment relationship used across the globe. The chief academic in charge of this has just retired but is from South America. He in particular was concerned that the differences between common-law and Roman law based countries were quite substantial.

They did a survey across in the order of 78 or 80 countries across a wide variety of legal jurisdictions, and that report said, 'We were surprised at the level of convergence between all of the jurisdictions on the definitional issues.' What they found was that countries or courts are consistently looking for an individual in a dependent style relationship. If they are in a dependent style relationship, that denotes employment. It was on the basis of that report that the entire discussion in 2006 continued, and the 2006 recommendation picked up from the 2005 report, and that is reflected right through the 2006 recommendation.

Senator GEORGE CAMPBELL—I put it to you that, if you look at the total context of the ILO standards, in fact you cannot draw the conclusion that you have drawn in that paragraph by saying it is clear and consistent across the globe.

Mr Phillips—The 2005 report quite clearly states that, and it was their surprise finding. It is the only investigation of such detail and of such scale that has ever been conducted on this issue.

CHAIR—Going on with the ILO labour standards, that is the June 2006 recommendation—is that correct?

Mr Phillips—Yes.

CHAIR—Isn't it the case that at the International Labour Conference all of the employer delegates voted against the recommendation and the governments abstained?

Mr Phillips—No, the governments voted for, the unions voted for and the employers voted against. Their view and their reason for voting against was that the clauses from about 11 through to 14 related to trying to create a definition for 'employment'. Each of those clauses was predicated on the notion that nations should consider the possibility of these sorts of definitional issues. I have to say I was not overly concerned about the definitional issues that were being recommended because I thought that most of them quite clearly covered the processes that we witness under common law and quite clearly covered the processes that were found in the ILO secretariat's report of 2005. The employer bodies held the very strong view that the ILO recommendation, which was established because of what happened in 2003, was only to go to the issue of disguised employment, not to the definition. I understand it was on that basis that they voted against it.

CHAIR—If the employers voted against it, I would have thought that you had reason to be concerned about this, but perhaps we can go on with that later. I will pass to Senator Murray.

Senator MURRAY—It seems to me that, from the evidence that has been put to this committee—

CHAIR—Sorry to interrupt you, Senator Murray. Did the governments actually abstain on that motion?

Mr Phillips—No, there was overwhelming government support for the motion. When you looked at the vote there was actually a leakage from the employer bodies across into voting for. I think there were half a dozen abstentions.

CHAIR—Who were they by?

Mr Phillips—One would need to look at the ILO record.

Senator MURRAY—It seems to me that, from the evidence we have heard at this inquiry, there will be some doubt as to who falls under this legislation. Yesterday we heard the distinction between 'dependent' and 'independent' contractors. Because of the way in which the bill is titled and worded, anyone who might be described as a dependent contractor in the language outlined by the ACCI might be considered not to fall within the bill. Secondly, if the bill is predicated on the Productivity Commission's definition that 'a contractor is a single person', it might be said that any contractor who employs anyone part time or full time may also not fall under this bill. These are the sorts of matters that might end up being adjudicated in courts, of course, but the thing is that the evidence indicates that it is not clear exactly who would be covered by the bill. Do you have anything to say on that topic?

Mr Phillips—The issue that the common-law courts always conduct, and which was the finding of the ILO process of looking at all of this, was that when you are identifying either an employee or an independent contractor what you are looking for is the nature of the contract. The finding that a contract is an employment contract means that the parties to it are employer and employee. If the contract is found to be a commercial contract, the parties to it are business to business, independent contractor to business or whatever. As a consequence of that finding, you then have a cascading series of issues in relation to how each of those contracts is regulated. In fact, independent contractors are regulated within the business framework and subject to all of the business regulations. When one looks at the decisions of

the courts, the courts well know what they are looking for. There is no confusion by the courts.

Senator MURRAY—Except this bill will change the statutory basis on which the courts must examine this matter. Therefore, that will produce new grounds if the matter is challenged. If somebody claims they are a dependent contractor or if somebody claims that, because they employ someone, they are not covered by this bill and are therefore entitled to be covered by the NSW state laws, for instance, they may well have a case.

Mr Phillips—That is not my reading of it. The jurisdictional reach of the bill is quite clearly restricted to the nature of the commercial contract. The issue of a dependent contractor is not a legal issue but an issue of debate and discussion. People will fall into—

Senator MURRAY—I am sorry to keep interrupting you, but the legislation does not just have independent contractors in its title, but uses the term 'independent' as a descriptor in the wording of various provisions of the bill. You are entitled at law to know what that means—

Mr Phillips—To know what that is. The definitions under the act quite clearly come back to common law, and it makes it quite clear that a person who is an individual at common law who is under a commercial contract is an independent contractor. That is quite clear and quite accepted. It goes one step further and covers itself by ensuring that entities that are corporations are not pulled within the nature of this act unless the person who is a director of the corporation directly does the work themselves. The distinction that is being drawn here on the definitions is very, very specific and is one of the things that I would say is very clear in the bill. The issue of the dependent contractor is not an issue that is capable of being addressed in the bill, because it does not create a dependent contractor; it does not create that third category. A person will either be an employee or an independent contractor under this act. It is quite clear and definite on that.

Senator MURRAY—Do you accept that common law is a living thing and that it changes by jurisprudence?

Mr Phillips—Absolutely. Where the confusion arises in, for example, the Vabu case is that we refer to it as an independent contractor. We have on our website a full description of how the common law works. We describe it as a swinging pendulum test. It is looking for the right to control issue, which is really the dependency issue. It has about 24 potential subtests to that major test. On each subtest, you look at each issue—the level of direction, whether you have done advertising on your vehicle or whatever it is, restraint of trade—and ask: 'Which way does each pendulum swing?' The courts will then get the totality of that and ask: 'Overall, which way does the pendulum swing?'

Senator MURRAY—You are not a lawyer, are you?

Mr Phillips—No. And I have to approach this from a practical point of view. If I can finish, Senator—

Senator MURRAY—Sorry. I am going to deliberately interrupt you, because I have to go shortly and I have a short period for questioning. I am simply saying to you that, where a statutory instrument is introduced and jurisprudence therefore comes into play with respect to any challenge to that statute, the common law has to take note of the statute. If the statute is

worded such that it refers to independent contractors and not just contractors, and if it is affected by a definition of circumstance, I suggest to you that the matter is not as clear as it might otherwise be. I am not going to anticipate—and I do not think you should either—how a court might view that. I am simply saying to you that witnesses appearing before this committee have raised these as issues that need to be attended to. I ask you, because I have a short time, to think about that more, and if you wish to put in some supplementary remarks to the committee, I am sure the chair would be happy to receive them.

I want to move to one other matter before I have to leave. That refers to your submission, where you have a summary of recommended amendments. It states, in relation to the Independent Contractors Bill:

If Clause 7(2) is retained,

- delete Clause 7(2)(c)

and

- amend Clause 35(4) to enable owner-drivers in Victoria and New South Wales to access (4)(a) ...

Clause 35(4)(a) is an opt-in agreement. I am always a bit wary of opt-ins, because I think if you are going to give a choice, you should also give the choice to opt out. Why wouldn't you give a choice to opt out as well as to opt in? Why should somebody have to fall under this if they might have to—

Mr Phillips—We looked at the opt-in arrangement because that is part of the transition arrangements under the act. Other than for unfair contracts arrangements, any other impact on an independent contractor who has been declared 'employee' takes three years before it has an effect, unless you sign to come in. I do not think I would have a problem with you on the opt-out.

Senator MURRAY—I asked you that deliberately because I know from your writings and submissions and from discussions I have had with you that you are a person who strongly supports individual choice, and therefore I would expect you to support opt-out—in other words, if you do not want to be caught under this legislation—as well as opt-in. As I understood the motivation of this legislation, which I broadly agree with as a motivation, people who are genuine contractors should be entitled to conduct their business in that way. The issue is for those on the cusp.

Mr Phillips—The issue which I could not agree with you more on is that a person has a right to be an independent contractor or to be an employee. That must be something that they freely express, which is not under duress from either side. The issue that we are dealing with here is that we have had a situation, historically, where there has been a presumption both socially and at law that you are an employee. It is wrong to make that assumption. The assumption must be a blank assumption and people must make the choice themselves to be one or the other.

It is quite normal for people to be an independent contractor one day and to be an employee the following day. There is nothing wrong with that. I would also say that there is nothing wrong with someone being an employee one day and an independent contractor the next and

moving in and out of those sorts of jurisdictions. That is perfectly acceptable. As you point out, the issue is: have they made a genuine choice in that themselves?

Senator HUTCHINS—Mr Phillips, thanks for confirming what I thought: you are not legally trained.

Mr Phillips—No.

Senator HUTCHINS—You confirmed that to Senator Murray. Madam Chair, as you are aware, I have a bit of background in this area. Mr Phillips, I was disturbed at the errors in fact and at law in your submission, which I may have to correct by either making a submission myself or making a speech in the Senate next week. They are similar to the sloppy errors in the Courier and Taxi Truck Association submission yesterday. Mr Phillips, do you know Mr James Taylor?

Mr Phillips—Yes.

Senator HUTCHINS—Is he a member of your executive?

Mr Phillips—Yes.

Senator HUTCHINS—He told us yesterday that he has one company employee and 300 lorry owner-drivers. He is eligible to be a member of your executive.

Mr Phillips—Yes.

Senator HUTCHINS—Because he is an independent contractor.

Mr Phillips—Correct.

Senator HUTCHINS—I have only a few questions to ask. You do not like this bill at all, do you? In fact, you think this bill 'will be of WorkChoices disaster proportions', don't you?

Mr Phillips—And you are quoting me from where?

Senator HUTCHINS—I am quoting you from a memo that you sent on 18 May this year.

Mr Phillips—That was before the bill had been seen, if I recall correctly. I was expressing a private view in a confidential email, which I think you have there. It has obviously been leaked to you.

Senator HUTCHINS—It is clearly not confidential enough for it to be leaked.

Mr Phillips—You have a copy of it.

Senator HUTCHINS—You do not now hold the view that it is of 'WorkChoices disaster proportions'?

Mr Phillips—No. Now that we have the detail and understand what this legislation is, we have broad agreement with the thrust of it. We have detailed in our submission the areas that we are—

CHAIR—Senator Hutchins, would you be able to table that memo?

Senator HUTCHINS—Yes.

CHAIR—The committee is agreed.

Senator HUTCHINS—So you are satisfied that it is no longer bad drafting?

Mr Phillips—That memo, if I recall, was written before the bill came into the House.

Senator HUTCHINS—So you had not seen the bill before that?

Mr Phillips—Absolutely not.

Senator HUTCHINS—You say in the memo 'It is becoming clear the detail of the bill'. That would suggest that you had seen the bill.

Mr Phillips—No, I had not seen the bill.

Senator HUTCHINS—So you are misleading your membership?

Mr Phillips—No, that was a memo to the committee.

Senator HUTCHINS—Well, misleading your committee, then.

Mr Phillips—No.

CHAIR—Is that the committee of your organisation?

Mr Phillips—Yes. It was an internal committee memo.

Senator HUTCHINS—It is just that your writing suggests that you had seen the bill and you told us you had not.

Mr Phillips—No, of course I had not seen the bill.

Senator HUTCHINS—But this says you had.

Mr Phillips—No, that was from our understanding of where it might have been heading.

Senator HUTCHINS—So you do not think it is shaping up as a trojan horse anymore?

Mr Phillips—If there are the amendments that we have suggested here, we will be very happy with the bill.

Senator HUTCHINS—You said that up until that stage you had not seen the bill but you sent out to your committee members a memo querying it.

Mr Phillips—When you are engaged in lobbying for issues and positions, you follow a sense of where the debate is going. There will be periods in that lobbying where you sense that the debate is heading in a direction that you are comfortable with and there will be periods in which you will sense that the debate is heading in directions that you are not comfortable with. That is all part of the normal process of democracy and the lobbying that we and any other organisation do. When you see the detail of a particular bill come out, you have something that you can specifically deal with. Up until that point you are dealing with a whole series of impressions.

Senator HUTCHINS—I find your statement a bit disingenuous. Further in your memo you say:

> Even more, the excellent work Peter Costello has done over a long time to resolve independent contractor tax issues, is at risk by a bad IC Act.

Do you still hold to that?

Mr Phillips—If the act was bad and those sorts of things then tax issues would be at risk. But the act is not shaping up like that. We have a different situation now that we have the bill

before us. You would be aware that I am not a shrinking violet in terms of my robustness in putting views.

Senator HUTCHINS—I just think you should be a bit more robust in being honest—that is all.

Mr Phillips—I have a union background, the putting of views in a robust and very strong manner is part of my personality and I certainly do resile from that. I hope that those views are then judged on the quality of the view put within the terms of achieving good outcomes with public policy. The process for getting there can be interesting on occasions.

Senator HUTCHINS—We do not have a lot of time left.

CHAIR—No, we have about three minutes left.

Senator STERLE—I am happy to go to smoko.

CHAIR—I am not, because we need to stick to times.

Senator STERLE—I am really looking forward to having my turn as well.

CHAIR—No. We are stopping in about three minutes because we do need to stick to time. You have about three or four minutes, Senator Hutchins.

Senator STERLE—Saved by the clock.

Mr Phillips—I would be more than happy to have a discussion with you after, Senator. It is not a problem.

Senator STERLE—I look forward to it because there is not much info on your website.

CHAIR—Senator Hutchins has the floor.

Senator HUTCHINS—I have a final question. You may not hold the following views any more. I would be interested in where you think the legislation you had not seen, which you are comfortable with now that you have seen, and that you told your membership you had seen—

Mr Phillips—No, told the committee.

Senator HUTCHINS—Your committee. You stated:

> Over a 5 year period we are likely to deeply regret the Independent Contractor Act given its current framework. With a change of government, the tool will have been created to do us enormous harm. These perhaps are extreme thoughts. But after a working life studying the tactics of the union movement and 15 years lobbying on independent contractor issues, all my experience tells me that everything is pointed in this direction.

Do you still hold that view?

Mr Phillips—With the modifications to the bill, no. That is in reference to the exclusion clauses. We have been very up-front about the fact that, in particular, the exclusion clauses in the bill deconstruct the integrity of the bill. This is about the protection of independent contractors and their right to be their own boss. It is not about the protection of some independent contractors and their right to be their own boss. This is a fundamental right for all Australians which must be protected.

CHAIR—Thank you.

Proceedings suspended from 10.45 am to 11.02 am

ORROCK, Mr Donald, Private Capacity

DEWBERRY, Mr Paul Francis, Delegate, Transport Workers Union of Australia

EVANS, Mr Michael John, Delegate, Transport Workers Union of Australia

JOHNSON, Mr Brendan John, Industrial Advocate, Victorian-Tasmanian Branch, Transport Workers Union of Australia

KAINE, Mr Michael Anthony, Chief Legal Adviser, Transport Workers Union of Australia

KEMPLEN, Mr Jerry, Owner-Driver, Transport Workers Union of Australia

MATTHEWS, Mr Tony, Delegate, Transport Workers Union of Australia

SHELDON, Mr Anthony, Federal Secretary, Transport Workers Union of Australia

CHAIR—Welcome. Do any of you have any comments on the capacity in which you appear?

Mr Matthews—I am an owner-driver with an express freight company.

Mr Evans—I am an owner-driver.

Mr Sheldon—I am also the New South Wales Secretary and the acting National Secretary of the Transport Workers Union.

Mr Dewberry—I am an owner-driver with Hanson construction materials.

Mr Orrock—I am a chartered accountant and a consultant to small business.

CHAIR—The committee has before it your submission. As there are no changes or additions to it, I invite those of you who wish to make a brief opening statement to do so. I understand that we are to hear from the owner-drivers, so perhaps one of the people involved in the submission would like to make a brief opening statement, and then we will hear from the owner-drivers. I ask them to keep their remarks between two and three minutes.

Mr Kaine—This submission to you will be structured briefly in the following way: we are going to outline what we would like the committee to recommend in relation to the bills, we have owner-drivers here who will provide the reasons why we seek those recommendations, and we will briefly outline the recommendations sought. First of all, I would like to give a brief overview before handing over the drivers, who have come down here to give evidence directly to the committee.

The principal position of the union, for reasons which will become apparent shortly, is that the bills should not be passed. But, if they are enacted, we support the exemptions which are contained in the bill currently for owner-drivers in New South Wales and Victoria. In addition, we are going to call for the expansion of those exemptions to permit the operation of any future law—and there are two laws pending from WA and the ACT which seek to address the same types of vulnerabilities that the minister acknowledged in his second reading speech.

It is fair to say that, until the 3 May announcement of the minister and the text of the bill, there was much concern amongst independent contractors about the prospect that the

protections that exist particularly in New South Wales and Victoria might no longer apply to them. In New South Wales, for example, there has been a longstanding, economically viable small business model. It has had the support of the entire industry in that state and both Labor and coalition governments alike. It has had that support because the provisions strike the right balance between ensuring that owner-drivers are able to at least recover the costs of running their business, including the critical costs of regular scheduled maintenance, and facilitating the widespread but responsible use of incentive systems for the more efficient performance of the work.

That exemption has been attacked in submissions before this committee, but it is our view—and I think it has become quite clear—that it has been attacked with assertion and rhetoric rather than any evidence being put before this committee that there is anything wrong with the existing systems. The TWU wants to briefly put what is positive about those systems. It also needs to debunk those myths, assertions and rhetoric that have been put forward by others.

The first thing I would like to do is to inform the committee that, as opposed to those submitters who purport to represent the interests of owner-drivers, the TWU actually represents their interests. Owner-drivers have been choosing the TWU to represent their interests since the 1920s. As opposed to those purporting to represent owner-drivers' interests, we offer here today the direct evidence of owner-drivers. Also, 100 statements of drivers from across the nation are supporting this position, and I would like to offer those to the committee at the appropriate time.

By virtue of its long history of representation, this organisation has established a unique understanding of the commercial and operational realities within which these small business owner-drivers operate. We have taken on the corresponding unique responsibility of assisting those owner-drivers to become and remain viable small businesses. We say it is important for the committee to acknowledge or at least note—and this is why we say that the bills as a whole were perhaps a blunt instrument—that independent contracting arrangements are in fact best viewed as a continuum of differing arrangements, ranging from genuinely independent business arrangements in which people determine their own priorities and have some market power through to arrangements like the owner-driver model, which, although providing tangible productivity and efficiency benefits, really has many of the hallmarks of dependency and, in our view, exploitable dependency.

The degree of practical independence that most owner-drivers exercise in the day-to-day operation of their businesses is minimal. For example, almost without exception, they perform work for a single transport operator at the behest of that operator and in accordance with specific priorities, including specific delivery and pick-up priorities, set out by the directors and management of that operator. They are usually required to hold themselves available for work for a single contractor, thus rendering them unavailable for someone else. They take direction from that operator on a day-to-day basis as if they were employees of that operator. They are required to paint or otherwise mark the vehicles they provide with the operator's colours or insignia. They have little—quite frankly, they have no—power to set price. Rather, they take the price they are given, and it is undisputed that they operate with very tight margins. These are indicators not of independence but of dependency and reliance.

Mr Phillips and others would have you believe that a dependent relationship cannot also be labelled an independent contracting relationship. He is wrong at law about that, and I will return to that shortly. So it is this dependence that brings vulnerability, and it is that vulnerability which we say the government has sensibly acknowledged and seeks to address in the exemptions which are proposed in the bill.

