



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND
WORKPLACE RELATIONS

Reference: Fair Work Bill 2008

WEDNESDAY, 28 JANUARY 2009

ADELAIDE

BY AUTHORITY OF THE SENATE

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

<http://www.aph.gov.au/hansard>

To search the parliamentary database, go to:

<http://parlinfoweb.aph.gov.au>

**SENATE STANDING COMMITTEE ON
EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS**

Wednesday, 28 January 2009

Members: Senator Marshall (*Chair*), Senator Humphries (*Deputy Chair*), Senators Arbib, Cash, Collins, Crossin, Fisher and Siewert

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

Senators in attendance: Senators Abetz, Cameron, Cash, Collins, Crossin, Farrell, Fisher, Humphries, Ryan, Siewert and Marshall

Terms of reference for the inquiry:

To inquire into and report on:

Fair Work Bill 2008

WITNESSES

CALVER, Mr Richard Maurice, National Director, Industrial Relations, and Legal Counsel, Master Builders Australia	28
FRITH, Mr David Neville, Director, Policy, Business SA	20
GILES, Ms Janet, Secretary, SA Unions	12
GUARNA, Ms Olivia, Coordinator and Industrial Officer, Young Workers Legal Service.....	12
HARNISCH, Mr Wilhelm, Chief Executive Officer, Master Builders Australia.....	28
McDONALD, Mr Tim, Partner, Sparke Helmore; Lawyer, Yum! Restaurants Australia.....	38
SHEEHAN, Mr Michael Alan, Senior Business Adviser, Business SA	20
STEWART, Professor Andrew John, Private capacity	2
STORY, Mr Angas, Manager, Industrial Services, SA Unions	12
WALLGREN, Mr Henrik, Business Adviser, Business SA.....	20
WALLIS, Mr Richard, Employee Relations Director, Yum! Restaurants Australia	38

Committee met at 9.02 am

CHAIR (Senator Marshall)—I open this public hearing. On 25 November 2008, the Senate referred to this committee an inquiry into the provisions of the Fair Work Bill 2008 for report to the Senate by 27 February 2009. This bill is the second of two major pieces of legislation which give effect to an election commitment of the government to establish a new industrial relations system to come into effect in 2010. Last year the parliament amended the Workplace Relations Act 1996 to change the framework for workplace agreements through the abolition of AWAs and to enable the process of award modernisation to commence. This second bill will, among other things, institute a strong safety net of 10 legislated National Employment Standards for all employees and an enterprise-level collective bargaining system. It will ensure a modern and simplified award system and will strengthen protection from unfair dismissal. A new regulatory body, Fair Work Australia, will assume the functions of a number of current agencies so as to streamline workplace relations processes with regard to wage setting and award variations, good-faith bargaining and resolution of disputes. The government has consulted widely with industry groups and unions in the drafting of this bill. These hearings are intended to complement these private exchanges through a more public disclosure of views.

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

[9.04 am]

STEWART, Professor Andrew John, Private capacity

CHAIR—The committee welcomes our first witness, Professor Andrew Stewart. Do you have any comments to make on the capacity in which you appear today?

Prof. Stewart—Yes. I am from the Law School, University of Adelaide.

CHAIR—Thank you, Professor. I invite you to make some opening remarks to the committee, to be followed by questions.

Prof. Stewart—Thank you. Members of the committee, I assume, will have my submission in front of them. I do not propose to go through all of it, but I would like to highlight a few points and add a couple of additional remarks at the end, and then I am happy to take questions both on the submission and on other aspects of the Fair Work Bill. The bill is one whose content I would generally support. In the first two pages of my submission, I set out a number of aspects of the bill which seem to me to be particularly welcome and, in general, I believe the bill can be seen as creating a fairer and more balanced system.

I would also commend the government on its willingness to draft the new legislation in much simpler and more accessible terms. Members of the committee may recall me, on previous occasions, directing a number of submissions about the difficulties caused for everyone who has to apply and understand workplace relations legislation when that legislation is expressed in terms as complex and confronting as those of the current Workplace Relations Act. The new bill, although perhaps not ideal in every respect, seems to me to be a vast improvement.

There are a number of areas of concern in the legislation. I do not propose to go through all of those because in some instances those areas of concern run headlong into the policy that the government took to the last election. It seems to me that the government has a clear mandate to implement its Forward with Fairness policies. So, in this submission and in my remarks today, what I would like to do is to concentrate on those areas where it might be possible to improve the bill without challenging the government's election policies or compromising the policy objectives that underlie the legislation.

There are a number of matters which I have addressed in the submission. First of all, on pages 3 to 4 I have dealt with the question of enforcing the new right to request flexible work arrangements. I understand a number of submissions have raised similar concerns. The new National Employment Standards create a right for employees to ask for flexible working arrangements but quite deliberately provide no mechanism for an employer's refusal to such a request to be challenged; indeed, the bill goes so far as to preclude parties from agreeing privately to establish a mechanism for dealing with a dispute over refusal. In the submission I have pointed out, as a number of other parties have done in making submissions to this committee, that the UK model on which this new proposal is apparently based does provide employees, at least to some extent, with a capacity to challenge an employer's decision to say no, particularly if there is a concern that the employer has not followed an appropriate procedure or if the employer's refusal is based on some error of fact. In the submission I have suggested some ways in which the bill could be amended to provide for at least limited review in that situation without going so far as to say that employers can be dragged into court and forced to justify every business decision they make.

On page 4 and onwards, I go into the question of confining enterprise agreements to dealing with so-called permitted matters. The bill, as senators would be aware, draws a distinction between unlawful terms and non-permitted terms in an enterprise agreement. If a term is unlawful then the enterprise agreement is not one that can be made or approved by Fair Work Australia, whereas if a non-permitted term is included in an agreement then the agreement can be approved and can take effect but the non-permitted term is unenforceable. I have objected in the submission to that approach on three grounds in particular. The first is that it runs counter to the principle which has informed industrial relations policies—both coalition and Labor Party—since the early nineties, which is that it is the parties at the enterprise level who best know what decisions they should take about the content of their agreements and what will best serve the objective of cooperative and productive workplace relations at that particular workplace. Indeed, this is the only aspect of the bill where it can be unequivocally said that the bill contradicts the Forward with Fairness policy platform that the Labor Party took to the last federal election.

The second objection is that the maintenance of a requirement for dealing with permitted matters in an agreement is likely to perpetuate the absurd practice that we have seen spring up in the last five years of

parties having to negotiate, in many cases, parallel agreements—a formal agreement that is proposed for registration that is enforceable under federal industrial law and a separate or side agreement that deals with all the matters that the parties want to agree on but that the government of the day has told them that they cannot put into their formal agreement. That seems to me to be a spectacularly inefficient system and I find it hard to understand why it should be perpetuated. I have explained in the submission the reasons why that kind of approach is likely to continue under the bill.

The third problem lies with the definition of ‘permitted matters’ and the retention of the requirement that an agreement should deal with matters pertaining to the employment relationship. According to the government, the ‘matters pertaining’ formula is one that has been around for 100 years and there is a lot of case law on it. My response to that is: yes, that is true, and it is 100 years of confused and conflicting case law, which makes it almost impossible to give definitive advice on the margins of what is or is not a matter pertaining to employment.