I need quickly to move on to debunk some of the specific fictions that are being promoted, in particular by the Independent Contractors Association and the other association, which they say is independent of them but which patently is not—Owner Drivers Australia. They say that the New South Wales provisions, for instance, deem independent contractors to be employees, and they do this in a very stark way. They are wrong about that at law and they are misleading this committee when that is put. The New South Wales act does not deem them to be employees at all. On the contrary, it emphasises their status as independent contractors in a discrete chapter of the act. There are no restrictions, as Mr Phillips would have this committee believe, on the capacity of owner-drivers to be independent contractors. No restriction can be pointed to in the act; there is no restriction.

There is no access to employee-type entitlements such as leave, minimum hours, penalty rates and overtime. And in this regard I pause to say that Mr Phillips, in his submission, and the Courier and Taxi Truck Association, have misled this committee by suggesting that owner-drivers have access to those entitlements; they do not. When a formulation is arrived at in determining what should be at least cost recovery for an owner-driver—that is, when they get in their own vehicle and drive the vehicle—then one of the cost components is the price of the labour. They are putting that forward to suggest that somehow owner-drivers under the New South Wales act are entitled to employee-like entitlements. They are not, and the act does not bestow that.

Owner-drivers are covered by the system. They are taxed and treated as independent contractors by the ATO and, most importantly, there are deeming provisions in the New South Wales act, and owner-drivers do not appear in them. That is obviously a very strong indication that they are not deemed employees.

Finally, I would just draw the attention of the committee to this point because I think it is important to note that other submitters have put proposals which are misleading. The CTTA and the Independent Contractors Association have put forward—and I note it for the *Hansard*—sections 343 and 344 of the act as the provisions which effect their fictional deeming of independent contractors. They are nothing of the sort; they are simply a drafting device by which that discrete chapter for owner-drivers accesses other parts of the act.

The next things that need to be debunked are the assertions about goodwill. The assertion that the New South Wales tribunal controls goodwill in New South Wales is a wrong assertion. The tribunal's role—and the history of that is set out in the submission—is simply to determine (1) whether goodwill existed, and (2) the extent of the goodwill. It also orders compensation where that goodwill has been unfairly extinguished. The other thing that the association does not point out is that that was a legislative provision which went forward with the support of Labor. It went forward when the coalition government held office in New South Wales. It went forward with complete bipartisan crossbench support and complete industry support. One of the reasons it did was that, although that problem needed to be

addressed, there are 16 jurisdictional hurdles facing each applicant which protect principal contractors from unmeritorious claims. This is a very balanced system. It is one that has served owner-drivers very well.

Phillips also asserts that the contract determinations under the system effectively set a maximum rate. I know that yesterday the CTTA—the Courier and Taxi Truck Association—were making a very similar assertion. They do nothing of the sort. They set minimum standards to ensure at least cost recovery. Above those minima, commercial arrangements and incentive schemes apply. They are the rule.

It is difficult to identify, for example, owner-drivers who are paid an hourly rate. The incentive schemes are the rule. It is a piece rate, a container rate or a kilometre rate; it is payment for VIP categories of work and priority categories. This is a system which has supported the productivity of companies and of owner-drivers by allowing them, above a cost recovery minima—nothing unreasonable but something that allows them to maintain a viable business—to freely enter into productive relationships.

Finally, in terms of addressing those assertions, the Independent Contractors Association simply states that unions' arguments about safety in this regard are false. As opposed to just a mere assertion, the TWU is able to cite evidence about the link between low rates of pay and unsafe practices. If left unchecked, problems arise. The long distance sector, which is an unregulated sector, is a prime example of this.

Committee members may be aware of 2000 Senate committee report *Beyond the midnight oil*, which was commissioned by the then Deputy Prime Minister, John Anderson. That report said that unreasonable demands from those in the transport chain contribute to fatigue and to accidents. The committee considered that all transport industry accidents should be treated as workplace accidents and that fatigue should be considered a contributing factor until ruled out through investigation.

There has been that federal government report and there has been the Quinlan inquiry in New South Wales, There have been coronial findings in respect of deaths of long distance drivers. There has been an Industrial Court decision, now of some notoriety, the Hitchcock case, and a stream of District Court cases which support the unions' argument. Those are in contrast to the assertions that have flowed from the Independent Contractors Association.

I would now like to hand over to the owner-drivers. Briefly, before I do, I will outline for the committee the recommendations that we propose. In the first instance, I have said that the bills ought not be passed. But in the event that they are, we ask the committee to recommend retention of the existing exemption provisions. We ask the committee to expand the exemption provisions to allow the same types of vulnerabilities identified by the minister to be addressed by future state legislation, in particular, the pending Western Australian and Australian Capital Territory legislation.

Senator MURRAY—By 'the minister', do you mean the transport minister?

Mr Kaine—Sorry?

Senator MURRAY—You said 'the recommendations by the minister'. I want to know which minister.

Mr Kaine—Sorry, Minister Andrews. We ask that subsection 7(2)(c) of the act be retained and that the unfair contracts provisions of the act be amended in the way that we have sought in our submission. I will not take the committee through that because time is short, but at page 9 of our submission we say that the committee should recommend either that the New South Wales and Queensland provisions should continue to apply—or at least continue to apply in respect of owner-drivers—or that the dot point amendments that we have proposed at page 9 should exist.

Very importantly, we ask for amendments to the so-called sham arrangements protections in the Workplace Relations Legislation Amendment (Independent Contractors) Bill to ensure that there is effectively not an 'out' clause in relation to those sham provisions—the sham provisions intended to protect against, for example, an employer imposing an independent contractor relationship on a worker which is not really such a relationship. The provisions as they currently stand seem to allow for quite an easy 'out', quite an easy escape clause, from those sham protections. The amendments we propose are on page 9 of the TWU submission. It is now appropriate that the committee have the opportunity to hear from actual owner-drivers, properly represented by the TWU.

Mr Matthews—I have been an owner-driver for 22 years now. I entered the business and bought a contract with Kwikasair Express. The reason to enter the business was that, it being a regulated business, we had access to contract determination to recover the costs for our vehicles. We also had a heads of agreement where we were able to get a labour rate. So we were regulated in the sense that I knew that I could enter into the business and be able to recover my costs and at least maintain my vehicle and perform my business in a daily routine.

As I said earlier, I am a part of the express freight business, and my work is mainly in the metropolitan area, delivering and picking up express freight. The business also revolves around our interstate movement. In the yard that I work out of we have maybe 80 movements of interstate vehicles. Firsthand you can see exactly where the deregulation of the business will come into effect. Incidents occur regularly where drivers come into our yard so fatigued they can hardly get out of their vehicles. This is becoming a normal part of the transport industry, unfortunately.

We have a guy who only recently came out of Wagga one night. He pulled a trailer into us in Lindfield, in Sydney, and instead of resting through the day he decided for whatever reason—his rate was too low or whatever—to take a trip up the Central Coast through to Newcastle, Singleton and Muswellbrook and back again and then pulled the trailer back out of our yard into Wagga. It was virtually a 24-hour straight day. Unfortunately, that is the reality of the interstate business. If the protections we have in New South Wales with regard to contract determination were removed, I can only see that the incidents that happen regularly in the interstate business would then be moved into the metropolitan areas, and I would hate to see the end result of that.

Mr Evans—I have been an owner-driver with TNT for 26 years. We have a registered goodwill agreement and a contract determination for exclusive supply of services to TNT. That contract arrangement has given a range of benefits to both contractors and TNT, such as fixed rates and budget expenses for profits. With those fixed costs, TNT have been able to secure long-term business. It provides a stable work environment and stable work hours. That

allows me to maintain a reasonable personal family existence. It stops destabilising work practices that come from not having collective contract determination.

There is a fleet of well over 100 drivers in my yard—that is in Sydney—and the current arrangements give TNT a very loyal fleet and a turnover of about half-a-dozen drivers on contracts per year, and that is mainly simply from retirement. In fact, we only just had two retire at the end of the last financial year.

The contract drivers have created an extremely flexible relationship due to the costly investment of small business people like me. It takes quite a large amount of money to set up truck financing—insurance, maintenance, fuel and the goodwill initial purchase. This has encouraged contractors to participate and assist TNT with integrations of other divisions, purchase of competitors, the running of restructures and the introduction of new technology to deliver optimum benefits for productivity and profit. To continue with these tried and true arrangements is a win-win situation for TNT, contractors and the general economy.

CHAIR—Thanks. Mr Dewberry.

Mr Dewberry—I have been in the transport industry for 28 years. I would like to say that the only reason I am sitting before you as a small businessperson, a single owner-operator, is the regulation that I have enjoyed in the past in the New South Wales era. You will hear more about our Victorian experiences in a while. My counterparts in Victoria are no longer with us. They have been out of the industry now for almost two years because the regulation down in Victoria could not support them. As I said to you before, the only reason I am here today is the regulation I have been able to enjoy in the New South Wales era. I would like to see the committee support the existing legislation as well support all states entering into our regulation, because I believe it is the best. We have a good case to say that we have run it over the years as the best. I would like you to support the other states getting involved and coming under the one regulation with us. Thank you.

CHAIR—Thanks. Mr Kemplen.

Mr Kemplen—I am a tip truck owner-driver from Sydney. I drive a 48-tonne trailer in the metropolitan area. We rely on the contract determination to maintain the minimum rates we have, which are based on an accepted formula—a rise-and-fall formula—based on insurance, fuel costs, interest rates, the cost of tyres and so on. It is reviewed every year. This is the only system we have to guarantee that we get these minimum rates. If it were not there, you would have a situation where operators would have to push old trucks to their limits on the roads and have to cut corners one way or another. If you were not getting paid and you had the choice between feeding your kids and buying tyres for the truck, what would you do? We have invested large amounts of money in the equipment and we need to know that we are going to be paid and paid on time. The contract determination allows us a quick, cheap and effective way to make sure we get paid. I hope this contract determination stays in place, because a business like mine simply would not be viable without it. Thank you.

CHAIR—Thanks for that. We will start with questions.

Senator BERNARDI—Mr Sheldon, yesterday one of the witnesses made an allegation of intimidatory practices by the TWU because of their support for this legislation. I wonder whether you would care to respond to that allegation.

Mr Sheldon—If you mean strident support for the New South Wales and the other national legislation, it is certainly strident. But, intimidatory? I do not quite know what context he or she was putting that in. Are we worried about people being killed on the road? Are we worried about people in small business losing goodwill? Are there 100 people here making the same submissions? Are there four drivers here—many drivers, dozens of drivers; we are running at about 60 now—who have come down to the House of Reps and to senators to speak about their concerns because they know what it is like out there on the road? If that is intimidatory—that is, being faced with the reality of what the consequences are of inappropriate legislation—then that is one person's interpretation. My interpretation is that that is such people telling it the way it is, what the consequences are for them. Many of those people gave evidence, as well, in this place, to various committees, about what it was like before there were contract determinations in New South Wales—evidence in Victoria, Western Australia, the ACT, common positions in a number of employer associations saying that this practice needs to end. It is about exploitation of owner-drivers. Various models have been put forward in various states by consensus. There is a long history of consensus in New South Wales. Unfortunately, there was obviously evidence yesterday, which my friend here has already spoken to. But there has been a consensus politically in many arenas about the need for owner-drivers to have minimum safe standards and minimum safe rates. If that is intimidatory, because it is a strong argument, then that is one person's interpretation.

Senator BERNARDI—But you reject the claim that was made about someone's business viability being jeopardised if they continue to support this bill publicly?

Mr Sheldon—If an employee or an owner-driver has an allegation against a company, they have a right to take it up in many various ways on an individual basis. If it is an organisational allegation, in New South Wales Industrial Relations Commission they have the right to take the allegation up. If it is a police matter they have a right to take the matter up. If somebody has made an allegation then I would like to be aware of it because this is the first time that I have been made of any allegation of intimidation being carried out.

Senator BERNARDI—Thank you for that. I appreciate that. It was raised yesterday and I just wanted to clarify it.

Senator MURRAY—Witnesses have the opportunity to respond if allegations have been made about them and you can read the *Hansard* and make a written response.

Mr Sheldon—I intend to make a written response. It would be appropriate.

Senator BERNARDI—I have another question and perhaps you are best placed to answer it, Mr Sheldon. In your submission you referred to the Western Australian bill, the Road Freight Transport Industry (Contracts and Disputes) Bill 2006. Are you familiar with that bill?

Mr Sheldon—I am broadly familiar with it but my friend here has a better understanding to answer any questions.

Senator BERNARDI—Mr Kaine, would you prefer to answer questions?

Mr Kaine—Yes, I think it makes most sense for me to hand that over to Brendan Johnson.

Senator BERNARDI—Certainly.

Mr Johnson—The Western Australian bill is largely modelled on the Victorian legislation that was enacted last year, which is based on providing an efficient, productive system with low levels of industrial disputation. It is based on fair business model legislation. The road freight bill has security of payment provisions that would enable contractors to ensure timely payment of invoices. It involves the establishment of a sustainable rate, which is what New South Wales and Victoria's legislation is based on, meaning that people can operate their businesses without receiving rates at such a low level that they are definitely going to go under. It establishes a road freight industry council which is a consultative council comprised of industry representatives from the unions, industry bodies, transport operators and those types of organisations.

It is very similar to the Victorian legislation in that it allows for the establishment of a code of conduct. And that code of conduct would act, in effect, as regulations to the primary act and allow the establishment of guideline rates to be set—not minimum rates but guideline rates—which allow industry participants to act with full information in the market, which is really a fundamental principle which I believe is fairly dearly held by many Liberal members of the Senate. It feeds back to Adam Smith's *The Wealth of Nations*, and the idea that participants in the economy should act with full information. It is a rational decision-making process that allows them to optimise their outcomes.

That is really what the economic basis is, because when you have situation where unfair business practices are allowed to be engaged in and where rates are pushed down, through competition in the market, to the extent that it creates unsafe situations, then you get to a point where there is a proper role for government intervention to prevent those negative externalities of unsafe conditions arising.

Senator BERNARDI—Thank you. Your Transport Workers Union has obviously made a contribution to the drafting of this legislation. Is that correct?

Mr Johnson—To the Western Australian bill?

Senator BERNARDI—Yes.

Mr Johnson—I think it is safe to say there would have been input.

Senator BERNARDI—There would have been input. Has the bill been tabled?

Mr Johnson—I do not believe it has been tabled yet but it has been widely foreshadowed and is imminent.

Senator BERNARDI—You said it has been widely foreshadowed; has there been an exposure draft of it?

Mr Johnson—I am not aware, Senator.

Senator BERNARDI—So where do you get the information you have put into your submission on the specific contents of the bill, considering it is not in the public domain?

Mr Johnson—I am relying on the submission of the Western Australian government, which was posted on the committee website and which I have read. The contents of that submission from the Western Australian government appear to line up very directly with the Victorian legislation. I am also aware of discussions that have occurred between the Victorian

government and the Western Australian government in terms of preparing that legislation in order to see how the Victorian legislation operates in practice on the ground—so things like the establishment of a code of practice and how that operates and how rates and cost schedules operate for the different industry subsectors and different vehicle classifications. Things like that are quite relevant.

Senator BERNARDI—In your opinion, is this Western Australian legislation designed to join the exemption contained within our proposed bill?

Mr Johnson—I think it should squarely fall within the exemption. Similarly, the ACT legislation, which I am aware is also proposed and running along similar lines—

Senator BERNARDI—That has actually been tabled though, according to your submission.

Mr Johnson—Yes. That should also fall into the exemption. What we get back to is a very central argument—that owner-drivers fall into a special category of participants in the market who require government intervention in order to prevent those unsafe circumstances arising out of the negative competitive factors in the market. If that principle is accepted in New South Wales and Victoria, which it is—and it has been thoroughly canvassed in the Quinlan report, in the Victorian report of the inquiry into owner-drivers and in numerous studies—it should be accepted across the board.

Senator BERNARDI—You talked about your input and contribution to the Western Australian bill, and you have obviously made some reference to it. Has there been a wide consultation across industry participants outside of the union movement?

Mr Sheldon—I might be able to supplement those comments. Unfortunately, I do not have here the people who are on the committee. It is a formal committee, which has been formulated with both the major substantial employer association, the Transport Workers Union and others. We would be happy to send a copy of those committee documents and the formulation of that committee to you. I understand they have been meeting for some months. There is also broad consultation amongst owner-drivers in Western Australia. There was a meeting reported in the press of 600 owner-drivers discussing that legislation in Perth, and there have been many meetings of large numbers of owner-drivers going through the whys and wherefores of the proposed legislation. I might add that, to my knowledge, there has not been a statement from any owner-driver in Western Australia opposing the proposed legislation or the intent of it. I also have the clear understanding from media reports and general discussions with the employer association that the employer association—and obviously they can speak on their own behalf—support having this legislation as well, as outlined in our submission.

Senator BERNARDI—Were these meetings in Western Australia for the owner-drivers organised by the union movement or associated in any way with the union movement?

Mr Sheldon—There were numbers of owner-drivers there who are members of the union in Western Australia—

Senator BERNARDI—But were they organised or coordinated by members of the union?

Mr Sheldon—No, they were coordinated by owner-drivers themselves. The union was also asked to answer questions at those meetings.

Senator BERNARDI—Mr Dewberry, you indicated that you believe that the New South Wales regulations are the best practice to go forward, but you also intimated that you believe a national process should be adopted to enact those same sorts of regulations on a national basis.

Mr Dewberry—Yes.

Senator BERNARDI—So can I draw the inference that, whilst there may be disagreement about a nationally consistent policy approach to this, you support a nationally consistent standard of independent contractor and owner-driver legislation?

Mr Dewberry—You may.

Mr Sheldon—I think that should be put in context. Obviously Mr Dewberry can speak for himself, but I can say that in previous discussions with all the owner-drivers who have made presentations to committees and other bodies within the parliament it has also been expressed that any national legislation should reflect appropriate pieces of legislation in any state. As it stands at the moment, there is a lot of conjecture about what the appropriate national legislation should be because of the different commercial and operational arrangements that exist in various states. Is there capacity for national legislation? That is what our submission will be looking at in January next year. Is it appropriate to override the New South Wales, Victorian or other proposed legislation in other states at this point? I would say not.

Senator STERLE—Mr Sheldon, thank you very much for availing yourself to the committee. To the owner-drivers, it is nice to see real people, real faces, people who are involved at the coalface. Over the last day and a half, we have taken a number of submissions from various witnesses representing companies that engage subcontractors, other unions that have coverage of subcontractors, other groups that purport to cover subcontractors—I could not find any figures on certain websites as to how many subcontractors they represent—and true contractors in the transport industry. The sad part is a lot of people want to stick their nose in and have a say about what is best for owner-drivers—and that is fine, as long as you talk to owner-drivers and represent owner-drivers, and I know that your association certainly does. For the purpose of the committee and to put some real credibility around the submissions we have had, can you tell us, Mr Sheldon, as secretary of the New South Wales branch and acting national secretary for the federal union, how many owner-drivers you have as members?

Mr Sheldon—Nationally, there are approximately 20,000. In New South Wales, there are approximately 12,000. The president of the branch committee of management in New South Wales, which is a governing body in between elections and subject to general meetings—

Senator HUTCHINS—Can I just ask what the fees are that owner-drivers pay? We have heard today that independent contactors pay $5 fees.

Mr Sheldon—They pay $546. Also a number of the owner-driver committees raise levies separately in their own funds. Some of those funds actually contain millions of dollars. Those funds are administered by those owner-driver groups, sometimes in conjunction with the

union but separately. The fees of $546 that are paid are under the auspices of the rules of the union. The president of the union is a Tooheys owner-driver. A third of the committee of management are owner-drivers. We have five sub-branches across the state and in the ACT. A similar breakdown applies to other states where owner-drivers have equivalent—and in some cases slightly higher—representation on those branch committees that formulate policy for their organisation.

Senator STERLE—What industries traditionally are the owner-drivers engaged in?

Mr Sheldon—A wide variety of industries: concrete, express, courier, cement, car carrying, container and some areas of long distance. There are some owner-drivers in areas of long distance in some markets, which are largely for the larger companies.

Senator STERLE—So there is a very broad coverage.

Mr Sheldon—Yes.

Senator STERLE—There have been some submissions that I believe have been very confusing and misleading. One word I find very misleading in this whole argument is the word 'independent'. In your submission you make it very clear to the committee—and anyone else who wants to read these submissions—that there is a difference between independent and dependent. Just so we get it very clear, how are the majority of owner-drivers engaged in Australia?

Mr Sheldon—The majority are dependent upon the particular employer that they are engaged with. They are not able to contract outside of that employer. Also, there is a group who are semi-independent; they might work for multiple employers over a period of a month. The degree of dependency on that sector of employers and their rates of pay—because, it is a competitive industry—is very much reliant on what the market is prepared to bear. Certainly in the trucking industry, where it is regulated, it means minimum safe rates. Where it is not regulated, which is long distance, we have seen a large, substantial carnage on our roads. In the case of the heavy vehicle industry that is long distance.

Senator STERLE—For the benefit of the other committee members and me—the owner-drivers are here and can talk for themselves—do you each work for one employer?

Mr Dewberry—Yes, 100 per cent for one employer.

Senator STERLE—Would I be right in assuming that is how you have always operated?

Mr Dewberry—Yes.

Senator STERLE—There is a perception in some of the submissions that you flit from job to job. You get the highest price and off you go.

Mr Kemplen—In my sector we might work for one person for a year or for a month or two and then we may have smaller jobs. We do move around between different builders in the same industry. We are not necessarily tied to one person, but that only applies to the tip trucks.

Senator STERLE—So you are on as per job. Once the job finishes—

Mr Kemplen—That is correct.

Senator STERLE—you go to another contractor who wins the next construction job and off you go?

Mr Kemplen—Yes.

Senator STERLE—Mr Sheldon, that has really cleared that up, because there has really been confusion. Certainly contractors in some fields would enjoy independence, I have no doubt—try getting a plumber to walk through your front door for less than $70 an hour—but you certainly do not enjoy that in the transport industry, in the majority.

Mr Sheldon—Another point to emphasise is that a number of people have given statements regarding goodwill, and I understand a number of other associations have put proposals forward regarding goodwill. Specifically in the case of TNT, we have three registered industrial arrangements regarding goodwill, as well as the industrial commission if there is a dispute or an argument about it. We have goodwill arrangements which exist across industry sectors because of what the competition is paying. If the competition, in the case of New South Wales, were to pay less and to opt out of the New South Wales system, then that would obviously mean that the goodwill would be under pressure, let alone the safe systems of rates that apply in New South Wales.

As some of our friends have said, when you have competition between putting food on the table, paying rent, keeping a roof over your head and paying for new tyres that you need, do you pay for the maintenance on the vehicle you should really have or do you turn around and put food on the table? As we have seen, the crisis in long distance is where people do not have that choice, those minimum safe rates. That is really the crisis of conflict, regardless of whether you are unionised, about what is a fair cost recovery across the market that still allows you to have competitive capacity, which occurs now, for incentive based systems where quality work is rewarded but where there are still safe minimum rates which protect people on our roads.

Senator HUTCHINS—My first question is to you, Mr Dewberry. It was unclear where you were saying that you in New South Wales are still here but your Victorian counterparts are not. Can you explain to us what you mean by that and how that came about?

Mr Dewberry—I said in my opening statement that my counterparts in Victoria are no longer with us.

Senator HUTCHINS—What company is that again?

Mr Dewberry—That was with formerly Pioneer Concrete, now Hanson Construction Materials. They had run their contract to its end and had no hope of renewing it. What they said simply was to 'Take your hardware and go'—the hardware being the truck, which was set up to do a specific job. That is what they did to them, because there was no regulation there to stop them from doing that, unlike in New South Wales. That is why I said in my opening statement that I believe we have the best regulation and legislation in New South Wales. It should be the model the rest of the nation takes on.

Senator HUTCHINS—So in essence the company was forced to negotiate with you, whereas they did not have to in Victoria.

Mr Dewberry—That is right, exactly. And we enjoy a further 10-year contract today because of that.

Senator HUTCHINS—Recently there has been significant publicity in New South Wales about a dispute at Tooheys brewery. I wonder if Mr Kaine and Mr Sheldon would like to comment on that. I see one of the delegates is behind them. How was that resolved? Was it because of the ability to go to this tribunal?

Mr Sheldon—There were many hundreds of thousands of dollars of goodwill invested in the business by owner-drivers. There has been a long history of drivers working for Tooheys. In fact, a number of those drivers were originally employees—some 30 years ago. There were also drivers who as recently as 12 months ago paid substantial sums to buy the business. There was a change of contract. These drivers have worked for not only Tooheys directly but as contractors in the various companies that Tooheys have used over the years. During that period, the livery of their vehicles was in Tooheys' colours. The drivers get awards from Tooheys directly for the performance of their duty. They have training sessions by Tooheys about how to deal with clients and customers et cetera. They are in Tooheys' magazines. They are part of the Tooheys' family, for want of a better word.

The company decided to award the contract to a new operator. Because of the cost pressures on that contract, the new operator then said to the Tooheys' drivers that they would decrease the contract rate that these drivers had been receiving by 43 per cent. They said that they would not compensate them for the goodwill.

When the Independent Contractors Act was first proposed it was to cover everybody. During the negotiations with the owner-drivers, they made a particular statement—which potentially is now parsed differently because an exemption has been proposed. They said: 'Take a 43 per cent rate decrease, cop losing hundreds of thousands of dollars of goodwill, cop us making any change at our whim regardless of the investment in your business and invest another $50,000 in upgrading your vehicle with no guarantees, because this is the best contract you are going to get because the Independent Contractors Act is coming and when that comes it will be Armageddon.' That was the response from senior management within Linfox. Those were the comments that they made through the negotiations. They thought that the independent contractors legislation was going to apply to owner-drivers. That may be the robust discussion of a negotiation, but I have different language for it. The matter was dealt with by the commission, which was critical.

CHAIR—I am not interrupting you, but I think you have made your point, Mr Sheldon.

Senator HUTCHINS—We had the New South Wales Road Transport Association here yesterday, and the union has a long history of relationship with them. That association represents waterfront carriers and customs brokers. I read in the magazine *Lloyd's List* about an application by people on the waterfront to the ACCC for an exemption to negotiate collectively. Are you aware of that agreement?

Mr Sheldon—I am aware of that.

Senator HUTCHINS—In your final statement, would you like to highlight to the committee exactly what waterfront carriers and customs brokers successfully approached the ACCC with?

Mr Sheldon—I will briefly add to my answer to the last question that was asked, and then I will go on to that. With that dispute, there was a blockade by the drivers because they were so desperately worried about losing their work. As a result of that, the matter went before the Industrial Relations Commission. The Industrial Relations Commission directed the drivers to go back to work, and that resulted eventually in the matter being resolved by the Industrial Relations Commission in New South Wales.

Regarding the waterfront issue, 250 companies negotiate with the two stevedores and through freight forwarders et cetera to carry out work on the waterfront. The ACCC has now given an exemption to an organisation so that they can put a collective rate, for those who wish to, to the two stevedores. The difficulty with the ACCC exemption is that one issue it is dealing with is the critical issue of competition. In a practical sense, you can have one rate, and that is a positive thing for the economy. The weakness, however, of that proposal is this: anyone on the negotiating committee who puts their head up in the negotiations is a very brave individual, because there is no obligation on the stevedore or freight-forwarding companies to re-engage them or to continue to engage them. These contracts are either on yearly, weekly, daily and sometimes even hourly bases, so you are a very game person to be on that committee. Secondly, if you are singled out or victimised, there is no recourse.

CHAIR—We will have to stop you there, Mr Sheldon. If you want to add to that answer in writing, please feel free to do so if you have not covered everything.

Mr Sheldon—Thank you, Chair.

Senator MURRAY—Mr Sheldon, I am glad you have raised the issue of contracts and their unilateral variation, because I am concerned, in this committee discussion, to look for ways in which people who shift out of an employee relationship under the law to a contractor situation in terms of this act have the protections and safeguards moved across with them as far as possible. The government has not done that. There are not cognate bills with this which address issues like superannuation or self-injury insurance.

I want to deal with the issue of contract variation. Mr Kaine, I would ask you to accept a request from the committee and I will ask the secretariat to provide you with the web links. There are two committee reports to which I want to refer you. One is the Senate Economics References Committee inquiry into the Trade Practices Act and protections for small business. That issue was reported on in March 2004. The second report that I will refer you to is from a Senate Rural and Regional Affairs References Committee inquiry into the wine industry. That committee reported this year. The secretariat will send you the web links for those.

In both of those there was unanimous—and I stress 'unanimous'—all-party acceptance of some changes to the Trade Practices Act and included in those was one which sought to prevent or restrict or better govern the circumstances where a contract could be unilaterally varied. I again stress it was a unanimous recommendation. The government has done nothing about it, but there is strong support across all parties. I would like you to have a look at that and come back to the committee with a view as to whether that would additionally assist people who find themselves in a contracting situation. Obviously, it would cover the whole economy but I think it has relevance to the remarks that you have made. Are you happy to accept that?

Mr Kaine—Yes, Senator.

Senator MURRAY—Thank you very much. The other thing that I would ask you on notice to do is to glance back through the *Hansard*—and I do not particularly direct you to my questioning—to see if you could isolate the most important protections which should be generally applied nationally for contractors. In my own circumstances, I think superannuation and insurance against self-injury are particularly important. But you may have other views and may suggest ways in which people could be better covered, because I am concerned. It is all very well for this bill to isolate New South Wales and Queensland but in my own state of Western Australia, for instance, there are huge distances travelled by owner-drivers and there are many other industry sectors—construction and housing—where large numbers of contractors, both dependent and independent, operate.

My last request on notice is for you to pay much more attention than you have, and I appreciate what attention you have given to it, to the issue of definition. It seems to me that there is some doubt as to whether 'dependent' and 'independent' actually cover the same field with respect to contractors. Does this legislation cover off dependent contractors? Are they automatically excluded or not? I do not know. You may have an opinion on that. The second issue is whether the legislation applies to an individual, as defined by the Productivity Commission as to the nature of a contractor, or a contractor who may at times employ somebody. As you know, it is very common in your industry for a member of a family to be employed, even if it is part time, temporarily or occasionally, to do the books and a payment is made for that. Do those people fall within this bill or outside of it? I am not sure, so I would like some more insights into that if you are able to provide them.

CHAIR—I also have some questions on notice, which we do not have time for. I will put those in and I would be grateful if you would respond to them. Thank you all for your appearance here today.

[12.02 pm]

CORNEY, Mr Brian, Director, Private Sector Division, Industrial Relations Victoria

LESTER, Ms Andrea Louise, Senior Policy Analyst, Industrial Relations Victoria

LOVEL, Mr Philip, Chief Executive Officer, Victorian Transport Association

CHAIR—The committee has before it your submission; are there any changes or additions?

Mr Corney—No, there are no changes to the submission.

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

Mr Corney—Thank you very much. The submission is on behalf of the Victorian government and Ms Lester and I are departmental officers. We have, with the committee's indulgence, enjoined Mr Lovel, the Chief Executive Officer of the Victorian Transport Association, to provide some practical responses to any questions the committee might ask in relation to the owner-driver legislation. We had also intended Mr Brendan Johnson from the TWU, who is also a member of the council that has been established under the owner-driver legislation, but I understand that the committee has some views on that given his previous appearance.

CHAIR—Mr Johnson had previously appeared before the committee, but thank you.

Mr Corney—Yes. I just make that comment at the start to ensure that the committee understands that there was a matter of balance that we were to present to you.

CHAIR—Yes, certainly.

Mr Corney—Thank you. You have the submission that has been provided by Victoria in relation to this legislation. Our submission ranges across a number of subject headings. First of all, in respect of the Victorian Owner-Driver and Forestry Contractors Act 2005, Victoria had previously urged the Commonwealth to not exclude the owner-driver act. The owner-driver act applies to owner-drivers in both the transport and the haulage and harvesting sectors of the forestry industry.

The Victorian legislation is broadly modelled on the Victorian retail tenancies legislation and is accordingly not readily characterised as industrial legislation. It provides three key elements: (1) the provision of information to small business, (2) a low-cost commercial mediation system by the Small Business Commissioner and ultimate determination by the Victorian Civil and Administrative Tribunal and (3) prescribes unconscionable conduct and certain harsh business activities. It uses this framework of commercial laws and institutions, not an industrial or an employment based framework. Victoria welcomes the Commonwealth's decision to include the Victorian owner-drivers act within clause 7(2) as an act that is not excluded and strongly supports the maintenance of this position. Victoria will willingly participate in the national review of owner-driver laws proposed by Mr Andrews.

The key concerns that Victoria addresses in its submission relate to the exclusionary and savings provisions in clauses 7and 8 of the bill. In very simple terms, they appear, on the

technical wording of the draft legislation, to override key provisions of the Victorian Outworkers (Improved Protection) Act and provisions of the Fair Trading Act and fail to provide a simple and low-cost means of obtaining a declaration on the status of particular working arrangements. We believe that the three matters that I have just briefly gone through can be readily remedied and, certainly in respect of the outworkers legislation, improved in a manner that is totally consistent with Mr Andrews's comments in the explanatory memorandum. We think it is really a matter of detail and technicality rather than going to the very building blocks. Our comments earlier about owner-drivers and owner-drivers legislation in Victoria indicated that Victoria has a commercially based set of arrangements rather than something else.

I will briefly go through a number of headings that are set out in our submission. The first is sham contracting. There have been recent notorious examples of sham contracting arrangements that have had some publicity in the media. While the legislation provides civil penalty provisions, in our submission we believe that there should also be a simple and inexpensive mechanism for individual workers or employers to seek a declaration from the court as to their employment status. In other words, it is a quick snapshot by way of a declaration, without leaving people exposed and not knowing what the arrangements are and with the only finality coming about when there is a civil penalty. That is the first recommendation in our submission.

The second element in the tranche of matters that I am putting to you relates to the impact of the bill on the outworkers legislation. We say in our submission that the bill in its present form radically alters the status quo in Victoria by removing the operation of Victorian laws which go beyond the federal law in providing protections to outworkers. As I indicated—and we put some faith in this—the explanatory memorandum accompanying the bill states that the exclusionary provisions operate to expressly preserve state and territory laws that affect outworkers who are party to services agreements. So it is very clear what the ministerial intention is in the explanatory memorandum. We think, however, that the technical wording—and we have set that out—pursuant to the savings provisions in the nominated sections of the bill would in its present form seek to affect and ultimately set aside the key elements of the Victorian outworker protection.

In very simple terms the outworker laws are about ensuring that Victorian outworkers receive terms and conditions consistent with employees. This follows a series of research over a number of years by any number of organisations. I think it is fair to say that the common view across the body politic is that the outworker area is one that is particularly vulnerable and is subject to extremes of treatment. The Victorian legislation aims to overcome those provisions.

In its present form, because of the wording of the bill, we believe that it affects the ameliorative provisions that are set out in the Victorian legislation which allow the claiming of unpaid remuneration against the apparent employer and the principal contractor; entitlements under the federal award; the operation of making it an offence not to comply with a mandatory code of practice; the inspectorial rights of information services officers; the right of entry by other union officials; the victimisation provisions, if an outworker uses the

provisions of the Victorian legislation, to protect them against victimisation; and the recovery provisions.

If on our analysis, as set out in the submission, the legislation fails, which we say it does, it goes to the very building blocks of the Victorian legislation. So we recommend a number of technical amendments which we believe are (1) clear, (2) easily introduced into the legislation and (3) if introduced in the form that we set out in the recommendations, entirely consistent with the comments made by the federal minister in the explanatory memorandum. In the absence of these amendments the protections afforded to Victorian outworkers will be radically reduced.

The next issue is that Victoria is concerned that the provisions of the Independent Contractors Bill purport to preserve the operation of state and federal laws. It is at best unclear and it is a very broad description. The interplay of the words 'workplace relations matters' and the exclusions from workplace relations matters in different parts of clause 7(1)(a) and (b) and clauses 8 and 2 is far from clear.

Victoria notes that the Commonwealth has enunciated an intention to override longstanding Queensland and New South Wales unfair contract laws. While Victoria does not support this objective, it could be achieved by expressly nominating and overriding particular state laws rather than attempting to stake out a very broad subject matter field that goes beyond the subject matters and the intention of the bill. So, again, we think that the wording of clauses 7 and 8 is complex and we address that in our particular recommendation.

The last major issue that I would address in this overview is the impact of the bill on fair trading laws. Again, this goes to the drafting of the legislation. We believe there are different mechanisms to overcome this simply. All state and territory senators would be well versed and would know that there are state fair trading statutes which reflect to varying degrees consumer protection laws under the federal Trade Practices Act. This has been in place for many years. It is well known and I think accepted in the community. It is not being used in any manner to regulate independent contractors in the manner impugned by the bill—that is, as if they were employees. So state fair trading legislation has not been used anywhere, to the best of our knowledge, to try to affect the role of independent contractors and their activities.

Fair trading laws, as I said, operate at a number of levels. The relevant key provisions of the Fair Trading Act relate to services, unconscionable conduct, misleading and deceptive conduct and consumer-trader and trader-trader disputes. Aspects of the Fair Trading Act are seemingly excluded by the Independent Contractors Bill. That brief list I gave you indicates the importance of fair trading legislation and includes an analysis of where that fails.

In summary, the act does allow an exemption of consumer rights, but in our view the phrase 'consumer rights' may well not be sufficiently broad to encompass those key elements of state fair trading legislation that go beyond the very simple and, we believe, narrow view of what consumer rights might be. In conclusion, there seems to be no logical reason to exclude independent contractors from laws which would provide benefits, protections and dispute resolution for businesses generally. This would have the unusual and unexpected outcome of treating independent contractors, who are usually small and vulnerable, in a less favourable way than larger businesses. We make a number of technical recommendations to ensure that

state fair trading legislation is given its proper import and is not caught by the 7(1)(a), (b) and (c) provisions, that fair trading should be listed as a matter of exclusion in clause 8(2) of the bill and that the fair trading legislation, in Victoria in particular, should be listed as a law that is not overridden by the Independent Contractors Bill in clause 7(2)(b).

CHAIR—Thank you for that very comprehensive opening statement. Senator Murray, do you have questions?

Senator MURRAY—You have stated that it is better for the Commonwealth legislation to specify particular state laws that are proposed to be overridden rather than take a general approach. As you know, that can be problematic in that laws may change or new laws may be introduced. Do you think that, rather than the approach of specifying the individual laws in statute, a power should be given through regulation as a disallowable instrument to name those laws, which would then be open to them being changed through regulation periodically?

Mr Corney—That, of course, is a mechanism. I suppose it depends on which side one comes from on this matter. If the particular legislation to be excluded is part of the principal legislation, it of course is more difficult to move out of that legislation than, say, if one included it in a regulation-making power. We believe that it creates greater certainty and clarity by way of inclusion in the legislation rather than just using a regulation-making power. I suppose the broad concern with regulations is also that one can readily include other pieces of legislation according to the want of the regulator. We believe that a different hurdle needs to be approached in relation to legislation—it creates a permanence and a clarity.