I have dealt with that fairly briefly in the submission itself. I could have gone on for pages and pages about the difficulties. I might give one example to the committee. Let us suppose that an employer and its employees decide that they want to make an agreement about childcare facilities that the employer will provide to the workforce. One would have thought that is a matter that has a lot to do with the employment relationship. Is it technically a matter pertaining to the relationship of employer and employee? If I were assisting the law firm to which I consult to give advice on that matter, I could write an opinion which persuasively argued that it was a matter pertaining and another opinion which equally persuasively argued that it was not. The two opinions would rely on different High Court authorities at different times. The issue is one to which, as I have indicated, there simply is no definitive answer. It seems to me to be ridiculous to perpetuate that kind of uncertainty.

If the real concern behind this idea of non-permitted matters is that employees and, more obviously, unions may take protected industrial action over some claim that does not relate to the employment relationship, if that is the real issue that the government would like to address, then it seems to me it can be addressed by modifying the rules on protected industrial action without having to cast this shadow over the permitted content of enterprise agreements. In the submission I have suggested a way in which the protected action provisions in the bill could be amended so as to preclude, for example, a union taking industrial action purely over or predominantly over an employer’s refusal to agree to some climate change initiative. So if that is the concern there are ways of addressing it without having to place this question mark over what you can and cannot have in an agreement.

There are a couple of matters relating to bargaining representatives that are dealt with on pages 7 and 8 of the submission. One concerns what I think is an unintended consequence of clause 179 of the Fair Work Bill. The bill has fairly elaborate provisions which indicate when there is or is not an enforceable obligation to bargain in good faith. It seems to me that part of that is the notion that, if an employer does not want to bargain, it cannot be forced to bargain unless Fair Work Australia makes a determination that a majority of employees want an enterprise agreement. Yet clause 179 as it is drafted appears to have the effect that if a single bargaining representative approaches an employer and says, ‘I want to bargain and make an enterprise agreement,’ the employer must accede to that request, no matter how little support that bargaining representative has. I suspect that is just a drafting error, or at least an uncertainty in the drafting, which could be corrected.

The other point about bargaining representatives is a situation that will not occur very often, but it certainly can occur. Indeed, in giving various presentations about the bill, I have had a number of employer representatives ask a question to me. This is the question: the union claims to have members at a workplace and claims therefore automatically, by default, to be their bargaining representative. The employer says, ‘Well, I don’t think you have any members. Who are they?’ The union does not want to say for fear that those particular members might be victimised. It is not a situation that occurs often, but it can occur.

In another part of the bill there is a mechanism, and in fact it is a longstanding mechanism, for dealing with that situation. It is in the right of entry provisions. There is a procedure under those provisions for a union to go to Fair Work Australia and get a confidential confirmation which it can present to the employer to say, ‘See, we do have members at your workplace and therefore we do have a basis for investigating a suspected contravention.’ I have suggested in the submission that it might be worth extending that to cover any disputes that arise about whether the union is or is not a bargaining representative.

I have made some proposals for simplifying the secret ballot procedures—in particular, removing the requirement that Fair Work Australia has to be satisfied that the applicant, which is usually a union, has been

genuinely striving to reach agreement. At the moment, under the current procedure in the Workplace Relations Act, employers are able to drag out the secret ballot process by having an argument at what arguably is a preliminary stage—and that is the ballot order application—about whether or not genuine negotiations are occurring. What I am proposing is to remove that. It does not make a bit of difference to the employer's rights to raise that issue, because if the ballot gets up and the action goes ahead, or is proposed to go ahead, the employer has still got the right to go to Fair Work Australia and seek a stop order, arguing that the union is not negotiating in good faith. All I am striving to do in the submission is to take out what arguably is an unnecessary step in the process that simply adds cost and delay.

In relation to payment for work bans, I have lauded the government for its more flexible approach to partial work bans—that is, giving employers the option of saying, 'Well, rather than making a total deduction, we're going to make a proportionate deduction or no deduction at all,' where employees take action by way of a partial work ban. But under the bill as it stands that is only applicable where the action is protected, and I have made the point that employers would welcome that flexibility with unprotected action as well.

Looking over the submission, a further point occurred to me that I apologise for not making in the submission, but I would like to raise it with the committee. It is this: the bill now draws a distinction between protected and unprotected action. What it says to employers is that they have far greater freedom, where protected industrial action is taken, to decide on what response they should have by way of paying their employees. If it is unprotected action, they have no discretion; they must withhold pay and it must be at least four hours pay.

Here is the practical problem: in many cases it is not clear until after the event whether action was protected or not. So suppose the union takes action. The employer may believe, quite reasonably, that that is protected action and yet it may turn out not to be. If the employer applies the provisions of the bill dealing with the deduction of pay for protected action and, for example, decides that it wants to make a proportionate deduction or no deduction for a partial work ban, and if it then turns out the action is unprotected, the employer is actually breaching the provisions of the bill that insist that it withhold pay. The employer can be penalised for doing that.

It seems to me the more logical approach would be either to abandon the protected-unprotected action distinction and, indeed, have the rules in the bill that deal with protected action applied to unprotected again as well, or at least to provide some kind of defence to employers. If an employer fails to make a deduction because they genuinely think the action is protected action, that should be a defence to any prosecution for breaching the prohibitions on making payment for periods of unprotected action.

There is one final point I would like to make. It is not dealt with in the submission, but with the leave of the committee I would like to raise it. It simply is a response to an issue which has been raised in other submissions and which I believe occupied the time of the committee for some part of yesterday's hearing in Brisbane and it relates to the seven-day requirement for lodging an unfair dismissal claim. That requirement was quite clearly part of the ALP's Forward with Fairness policy.

Indeed, there is a good reason to have a very short time period for lodging a claim as a general rule—that good reason being that you are encouraging disputes to be dealt with much more quickly and you are maximising the chances that, if the dismissal is unfair, there can be an enforceable reinstatement. It seems to me that the basis for that policy is well founded. Nonetheless, I understand a number of parties have made the point—and I would agree with it—that there is a potential for quite significant injustice if that seven-day limit were policed too rigorously. I strongly suspect that, under the new system, Fair Work Australia is going to have to make a lot of decisions about granting extensions.

What I would like to propose is that employers be encouraged to give written notification—written information—to an employee at the time they dismiss them, telling them that they have a right to claim unfair dismissal if they believe they have been harshly, unjustly or unreasonably treated but that, if they want to bring such a claim, it has to be done within seven days. I say 'encourage', not 'require'. It would be perhaps too intrusive to require every employer to do that in every situation. I propose that the provisions of the bill dealing with extensions of time should be amended so as to make whether or not the employer has in fact given such a notification a relevant factor in determining whether to grant an extension of time.

There is no reason the government could not produce a standard, short-form notification that is easily available on the website. The idea would be that, if the employer has in fact given that notification, that factor would be taken into account if an employee subsequently lodged a late claim and sought an extension. Equally, the absence of such a notification might perhaps lend weight to a case for an extension where an

employee has been genuinely unaware that they have to move so quickly or, indeed, has taken time to get advice and that has taken them outside the seven-day limit.