Senator MURRAY—The thing is that you rightly indicate that the provision in the bill covers the field—it covers any present or future act in any state or territory—whereas, whatever the limitations of a regulatory instrument, delegated legislation has to take notice of the substantive act and, being a disallowable instrument, is subject to debate and disallowance. I would have thought that, if the Commonwealth is unable or unwilling to accept your proposition, the proposition I put to you is the next best.

Mr Corney—As I say, we understand that it is a mechanism. Our preference, as we indicated, is for legislation, for the reasons as shown.

Senator MURRAY—My second question is: can you confirm that no state or territory government supports this legislation or are you only aware of the Victorian government's views?

Mr Corney—I cannot respond to that in a considered way. I am not aware of all the other states' views. I can only speak to the Victorian government's view.

Senator MURRAY—Do you regard this as a hostile takeover—one which is done without the agreement of the Victorian government?

Mr Corney—Let me respond in this way. There has not been consultation in the development of this legislation. In particular, there has not been consultation on the issues of state exclusion, the nature of the characterisation and the laws that are to be involved. This is our submission that we made in 2005 to the House of Representatives standing committee inquiry into independent contracting. Supportive of those comments that I just made at page 3 of that submission, we said:

Victoria is opposed however to any move to override State and Territory laws with respect to these matters. The Federal Government should work with the States and Territories to develop nationally consistent solutions.

Senator MURRAY—Nationally consistent means agreed, doesn't it, in your language?

Mr Corney—I think the emphasis is on consultation between the states and the Commonwealth. You would be aware of the matters relating to the referral originally in 1996 of the Victorian industrial relations powers and the agreement that was entered into between the two governments for consultation. Certainly, from the Victorian end, we are extremely keen to consult in the development of relevant legislation.

Senator MURRAY—I ask you these questions deliberately because I was intimately concerned with that circumstance and it seems to me that the value of agreements between states and the Commonwealth is that they are likely to survive changes of government whereas a hostile action, in my view, is unlikely to survive a change of government. Therefore, contractors who are affected by this legislation are going to face an uncertain future because, if there were a change of government in 2007 or 2010, or whenever it would be likely to occur, I think the circumstance of this legislation is highly likely to change. In your experience of intergovernmental arrangements, is that observation accurate?

Mr Corney—It is true that the 1996 referral was made under another government in Victoria. The referral has both continued in its current form and, of course, has been extended following discussions between the federal and state government to provide the common rule power. So, rather than a personal comment, if one looks at the evidence in this area, where there has been consultation on the development of that, so the underpinnings have remained. As I say, and as we have said previously, we are very keen to consult with the Commonwealth in the development of legislation.

Senator MURRAY—If this legislation is policy driven rather than ideologically driven—I draw no inference; I just relate back to views that have been put to the committee—it would seem to me its longevity would be shored up if the Commonwealth government were to assess the protections, such as you have outlined, and consider how best those which are particular could be transferred into Commonwealth law. Until such time as they arrive at that, it obviously would be best to exclude certain categories from the contractors' law. Outworkers are an obvious category, given the nature of your submission.

Is that an approach you would accept? It is open to this committee to suggest to the government that this legislation does not stand well enough on its own and that the Commonwealth should consider—to use my language—shoring it up in other areas of importance, and I name superannuation, insurance against self-injury, perhaps trade practices areas and the personal services income legislation, and there may be others that the committee would be interested in.

Mr Corney—We express no view in respect of those additional matters that you raise. Suffice to say that we have approached this submission, in lodging it with the committee for its consideration, in a way that will actively assist the process by trying to identify what we believe are discrete and concrete areas that can be looked at and reasonably readily rectified and yet enable the thrust of our concerns to be implemented in a proper and appropriate way.

CHAIR—I have one question for Mr Corney, Mr Lovel or indeed Ms Lester. An inference was made, I think, by the previous witnesses from the TWU that the state of the owner-driver transport industry in New South Wales is very healthy, given the protections afforded by the New South Wales government compared with other states. While I do not expect you to comment on that statement, could I have an assessment from any one of you of the state of the owner-driver industry in Victoria, given that it operates as more of a free market activity?

Mr Lovel—It is good to have a chance to have a say, rather than answering those technical questions. I represent 700-odd freight logistics companies, and I have done that for nearly 20 years now. A lot of my time has been taken up with owner-driver activities and disputes. I have handled hundreds of disputes over my time. One of the issues with disputes is that we have never had a process of having somewhere to go, and for some of the interstate disputes—blockades on the Hume Highway, for instance—we have had to go to the Industrial Relations Commission and ask for help, even though they do not have jurisdiction, so we support this new legislation in Victoria on the basis that it is business to business, which is fantastic. I always said in disputes: 'Hang on. You guys are small business people. What are we doing here talking'—

CHAIR—When you say that you support the new legislation, do you mean the Victorian legislation?

Mr Lovel—Yes, the Victorian owner-driver legislation.

Senator MARSHALL—That is an important clarification.

CHAIR—I thought I had better check that.

Mr Lovel—I am talking as a Victorian. I am a member of the council, as is Brendan sitting behind me, who is from the Transport Workers Union, and we have a very cooperative relationship working through it. We have a meeting on Monday morning, for instance. They are not easy meetings—we have long and strong debates about the issues—but we are working through them. The tradition in Victoria when working with the union is that we have a very cooperative, robust relationship and we resolve our issues in that matter.

As to the health of the owner-driver industry—and it is an interesting point that you make—I would say that the owner-drivers who belong to members of the Victorian Transport Association are very healthy, because we have brought in a fuel levy and proper insurance and we have a whole array of arrangements, including our safety guide, which applies to owner-drivers. Outside that, where there is really no expertise in transport, there are thousands of owner-drivers who do not have the ability to understand business and safety—they operate on the roads and share the roads with us all—and so this owner-driver legislation in Victoria gives the ability to assist with that. We have lots of good publications, with a code of conduct and a new 90-page booklet—even though it is too long, Andrea—on how to operate a transport business. That is all very positive stuff, so we would hate to see those relationships destroyed by any federal legislation. I have put my time into this session today to come up to explain that. It is very important that we keep the owner-driver legislation going in Victoria.

Senator MARSHALL—Mr Corney, you indicated that the explanatory memorandum with respect to outworkers talked about preserving state and territory laws. In the second reading speech when the bill was introduced, the minister was actually more specific. He said:

... the principal bill preserves existing protections for certain groups, in particular textile, clothing and footwear (TCF) outworkers ...

He then went on and said, very clearly:

... the Independent Contractors Bill 2006 will not override state protections for contract outworkers.

Your submission then details a litany of flaws in the legislation and you clearly tell us that the effect of this bill will be to remove existing protections and will force state legislation, in Victoria in particular, not to apply in respect to outworkers. So it would appear, based on your understanding of the bill, that the federal government has got it wrong, which is a concern to everybody on the committee because there is no member of this committee who does not share the policy objective that has been outlined in the explanatory memorandum nor who disagrees with what the minister has said in his second reading speech. Have you raised these issues with the federal minister and, if you have, what was the response to your very detailed criticisms about the legislation in this respect?

Mr Corney—I think the analysis is correct. As I indicated, we approached the development of this submission to the committee in good faith on the basis of the comments that were made in both the explanatory memorandum and the second reading speech. We thought that if the legislation, considered objectively, was not satisfying those principles, it was incumbent on us not only to identify that that was not correct but also to identify it in a considered and helpful way—to say where we believed that it had failed. That is addressed in the submission and I spoke to it at some length.

The submission and the matters included have, of course, gone on this committee's website and we have apprised the Commonwealth department at officer level of the issues and concerns that have been raised by us. I should say, too, that we initially had these concerns when we saw the bill. But we also, for the sake of completeness, sought the highest quality legal advice—private sector legal advice—and that both confirmed and is reflected in these comments here, in saying that the legislation does not meet the principles as set out in both those documents I referred to—the explanatory memorandum and the second reading speech that you referred to.

Senator MARSHALL—Have you raised these issues directly with the minister's office, and what has been the response? And have you provided them with that legal advice as well? It is one thing to say, 'There is a drafting concern about those issues', but to have it backed up by written legal advice says, to me, that the stated objective of the government and the minister clearly is not being achieved.

Mr Corney—It has been raised at officer level with the federal department. We have used the opportunity of being here in Canberra to raise that. To be fair, they have received our views and, while we have not formally shown them the legal advice, the content of this submission is comprehensively reflective of that legal advice, so it will be a matter of the department and, obviously, the minister considering it.

CHAIR—We will be talking with the department later this afternoon so we can raise the matter with them then.

Senator MARSHALL—So they have not responded to you as yet?

Mr Corney—To be fair, we have raised it at officer level and there is obviously a raft of matters that need to be considered, but it has been raised comprehensively and they fully understand the basis of our concerns.

Senator MARSHALL—You talked about the concern about the other areas being overridden. The second reading speech makes the point that:

> State unfair contracts jurisdictions will be overridden ...

Is that your understanding of the intention of the bill? Or do the areas that you referred to in your submission not cover unfair contracts jurisdictions?

Mr Corney—It is not an unfair contracts jurisdiction, as such, in Victoria, so our submission does not go to that matter.

Senator HUTCHINS—Is the mediation process within the council?

Ms Lester—The Owner-Drivers and Forestry Contractors Act was broadly modelled on Victoria's retail leases legislation, which has been in place for approximately four years. Coinciding with that was the establishment of the Office of the Victorian Small Business Commissioner. As well as representing the interests of small business to government and promoting policies that enhance the small business operating environment, the Small Business Commissioner has taken a role under the retail leases legislation of coordinating a panel of mediators. That model was so successful that we have picked it up in this legislation. It is not yet operative; it will come into effect on 1 December. It gives the Small Business Commissioner the principal mediation role. To actually be able to go further, to VCAT, the Victorian Civil and Administrative Tribunal, you need to have a certificate from the commissioner saying that mediation has not resolved the dispute.

Mark Brennan is our Small Business Commissioner. He will put together a tailored panel of commercial mediators with a variety of business experience or a legal background, as appropriate, and they will deal with that. He also has that function under his own legislation. A range of matters from the transport industry have gone through this mediation process using that legislation, and the feedback to date has been very positive.

Mr Lovel—Before we go to the Small Business Commissioner, we get out our bit of four by two and try to settle it around the VTA boardroom table.

Senator STERLE—Senator Bernardi will get hold of you if you say that.

Senator HUTCHINS—Would this mediation process deal with disputes about rates, unfair contracts and goodwill?

Ms Lester—It is a broad jurisdiction—disputes arising under or in relation to the contract. It could be a simple matter of debt recovery—not having been paid or the person is continually late in paying—

Mr Lovel—Fuel levy.

Ms Lester—Yes. It could also be in relation to unconscionable conduct. We have effectively cut and pasted unconscionable conduct provisions that mirror those in the Trade Practices Act into our legislation. Again, where there was such an allegation, the first step would be mediation by the Small Business Commissioner.

Mr Lovel—It is only a small cost, too—$95, I think.

Ms Lester—That is right—$95 per head.

Senator HUTCHINS—To make the application?

Mr Lovel—Yes.

Senator HUTCHINS—But could it cover goodwill claims?

Ms Lester—If there were a contractual dispute in relation to goodwill, that is correct.

Senator STERLE—I think I should direct my question to you, Mr Lovel. I want to talk about the Owner-Drivers and Forestry Contractors Act. Is it all done and dusted and waiting to go through parliament?

Mr Lovel—Perhaps Andrea can respond.

Ms Lester—It in fact has passed parliament. Certain provisions were proclaimed early, and they were the provisions that established the industry councils. They have a number of tasks to put some things in place before the remainder of the act becomes operative, and that will happen on 1 December this year.

Senator STERLE—Which industry bodies were involved in negotiating the bill?

Ms Lester—There was extensive consultation. Obviously transport is an area that touches almost every sector of the economy. Principally those involved were the Victorian Transport Association; the Transport Workers Union, as the key representative body of owner-drivers; A3P, the plantation growers association, in the forestry industry; VECCI; AiG—

Senator STERLE—AiG?

Mr Lovel—Yes, AiG, the Australian Industry Group.

Ms Lester—The harvesting contractors association was also involved. There was a long list that I would be happy to provide.

Senator STERLE—If you could, please. How long were the negotiations going for to get to the agreed position on the bill?

Ms Lester—There was a staged process. The department undertook an inquiry over a number of months in 2004, and submissions were received in relation to that. The inquiry report made a series of recommendations to government regarding the legislation. Following those recommendations, there was a further round of consultation during the drafting process before the legislation was introduced last year.

Senator STERLE—So how long did the process go for—roughly?

Ms Lester—I think approximately a year.

Senator STERLE—So there was plenty of time for people to contribute to arguments for and on behalf of. Would I be right in assuming that in Victoria industry groups have got their collective heads together and thought, 'We've got to make this better for everyone, so we are on a win-win situation?'

Ms Lester—Yes.

Senator STERLE—It would be fair for me to assume that it was all done in good faith and the outcomes will benefit Victoria and Victorians. That is what it is trying to achieve. I find it strange—and I would be interested to hear your views—and it must be very annoying to think that everyone has contributed. One would assume that, if it was to do with Victoria, Victorians would know what you want and what is best for you. But then there are federal bodies of certain organisations you have just mentioned coming over the top, and I am getting the impression that they know better than the Victorians.

Mr Lovel—From my angle it is very frustrating because, first of all, they sit back and say they really do not know what they are talking about. That is why I was keen to come today because they do not understand. As I have said, for 20 years I have been arguing business to business relationships. That is what an owner-driver is. They want to be their own businesspeople, and this is exactly what it sets out. We never had a disputes procedure that you could have an end result to because you have the drivers out on strike or bans. You come to our boardroom—and I am a layman; I am an engineer—and I do not have jurisdiction to solve the dispute. In goodwill, we solve it with the union. Now we have a process whereby if you do not solve it there you can go a further step—that is, the Small Business Commissioner. It has been interesting that over the last two years we have built a relationship up with the Small Business Commissioner and he is starting to understand our industry a lot better, so that is working well. It is very frustrating to think that we might do all this work and get to the end for no result. I cannot believe it.

Senator STERLE—I am struggling too, but thank you very much. I wish you luck.

Mr Corney—Would it assist if we provided a listing of the contributors to the initial departmental report as well as other work that has been done?

Senator STERLE—If you could, please. Nothing satisfies me more than when both sides of the industry come together and, with tripartite agreement, work with government to achieve best outcomes for their industry, their employers and their employees.

CHAIR—That is because we have had such difficult industrial experiences in the past that in Victoria we are very pragmatic. If we do not get together our state will go down the tube, I fancy.

Mr Lovel—I want to make the point that there is a shortage of truck drivers. We have a shortage of trucks. We are actually leaving freight behind because we have not got enough resources to move it, even though the economy is slowing a little. This gives an opportunity for new businesspeople to come into the owner-driver segment, provide their vehicle and grow with the freight task. If we do not do that we cannot get drivers, so this gives an opportunity for small businesspeople to create, as I said in my submission, another Lindsay Fox. That is how you will get a growth in the transport industry: professional people moving into the industry, doing the right thing, operating safely with reasonable circumstances.

CHAIR—Thank you very much for your submission today and for appearing before the committee.

Mr Lovel—I will pass this sign of cooperation around.

CHAIR—You would like to table that, Mr Lovel. The committee is agreed.

[12.45 pm]

CARSTENS, Ms Debra Janet, Member, FairWear

NGUYEN, Ms Rose, Member, FairWear; through Ms Bich Thuy Pham, interpreter

PHAM, Ms Bich Thuy, Community Worker, FairWear

FAWCETT, Ms Kathryn, National Industrial Officer, Textile Clothing and Footwear Union of Australia

LEE, Ms Hong, Outworker, Textile Clothing and Footwear Union of Australia

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

TUBNER, Mr Barry, New South Wales State Secretary and National President, Textile Clothing and Footwear Union of Australia

CHAIR—Welcome. The committee has before it your submission. Are there any changes or additions to that? As there are none, I invite those of you who would wish to to make a brief opening statement before we begin our questions. I understand that there are to be statements from the outworkers. Perhaps they could keep those to between two and three minutes so we can get through the questions.

Ms Carstens—As some of you know, FairWear is a coalition of churches, community organisations, unions, individuals, students and many others. We have been working for 10 years to end the exploitation of outworkers. We are disappointed to be here again defending the protections that have already been put in place when we would prefer to be working on the enforcement of the protections that have been put in place over those 10 years.

We met with members of this committee at the Work Choices inquiry last year and know that you do all recognise the unique situation of outworkers. We are looking for your help again to fix the problems that have been created for outworkers by this new legislation. Outworkers have quite different experiences in relation to the concept of independent contracting. Some are told that they are contractors or independent contractors. Some are actually required to put in place a legal fiction—Hong will tell you about that—and others like Rose have been given no indication of their legal status at all. But the common thread for all of them is that they have no choice, except to say no to the work. They have very low rates of pay and attempts to negotiate usually draw a blank and most will sign anything to keep their job. Even the outworker that we describe in our submission, who is getting above award wages and conditions, said if she had to sign an unfair agreement in order to keep her job she would do so.

From the moment the intention to have independent contractor legislation was announced Fair Wear was anxious about the impact it would have on outworkers. We approached the government looking for three things. We were seeking the maintenance of the state protections for outworkers so that both entitlements and monitoring mechanisms were maintained. We were seeking penalties for employers who tried to pretend that outworkers

were independent contractors and we asked the government to exclude outworkers from the remainder of the bill.

We are looking for clarity of the employment status of outworkers and the ability to pursue those who exploit outworkers directly or indirectly, no matter where they are in the contracting chain. The Independent Contractors Bill gives us neither. It excludes the operation of most of the state outworker protections. The Independent Contractors Bill creates a new Australia-wide category of contract outworker which strips outworkers of all award protections other than a minimum rate of pay. The Independent Contractors Bill introduces penalty provisions for sham contracting which are weak and easily avoidable and fails to provide specific protections against the sham contracting arrangements for outworkers.

We are looking for clarity and, unfortunately, what we have got are loopholes and confusion. Some of the outworkers here in the gallery today, and many others who are not with us, receive letters written on behalf of the minister assuring them that all existing outworkers' protections in state and federal law would be retained. Those letters were in response to their own letters expressing their concern about this new law. In the public announcement on 3 May, prior to the bills being released, the minister also stated that the employment status for outworkers under state legislation would be maintained. Unfortunately, with this legislation the minister has broken his promise to outworkers. We hope that this is simply the unintended consequences of drafting a complex piece of legislation. But the loopholes and the confusion need to be addressed by amendments or this government will end up leaving outworkers even more vulnerable than they already are.

Ms Nguyen—I started sewing at home when I arrived in Australia in 1991and have worked continuously in the clothing industry. I spent a couple of years working in a couple of factories—you could really call them sweatshops. I only received about $5 an hour. I have had about eight different bosses over the 13 years of working at home. Some bosses did not pay me and disappeared. I have lost thousands of dollars that way. At least now I am paid very regularly, but the rate is low. The work I am doing at home at the moment is very cheap. I get $2.70 per shirt. Sometimes I get $3.50 per shirt. For long skirts I get $3 per garment for the synthetic fabric and $2.50 for plain cotton fabric. I am a skilled worker but cannot complete two of these garments in an hour. I make the whole garment so I have an overlocker machine and two other machines at my house. A few months ago I was making evening dresses for $7.50 each. Each one will take me a couple of hours to complete. I have done bridal wear as well. Jackets are about the only thing I have not made.

Generally, I have to work 10 to 12 hours a day to complete orders on time. None of my eight bosses have even said to me, 'You are a contractor.' They just give me the order, tell me how much they will pay me and when I must deliver the completed order. I know the law in New South Wales says I should receive nearly $14 an hour for my work. I should also get overtime pay, reasonable working hours, superannuation and workers compensation cover. I want to have all these things, just like other working people. I want to be treated fairly but my bosses ignore the law and do what they want at the moment. I want the government to have strong laws that make it clear to my bosses that they must pay me award rates and conditions as a minimum. I want the government to have the law allow the union and the government inspector to chase up the bosses and make them treat us fairly.

CHAIR—I think we will have to leave it there, but thank you very much indeed for that testimony. Ms Lee, I invite you to make an opening statement.

Ms Lee—Good afternoon, ladies and gentlemen. I have worked as an outworker for over 20 years. I now do work for one factory, sewing women's jackets, shirts, pants and skirts. The factory has no inside workers; I think it has about 20 outworkers. Two years ago, I worked every day of the week. I only work when the boss at the factory gives me work, and now there is less work. Sometimes I work for three or four days in a row; then I have no work for a week. I never know when I will get more work. When I get the work it usually takes 12 to 14 hours a day to finish it by the time the boss at the factory wants it. When the work is difficult, I start at 8 am and do not finish until midnight. I get paid piece rates for my work. It works out to roughly three dollars per hour. I had to give the boss at the factory an ABN number, otherwise he would not give us any work.

About five years ago, I worked for a different boss. He told me that I could not have any work unless I had proof that I paid my own workers compensation. I got my children to help me to get the paperwork and paid $150. When I showed proof of the payment, the boss gave me work. Last October, I asked for more money to sew the jackets because they are a difficult job. The boss said, 'No,' and said: 'Do you want to do it or not? If not, I'll give it to someone else.'

Even in Victoria, we have the law to protect outworkers but up until today it has not happened yet. The boss still finds a reason to not pay outworkers properly. If the government makes new laws against us getting treated properly and if the government takes away the laws that protect us, maybe the pay will be even lower. I want to ask the government to make a law to give a lot of penalties towards this. That would mean that they would pay outworkers properly. That would mean it will happen not only on paper. Thank you for listening. Thank you very much.

CHAIR—Thank you very much for that. No-one else wants to say anything?

Ms O'Neil—We have some very brief detail that we are going to share between the three of us. Mr Tubner is going to commence.

Mr Tubner—I have been a union official in New South Wales for 25 years. For at least the last 18 years our branch has made a decision that, as far as outworkers and outworker protections were concerned, we never roped employers into the federal system. We believed that the New South Wales system for outworkers was the best system in Australia. So, as far as outworker protections are concerned, at a state level we have worked, for over 20 years that I have personally been involved in, with the employer groups in New South Wales who recognise the plight of the outworkers and with both state Labor and Liberal governments to make sure that outworker protections were there.

There was always one missing piece in the chain. It was not the outworker clauses that are in the award, because they are good clauses. The problem we always had was the link between the award and the retailers. With the help of the New South Wales government, we were able to put in place, firstly, a voluntary retailers code that has been accepted nationally, but also a mandatory retailers code in New South Wales. That was done with the industry,

with the support of all the groups. It went through parliament with the support of all sides of government.

So, as far as the issues of outworkers and state laws are concerned, it is important that the protections that have been put in place over years with consent from all parties are protected. I know that under Work Choices there was a commitment to do that. We are concerned that, either by the drafting or by intent, the independent contractor legislation has damaged what we believe are protections that need to be kept in place in the different states.

The chair asked whether we had any further information we would like to give up. I was not quite quick enough to take the opportunity. But in New South Wales at the moment we have a Senate inquiry into Work Choices. I am not going to bore you with the whole thing—

CHAIR—Is that a state government inquiry?

Mr Tubner—It is a state inquiry.

CHAIR—So it cannot be a Senate inquiry—I just want it correct. Is it the upper house?

Mr Tubner—Sorry; you are correct, and I am mistaken.

CHAIR—Thank you. It is a New South Wales state government inquiry?

Mr Tubner—New South Wales state, yes. We have just been through an exercise last week in New South Wales, and the issue of outworkers was brought up there. I have sought permission from the chair in New South Wales to table—just as far as the outworker side is concerned—the TCF submission to that. It may add some value to your deliberations.

CHAIR—If you would like to table that, the committee has agreed. Thank you, Mr Tubner.

Ms Fawcett—It is my intention to try to explain in a bit more detail how the Independent Contractors Bill maintains the appearance of saving these state outworker laws but in fact fails to deliver on the government's commitment to this. The starting point is at clause 7(1) of the bill. That is the provision that excludes the operation of a very broad range of state laws—namely, laws which, to paraphrase, firstly, regulate a party to a services contract as though that party were an employer or an employee and, secondly, make the services contract invalid or unenforceable on an unfairness ground, which is extremely widely defined in clause 9. Clause 7(1) provides that the exclusion will operate where the state law in question affects the rights, entitlements, obligations and liabilities of that party to the services contract. It is clear that 7(1) taken on its own would exclude such a large chunk of state outworker protection laws that any remaining laws would no longer have any practical effect.

CHAIR—Could you give me the name of that section again.

Ms Fawcett—It is clause 7(1). There are three parts to that. It is then necessary to look at clause 7(2)(a) of the bill, which I will refer to as the savings provision—although it does not do much saving, as I will go on to illustrate—to look at which state outworker laws get saved from that broad exclusion in 7(1). The answer, in our submission, is that because of the very narrow drafting of that provision very few laws will get saved.

Firstly, the savings provision only operates when an outworker is a party to a services contract. That means that a number of state laws that establish, for example, mandatory industry codes—such as the one that Mr Tubner was referring to earlier—which regulate the

conduct of other parties in the contractual chain will not be saved because those parties, whilst parties to services contracts, are not parties to services contracts with an outworker. That is an extremely important aspect of the state provisions because it is the aspect that allows transparency through the contractual chain to be maintained. I noted that the Independent Contractors of Australia's submission to the inquiry also has the same analysis—that such laws would not be saved.

Secondly, the savings provision provides that even when an outworker is a party to a services contract, only the laws which apply to and make provision for that contract are saved. This is in stark contrast to the breadth of laws which are excluded in 7(1) which, to paraphrase, need only affect the rights or liabilities of a party and need not have any relationship to the contract to be excluded.

An example of the effect of this narrow drafting is as follows. If you take a state law that provides that an outworker deemed an employee is entitled to four weeks annual leave, this is a law that provides the statutory entitlement to an outworker. It is clearly a law which affects the rights of an outworker and would be excluded by 7(1), but it is not a law which applies to or makes provision in relation to the contract that the outworker has with the person who engages them. Accordingly, it would not be saved by the savings provision. I understand that the committee has heard from the Victorian government and has read its submission which elaborates on the effect of that aspect of the drafting on the Victorian outworker legislation.

Thirdly, even if a law managed to survive these two very broad restrictions, the savings provision explicitly does not save laws which provide for the invalidation of a contract on unfairness grounds. One such unfairness ground is that the contract avoids the provision of various industrial laws. For example, a state law which said, 'Any contract with an outworker is invalid to the extent that it provides for payment of less than four weeks annual leave,' would not be saved because that is a law that would be excluded by 7(1). I understand that the government's intention in relation to this particular aspect of the exclusion is to override unfair contracts jurisdictions in states. In our submission, the manner in which this is drafted does far more than that and excludes a far broader range of laws.

Fourthly, clause 10 of the bill provides an overriding power for regulations to be made to exclude the operation of any state law, and that includes any state outworker protection law. We would say that this simply needs to be removed.

There is a certain air of familiarity about the position we find ourselves in today, but I am hoping that we have helped to make it clear to the committee that the savings provision and clause 10, along with other provisions that Ms O'Neil will elaborate on, will require amendments in order to meet the government's policy commitment. We have raised these concerns with Department of Employment and Workplace Relations personnel. We have strongly suggested that we work with them to suggest some solutions to these problems, and we are hoping that that might happen.

Ms O'Neil—I want to draw your attention to two other aspects of the bill on which we have concerns. One of them relates to part 4 of the bill, and the other relates to the amendments to the Workplace Relations Act which also deal with the issues around the introduction of independent contracting legislation. Firstly, part 4 removes from the

Workplace Relations Act what was previously a very limited provision in that act which dealt with the notion of so-called Victorian contract outworkers, places it within the independent contracting legislation and extends it nationally. We have heard today how the sham notion of a contract outworker has been created as a legally enshrined concept throughout Australia. Saying that there is such a thing as a contract outworker is directly contradictory to what has now been two decades of studies, reports, analysis and investigations by this Senate and this committee into the situation of outworkers and the conclusion drawn by those studies and inquiries which says that a critical aspect of their protection is their being deemed as employees. Introducing part 4 of the Independent Contractors Bill re-enshrines the notion of a contract outworker, which is directly contrary to the findings of all those reports and previous attempts to address this problem.

By creating the notion of a contract outworker and spreading it Australia wide, that provision allows for unscrupulous employers in our industry to put in place a way of contracting out the substantive protections that this committee helped enshrine in the Work Choice amendments. In terms of rights to award coverage and the conditions that come with those awards, such as being able to have access to the basic protections—things like annual leave, reasonable hours, overtime payments, shift allowance, redundancy, public holidays, superannuation or parental leave—those provisions would no longer apply to this category of workers. In fact, the only provision that would apply to the so-called contract outworkers would be a minimum rate of pay.

So it provides an opportunity for unscrupulous employers, in situations such as those you have heard explained today by Hong, to say, 'No, you're not an employee; you're a contract outworker,' and, on that basis, the only entitlement that would apply would be a rate of pay. There would be none of the other conditions that have been protected previously in legislation. Given our experience in our industry, we think this is something that would create huge confusion as well as an opportunity for people to find yet another way of making a loophole that would allow for the exploitation of these workers to continue. It does it in a way that purports to provide some minimum condition, but in fact we think it will have the opposite effect by allowing the stripping away of conditions that would otherwise apply.

The other matter that we wanted to draw the attention of the committee to was the introduction of provisions within the Workplace Relations Act in relation to sham contracting arrangements. We are of the view that, because of the exploitation that exists in our industry, we need specific, strong provisions that deal with the types of sham contracting arrangements that you have heard evidence of today. We do not believe that the general provisions introduced as part of the amendments in the legislation before you have any teeth, because they allow for a defence by an employer to say that they did not reasonably know that the contract was a contract rather about the rights of an employee. It gives them an opportunity to say that they did not know, that they did not understand and that, therefore, none of the penalty provisions that the legislation is designed to effect would apply.

So we think the legislation is a bit of toothless tiger. Given the sorts of efforts and hoops that unscrupulous people in our industry have used in the past to avoid obligations that they have to these workers, the legislation would not work as a deterrent. We would love to see

some serious deterrents within law that would stop these types of arrangements from being put in place. They are the issues that we want to draw to your attention.

We acknowledge the role that this committee and that of its chair, in particular, have played over many years in trying to make sure that this problem in our industry is cleaned up. We acknowledge the statements and commitments that were made recently by the federal government, for example, in the second reading speech about the intentions of the government, but we are very concerned that those intentions are not met by these mechanisms. As you have heard from Ms Fawcett and other speakers, we want to fix it. We want to work with this committee and ask whether it can assist us in ensuring that what we think are quite simple amendments to the legislation that it is considering are made to ensure that this problem does not get worse by the effect of the legislation.

CHAIR—Ms Carstens, do you want to say anything.

Ms Carstens—No.

CHAIR—I have encouraged a very full explanation by the witnesses of their view of the legislation, because I think it is very important for this committee to fully understand where the flaws are in this legislation, if there are any flaws, so that we can point out where they need to be fixed. That is why I have let the majority of the time go to your explanation of it, so we have about 12 minutes for questions.

Obviously you are worried about the conditions that exist being stripped away, but witnesses from the industry have been telling us in their evidence today that those conditions do not exist anyway, at least for them, and I presume for other similar individuals as well. Why don't they exist if they are enshrined in law? And if they are being abused, what attempts are being made to police them?

Mr Tubner—It is one step forward and two steps back with us. Every time we work a solution there seems to be another problem. We have known for a long time—since the Senate inquiries back in the early nineties—the problem we had. The award said that the union had the right to do these things to track the work down, but the problem was that we never got the honesty from the industry about how far the award could go back—in other words, we would ask a fashion house how many garments and how many subcontractors they had, and they would tell us probably about 50 per cent of the truth. This was the case until we were able to link the retailers into the game. Now I can contact David Jones over the phone and they will give me a complete breakdown of every unit that they have given out to the suppliers in a 12-month period. They tell us the turnaround time. I can then go back to the fashion house and, for the first time, be armed with all this information and say: 'We know that you have 100,000 units. Can you explain to us where those 100,000 units are being made?'

CHAIR—I see what you mean. Armed with that information, has it been possible for you to improve the sorts of working conditions that have been described to us?

Mr Tubner—I believe that in New South Wales we are on the cusp of developing a model, which will be moved across to the other states, because one retailer of significance is working closely with the union on the whole supply chain. We have gone from a known factor of about 95 employees to a known factor of over 300 employees. Those 300 employees will be fully award compliant. Whether they are outworkers or they are inside the factories is irrelevant to

the union. The issues are: how many people are there and are they being paid award wages, workers compensation and the whole lot? That will be the model. We could not ever have achieved that unless we had a retailer who was prepared to give that.

CHAIR—So what you are saying is that you need to have the whole chain involved, from the retailer to the outworker?

Mr Tubner—Yes, most definitely. The problem we have had, first with Work Choices and now with independent contractors, is that it actually takes a lot of time for an organisation as small as ours to be able to prepare ourselves to be able to try and defend these laws.

CHAIR—I am sure that is so.

Mr Tubner—It moves us away from what we are trying to achieve. But we are very close.

Ms O'Neil—I would like to add two other points. The first is that we have actually prosecuted companies. There have been over 200 prosecutions of clothing companies in the Federal Court over the last few years—in Victoria, for example—about specific breaches of the clothing trades award and the outwork provisions. Those prosecutions are about trying to send a message to the industry that these are serious provisions. The point that you made refers to the aspects that they go to. They are about the contracting chain, the cascading obligations that must be followed all the way through and the fact that it is about not just the right that the worker has for a rate of pay and conditions but also the obligations to make sure that that is transparent. An extraordinary effort is going on, but, as you have rightly drawn our attention to, the problem is not fixed. What we are trying to say is that we have developed an elaborate set of rights and conditions that exist federally and at state level to try and close off every possible way that these obligations can be avoided. We think we are at a point where those things are finally starting to have an impact on the workers who are working at home. Right at that point, we see this as providing an escape route. That is why we are here.

Senator MURRAY—Ms O'Neil, I think you are right in complimenting the committee. As you know, it was at my instigation that outworkers were first protected in Commonwealth legislation, and since then cross-party support, particularly through this committee, has been given to outworkers. You could have some faith that the committee will continue to bat for you. I want to ask you one question on notice. This bill is entitled Independent Contractors Bill. The objects of the bill, in three cases—clauses 3(1)(a), (b) and (c)—refer to the protection of the freedom of independent contractors. Independent contracting is referred to in (b) and again in (c). The definition of 'independent contractor' is not clear. The bill simply says '*independent contractor* is not limited to a natural person'. When this bill becomes an act, it will therefore be open to challenge that it does not cover dependent contractors. So the first issue that I want you to come back to the committee on is whether you consider outworkers to be dependent or independent and whether you think it is at all open to challenge—that, in fact, this bill might not cover outworkers in the normal course of events.

I think that the government, in designing this bill, has anticipated that problem, because when you turn to part 4 you will find that the definition of contract outworker is far more detailed. It no longer says 'independent contractor'; the definition is now 'contract outworker'. So they are being isolated and picked on deliberately. It says:

contract outworker means an individual who:

(a) is a party to a services contract; and

(b) performs work under it for another party or parties to the contract.

It is a far broader definition. It includes dependent contractors as well as independent contractors.

As you know, it has been the opinion throughout the period of this committee that outworkers are simply employees who work from home as opposed to elsewhere. I would like you to examine that definitional issue and indicate to us the ways in which the committee should perhaps view that and resolve the matter. My own view is that the easiest way is just to exclude outworkers from the provisions of this bill, but maybe you have a different view. I would appreciate it if you could give your advice to the committee. Is that clear enough?

Ms O'Neil—It is, Senator. Thank you for that.

Senator BERNARDI—I have two questions of clarification about the submissions that have come in. What would you estimate to be the average rate of pay now for outworkers? I know what it says in your submission—about $3.60—but I think there is a lack of statistical credibility, given that the survey was of 119 people out of 144,000 outworkers in Victoria and that it is five years old. For my information, and for that of the committee, I am interested in your thoughts on what the average rate of pay is now.

Ms O'Neil—I will give you an answer partly based on what has been detailed in academic research, which is where that figure is drawn from, in terms of the most detailed study to date, where outworkers provided a comprehensive range of information about their rates of pay and conditions. Also, in Victoria we run on a weekly basis English language classes for outworkers throughout Melbourne. We have been running those now for more than seven years, so we have a large number of outworkers who appear throughout those classes every week. In those classes they discuss in detail their rates of pay and conditions. Unfortunately, from our research in talking to those workers—many of whom are not members of our union and are not related to or involved in union or FairWear activities—their average rates of pay are still between $3.60 and $5 an hour. It is sometimes lower and sometimes higher, but if you look at the hours worked and the piece rate that is received, it still averages at that amount. Ms Carstens might also add to that in relation to their contact with outworkers in New South Wales.

Ms Carstens—We have contact with a network of about 700 Chinese and Vietnamese outworkers and also, through connections with other community organisations, about 100 Khmer outworkers. The reports that we are hearing from those women are that there are a lot of people still getting around $3 an hour. Rose's story given today is similar. Outworkers talk about $5 an hour also being accessible. Some outworkers get really excited when they are able to get $8 an hour. The women getting $8 an hour are working at the upper end of the market. They are the women working for designers and so on.

Senator BERNARDI—I raised it because I think that it would probably serve your cause much better to formulate a more extensive study rather than just of 119 people, which, from the figures provided, is 0.1 of one per cent of the outworkers in Victoria. I would encourage you to go down that path and also, given that the other examples are case studies, to provide an indication of the upper end—$7, $8, $9. I think that would help. Is there evidence that your

English classes are helping people to achieve a higher rate of pay because their command of English allows them to negotiate more strongly?

Mr Tubner—Yes and no. Do their English skills enable them to negotiate a better rate of pay? The answer is no. Due to their gaining English skills, are they able to look for employment in other areas with those new skills and by doing so get better rates of pay? The answer is yes.

Ms Carstens—I would add that our experience with outworkers who have increased their English and have got a better education is that they have chosen to leave the industry and go somewhere else where they can get a better income.

Senator MARSHALL—We are running short of time. I would have liked to have gone through and discussed in detail all the issues that you have raised in terms of where you say the flaws are. Let me do something more generally and talk about how we as a committee may resolve the issue if it is still unresolved. You indicated that you were having some discussions with the department about the weaknesses that you see in the legislation as it is. Have they responded to you in any way?

Ms Fawcett—The discussions were held only this week, and they responded in a preliminary way to say that they could see some force in our argument but they did not want the provisions to be ambiguous and they are intending to examine them in more detail. We do not have a particular commitment for any particular action at any particular time.

Ms Carstens—They said that they need to discuss all those with the minister's office, so they clearly were not making any commitments.

Senator MARSHALL—They are appearing before us this afternoon, so the matter may be resolved this afternoon, or it may not be. I am concerned about what happens if it is still unresolved at the end of the day. The committee is not reporting until the 25th of this month. I had a discussion yesterday with the chair, and one of the things the committee may do or could consider doing, if the issue is still unresolved to your satisfaction in terms of the stated policy objective of this bill, is getting the department and yourselves and reconvening as a committee to go through all those issues in some detail until we get a satisfactory resolution or at least have the committee satisfied that the department has in fact addressed the issues. It is something the committee would have to determine to do. I raise it now because I want to get an indication from you as to whether you would be prepared to participate in such a committee if it reconvened in that form.