I would be happy to put that into a supplementary submission if the committee requests, but I hope the gist of the suggestion is reasonably clear. That concludes my remarks. My thanks again to the committee for giving me the opportunity to come and present the submission. I am happy to take questions, as I said, not just on the content of the submission but on other aspects of the bill.

CHAIR—Thank you, Professor Stewart. One of the other matters that also occupied the committee for some time yesterday was the right of entry provisions and the access to documentation. Have you had any thoughts about the appropriateness of those provisions?

Prof. Stewart—If we are going to have a system where union officials have a right to enter workplaces and investigate proposed breaches of workplace laws—and it is a system we have had for a very long time in this country and it has worked tolerably well—it makes sense to me to give a permit holder the right to inspect any documents which might be directly relevant to the suspected contravention.

To impose artificial limits on that—to say that you can only look at one employee's records and not at another's records—I think puts an unnecessary limit on that and, indeed, impairs the effectiveness of the whole system. What I think is crucial, however, is that there should be appropriate checks and balances—appropriate ways of, firstly, ensuring that a permit holder is under appropriate obligations in relation to any information to which they are given access and, secondly, an appropriate procedure for removing the privilege of exercising the statutory right of entry where it can be shown that that right has been abused. In the second respect, the provisions of the bill are adequate.

The question of misuse of information is one where I believe the bill could be improved. I noted some of the questions that I believe Senator Brandis directed to the department in the committee's briefing back in December, and it seems to me that many of those questions were well directed. I also noted a submission which has been put in more recently by the Office of the Privacy Commissioner, which raises some concerns—which on the face of it seems to be well founded—about the provisions in the bill that deal with privacy obligations. Amending the bill to address some of those concerns would adequately deal with a lot of the concerns that have been expressed.

CHAIR—Thank you.

Senator CROSSIN—Professor Stewart, thanks very much for your submission and attendance today. Can I take you to the early stage of your submission about enforcing the right to request and the reasonable business grounds. We heard yesterday that another academic in Queensland has suggested that there needs to be a definition of 'reasonable business grounds', and he gave to us an example of the definition that was in the UK legislation. Do you think that that would assist in clarifying this matter to be enforceable?

Prof. Stewart—I understand the reasons for doing that. I do not believe it would assist, simply for this reason: I have looked at that list, and it is a perfectly sensible list, but it seems to me to be a list which could also be quite sensibly reproduced by Fair Work Australia in guidelines to employers about what does and does not constitute reasonable business grounds. It is not that I am opposed to elaborating what are reasonable business grounds, but this seems to be a classic example where that could be done at a level below the legislation rather than in the legislation itself.

Senator CROSSIN—Okay.

Prof. Stewart—It is perfectly possible to set out a lengthy list of relevant factors. The problem is that the list itself is insufficient, because the list will very often contain a whole series of factors which are essentially conflicted. The real question is: how do those factors get balanced in a particular situation?

Can I give the analogy of the 'better off overall' test or the previous no disadvantage test. It would be possible to write a whole series of provisions into the legislation, trying to elaborate on when someone is or is not disadvantaged or is or is not better off overall under an agreement compared to the relevant award safety net, but you would simply be multiplying words in the legislation, and the exercise is one which would be undergone by the relevant decision makers anyway.

It seems to me that a more extensive guide that not only sets out the relevant factors but provides examples of situations where there would be reasonable business grounds or there would not be reasonable business grounds would be more helpful. In line with the goal of trying to keep the legislation expressed at a general level—uncluttered, understandable—it is better done at that sublegislative level. I understand that the

government has said that it would expect Fair Work Australia to produce guidelines. I suppose it would not do any harm to amend the legislation to make that a requirement, but I would confidently expect it is something that would happen anyway and it would be better dealt with in that way.

Senator CAMERON—Professor Stewart, I really appreciate you going into some of the detail on the legislation, but can I bring you back to the macro level, because a lot of this is played out politically at the macro level. The argument we have been hearing is that this bill will be an impediment to productivity generally, that it will reduce flexibility and that we should tailor the legislation to suit the economic times that we are in. Could I ask you to comment on those three issues, but in particular on this question of tailoring the legislation to the economic times that we are in. How do you provide some anchor for workers' rights if we have this approach to flexibility on industrial legislation?

Prof. Stewart—Can I first of all say in response to that that the arguments about productivity seem to me to be completely unfounded. There was never any clear evidence that the current Workplace Relations Act, and in particular the Workplace Relations Act under the original Work Choices provisions, prior to being modified first by the stronger safety net amendments and then by the transition act, was a system that would produce greater productivity. This committee, or earlier versions of this committee, have heard a lot of, I believe, very persuasive evidence from the likes of Professor David Peetz to question the alleged productivity dividend from the kind of system which was put in place under Work Choices.

It seems to me right now that, likewise, the drivers of productivity in the current system are not going to be found predominantly in this legislation. They are going to be found in good management, in appropriate use of technology, in innovation—in various ways. There is a lot that governments can and should do to support greater productivity, and that includes through promoting better investment in training and skills. The issues that we are looking at in this bill do not seem to me to have a great deal to do, one way or the other, with productivity.

On the question of flexibility, there is no doubt that the bill does and will reduce flexibility for employers in certain respects. It means that many employers will have to think more carefully before they fire workers. It means that they will have less flexibility in the agreements they can make in terms of falling below what would otherwise be the safety net. The question will always be: is that the kind of flexibility that we want? I suppose it comes back to the old question of whether we want to take the high road or the low road to economic growth. The low road would say that you allow businesses greater profits by cutting employment conditions. The high road would say that you maintain a strong safety net of conditions and you try to encourage economic growth through more innovation, through greater productivity, through higher skills and training and so on.

I see very little in this legislation which would create some of the problems that some of its critics have been suggesting. Certainly it seems to me that what this bill essentially does is strengthen the individual rights of many Australian workers and it will make a modest difference to collective bargaining in a handful of enterprises where there is a genuine contest about whether there should be collective bargaining. But for many workers, particularly those workers who already enjoy good employment conditions, the fact that the safety net may be coming up somewhat will not make a great deal of difference to them.

In the end it comes back to—I think you used the phrase—anchoring. It is a question of a society making a decision of what is the minimum it expects in a decent workplace and this bill is one by which it seems to me we come much closer than we have done previously to meeting that goal of fair and decent working conditions.

Senator CAMERON—Is that your response on this issue of having a flexible system that responds to the current economic crisis?

Prof. Stewart—I would also say that of course there is flexibility built into the system in a whole lot of ways anyway. There is still ample scope for many parties to engage in workplace bargaining that could indeed, in some instances, see some employment conditions being negotiated away. We are starting to see some of that happen already in the current economic climate and I would expect that will continue. The question is: do we want to move to a situation where you can bargain below the safety net?

For a very large number of workers in industries like retail, hospitality, cleaning, child care and community services, there is not a lot of scope there to bargain downwards. Until and unless there is a convincing economic case which says that society as a whole benefits massively by cutting employment conditions of some of our lowest paid, most vulnerable workers, then I for one would not support that.

Senator ABETZ—Thanks for the submission. How many jobs do you think this legislation will create?

Prof. Stewart—I do not believe on the whole that jobs are created or lost as a result of these kinds of reforms. It seems to me that job creation responds predominantly to forces other than the conditions that are set by labour law. Let me say right away that of course you can find extreme examples where it makes a difference. If this legislation were proposing to massively raise the minimum wage, or to make dismissal impossible, or to double leave entitlements, then of course you would say it would have a negative impact on jobs; otherwise, it seems to me that the predominant drivers of employment growth are factors other than the content of this sort of legislation.

Senator ABETZ—What are the positives in this legislation that you would point to that would drive employment growth? Are there any?

Prof. Stewart—I suppose you could say that, round the margins, by giving parties somewhat greater freedom to bargain than they have had, you might, on the logic that enterprise bargaining generally has positive effects on productivity, see some modest growth in that area for that reason. But, by and large, I do not see this as being about promoting any higher levels of employment than would otherwise be dictated by the prevailing economic circumstances. I do not see it as having a negative effect or a particularly positive effect.

Senator ABETZ—What about the previous legislation then?

Senator CAMERON—Good! I was going to ask that as well.

Prof. Stewart—Again, there was no convincing evidence put forward over the previous decade for a significant effect on employment as a result of the previous government's reforms. It is a claim which I am aware was made on many occasions, but I am not aware of any convincing evidence which supported that claim.

Senator ABETZ—Even SA Unions claim that 6,000 jobs were actually created, and one would imagine that would be the worst-case scenario, if that is what SA Unions are putting to this committee, but you indicated to us that employers might have to think twice before dismissing people.

Prof. Stewart—No. If I can correct that, my point was that if you made it extremely difficult for employers to dismiss workers—for example, if you had a rule that said no worker could be dismissed unless Fair Work Australia agreed—then it seems to me that would have a negative impact on employment, but I have seen nothing to suggest that strengthening unfair dismissal rights, as the bill does, would have any negative economic outcomes and, on some views, it will have positive outcomes.

Senator ABETZ—It is a gradient, isn't it? It does not start cutting in only when it is absolutely extreme; it will start cutting in as it becomes more difficult, surely. And if it is more difficult, then chances are that may act as a disincentive to employ in the first place. That is the proposition I want to put to you.

Prof. Stewart—Again, the studies I have shown have suggested that strengthening unfair dismissal laws has a very small effect, at the margins, on filling positions. Indeed, my view is that what may be the most important thing is the perception element. There has been such hysteria about this issue that it seems to me quite plausible that there are some small businesses that have been so afraid of unfair dismissal laws that they may have failed to hire somebody. The question is: does that person go unhired? There is an argument that says that, if a small business will not grow its business because it is afraid of unfair dismissal laws, a rival business will do so and will take the market that would otherwise have been available.

Senator ABETZ—It is interesting that even SA Unions were able to refer to a study, which I might dig out later. In your submission you tell us, on the top of page 5, that in relation to the agreement content:

... the content of enterprise agreements is the one aspect of the Bill which represents an unequivocal departure from *Forward with Fairness*.

I have *Forward with Fairness* before me. On page 2 there is a dot point:

- Existing right of entry laws will be retained—

Are you saying that the legislation does not represent an unequivocal departure from that cast-iron guarantee that Julia Gillard made time and time and time again, both before the election and after the election, that is no longer so now that the legislation has been tabled?

Prof. Stewart—I believe that is a matter of interpretation. I do not want to be too pedantic about this. There are certainly aspects of the bill which do not match up with the policy in every respect in areas that some

parties will consider very important areas of detail. In relation to right of entry, it seems to me that the bill is inconsistent with the heading that you have just read out. It is perfectly consistent with all of the text that follows. Because I have heard this claim so often, it is something I have looked at. If you read the text of the policy that follows, it seems to me it accurately captures what is in the bill. The heading arguably does not, and I certainly understand why many people would make the claim, as you have just done.

Senator ABETZ—‘Existing right of entry laws will be retained’ would suggest that there would be no amendments to the legislation, that the regime that existed at the time when Julia Gillard was speaking would be retained without any changes, surely, on any interpretation? We do not need law degrees to work that out, do we?

Prof. Stewart—It was never going to be possible to retain, word for word, the existing laws absolutely in their entirety. That was never going to be possible because the right of entry provisions were always going to be affected by other changes to the legislation.

It is a matter of interpretation as to whether or not you think that is a significant departure. As I say, I understand why some employer groups, in particular, have claimed that it is a significant departure and I believe there is good reason for that if you look at the heading alone—not if you look at the policy as a whole. I will maintain my view, however, that it is in relation to agreeing the content. That is the only aspect of the bill where you cannot, on any interpretation, match up the bill to the government’s policy commitment. On the right of entry, there is an argument. There is an argument about compulsory arbitration. There is no doubt that, for example, the bill provides for compulsory last resort arbitration in a slightly larger range of situations than the original policy had mentioned. It is certainly possible to find discrepancies, but there is only one area where, in my view, there is an out-and-out contradiction, and that is agreeing the content.

Senator ABETZ—I think you are putting the best spin on it for the government, and that is fine; it is a matter of interpretation.

Senator JACINTA COLLINS—It was a very helpful answer, thank you, Professor Stewart.

Senator ABETZ—Can I take you back to the issue of jobs. Even SA Unions in their submission, on page 22, say:

Economists estimate, for example, that the exclusion of workers in small and medium sized businesses from protection against unfair dismissal ...

so that is their study—

only created 6,000 extra jobs—

You were not aware of Oslington and Freyens’ study on that?

Prof. Stewart—Yes, I am.

Senator ABETZ—So they are wrong?

Prof. Stewart—I would not presume to tell them that they are wrong, not being an economist. I think they made some estimates. Reading their published article—obviously I do not have access to their numbers and I do not have the econometric skills to question their methodology—I was not entirely persuaded, but I think even if you accept their claims it supports the proposition that I am advancing that, if there is an effect there, it is a small effect and it is at the margins.

Senator ABETZ—I do not want to particularly criticise you for it, because I am noting that more and more academics seem to be doing this: they write something, they footnote it as though there is an authority, you look at the footnote, and the authority is themselves. We had that in Brisbane yesterday. I do not know what has happened since I was at uni, but I was told that that was pretty poor form, that quoting yourself or quoting yourself as an authority is in fact no authority and does not really add to the academic robustness of that which you are presenting. You are not the only one, so I am not trying to pick on you, but today we have, I think, three minutes left to explore that, and I just wonder generally what the approach in the world of academia is these days.

Prof. Stewart—I am tempted to say that, if you did not think of yourself as being an authority, it is hard to see what you are doing in front of a Senate committee presenting evidence and putting in submissions.

Senator ABETZ—Can I say to you, if I may, quickly, that it is a bit like the self-serving statement in your opening statement. You praised the drafting and structure of the government’s new legislation, which is fine—only then to find that you provided advice on the drafting and structure of the new legislation.

Senator CAMERON—Good advice.

Senator ABETZ—At the end of the day, if you are involved in the drafting and structuring of the legislation, chances are you would think you have done a pretty good job and therefore you say it is a good job, but self-praise fits into that category as well.