Ms O'Neil—We would welcome the opportunity to be involved in an exercise, with the assistance of the committee, to try to resolve these problems. As I have previously said, I think that members of the committee have great expertise in this area. Obviously, we have some proposals that we think will fix the problem but our concern is that we actually raised what we thought could have been done before the legislation was drafted and introduced to the parliament and those things were not taken into account in the drafting of the bill. It was interesting to hear Senator Murray's suggestion about simple proposals to exempt outworkers from the operations of the bill. That was—

CHAIR—We are now at the pointy end of the action, Ms O'Neil, so—

Ms O'Neil—I think that is right, Senator, but in terms of how it would operate and being able to have some detailed discussions, we would welcome it with the department and the involvement of the committee.

CHAIR—Thank you.

Senator MARSHALL—We will see what the department says today, and you may have some more discussions with them in the very near future, but if you are still unsatisfied I would invite you to contact the committee and the committee will then discuss that and determine a way in which to proceed from then on. I think that is probably all I have got time for.

Senator HUTCHINS—I have a number of questions which I would seek answers to but, to expedite time, I might submit them to you and you could send them off—

CHAIR—That would be great. I have done the same with mine to the TWU. As there are no further questions, we thank the witnesses very much for their appearance today.

Proceedings suspended from 1.34 pm to 2.17 pm

HIGGINS, Mr John Edmund, National Industrial Relations Adviser, Civil Contractors Federation

LONG, Mr Craig Neil, Chief Executive Officer, New South Wales Branch, Civil Contractors Federation

CHAIR—I welcome our next witnesses. The committee has before it your submission. Are there any changes or additions you wish to make?

Mr Higgins—No.

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

Mr Higgins—I will briefly deal with chapter 6 of the New South Wales Industrial Relations Act. Then Mr Long would like to speak briefly about the definition of 'independent contractor', and he will also touch on contracting arrangements that apply in civil contracting, building and construction and the like. In New South Wales and, to a very much lesser extent, in Victoria commercial contracts with owner-drivers are regulated. In New South Wales the position is that owner-drivers have in a sense become a privileged group within the industrial relations system. The Industrial Relations Commission of New South Wales was given the power—I think in 1978—to inquire into any matter arising under contracts of carriage and to make a contract determination with respect to the remuneration of any carrier and any condition under a contract of carriage. The use of the words 'any matter' and 'any condition' has resulted in the New South Wales commission greatly intruding into the area, probably to a much greater extent than was ever envisaged in 1978. There are not just contract determinations dealing with rates; there are contract determinations dealing with employee benefits and matters such as superannuation and the like. The principal determination that applies to the Civil Contractors Federation is the Transport Industry Excavated Materials contract determination. Each year we renegotiate the rates in that determination with the Transport Workers Union.

The increase in the New South Wales commission's intrusion into the area appears to be continuing. I know that papers from groups that have appeared before you already have mentioned the transport industry mutual responsibility state contract determination. There is a decision pending in that matter which may impose obligations on operators who are not even a party to the actual contract with the owner-driver. The Transport Workers Union has also made an application for a redundancy contract determination that would extend redundancy benefits traditionally available to employees across to owner-drivers. So the trend of an expansion appears to be continuing and will no doubt continue if there is no alteration.

We have an unusual situation currently in New South Wales. If company employing 100 people or fewer terminates an employee's employment for poor performance, that employee cannot make an unfair dismissal application. If there is an owner-driver working for that very same company and that owner-driver's contract is terminated, that owner-driver can make an application to the New South Wales commission seeking reinstatement of their commercial contract or compensation in lieu of reinstatement. That power of the New South Wales commission is found at section 314 in chapter 6 of the Industrial Relations Act. We say that it is inappropriate that the New South Wales commission has continued to intrude into the area. It has consistently applied employee benefits to owner-drivers and, in many respects, sees

owner-drivers as quasi-employees. There is no reason why owner-drivers should now be insulated from legislative changes that will apply to employees and are, indeed, currently applying to employees.

In relation to all the other states, there is no such regulation. As I understand it, there is no proposal in any state of Australia to introduce a comprehensive set of industrial relations regulations such as those which apply in New South Wales. I know there is legislation in Victoria that in no way reflects the New South Wales legislation. There is proposed legislation in Queensland and Western Australia which will not apply to corporations, but it also does not go to anywhere near the extent to which New South Wales chapter 6 does.

We accept the reality that for many years—some decades—there have been contract determinations that set minimum rates of pay. To say that that should simply be eliminated overnight when the act is proclaimed would, I think, cause disruption, and I do not particularly mean industrial disruption. I mean disruption because people have been used to a particular system for some decades.

We propose that the rates—which are the principal clause under every contract determination—should be preserved by legislation in their current form and at their current level. We note that the Hon. Wilson Tuckey has proposed a sunset amendment whereby the chapter 6 arrangements and the Victorian arrangements would come to an end in 2008. We support that. We also note that there is a review to be held next year, which we would participate in. We support the proposed amendment by Mr Tuckey subject to any earlier outcome arising as a result of the review next year, with the preservation of the current rates applying in the interim and the jurisdiction of the New South Wales commission excluded. That covers the industrial relations aspect of chapter 6, which is our principal industrial relations concern.

Mr Long—The Civil Contractors Federation represents organisations of owner operators or independent contractors right through to national and multinational contractors in the civil construction industry. The civil construction industry is quite unique from the construction industry and also the housing industry—although, quite often there may be an amount of crossover as well, although we are particularly talking about infrastructure, development and people who own and invest in, quite often, large items of plant and equipment. That provides a mixture in our industry of what might be referred to as a subcontracting industry—organisations at the top which may ultimately be project managers operating with a subcontract chain through the development of the infrastructure right down to independent contractors or owner operators providing specialist skills and specialist items of plant and equipment. We would support legislation which would provide a clear definition of independent contractors and which would see them as a natural part of our industry. Traditionally they have been—and over the years they have become a larger part—a part of our industry. We have moved away from direct employment to a larger subcontract chain in the construction of infrastructure.

As I said, independent contractors are a feature of our industry. Quite often they provide unique skills and items of plant, and that quite often means large capital investment. It is important for our industry to have legislation which will provide clear definition of what an independent contractor is because without doubt, unfortunately, we do have sham contracting

arrangements in our industry. As an organisation, and for our members, we would like to see the industry rid of that. We would like to clearly be able to define what an independent contractor and employee is for those purposes. Going back to the Cole royal commission into the construction industry, some of these issues were embraced as problematic. Out of that, there was work commissioned by the ATO to establish working parties and committees, one featuring the ATO building and construction partnership with the industry. The Department of Employment and Workplace Relations has been party to that from time to time.

One of the key areas that the committee looked at was status of the worker. They endeavoured to provide clarity as to contractor-employee status. Much work has been done and we now have a tool on the ATO website which is quite good. It may need some finetuning in one area, but generally it provides a very good ruling. It is an electronic website tool that provides an outcome when a person or a situation is run through the tool. From an ATO point of view it provides an outcome that is reliable as to whether that person should be treated as a contractor or employee. That is quite a major step forward in our industry, to be able to have a tool to rely on in that respect. All the tests that we have done with that tool have provided positive outcomes. It has been very meaningful.

There is also work being done with the New South Wales WorkCover Authority in the area of workers compensation with regard to contractor-employee tests for workers compensation because of the problematic issues surrounding the industry in that area. They are using an electronic tool currently—which may turn into a hard copy tool—to step people through the process to determine contractor or employee status. This is a late development. Early evidence from that tool indicates that it is a process that makes determining contractor or employee status very achievable. That is far beyond where we have been in the past. We certainly do not support reliance on common law. It has not proved to be successful and has created many grey situations and, in our industry, too much of what I have referred to earlier as sham contracting.

A taxation ruling by the Australian tax office, TR2000/14, which is about withholding payments from employees, provides a summary of indicators which could be addressed in legislation to assist with the outcome of clarity in respect to contractor versus employee status. That does not go as far as providing a good, reliable outcome as these tests do.

One other matter that we have raised in our statement is a suggestion for the federal government to use legislation to enable government agencies to assist in approving contractors via evidence. That might be similar to what we call the 100-point bank check. You need to go along and prove your identity to open an account. To get that account, you need to go along and provide certain evidence. Likewise, if you want to be a contractor in an industry and maintain that status, it would not be impossible to have approved agencies check that. They may be organisations such as ours, federally registered workplace relations organisations or others. A person or an organisation could come to them and provide evidence along the lines of workers compensation, accident insurance and various things like that and prove that they are a contractor in this industry. As I said, that could be done under some form of agency arrangement.

We certainly support legislation that would provide clear definitions of contractor status and employee status. It is extremely important for our industry to achieve that, given the high level of sham contracting through the industry and people claiming to be contractors when

they would not otherwise meet tests to be contractors and who probably should be treated as employees and who are receiving taxation advantages along those lines.

Senator MARSHALL—You indicated that you thought that owner-drivers in New South Wales were nearly in a privileged position. Do I take from that that you mean that owner-drivers in New South Wales, because of the contracts determination regime that applies there, do better under that regime than they otherwise would in the absence of that regime?

Mr Higgins—There are certainly owner-drivers who would receive less if the contract determinations were not there. The position is that most of the larger companies have agreements with the Transport Workers Union, whether registered or otherwise, and they would do better than the contract determination. They are privileged vis-a-vis employees. I mentioned the reinstatement compensation aspect. They have all the benefits available to an independent contracting company—taxation benefits in particular, such as income splitting and the like—but they also have the same protection as an employee through the Industrial Relations Commission of New South Wales and the industrial relations system in that state generally. They have the best of both worlds, and I think that they are in a privileged position.

Senator MARSHALL—Do you think that it is wrong for them to have the best of both worlds?

Mr Higgins—I do not know that it is wrong, but—

Senator MARSHALL—What are you saying to us?

Mr Higgins—I do not think that they should have the best of both worlds. If you are an independent contractor and you are picking up the benefits of being an independent contractor, that is the world in which you should live.

Senator MARSHALL—They should be less than what they are now.

Mr Higgins—If you are an employee who is paying PAYE, then—

Senator MARSHALL—Mr Long, you told us that your organisation represents people from individual type owner-drivers, who might be plant operators, for instance, right up to big contracting businesses; so who are you actually representing? Given Mr Higgins's evidence about the contract determination regime putting owner-drivers in a privileged position, I would have thought owner-operators of plant and equipment would like that system to apply to them. What part of your organisation do you say you represent today?

Mr Long—I, in fact, represent the entire organisation. It is a commercial environment and—if I could add to the answer of Mr Higgins to your previous question in endeavouring to answer your question—it is arguably not correct that somebody is provided with a minimum rate when they are driving that truck as a sole operator. And yet the minute they purchase another truck and have another driver in it they become a fleet operator and people can negotiate whatever rate they like with them. It makes it very difficult for a level playing field and competition. Generally, I do not think it has worked well in the industry. We certainly do, as I say, represent the entire industry.

Senator MARSHALL—How did you come to that? To be honest, I find it a bit difficult to believe that owner-operators would not want the best of both worlds, which Mr Higgins says

is unfair and they should not have. Is it really the position of owner-operators that they want to work in an environment where they can get less?

Mr Long—Again, in a competitive marketplace it should be a matter of free enterprise; people should be able to negotiate what rates they would like to work for. There are situations where owner-operators in our industry do not get work, because they have to take the minimum rate under a determination. They cannot accept less, so they will lose out in getting work in some situations because they cannot compete with a fleet operator, who may be only a very small fleet operator. They cannot accept, by law, less than the minimum rate specified in the determination. So, if the minimum rate is $80 an hour for a bogey truck—a 9-tonne truck; something along those lines—and a competitor down the road has two trucks, the latter is a fleet operator and can go and negotiate with the contractor that he wants to work for and do work for $70 an hour. That first person is then uncompetitive. Quite often, he may like to get that work at that rate, but it may also make him uncompetitive.

Senator MARSHALL—It is a terrible thing if we stop a race to the bottom in industry, I suppose! But, coming back to the question I asked you, how did you determine your position? Have you canvassed your membership? What did owner-operators say about your submission?

Mr Long—We canvass our organisations on a regular basis and speak to them regularly. We know that there are contractors. I have had personal dealings in cases where—particularly in the case of the trucks—the truck owner-operator has challenged the union because he wanted to accept less. He wanted to work for the contractor for a lesser rate, he received regular work and he did not want to have to upgrade his truck or do anything along those lines. There were longstanding relationships between the contractor and the independent carrier. The person wanted to do the work and they were happy to accept less. There are cases on record in the New South Wales commission where those people were not able to accept less.

Senator MARSHALL—Hang on a minute. When you tell me people want to work for less, I find that incredible. It may be that they are prepared to, but please don't tell me that people want to.

Mr Long—In some cases, with the determination and areas like that, minimum rates have been set on requirements for people to upgrade their trucks—new vehicles, new chassis, new bodies. It sometimes takes a very large investment by operators to do that. Some operators do not want to have that burden of being committed to a very large investment for 10 or 20 years down the track. In any situation, the truck can carry only a load that meets the road requirements as well. If your truck is heavier by body mass—heavier wheels, heavier body and heavier everything else—you cannot carry as much material.

People who invest in a new truck—they may have a whole new aluminium truck, for that matter, which might be a lot lighter and carry more load—may be preferable to some contractors. Other people have a relationship, as I said, and do not want to make that investment, and they want to be able to negotiate in the marketplace a fair rate between the contractor and the carrier, and not have that determined by a third party. They wish to be able to look at their own circumstances and work out a fair rate based on their investment.

Senator HUTCHINS—The industrial instrument—or commercial instrument, or whatever—of the contract determination for excavated materials: when was that last varied?

Mr Higgins—It was varied, I think, about five to six weeks ago. There was a rate review—the annual rate review—which I was directly involved in. I cannot remember the operative date but it was very recent.

Senator HUTCHINS—So the review resulted in an increase?

Mr Higgins—It resulted in an increase in the rate, of about 7 per cent. I think it was slightly above 7 per cent—the major component, not surprisingly, being increases in the cost of fuel.

Senator HUTCHINS—And once you did the review did that that go to the industrial commission?

Mr Higgins—Yes, I appeared in the commission in the matter, before Deputy President Sams. The review takes place in accordance with a formula that is contained in the contract determination. The union did the calculations and provided those to me. There was an error in one of the calculations. That was corrected and then it went forward before the commission.

Senator HUTCHINS—And that was a consent agreement was it?

Mr Higgins—Correct.

Senator HUTCHINS—You could have not consented if you had wanted to?

Mr Higgins—It would be very difficult not to consent because the increases were entirely in accordance with the formula that is contained in the contract determination. I cannot think of an argument I could have raised to oppose it.

Senator HUTCHINS—But the contract determination is something that you would have consented to the last time it was reviewed, no doubt.

Mr Higgins—Yes.

Senator HUTCHINS—Mr Long, I am trying to recall the words Senator Marshall used when he asked you about people being 'unable to work for less'. I think those were the words? Are they being prevented from working for less?

Mr Long—Under the determination in this case they cannot accept less—I think that was the terminology I used—but if they are an owner-operator and a person driving a truck—

Senator HUTCHINS—But you know that people are accepting less, don't you?

Mr Long—We do not advise people that way but I do know out there in the industry—

Senator HUTCHINS—I can tell you from my own experience. My brother-in-law works under this determination—

Mr Long—Yes.

Senator HUTCHINS—and people are undercutting the rates at the moment because of the lack of work in Sydney. Now he has taken his truck up to North Queensland to work it. He would not work for less but I suppose there are people who would. He needs to get cost recovery, which is set by the determination, to operate his vehicle.

Mr Long—Senator, if a person has gone to the trouble of investing, as your brother-in-law may have, in a new truck or that type of thing, they may need to get the full rate. As I said, there are circumstances where people would want that rate. They may want higher. Remember, it is only a minimum rate. This is an industry where they carry materials from sites to tips in various locations throughout Sydney or throughout the regions. It applies anywhere throughout New South Wales but generally it is about carrying materials either between sites in Sydney, or from a site to a suitable tipping location. Depending on the distances and the number of loads and all the things that can apply, there are a number of variations to the determination that can be chosen as the most suitable arrangements. Sometimes it suits people to use the contract rates or the determination rates, and at other times they may wish to negotiate off that and even use higher than the minimum rate.

As I said, there are other circumstances where people may wish to contract for lower. In fact, I think over time there are fewer and fewer owner-operators out there and more are moving to fleet arrangements because they find they cannot be competitive under the determination. If the determination continues to go up and up, eventually people will become completely uncompetitive.

Senator HUTCHINS—But you have not sought to contest the formula at this stage?

Mr Long—We have been advised by the commission previously that we would want to have significant grounds for contesting the determination and it would not be easy to get rid of. I would say that generally the industry is not supportive of the determination, given it was introduced many years ago—and I am talking about the civil construction industry—because it is making it hard for them to use operators that they like to use or may have longstanding relationships with, and it is driving people to use larger fleet operators.

Senator HUTCHINS—We had an owner-driver this morning from that sector and he said that it suited him to have the determination because that was a quick, cheap and effective way to get minimum payments. Say this determination disappeared, and Mr Higgins has alluded to some sort of transitional period. Don't you think that after it all goes and after there has been a transitional period there will be some rate struck in the end, because of the nature of the industry?

Mr Long—I certainly think it would be like any other rate. There are rates for other items of plant throughout industry and they move depending on the marketplace. Given there is a higher rate for all other invested items, why would trucks have a minimum rate while, for instance, a half a million dollar excavator would not have a rate? Take when work is quiet, as you say. In Sydney at the moment somebody can choose to work for less or to hire out their equipment for less and make themselves more competitive, rather than having it tied up in their yard or something along those lines and not getting some return for that equipment. If it is a long-term hire or a short-term hire, again all those commercial arrangements come into play in determining what the market rate is; it is not being set by fixed parameters under a determination.

Senator HUTCHINS—But the determination does not fix 38 hours a week and 48 weeks a year; it does not do that. You were saying that the determination that you work under allows

a tonnage rate, a kilometre rate or an hourly rate, whichever is more suitable to the nature of the operation. That is correct, isn't it?

Mr Long—That is correct. There are three different rates but that does not address anything other than rates.

Senator MURRAY—Mr Long, you did ask a question to which I should reply in this way. You asked why should there be a minimum rate for owner-drivers compared with somebody who drives an excavator or uses a ditch digger or some other form of equipment. Evidence to this committee is that the reason that that is desirable is that if you underpay an owner-driver they are likely to shortcut on health and safety areas in order to put bread on the table. I am quoting what has been said to us. In other words, to ensure a proper return for that person, they then do not renew their tyres when they should or have their truck serviced when they should. That is the reason, and traditionally this area, according to the evidence to us, has been treated differently. You asked the question and that is the answer that we have been given by witnesses.

Mr Long—That was not a direct question. I posed that as a scenario. That would also suggest that there should be minimum rates set across the entire industry for all contracting, that everything in industry would have minimum rates and that we would not rely on free enterprise in industry or in the workplace for works to be undertaken. I would suggest that is not achievable.

Senator MURRAY—But death rates are not comparative in any other industry.

Mr Long—I beg your pardon.

Senator MURRAY—There is nothing like the death rates of trucks in any other sector of your construction industry, nothing like them.

Mr Long—Trucks in the construction industry? Death rates?