Prof. Stewart—Just to clarify, I was not involved in the drafting of the legislation. I did provide some advice. My views on what makes for good drafting of workplace law have been a matter of public record for many years and it would be entirely inconsistent for me to say anything other than the fact that this legislation is an improvement. It is not ideal, as I have said, but it is a significant improvement.

I will come back to the issue of academics referring to themselves. In my experience, what usually happens in that regard is that a submission by definition tends to be fairly brief, covering a wide range of issues. Footnoting a piece which the relevant academic has written in another form at great length seems to me a perfectly acceptable and effective way of simply drawing the committee's attention to the fact that there is another and far more detailed piece of work available, with far more extensive citations and far more detailed explanations of a particular point. For example, it would seem to me to be perfectly acceptable if Professor David Peetz were to footnote a reference to his report for the Victorian government on the effects of the first year of Work Choices, because it would save him having to reproduce 100-odd pages of detailed analysis in what is otherwise a short submission. So I would not take the same issue with it that you appear to.

Senator ABETZ—I agree that the structure and drafting is a lot simpler than the previous legislation. I do not take issue with that. I think it is a lot easier to read and comprehend, and those that were involved did in fact do a good job.

Senator FISHER—Professor Stewart, Senator Abetz asked you about jobs. I want to ask you a bit more about productivity. The Deputy Prime Minister promised that this legislation would link wages to productivity, so wage increases would be linked to increases in productivity. Is there anything in the legislation that achieves that directly?

Prof. Stewart—I would say that the link is as strong in this piece of legislation as it is now.

Senator FISHER—That is not my question, Professor. My question is whether there is a link in this legislation.

CHAIR—Senator Fisher, the witness is trying to answer your question.

Senator FISHER—Thank you, Chair.

CHAIR—So let's let him answer and then you can make a determination.

Prof. Stewart—I was going to say, Senator Fisher, that I believe the link is as strong as it has been in our federal industrial laws over the last 15 years. It rests on two principles in particular. One is the assumption that parties to enterprise bargaining will naturally make agreements which improve productivity in return for wage increases. I am not entirely convinced that that is always going to be the case, but it has been an assumption that has strongly underlaid legislative policy under both major sides of politics for the last 15 or more years.

The other assumption is that, in making decisions about safety net wage increases—which used to be the responsibility of the Industrial Relations Commission, is currently with the Australian Fair Pay Commission and under this new system will be with the Minimum Wage Panel of Fair Work Australia—the relevant authority will take into account prevailing economic circumstances and ensure that wage increases do not outstrip whatever might be justified.

Senator FISHER—Thank you. So the Deputy Prime Minister's promise to link wage increases to increases in productivity rests on two assumptions.

Prof. Stewart—Yes, I believe that is fair. They are strong assumptions, but they are assumptions.

Senator FISHER—I ask my question again: there is no direct legislative requirement that wage increases be linked to productivity increases?

Prof. Stewart—There is nothing in the legislation which would, for example, say that an enterprise agreement cannot be approved unless every wage increase in it is linked to a demonstrated productivity improvement.

Senator FISHER—Thank you. I have a second area I want to ask about. I am happy to do that on notice, Chair, if that is all right.

CHAIR—Yes, if you could, because Senator Humphries wants to ask a question.

Senator FISHER—I will place this question on notice. Professor, you have come before the committee previously and referred to the indication by the government, and also in the schedule to previous legislation about award modernisation, that said that this legislation would neither disadvantage employees nor increase costs for employers. Firstly, does the bill achieve that promise? Secondly, is it possible for the bill to achieve that promise? If I may, Chair, I will put a second question on notice: Professor, what effect will this bill have on union membership?

Prof. Stewart—I am happy to take those questions on notice and provide a supplementary submission that addresses them.

Senator FISHER—Thank you.

Prof. Stewart—I simply ask, Chair: would it be acceptable to include in slightly more detail something about the point I raised about the seven-day unfair dismissal right?

CHAIR—Indeed. We are happy to receive any supplementary submission from you.

Senator HUMPHRIES—On your first page, Professor Stewart, you welcome the expansion of the statutory safety net of minimum conditions for all national system employees and list things like redundancy pay, long service leave and so forth. Then you say on page 5:

I find it objectionable that management and labour should be told that, even if they freely agree on a matter that they regard as important to their relationship, such as a commitment to certain climate change initiatives, they cannot include it in their agreement—

Isn't there a contradiction in suggesting that the employer and employees should be able to negotiate, say, on climate change matters but not on matters to do with redundancy or long service leave?

Prof. Stewart—The question in the end is: do you have a safety net for bargaining? My very longstanding belief is that in any society it is necessary and appropriate to set limits below which parties cannot bargain. There will always be arguments about where that safety net should be pitched. My opinion is that the level of the safety net is more appropriately set by this legislation than by the legislation it is replacing. I do not see a contradiction, simply because it seems to me that the bargaining system of necessity has to be concerned with bargaining above whatever level of safety net has been set by the legislation.

Senator HUMPHRIES—Something has to be offered and received on either side, presumably, to be a bargain. That is a philosophical question. To follow up, you argue that clause 194 should be amended to provide more flexibility for things to be negotiated, presumably to improve the position of, I assume, the workers at least, if not both the workers and the enterprise. The MBA has argued that you need to retain that sort of restriction on what cannot be negotiated between the parties in order to prevent independent contractors from being caught by the Fair Work Act. Is that a reasonable concern for them to raise?

Prof. Stewart—It is unclear to what extent independent contractors are caught by this act. What the bill will allow is for enterprise agreements to deal with matters pertaining to employment. In one view—and it is a view which is expressed in the explanatory memorandum to the bill—it is permissible for an employer and its employees to negotiate the terms on which the employer may choose to bring in outside labour by way of labour hire employees, or indeed independent contractors, but it is not a matter pertaining to employment to negotiate a prohibition on the use of labour hire or independent contractors.

It seems to me that is an accurate summary of the existing law, but it does not recognise that it might well change with the next High Court decision on what 'matters pertaining' means, and it does not recognise the difficulty in distinguishing between a prohibition on independent contractors and a term that merely attaches a condition to their use. But, in the end, apart from the uncertainties in the existing position, I would come back to the more fundamental point, and it is simply this: if an employer is prepared to agree freely and without coercion—and there are mechanisms in the legislation for dealing with coercion—and to say, 'Well, we'll only use outside labour in these circumstances,' or 'We won't use outside labour at all if we can help it,' that ought to be a matter that that employer is able to negotiate. It comes down again, I think, to freedom of agreement making.

Senator CASH—Thank you, Professor Stewart. In relation to union greenfields agreements, we have been presented with evidence that the proposed amendments in this legislation will have an adverse impact on productivity or employment—that is, the notification of all unions that could be a party to the agreement and having to actually sign them up prior to the agreement commencing.

A small change that has been proposed by AMMA is that the bill be amended to confirm that an employer can make a greenfields agreement with one or more eligible unions, so you do not have to make it with all of them, thereby ensuring that the project actually gets off the ground without any potential disputes amongst the unions. Would you see an amendment like that as being one that would ensure that there is minimal adverse impact on productivity or employment but would not actually affect workers' rights as such?

Prof. Stewart—There is, I think, a potential ambiguity in the existing provisions relating to greenfields agreements, and I must say that when I originally read the relevant provision my first thought was that it meant that any eligible union had to be party to a greenfields agreement no matter how few employees it represented.

Senator CASH—It seems to be a matter of interpretation as to whether or not that is actually correct.

Prof. Stewart—On looking at it again, I think it probably would be interpreted by a court to mean what the government is saying that it would mean, which is that it is only those unions who are prepared to actually make the agreement who need be involved in the process of making it. I would certainly agree that it would be helpful to amend the bill to clarify that.

However, what I would be concerned about would be an amendment of that nature producing a situation where, as we have had in the past, an employer that is proposing to set up an agreement will go and pick one union, regardless of how representative that union is likely to be of the employees to be covered by the agreement, negotiate the greenfields agreement with that union, put it in place and exclude other unions from the process who could plausibly claim to represent a substantial number of workers.

I accept that some amendment there would be useful but we would need to be careful not to return to the arbitrary types of agreements that we have occasionally seen in the past. Again, I would be happy to take that on notice and perhaps come back with a proposal about how that provision could be amended to clarify it without creating those sorts of problems.

Senator CASH—Thank you.

Senator SIEWERT—I want to follow up the issue of flexible individual arrangements and agreements. I asked a similar question of Professor Peetz yesterday. Now that our understanding is that they do not have to be registered, how can we be sure that they are meeting the standards? No-one is checking them any more.

Prof. Stewart—I think that is a reasonable concern, and I guess that there are a couple of ways in which it could be addressed. First of all, these agreements have to be in writing and a copy has to be retained. That means that the Fair Work Ombudsman, as part of its role in ensuring compliance with the legislation—and, for that matter, a union official that was a permit holder and reasonably suspected a contravention of a requirement in relation to a flexibility agreement—would have the right to demand to see the agreement itself and then check it.

So there is a mechanism there in the legislation. The question, I think, remains: is that enough? The legislation could go further and provide for some kind of vetting process where agreements have to be taken to Fair Work Australia to be approved, but that would, I think, run the risk of re-creating the kind of unworkable bureaucracy that we saw with the growth of Australian workplace agreements, particularly after the fairness test was introduced. We saw the difficulties that the Workplace Authority had in dealing with so many individual agreements.

I think what I would propose would be that this is a matter that ought to be kept under review. If credible evidence emerged—whether from the Fair Work Ombudsman or from unions or from any other source—that these arrangements were being made in breach of the very clear conditions that are set out both in the legislation and in the model award clause that the Industrial Relations Commission has formulated, it might be time then to look at whether further mechanisms need to be added to the legislation or, indeed, to the award, because that is a matter that Fair Work Australia itself could deal with. Fair Work Australia has got the capacity to strengthen those sorts of mechanisms in reviewing award terms.

On balance, again being mindful of not having unnecessary rules and not having unnecessary bureaucratic processes, it may be that, if you will forgive the expression, a 'suffer and see' approach might be the best way to go in the first instance.

Senator SIEWERT—Thank you.

CHAIR—Thank you, Professor Stewart, for your presentation to the committee today.

Prof. Stewart—Thank you very much.

[10.07 am]

GILES, Ms Janet, Secretary, SA Unions

GUARNA, Ms Olivia, Coordinator and Industrial Officer, Young Workers Legal Service

STORY, Mr Angas, Manager, Industrial Services, SA Unions

CHAIR—I welcome our next witnesses from SA Unions. Thank you for your submission to this inquiry. I now invite you to make some opening remarks, to be followed by questions from the committee.

Ms Giles—Thank you, and thanks for the opportunity to present our submission this morning. We will be doing a bit of a team presentation. I will make some introductory comments, and we are keen for Olivia to also make some introductory comments from the perspective of young workers. Angas will be here to also follow up any detailed questions.

Senator ABETZ—Chair, could I at this stage ask for an indication as to the time, because we had one group of witnesses yesterday who sort of swallowed the overwhelming amount of time in their own presentation.

Ms Giles—We do not intend to do that.

Senator ABETZ—Excellent. Good on you! Thanks.

Ms Giles—I want to start off by saying that there is no doubt that the Australian people want to see fairness reinstated in their work laws. The Australian government has a clear mandate to proceed to introduce the Fair Work Bill, and any member of parliament who supports that does so knowing that they have the support of the Australian people. In particular, the issues that they are most concerned about are unfair dismissal protection, the right to collectively bargain, a strong safety net, the abolition of individual contracts of Australian workplace agreements and the right to be represented and be an active part of their trade union.

In South Australia last year there was an extensive inquiry conducted by the South Australian Industrial Relations Commission, which we refer to extensively in our submission. It took evidence from all sectors of the community and even toured the state to look at the impact of Work Choices on our state and on workers in our state. In paragraph 19 of our submission the research clearly showed unequivocally that Work Choices had had a significant and negative impact on many employees and their families. In particular, the South Australian inquiry noted the impact of the laws on vulnerable workers, including women, young workers and the low paid. So we urge senators to recommend supporting this bill because it does go a long way to reinstating this fairness, balance and flexibility that the South Australian commission believes that Work Choices did not provide. In paragraph 61 of our submission, we state:

The SA Work Choices Inquiry expressed concerns about the vulnerability and inexperience of young workers and was concerned that if they were being exploited in a buoyant labour market their circumstances could get a lot worse in the event of an economic downturn.

I will ask Olivia to talk very briefly about the impact of Work Choices on the young workers that the Young Workers Legal Service in South Australia has represented over the period of Work Choices.

Ms Guarna—Thank you for the opportunity to address the committee today. Certainly, in almost three years of operating under the Work Choices legislation we did experience a lot of difficulties with young workers who were exploited and were finding themselves in quite horrible situations at work. The Young Workers Legal Service provides advice and, where appropriate, representation for young workers under the age of 30. However, most of our clients that we see are actually under the age of 24, so they are still very new to the workforce. Their inexperience does lead to a lack of understanding and awareness of how the workforce and the workplace operate, and this does lead to some problems that we end up speaking to the young workers about.

Our concern is that this lack of awareness, this vulnerability, can be exploited and taken further: they are not given an opportunity to improve and meet their potential in the workplace. The young workers that we speak to are eager, they are willing to form a really successful working relationship with their employers and with their co-workers. They want to do well. We certainly see a streak of independence at a younger age. We are seeing children as young as 13 and 14 who are working quite significant hours while still at high school. There are a large number of young people and young children who want to work, want to have a successful working experience, and we hope that they are supported in the legislation that covers their employment.

CHAIR—Thank you, Ms Guarna.

Ms Giles—We welcome many aspects of the legislation and we have listed those in our submission in paragraphs 68 to 88. In particular, we welcome the reintroduction of the right of entry for union officials. The right of workers to representation and consultation is crucial, particularly at a time of economic downturn. If the power differential in the workplace is there in any essence, in an economic downturn the individual bargaining power of someone with little economic security is far less, and it is at a time where people need to be represented even more.