Senator MURRAY—You are debating an issue with the committee. Having made one assertion to which I gave you the evidence in response, you then said, 'In that case, there should be a minimum rate across the entire construction industry for every equipment user.'

Mr Long—I said that that would suggest that.

Senator MURRAY—But it does not suggest that. The reason that the truck drivers have been isolated is because of a very high incidence of deaths and injuries, both for them and for the poor unfortunates on the public roads, because of the way in which the industry has operated. Legislatures have tried to lessen that by ensuring that the standards would reduce the likelihood of that happening. Of course, that is contestable, and I accept that you are entitled to contest it. But that is the reason they have been isolated, as opposed to someone who operates a ditch-digging machine or anything else.

Mr Long—I certainly would not play down the requirements for people to maintain their occupational health and safety requirements, but I would suggest that that can be done in many ways other than through the setting of rates. There are many other ways that OH&S matters can be and should be addressed without setting a fixed rate. There is no guarantee that that fixed rate will be spent on the truck.

Senator MURRAY—Is that available to independent contractors in law, or is that still something that should come through these many other ways? Are they in law yet?

Mr Long—No, they would be industry regulated matters as well as some legal situations, as in registration issues. Some would be legal and some would be industry determined matters. Some would be done through public agencies—such as accreditation schemes, where people are required to prove and be accredited on an annual basis—

Senator MURRAY—Sorry, you might have misunderstood me. When you said there were many other ways in which this could be addressed, were you talking prospectively—in other words, laws should still come into play to deal with those aspects—or were you saying they already exist?

Mr Long—I think there are some that exist now, and certainly they can be improved to achieve better standards of occupational health and safety—most definitely.

Senator MURRAY—Then, if I may conclude this way, that would suggest that until those prospective measures are put into place it is dangerous to remove safeguards that already exist. I leave it at that.

CHAIR—As there are no further questions, thank you very much for your appearance today.

Senator HUTCHINS—I have just one more question—just a response. I think it was one of the your owner-drivers who said, 'If I have to choose between replacing the tyres on my truck and feeding my children, what do you think I'm going to do? I'm going to feed my children.' I just want to follow on from Senator Murray's comments by suggesting to you that safety can be an issue that can be regulated by rates. You would not necessarily agree with me on that?

Mr Long—I just question how you can determine just by the rate alone that that person will then replace the tyres on the truck rather than investing it in some other way. I am suggesting that there are ways—by registration, by accreditation processes, by various numbers of schemes available—to ensure that that truck is safe, other than just having some pseudoreliance on the fact that, because they are paid a certain sum of money, that money will be spent on maintaining occupational health and safety or maintaining that truck. As I say, there are both legal and industry schemes that would provide better evidence that their truck is maintained—or they would not be able to work in the industry.

CHAIR—Thank you very much, gentlemen.

[2.54 pm]

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

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

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

CHAIR—I welcome the witnesses from the Department of Employment and Workplace Relations. The committee has before it your submission: are there any changes or additions to that?

Mr Pratt—No.

CHAIR—Do you want to make a brief opening statement?

Mr Pratt—Yes, please. I would like to thank the committee for inviting the department to appear at the hearing today and for the opportunity to make an opening statement. I propose to give a very brief and broad overview of the content of the proposed legislation. The two bills before the parliament implement the government's 2004 election commitment to protect and support independent contractors. The proposed legislation recognises independent contracting as a legitimate form of work that is primarily commercial and as such should be regulated by commercial laws and not workplace relations laws.

The proposed legislation would operate to exclude a range of state and territory laws which provide employee-like entitlements to independent contractors, allowing contract law, common law and Commonwealth law to govern independent contractor relationships. However, I would like to make it clear at the outset that the proposed legislation will make no changes to taxation legislation or the definition of an employee for the purposes of tax. Similarly, the proposed legislation does not affect the operation of laws regarding workers compensation, occupational health and safety or superannuation. The proposed legislation deals with several areas: state deeming provisions; protections for outworkers; unfair contracts; sham employment arrangements; and owner-drivers. I would like to deal with them very briefly in turn.

First, I will start with deeming. The principal bill will override state laws which deem certain classes of workers to be employees. Government policy is that these laws unnecessarily interfere in commercial relationships. However, the principal bill will not override state laws that deem outworkers to be employees, other state laws providing specific protections for outworkers and state laws which provides specific protections for owner-drivers in New South Wales and Victoria. For other independent contractors who have previously been deemed employees, there will be a three-year transitional period to give businesses and workers time to adjust to the legislation if passed.

Second is protection for outworkers. Where outworkers are not covered by laws of a state or territory providing for some form of remuneration guarantee, the provisions of the bill will provide for a minimum rate of pay applicable under the Australian Fair Pay and Conditions Standard. A number of submissions indicate that the Independent Contractors bill fails to preserve state laws protecting outworkers. This misrepresents the intent of Independent Contractors bill.

Third is unfair contracts. The Independent Contractors Bill will replace existing unfair contracts and jurisdictions with a single federal contracts jurisdiction. The existing federal unfair contracts legislation, which is currently in the Workplace Relations Act, will be made more accessible by providing that remedies may be sought in the Federal Magistrates Court as well as the Federal Court.

The fourth is sham employment arrangements. The bill will protect genuine employees from sham or disguised employment arrangements, such as when an employer misrepresents an employment relationship as an independent contractor. Civil penalties will apply to employers who deliberately tried to avoid their responsibilities through the use of sham arrangements. The bill also provides penalties which would apply to employers who engage in certain threatening or deceptive behaviours aimed making employees change their status to independent contractors. The Office of Workplace Services will investigate such cases and enforce the provisions as required.

The fifth is owner-drivers. The bill will not seek to override protections for owner-drivers in New South Wales and Victoria—the only two states with such legislation. The government believes that protections applying to owner-drivers in New South Wales and Victoria should not be disturbed at this stage. The minister has announced that a review of owner-driver arrangements will be undertaken with a view to rationalising and achieving nationwide consistency if possible. A review will involve a public consultation process with a discussion paper from the department and will begin in 2007. Over the next four years, $8.9 million will be spent on providing information and assistance to those affected by the legislation. Also, the Office of Workplace Services will receive an additional $6.2 million for compliance purposes. This funding was announced in the 2006 federal budget.

Finally, the submissions received by the committee have raised many issues, and the department would like to clarify and respond to as many of those as possible. However, some of them may not get picked up in the course of the discussion this afternoon, so—if you agree, Madam Chair—we might seek to flag some of those at the end of the session.

CHAIR—Yes, that is fine.

Mr Pratt—My colleagues and I are now available to assist the committee. Thank you.

CHAIR—Thank you. If the committee feels that the concerns we have are still not dealt with—I do not mean in the sense of 'bolting the gate'—we might seek the opportunity to have a further meeting with you next week or the week after. That is to be decided as we see how things go.

Mr Pratt—Certainly.

CHAIR—Thanks. I would like to ask you about a couple of things. Firstly, with regard to the sham arrangements, many witnesses—as I am sure you have gathered by your reading of the transcript—seem to feel that there were still many loopholes in the actual wording of those clauses, in that employers who wish to get out of that arrangement or to circumvent the law as it exists would still be able to do so through a variety of loopholes in the way that the legislation is framed. That is one concern that the committee has picked up. Secondly, as each member of the committee will probably tell you in turn, this morning we had further discussions with the outworkers and their representatives. You and everyone on the committee know that last year we spent a considerable amount of time making sure that the interests of the outworkers were preserved. For whatever reason, even though the minister has said in his second reading speech, and I know that you have said—I do not mean you as individuals, but it has been said—that it is the intent of this legislation not to strip outworkers of any of the state and federal protections that have been afforded them in the past, the feeling still is that

these protections are being taken away. I do not know how we are going to deal with that, but it is something that the committee feels very strongly about. It is probably on that more than on any other issue that we would like to dwell, not this afternoon but possibly in ongoing discussions, because we would like to do as much as we possibly can. Specifically, if I have heard this correctly—and the transcript may correct me—they were particularly concerned about clause 7 subclause 1, clause 7 subclause 2A, clause 10 and part IV of the bill. I am quite happy for you to comment further on that now after other senators have asked questions, or we can leave that for another day. I leave that up to you.

Mr Pratt—We would be happy to address those issues now, if that would suit the committee.

CHAIR—Yes, that would be fine.

Mr Pratt—Can I start by reiterating a comment you made, Chair, in relation to what the minister said in his second reading speech. It was quite clear that the Independent Contractors Bill 2006 will not override state protections for contract outworkers. As I understand it, the intent of government is identical to its intent with Work Choices, which was to ensure that the various protections which existed for outworkers were maintained as a result of the legislation and were not overridden in any sense. That is, as I understand it, the intent of the government in the Independent Contractors Bill. Ms James may wish to add a few things to that.

Ms James—Madam Chair, would you like me to address the shams issue to start with?

CHAIR—Yes, that is fine.

Ms James—In observing the hearings that I have been able to watch so far, I have noted that some witnesses have asserted that the sham penalties are too broad and catch too much conduct; others have suggested that they are too narrow and do not catch sufficient conduct. This suggests to me that perhaps the government has actually got it right. If each side is asserting that they do not like the result then perhaps the middle ground is appropriate. I can give some context as to what the sham penalties are there for. They are there to target deliberate and misleading behaviour in relation to the status of a person as an employee or an independent contractor. They focus on behaviour where someone has deliberately misrepresented the status of a person or has not reasonably made inquiries or investigations.

CHAIR—And has then claimed not to have known about it and that it was unintentional?

Ms James—Correct. For example, the key sham penalty provision prohibits misrepresenting an employment arrangement as a contracting relationship. The person will not have committed this civil penalty provision if they genuinely believed it was an independent contracting relationship, and they could not reasonably have been expected to know differently. Some witnesses suggested that, as long as they thought that it was independent contracting, it was fine. It is not. The burden is a little higher than that; you need to demonstrate that you could not have reasonably expected it to not be an independent contracting relationship. I would think that, to satisfy that requirement, a person would at least need to demonstrate that they sought some advice on this point. The government considers it to be a significant disincentive to people not thinking carefully about their arrangements and not at least making the inquiry.

In addition to the sham penalties there are already remedies that deal with wrong classification, if you like. If someone is engaged as an independent contractor but in actual fact is an employee and, for example, has not been given the terms and conditions of employment that might apply under the standard or relevant award, they can seek a remedy now. They can seek underpayment of wages and they can seek a civil penalty to be imposed on the person. That is available now and that would apply in cases where the sham penalty might not. If the relevant intention was not there—or the relevant 'recklessness' on the part of the employer—it is true that the sham penalty may not apply. However, this does not leave the employee involved without remedy. They can go to the Federal Magistrates Court and seek their underpayment of wages. They can also seek a civil penalty to be imposed on the employer. The sham penalty is in addition to the existing suite of remedies available. It is designed to target that very deliberate and misleading behaviour of people quite knowingly wrongly classifying people as employees. It is a fairly novel penalty; I do not know that a civil penalty like this exists anywhere else in Australia—for example, in the state jurisdictions.

CHAIR—Are there any questions on that issue?

Senator MARSHALL—I have some questions, but I will put them on notice because I have some other priority questions I want to ask.

Senator MURRAY—I want to address the issue.

CHAIR—No-one is flagging their punches.

Senator HUTCHINS—I am not sure if you have already handled this. If the bills cannot pass in their current form, how would a person who engaged in outwork reasonably know whether that outworker was an employee or a contractor? Is that something that you can answer now?

Ms James—I can, actually. There is quite a lot that can be said about outworkers, and I am happy to go into that now, if you like.

CHAIR—Are there any questions to the department other than those on outworkers?

Senator MARSHALL—Yes, there are.

Senator MURRAY—I am having difficulty with this—but it frees up some time that most of my considerations revolve around policy. To make it clearer: I am of the view that people should be allowed to jump out of aeroplanes and float through the sky, but they do not do that before they have equipment, a parachute and a safety parachute. I feel that there is not enough legislation accompanying this to move across, if you like, the necessary safeguards that exist in state legislation.

I want to concentrate on two areas. The first is with respect to the alienation of personal services income. I am sure you are not an expert in that, but it seems to me that it is possible for the tax office to determine somebody to be an employee but, for this act, to designate them a contractor or vice versa. That would seem to me to initiate confusion into law. If ever that was the subject of a court matter it would be a problem. Has the department at all in any way had consultations with Treasury to ascertain whether there are any problems of that sort that may arise?

Mr Pratt—We have certainly had very extensive consultations on those issues. Whether that was directly with the tax office or with Treasury I am not sure.

Ms James—I am not sure if we have had direct consultations with the tax office and Treasury about that issue. We have had some consultation at the officer level with the ATO.

Senator MURRAY—Just to make it clear in my mind, you are responding with respect to this bill? You are not saying that you had general consultations; it is with respect to this bill?

Ms James—That is correct. During the discussion paper process there was a lot of canvassing of the taxation tests and other tests—the common law tests—for determining whether someone is an employee or an independent contractor. So all of that was taken into account. But the tests associated with the tax treatment of personal income were developed very much in the context of tax policy. The Independent Contractors Bill is about a different policy framework, I suppose. So there are a range of things in the taxation tests that are relevant in terms of being aware of them and looking at them, but it is not really appropriate to simply apply it in this context.

Senator MURRAY—I suggest, with respect, that it is. One of your tasks in your departmental responsibilities and mine as a legislator is to try to anticipate what might occur once a statute becomes law. It seems to me that there is a potential for someone to be deemed a contractor under this law, or to be determined by the supplier or the person who lets the contract to be a contractor, and for that person not to wish to be seen on that basis because they might see that it is to their disadvantage. They might then produce a certificate or a tax return from the tax office which says they have been determined to be an employee under tax jurisdiction. They go off to the courts and say, 'What is the conclusive opinion of the courts?' Will the tax office opinion prevail—namely, they have assessed the arrangements under the personal service income tax—or will the independent contractor's position prevail? I would suggest to you that that possibility may arise. I am not satisfied that you can simply say, 'That's another jurisdiction,' because I think there is an issue here.

Mr Pratt—As I understand it, it is possible that that issue could arise today under current arrangements. Certainly taxation issues would be considered in a court case of that sort looking at whether or not a worker was an independent contractor or an employee. That is certainly something that may be considered in that assessment.

Senator MURRAY—This is where we would get to policy, and I sure you cannot answer. But my answer to that would be to put in the bill that a tax office determination is conclusive as to whether you are an employee or an employer, and that resolves the matter. If the government wants to adjust or tighten up the personal services legislation to make sure that it all fits nicely, so they can. It seems to me odd to develop these things separately. I will leave it at that because I am quite sure that I do not have that much time. If you are able to come back with further views on that matter I would appreciate it.

Mr Kovacic—In terms of the issues that you raised about discussions with the tax office and Treasury, I am advised that those bodies made submissions to the House of Representatives inquiry into independent contracting. It is also worth noting that the issue of the appropriate test, if I can describe it that way, to define who may be an employee and who may be an independent contractor was canvassed in that particular committee's report. The

committee recommended that the common-law test prevail and that is something that is reflected in the context of this legislation.

Senator MURRAY—Thank you, Mr Kovacic. I have not read those two submissions to the House of Representatives. As I say, if you would like to add any more to the submission you have already made, I would be grateful. I have given you where my prejudice lies, so you can understand where I am coming from. The second area is the definitional area. If you have been following the hearings, you would have noted that it had been raised. There are at least three things to identify; perhaps you can identify more. The first is that the both bills in fact refer to 'independent' contractors. The second is that 'independence' is not defined and, of course, employees are not defined either. We recognise that. The third is that outworkers have a different designation. Contract outworkers are defined and the definition is much more expansive than the one you have given to independent contracting.

Witnesses have drawn attention to the fact that 'dependent contractors' are a live and active body of people. They have also drawn attention to the fact that people can switch in and out of being an employee and a contractor in the same tax year. I think Mr Phillips specifically said you could be an employee one day and a contractor the next and vice versa. It is not an easy area to determine. Again, I am concerned about what will happen when these matters come as a dispute before courts or tribunals. Of course, the common law is a living thing. Jurisprudence develops common law and statute affects the common-law determination because it introduces new elements. Do you think that there is likely to be doubt over who is a contractor or who is not if someone contends that they are not independent but dependent? Have you thought through that issue at all?

Ms James—There will always be some cases at the edges of these definitions where there is some doubt. It is clear that in the last few years, often in commissions or in courts, the question arises. That is why there is common law and jurisprudence, I suppose. Having said that, I believe that the common-law test has been fairly settled for some time and it is possible to look at the indicia, apply them to any given set of circumstances and come up with a reasonably good response as to which camp a person falls into. One of the good things about the common-law test, as opposed to a more formulaic test, such as the tax test for example, is that it allows the weighing of those factors. Some factors will be more important in some relationships and some industries than others. For example, if you are an IT professional who is doing a long-term project with a firm, let's say it lasts a year, because you only have one client and all of your income is coming from that one client, the tax test is probably not going to allow you to self-assess as someone who is earning income from the business. It is going to say that you are earning income as an individual and that individual tax arrangements will apply to you. You might then be able to get a determination from the tax commissioner saying otherwise but that formulaic or numeric approach to where the income comes from in that case would wrongly result in a person being found to be more like an employee than a contractor, when clearly they are not.

On the other hand, the common law allows a judgment to be made taking into account the whole relationship. If you have an IT professional who provides very particular services and who provides their own expertise but who happens to come into an office and work with some other people—other contractors or other employees—for a period of the year, to develop a

database, for example, that person may well consider themselves to be a contractor, and may be a contractor, but the tax test may not produce that result. But a court can weigh all those factors up.

Senator MURRAY—Let me ask you this question: are all dependent contractors covered by this legislation? Yes or no?

Ms James—It is not a simple answer, I am afraid.

Senator MURRAY—Exactly!

Ms James—I have heard the term 'dependent contractor' used quite a bit over the last couple of days and, at law, it is not a term that has any meaning. It is more of an academic term that has been developed to describe a particular type of independent contracting. So at common law you have employees and you have independent contractors—

Senator MURRAY—Let me stop you, if I may. You can correct me if I am wrong, but I think this is the first time in Commonwealth legislation that the words 'independent contractor' have been introduced to legislation. You can tell me if I am right or wrong, but if you have done that you are changing the law. They will then say, 'What is not an independent contractor?' They will then say, 'A dependent contractor cannot be an independent contractor,' and you are into a mess. Isn't it easier to say that this only applies to people who are independent contractors and not to those who are dependent contractors? That is my question. You know far more about the range of statutes in this field than I do, but isn't that true? Have you found 'independent contractor' ever put into a statute anywhere else in Commonwealth legislation?

Ms James—I believe that it is in the Workplace Relations Act now. The freedom of association provisions currently use the term 'independent contractor'. It is a different context, of course, but the term is used there and it is not defined other than, I think, to make it clear that an independent contractor is a natural person in that context.

Senator MURRAY—Right. Can we leave this, because I am terrified of the chair and she will tell me to stop! If you have more thoughts on this, and you are able to research and think it through a little more clearly—not that your answers have not been clear, but if you could think it through a little more deeply—perhaps you could come back to the committee. Either you need a better definition or you need to exclude certain possibilities, I would have thought.

The last thing with respect to the definition—and you can come back again if you have further thoughts on it—is this. Some play has been made of the numbers of contractors. The independent contractors association says there are 1.9 million independent contractors, based on an expansive view—namely, that they are people who may employ others. The Productivity Commission, on the other hand, uses the ABS definition, which says an independent contractor is a single operator. I am well aware of the common practice, particularly within families, whereby the contractor will employ—and it is a useful tax device, I might say, as well—a member of the family to do the books and to run the home office, even though they are the independent contractor. My question to you is: if independent contracting is defined, as per the Productivity Commission and the ABS's view, as being a single person, if in fact it constitutes a business or a couple or somebody who is employed,

are they not covered by this bill? And if there is doubt on that matter, how would you address that doubt?