We would like to draw the Senate's attention to a CFMEU case—and it does not look like I have brought it to the table with me—that the Workplace Ombudsman has recently dealt with in South Australia for a large amount of underpayment of wages. This is an example of where, if the union which took that case to the Workplace Ombudsman had been able to go in and inspect wages records and had the right of entry under the law, those issues would have been dealt with far earlier. The amount of money out of that particular case—which I will provide to the inquiry when I go back and get it—is the equivalent of \$90,000 of underpayment over many years. That is just one example in South Australia where the right of entry could assist workers to deal with issues quickly and efficiently and not have to wait for long legal procedures in industries where they may not be for very long because of the casual work.

We have some concerns about the legislation and they are outlined in paragraphs 89 to 139. I want to highlight four in particular, although there are others. The first issue is the Australian Building and Construction Commission. We believe that there should be one law for Australian workers in industrial relations, and that would be the law that the Senate is considering, and that there is no need for a different law for a group of workers. The Royal Commission into the Building and Construction Industry in South Australia found absolutely no evidence of any concerns around the construction industry here. The construction industry works generally harmoniously in our state and we cannot see the reason for the special provision. In fact, it has caused difficulties more recently in the construction industry because of work being stopped unduly when there has been agreement between employers and unions on a particular site.

Another issue is the right to request flexible working conditions. We want to highlight this in particular because there has been clear law under the Australian Industrial Relations Commission which set some minimum standards about the right to request flexible working conditions, and particularly in relation to family responsibilities. This bill we think goes backwards in relation to that, and it is even worse than the position currently under Work Choices. We think we need better provisions in this area, particularly at a time when we want to encourage more women into the workforce and also where the balance between family and work has become a significant public issue.

The next issue that we want to draw attention to is the right for workers to be consulted and to be represented. We believe this should be part of the National Employment Standards and is not strong enough for individual workers and groups of workers to be able to insist that they have the right to be consulted about workplace changes and also to be represented at the workplace.

The last key issue is in the area of unfair dismissal, particularly in relation to vulnerable and young workers. We have outlined our concerns there, and I am sure that Olivia will be keen to talk about the unworkability of some of the provisions for people that are young, who are very rarely in workplaces for more than months at a time, who do not know their rights and cannot access that law if they do not know about their rights, and then that seven days runs out and they are often in shock about being sacked still within the seven-day period.

Finally, we want to make a quick point about transition. Until we see the legislation around transition in relation to state and federal jurisdictions, it is difficult for us to comment; albeit we would say that our state government's position and our position at the moment is that we do not want to see any reduction in the rights of South Australian workers that they can currently access under state jurisdiction. We want the ability for the South Australian government to be able to negotiate any future changes. We also support a continuation of a state jurisdiction for those in the public sector and those not covered under state law. That is the union position in South Australia at the moment and it is also, at this stage, the South Australian government position.

In conclusion, we believe that there was an overwhelming call for the reinstatement of balance and fairness at work by the Australian people at the last election. We believe we now need that more than ever because of the economic times that we are in. Work Choices was bad in good times; it is going to be horrific for vulnerable people in difficult times and where individual workers have far less bargaining power. It is the role of industrial relations to not only provide a collective voice for workers but also to protect the vulnerable and the young, and that is why we think that right now it is crucial to have this strong safety net based legislation,

and we urge the Senate inquiry to recommend support for this legislation and to seriously consider amendments to the bill to include the issues that we have raised in our submission. Thank you.

CHAIR—Thank you, Ms Giles.

Senator ABETZ—Under the Fair Work Bill, can an employer pay above the award?

Mr Story—I do not think there is any impediment contractually for an employer to pay whatever they wish above the entitlements that employees—

Senator ABETZ—So it would not be a breach if an employer were to say to a particular employee, ‘I think you’re doing a good job. Here’s a \$100 Christmas bonus’?

Mr Story—The requirements are always that someone meets the requirements of law; it is not an impediment to them—

Senator ABETZ—Yes, so they can do that?

Mr Story—As far as I am aware, yes.

Senator ABETZ—Thank you for that. Can I take you to some aspects of the submission, first of all page 20 where we are told about the low-paid stream. What is the definition of ‘low paid’ to your understanding?

Ms Giles—That would be people who are currently on the minimum award rate and reliant on national and state wage case decisions.

Senator ABETZ—Where is that in the legislation? Are you able to point me to that? There is a criticism of the legislation by some that a high-wage earner is defined as \$100,000 plus but ‘low paid’ does not have a monetary figure attached to it and does not seem to be defined in the legislation at all, and I was just wondering whether any representations were made to SA Unions as to what ‘low paid’ actually meant.

Mr Story—I do not have the bill in front of me, but we will have a look at it. If there is anything useful we can add, we will supplement our submission.

Senator ABETZ—Thank you. In paragraph 74, you indicated that there is no evidence that go-away money was paid in relation to unfair dismissals. Are you saying that that never happened? You say: ‘There is no evidence that this is the case.’

Mr Story—The South Australian inquiry looking into Work Choices invited parties to come forward. Submissions were made from unions, employer groups and so on. That reflects the finding of the inquiry that there was no evidence of that.

Senator ABETZ—So when Kevin Rudd, during the election campaign, talked about go-away money et cetera, he was mistaken about that?

Mr Story—I think there is a popular perception afoot by those who are not day-to-day practitioners in the area that there is something called go-away money, but when it is chased down and people are invited to come forward with examples of it, they are very scant on the ground.

Senator ABETZ—I am aware of a number of them, but let’s move on.

Senator CAMERON—The Liberal Party?

Senator ABETZ—Even your Prime Minister said it, Senator Cameron, so be very careful!

Senator CAMERON—You know I am always very careful, don’t you?

CHAIR—Order! Senator Abetz.

Senator ABETZ—Can I also ask you about your view—I assume you are quoting this with approval—on the study by Oslington and Freyens that the previous legislation only created 6,000 extra jobs in Australia. Do you think that is a fair assessment?

Mr Story—I think we need to accept that study, because there is very little academic evidence about whether changes to unfair dismissal laws could create employment, so the study stands out because it is a proper based study. But remember this: what they were seeking to explore was the previous government’s claim that dismissal provisions were a significant disincentive to firms taking on workers and that this was especially so for small businesses. The contention was that removing unfair dismissal protections for employees in small to medium businesses would create 77,000 new jobs. That was the widely quoted figure.

Senator ABETZ—Yes, that is right.

Mr Story—So they set out to explore that assumption. Their finding, on page 12 of the research, is that the employment gains from removing unfair dismissal protections are likely to be small: around 6,000 if we assume all firms with fewer than 100 employees will be affected. In other words, less than 0.1 of one per cent of the labour force would be the improvement that might be gained from that. In other words, it is negligible; a very small number—and certainly 71,000 less than the figure that was being tossed around by the government as the potential jobs to be gained from introducing that legislation.

Senator ABETZ—I was asking whether you agreed with and quoted that with approval, and I think the answer to that is yes, which therefore would suggest that if this were to be changed we might in fact have 6,000 jobs uncreated, if I can use that term, or lost.

Mr Story—I think it is worth having a look at the whole of that bit of research, because they make the very valid point that there is such a multiplicity of economic factors in the swirl leading to the creation, loss and readjustment of jobs that it is particularly difficult to stipulate any particular number. So I would not be accepting that.