Mr Kovacic—In terms of the numbers, as you have quite rightly noted, there is some lack of definitiveness in terms of the numbers—they range from the numbers identified by the Productivity Commission up to those identified by the independent contractors association. In terms of the coverage of this particular bill, in terms of the numbers, we would certainly have it in that range. In terms of how you determine whether you are covered by the provisions of these bills, it ultimately comes back to, I think, an assessment against the common law test as to whether an individual is a contractor.

Senator MURRAY—That is my specific question. If you feel you need more time to come back to the committee, please take it. What will happen is that people will rearrange their affairs to employ someone and then not fall under the act, if that is the consequence of this.

Mr Kovacic—Certainly. One of the points that Mr Pratt made in the opening statement is that there is a recognition by government that there is a need for both communication and education activities to assist individuals understand the extent to which they may be captured by this legislation or to assist them to determine whether they may alternatively be categorised as employees for the purpose of this legislation.

Senator MURRAY—Could you come back to the committee with some further thought? The question is specific: does a contractor who employs somebody either part time or full time fall under the provisions of this bill or not?

Ms James—The answer is that they may well fall under the bill.

Senator MURRAY—That means that they may well not.

Ms James—Different parts of the bill operate in different ways. You need to refer to what the bill is doing. Some parts of the bill are not providing regulation itself but excluding the operation of state regulation.

Senator MURRAY—Ms James, may I interrupt. Think of what you are saying. I think the figure given by the Productivity Commission for the number of contractors under the ABS definition was 789,000. The figure given by Mr Phillips—I have no way of knowing whether it is accurate or not—is 1.9 million. The difference between those figures, rounding it up, is 1.1 million. So the 'may or may not' may affect 1.9 million people, is my assessment of what you have just said. That is why I want the department to give it further thought and come back to us with a deeper response. If it is the case that they may not, then how many may not? What does that do to certainty in the contracting industry?

Mr Pratt—I suspect we are going to have a great deal of difficulty in giving a definitive answer to that. Could you give a specific example of what it is that is in question?

Senator MURRAY—Take an owner-driver in WA. They are not excluded by virtue of the provisions of this act. We understand the owner-driver issue, because it seems to be quite specific and there are large numbers of them. An owner-driver in WA ostensibly falls under the provisions of this bill. However, that owner-driver employs his wife to run the books. According to the ABS definition, they fall outside the definition of a contractor because they

are a single person and they employ a person—this is my understanding. They are therefore categorised as a small business. Do they fall under this bill or not?

Mr Pratt—My follow-up question—and I realise this is the reverse of how it is meant to be—is: what is the issue that is applying to the owner-driver's wife that may or may not need to be considered under the Independent Contractors Bill?

Senator MURRAY—That applies to the owner-driver, not his wife; his wife is plainly an employee.

Ms James—The first section of the bill, which deals with the exclusion of state laws, would not have any relevance, I suspect, in this case, because I do not know that there are any relevant state owner-driver laws in Western Australia. The unfair contracts provisions specifically allow an independent contractor—a body corporate, for example, where that body corporate has members of the family as directors, for example—to apply for that unfair contract remedy. That was partly designed with owner-drivers in mind because some owner-drivers are incorporated entities that have a member of the family working with them or as a director of the company.

Senator MURRAY—What happens if they are not?

Ms James—Even if they are not, the independent contracting relationship is the one between the owner-driver and the people he or she drives for. If that owner-driver happens to engage an employee or another contractor as well, that does not change the fact that with respect to that first relationship they are an independent contractor and they are covered by this bill. I cannot say anything about how the numbers count those people.

Senator MURRAY—I am not interested in the numbers except with respect to the fact that it indicates scale. I am not that bothered by that. Whether a bill affects 100,000 or two million, it is still a bill we must pay attention to. This illustrates the difference between the two definitions employed by somebody like Mr Phillips, who takes the expansive view, and somebody like the ABS, who takes the specific view. I am most interested in who is really in and who is really out of this, and the witness evidence to me indicates there are two areas where that is unclear. I will not take up any more of the committee's time. You understand my concerns. If you have any further thoughts on that, perhaps you could come back to us.

Mr Pratt—We will have a look at that and if we have got anything further to add we will come back.

CHAIR—Thank you for that.

Senator HUTCHINS—I have got two questions. There is legislation pending in Western Australia and tabled legislation in the Australian Capital Territory relating to owner-driver protections. If they are carried, will they be able to operate if this bill is enacted?

Mr Kovacic—That is something the government would need to consider should the legislation be passed.

Senator HUTCHINS—You would have read the TWU submission, no doubt, and it refers to areas relating to unfair contracts. I do not know if you have it off the top of your head with all the other submissions.

Mr Kovacic—I am sure we have.

Senator HUTCHINS—When the minister made a statement to exempt New South Wales and Victorian legislation, it was to exempt—I will paraphrase—to allow those protections to continue. The TWU submission suggests that if parts of the bill relating to unfair contracts are carried as they are they will put owner-drivers in New South Wales in not as good a state as they are in at the moment. Would you like to respond to that or is that maybe more appropriately directed to the government? Are you aware of that?

Ms James—Yes.

Senator HUTCHINS—Would you agree with me that the position that, say, New South Wales is in is superior to what will be available to them under this proposed bill?

Ms James—Perhaps I will explain how the owner-driver carve-out works. Unlike with other parts of the cover-the-field provisions, we have named the specific act or parts of the act that are being preserved here. In the case of New South Wales, we have preserved chapter 6 of the IR Act which provides for the contract determinations and other specific things that relate to contracts of carriage. It is broader than owner-drivers. The unfair contract provisions in the New South Wales IR Act are not in that part, so they are not preserved for anyone—owner-drivers or any other independent contractor in New South Wales. In Victoria, on the other hand, the dispute resolution framework, which I think includes an unfair contract sort of jurisdiction, is within an owner-driver specific piece of legislation. So that piece of legislation has been preserved because it is owner-driver specific and those remedies are available in Victoria. The distinction is simply because of the placement of that particular unfair contract remedy.

So the answer is: there has been a different effect with both those states because of the way the state provisions are drafted. That means owner-drivers in New South Wales will no longer continue to have access to the IR Act unfair contracts jurisdiction; they will have access to the improved national unfair contracts jurisdiction in the independent contracting bill, which allows a remedy to be sought from the Federal Court or the Federal Magistrates Court in the event that a person considers their contract to be unfair.

Senator MARSHALL—Congratulations on your appointment, Ms James. Mr Pratt, is it possible under the proposed legislation for workers to be paid less than the federal minimum wage?

Mr Pratt—The answer is no, with one possible exception.

Ms James—Because the legislation, by and large, regulates independent contractors, independent contractors are not entitled under federal legislation to a particular minimum wage. So to the extent that contractors might currently be deemed to be an employee and because of that receive a range of employee entitlements, those entitlements will not immediately cease but under the framework will cease to apply. That is because the government considers that these are commercial arrangements that should not be regulated by industrial frameworks.

Senator MARSHALL—So is the answer yes?

Ms James—The answer is that an independent contractor affected by this bill, within jurisdiction, will not be entitled to a minimum wage under industrial relations legislation, apart from some of the exceptions we have been discussing: outworkers, owner-drivers—

Senator MARSHALL—Is it possible under this proposed legislation that an independent contractor can be paid less than the federal minimum wage?

Ms James—Yes.

Senator MARSHALL—Is it possible for an independent contractor under this legislation to receive less than the Australian Fair Pay and Conditions Standard?

Ms James—The Australian Fair Pay and Conditions Standard in the Workplace Relations Act does not currently apply to independent contractors; it applies to employees.

Senator MARSHALL—So is the answer yes?

Ms James—The answer is yes, but that is not new.

Senator MARSHALL—I am just asking you to put on the record for me the answer to these questions, thank you. Is the department aware of reports that 14- and 15-year-olds have been engaged as independent contractor food vendors by large catering companies at the MCG?

Mr Pratt—We are aware of allegations to that effect.

Senator MARSHALL—Does the proposed legislation allow for these types of arrangements?

Ms James—I do not know that the legislation affects those sorts of arrangements.

Senator MARSHALL—Does the proposed legislation allow for these types of arrangements?

Ms James—No.

Senator MARSHALL—It does not?

Ms James—It does not facilitate those sorts of arrangements, no.

Senator MARSHALL—That was not the question. Let me ask it again: does the proposed legislation allow for these types of arrangements?

Mr Pratt—Without more information, I think our answer would have to be no.

Mr Kovacic—I can say that state and territory legislation that affects the employment of children is not affected by the operation of this legislation.

Senator MARSHALL—Someone might answer the question for me then. Let us go back. The example I am giving you is 14- or 15-year-olds being engaged as independent contractor food vendors. Would the independent contractors act allow that?

Ms James—I think that is a very unfair question. In terms of whether the bill would allow for a particular thing to happen or not happen, the bill does not regulate those sorts of arrangements.

Senator MARSHALL—If you are an independent contractor, you do not fall under the Work Choices legislation, do you? Mr Pratt has confirmed that for us.

Ms James—That is correct.

Senator MARSHALL—So, if you are 14 or 15, you could be engaged as an independent contractor. There is nothing in this bill that excludes that. Is that right?

Ms James—The bill does not seek to regulate that. It does not seek to allow or facilitate that. It expressly saves the operation of child labour laws. Child labour laws can and do regulate work by children.

Senator MARSHALL—Is there any protection—

CHAIR—Just before we go on with that: I do not intend to intrude on state labour laws but it would be a fact, would it not—and please correct me if I am wrong—that 14- and 15-year-olds would be employees rather than independent contractors?

Senator BERNARDI—They do not have the capacity to enter into a contractual arrangement without either legal advice or representation of a parent or guardian.

Senator MARSHALL—I am getting to that. You said you did not have any questions, Senator.

CHAIR—I will just put that on the table.

Senator MARSHALL—Since the removal of the no disadvantage test under the Work Choices legislation for employees, someone who is under 18 would have to have their parents' consent before they entered an individual contract. That is the case, isn't it?

Ms James—That is correct.

Senator MARSHALL—So what provisions of this legislation give any protection to people under the age of 18 entering into an independent contractor relationship? Is there any?

Ms James—No.

Senator MARSHALL—Can you explain why?

Ms James—It is not the purpose of this legislation to regulate the way in which people make or enter contracts.

Senator MARSHALL—So people under 18 can be engaged as independent contractors?

Mr Kovacic—I think it would be true to say that contract law, commercial law, to the extent that it deals with the issue of people under the age of 18 entering into contractual arrangements, would apply in the circumstances you are outlining.

Senator MARSHALL—Thank you for that, and that is probably the case, but I would rather that you answered the question that I have asked. That is the answer to a question I did not ask. I am not saying that it is not true—and thank you for that information—but I would like the answer to my question.

Senator MURRAY—Could you just repeat it for me?

Senator MARSHALL—Are people under the age of 18 able to be independent contractors under this proposed legislation?

Ms James—The legislation does not affect a person's capacity to enter into a contract; the legislation relies on common-law principles of contracting. I would think there might be a

question at common law about someone's capacity to enter into a contract below a certain age, although clearly a normal employment contract is a contract and clearly people under 18 can enter into such contracts. That is an issue that is governed by common law or state laws that deal with child work. It is not governed or regulated by this bill. This bill does not seek to regulate the issue.

Senator MARSHALL—But this legislation allows it, doesn't it?

Ms James—No—

Senator MARSHALL—And, if you are an independent contractor, you are removed from Work Choices, aren't you? You are removed from the protections of Work Choices if you are an independent contractor?

Ms James—If you are an independent contractor, you are not covered by the Workplace Relations Act. You were not before Work Choices, and you are not now. The Workplace Relations Act, apart from a few very minor exceptions, applies to employees.

Senator MARSHALL—Is there any capacity in the proposed legislation for issues of pay and equity in female dominated industries to be addressed?

Mr Pratt—This is a bill about independent contracting, not about employees.

Senator MARSHALL—If there isn't, Mr Pratt, why don't you just tell me and I will move on to the next question? If the answer is no, the answer is no.

Ms James—Would it assist to perhaps give an overview of what the legislation does? We could spend quite some time talking about the things that the bill does not do.

Senator MARSHALL—You could, and that would be nice, if you answer my questions.

CHAIR—With due regard, Senator, I think Mr Pratt did answer your question by indicating that the bill was not about what you referred to.

Senator MARSHALL—That was not the question, so I will ask it again: is there any capacity in the legislation for issues of pay and equity in female dominated industries to be addressed?

Mr Kovacic—The issue of remuneration under contracts is a matter for agreement between the parties.

Senator MARSHALL—That may be the case, but that is not answering my question. How about answering my question?

Mr Pratt—We have given you two answers to it.

Senator MARSHALL—They are not answers. Let me ask it again: is there any capacity in the legislation for issues of pay and equity in female dominated industries to be addressed?

Ms James—The bill does not seek to regulate that.

Senator MARSHALL—So the answer is no?

CHAIR—The bill is not about that—if I can put that in senator language!

Senator MARSHALL—Thank you, but is the answer no? Maybe you can answer that question.

Mr Pratt—I think we will go back to my original answer.

Senator MARSHALL—Is the department aware of any independent contracting arrangements that include provisions for maternity or parental leave?

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

Senator MARSHALL—Will it be possible under the legislation for a worker to be an independent contractor for contract purposes but an employee for taxation purposes?

Ms James—My understanding of the way the tax framework operates is that it does not determine that someone is or is not an employee or an independent contractor. It establishes a framework for taxing people based on meeting certain criteria, but it does not actually say, 'You are an employee for tax purposes,' or 'You are an independent contractor.' So I think the answer to that might be no.

Senator MARSHALL—Thank you. Is the department aware of any economic modelling that has been done to estimate the long-term public cost of workers in independent contracting situations not funding their own retirement through superannuation?

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

Senator MARSHALL—And do you know if there is any potential impact of this on the welfare system?

Mr Kovacic—We will have to take that on notice as well.

Senator MARSHALL—If a welfare recipient is seeking work and is offered work on the basis that they must accept an independent contracting arrangement, how does this affect their obligations?

Mr Pratt—We would have to take that on notice. I am not sure that that would apply. I am not sure that an unemployed person who was offered an independent contracting position would be required to accept that, so we would have to check whether that is the case or not.

Senator MARSHALL—Would it be considered turning down a job? Is that what you are going to check?

Mr Pratt—My expectation is that that would not be considered turning down a job, but we will correct that if that is not the case.

Senator MARSHALL—Does independent contracting count as work?

Mr Pratt—If you are an independent contractor, you are effectively in a business.

Senator MARSHALL—So it does not count as work?

Mr Pratt—It does not count as being unemployed.

Senator MARSHALL—Does it count as work?

Mr Pratt—For the purposes of the social security test? Is that the question?

Senator MARSHALL—Under anything you are responsible for in your department.

Mr Pratt—My expectation is that it would count as work but, again, we will clarify that if that is not the case.

Senator MARSHALL—Do Job Network providers place people in independent contracting positions?

Mr Pratt—I expect they assist them on occasions to do so. There is certainly a program which is run by Job Network members, the NEIS program, which helps people set up their small businesses. It is possible that they might help them set up as independent contractors.

Senator MARSHALL—What is the process when an employer offers a position to a Job Network provider for filling but they seek a contractor?

Mr Pratt—I would have to take that on notice.

Senator MARSHALL—Is there any scrutiny of the position by the Job Network provider, and what sort of scrutiny do you apply as a department?

Mr Pratt—Certainly there is a great deal of scrutiny applied to the nature of the job. For example, if it is an employment offer, it needs to be scrutinised against the relevant industrial instruments and the fair pay and conditions standard.

Senator MARSHALL—Are you able to provide to the committee any guidelines, advice or documentation that has been provided to Job Network providers about placement into independent contracting positions?

Mr Pratt—We will take that on notice.

Senator MARSHALL—I have some other questions, which I will put on notice.

CHAIR—In the first instance, could you perhaps look at those parts of the bill about outworkers that I mentioned at the start of this meeting. Tell me in plain English—there was no inference there—

Senator MARSHALL—They can use the words yes or no occasionally!

CHAIR—how those clauses correlate to what was put forward in Work Choices so that there is no diminution of the present conditions for outworkers. That will allow the committee to move some way towards deciding whether or not what is provided in this bill correlates exactly to the undertaking that was given in Work Choices. Could we use that as a starting point?

Ms James—Yes.

CHAIR—That would be very useful. Thanks.

Ms James—The government does not intend to interfere with outworker protections in state laws, whether they apply to employee outworkers or contracted outworkers. It is a confusing area, because what we have is Work Choices, which applies to employees. Work Choices expressly saves the operation of outworker laws with respect to employees. Work Choices does not apply to contractors; this bill does. The intention is that this bill takes the same approach as Work Choices and does not interfere with state outworker protections for the other side of the equation—contracted outworkers.

The confusion can arise because, within state systems, many outworkers are deemed to be employees. This means that all outworkers, irrespective of whether at common law they are contract outworkers or employee outworkers, are treated as employees in the state system.

However, that deeming does not necessarily funnel back into any other framework. It does not have effect with respect to the federal framework, for example. So the IC bill uses very different language from what the state legislation will use, because in many of the states all outworkers are deemed to be employees. So they will talk about the employment relationship whereas the IC bill operates on the common-law relationship and so it has to refer to these terms of the services contract, which is the constitutional basis for the bill, rather than to an individual outworker. So some of the language appears to not jell. I reiterate that it is very clearly the government's intention not to interfere with any of these laws, irrespective of whether you are a common-law contract outworker or a common-law employee outworker.

Senator MURRAY—So why don't you just exclude it?

Ms James—That is the purpose of clause 7(1)(a), which I know got some attention this afternoon. There was one specific example that was given that perhaps I will talk about. I think it was an example of an outworker in, let us say, New South Wales. New South Wales outworkers are deemed to be employees in the state system, so the employee was entitled in this example to four weeks annual leave. That may well be the case because if they are deemed to be an employee then the clothing trade state award in New South Wales may well entitle them to four weeks annual leave in a similar way to what I expect the federal outworker award would. As far as the New South Wales system is concerned, this person is an employee outworker and they are entitled to four weeks annual leave.

If at common law the worker is an employee then this package does not affect that. They are covered by the WR Act and its nonexclusion of those laws. If at common law this worker is a contract outworker then they are a party to a services contract as far as this bill is concerned. The state will say they are an employee. At common law they may be a contract outworker who is a party to a services contract, which is the language used in 7(2)(a). They would be a party to a services contract and 7(2)(a) says that state or territory law, in this case, is a combination of state deeming law and the state award. If those laws apply to the services contract to which an outworker is a party—which is the case—and the laws make provision in relation to such contracts—which is the case—then the law is not overridden. My view is that the analysis of that example given earlier today was not correct. Our view is that that entitlement exists.

Having said that, we have looked very closely at the submission of the Victorian government. Unlike some of the other submissions, the Victorian government's submission has gone into some detail in analysing particular laws and the way in which this provision interacts with those laws. We have looked very closely at those examples, which were very helpful to us, and we are continuing to seek advice and look very closely at those laws. If there is any doubt that those laws have been interfered with, it would be anomalous to allow the bill to remain in its current state.

CHAIR—That is exactly what we were after, so I do appreciate that very much. We will have further discussions on this?

Ms James—If the committee would like us to.

CHAIR—Yes, thank you. Thank you very much for appearing before us today. I am sure we will meet again.

Committee adjourned at 3.54 pm