Senator ABETZ—Can I take you to paragraph 84 of your submission. Previously you have agreed with me that an employer paying or giving a condition to somebody that is higher than the award would not be in breach of any legal requirement, yet under ‘Right of entry’ you tell us:

Unions can inspect the employment records of non-members if this is necessary (for instance, if the union suspects that non-members have been treated more favourably than members).

So if an employer were to, let us say, provide a \$100 Christmas bonus to one particular worker because they actually performed better but that worker is not a member of a union, and the other two or three in that group may or may not be members of the union, you say the right of entry therefore would allow the union to look at all the records and exercise all the rights of entry under the legislation because somebody got a Christmas bonus?

Ms Giles—No.

Mr Story—No, that is not what it is saying at all. The point being made was that if we suspected that nonmembers had been treated more favourably than members—in other words, if the employer were deliberately paying someone less money because they were a union member than they were paying to a nonmember—that might be cause for concern and would be grounds for a union to inspect that. In other words, if they were discriminating against people who were union members, that is a legitimate reason for the union to look at it. If it is expressed in a way that allows you to interpret it differently, let me assure you that is not what this means.

Senator ABETZ—What would the legislative requirement be? This committee is looking at legislation and the actual words of the legislation, and just because an employer decides to treat one employee who happens to be a non-union member somewhat more favourably, I would have thought, would not allow the right of entry to occur. If you are saying that you suspect widespread discrimination on the basis of union membership or non-union membership, then I can understand what your submission is, but that, if I might say with respect, was not clear on reading it. I take you to paragraph 85. You say:

Unions can also enter workplaces to hear complaints from workers (but only those who are eligible to join the union).

Who would not be eligible to join the union?

Mr Story—There are workplaces where there may be several different categories of employee. For example, there may be electricians working in a place and there might be clerical workers. It would be inappropriate for someone from the Electrical Trades Union to go in and start talking to clerical people, for example.

Senator ABETZ—But why would that be inappropriate?

Ms Giles—Because they would not have the coverage of their agreements or awards and they are unlikely to be eligible to be their members.

Senator ABETZ—Yes, but the entitlement to be a member of a particular union is determined by the union itself in the rules that it makes for itself.

Ms Giles—I think you would find that there is a lot of regulation around that too. I think you had better go back and actually understand the rules and regulations and the laws around union membership, because that is not—

Senator ABETZ—The membership, your entitlement to join a union, is determined by the union's rules. Is that right or wrong?

Ms Giles—Yes, but the rules have to be registered and within the law as well. You will find that this is not really an issue, that unions have got clear membership and they know who they represent.

Senator ABETZ—So we never have demarcation disputes. Thank you for clarifying that for me. All that I learnt about demarcation disputes clearly was esoteric.

Mr Story—No need to worry about it.

Senator ABETZ—Yes—not to be worried about.

Mr Story—Obviously, the industrial commission and other bodies have assisted employee organisations in relation to their rules over the years and there are clear boundaries established in many cases. Where that is not the case, then that is a role for Fair Work Australia.

Senator FISHER—Further to that, why would it be that in the *Australian Financial Review* on 22 January it was reported that there were power struggles over members' funds which could be renewed under the proposed fair work laws, power struggles between the New South Wales, Queensland, South Australian and Western Australian branches of the National Union of Workers, which were reported as having said that the Fair Work Bill would encourage federal union officials to engage in a wholesale orgy of asset-stripping of state branches that will lose relevance under the state system? How are the rules clear between unions, including branches and federal officers, if some of your colleagues are speaking out on those sorts of issues?

Mr Story—I cannot pretend to have seen that particular news report, but we will ask the South Australian branch of the National Union of Workers whether there is anything they want to say on that point and will be happy to provide that information.

Senator FISHER—Thank you.

Senator ABETZ—On page 25 of your submission you tell us that the Building and Construction Industry Improvement Act discriminates against building workers in relation to other workers, but it would be fair to say that, whether you use the word 'discriminate' or not—I will not argue that point because time is very short—it also, to employ your term, discriminates against building employers, does it not? Building employers are treated differently to other employers out in the marketplace.

Ms Giles—The industry is treated differently from any other industry.

Senator ABETZ—Yes, which includes both employers and employees.

Ms Giles—Yes.

Senator ABETZ—Yes? You acknowledge that. Thank you very much.

Ms Giles—That means that often it gets in the way of very sensible arrangements that we have in South Australia with people actually being able to—

Senator ABETZ—Thank you for that. I was just wanting to know whether or not you acknowledged—

Ms Giles—Can I just give you some explanation?

Senator ABETZ—Unfortunately, time is very short.

CHAIR—Yes, and I am going to wind you up.

Senator CROSSIN—I think Ms Giles wanted to finish the answer.

Ms Giles—I just wanted to say that what we have found in the practice of this particular bit of law is that we have had situations where there has been an agreement between the union, the workers and the employers at a particular site. The work has been settled, people have gone back to work, and then two months later there is an inquiry into the situation, people are questioned through this other bit of law, and it has disrupted the relationship between the employers and the workers at that site unnecessarily, having already settled the matter months before.

CHAIR—Senator Crossin.

Senator CROSSIN—Thank you.

Senator ABETZ—I thought I was getting one last question, and then Senator Crossin insisted that Ms Giles be allowed to go on with an answer that was not relevant to my question.

CHAIR—You are quite correct, Senator Abetz—yes, your last question.

Senator ABETZ—Can I move on to the topic of harm to parties, at paragraph 117. I must say the language that is employed is not suggestive of a willingness to bargain and undertake negotiations in good faith, when we are told:

We are concerned that the proposed provisions ... will be used to stop effective industrial action on the part of workers, where capitulation by the employer is imminent.

So Fair Work Australia could intervene where you have got an employer by the stranglehold so much that they are about to capitulate, to use your words—hardly a harmonious term. But could I not also suggest to you that the same provisions could be used in circumstances where the employer has stood out and the workers are starting to rebel against the union and say, ‘This action is ridiculous. The employer’s offer is reasonable.’ The employer is just about to win and, to use your term, the union is about to capitulate, and Fair Work Australia comes in and says, ‘Bad luck, employer. We are going to negotiate this settlement.’ It would cut both ways, would it not?

Mr Story—I think Fair Work Australia can step in in both circumstances—

Senator ABETZ—Yes.

Mr Story—regardless of whether it is an employer or an employee party.

Senator ABETZ—All right. I have many other questions, but I am not allowed to ask them.

Mr Story—I am sorry we do not have the opportunity to answer them.

Senator CROSSIN—Thanks for your submission and time today. We had a fair bit of evidence yesterday in Queensland about access to employees’ records for the purpose of investigation of breaches of industrial law or awards or agreements. Can I ask you if SA Unions are aware of any allegation or case or proceeding or complaint by any person about the misuse of the union exercising its right of entry and misusing employees’ information?

Mr Story—That is a good question. I have been exercising my mind as to whether I could think of any example, whether there was ever an instance prior to the introduction of Work Choices when there were right of entry arrangements and examination of records, where an employer in this state complained that information that the union had access to was used inappropriately in any context. There may be an example, but I do not know of it. Certainly, as far as we are aware, there is nothing that you could describe as a widespread pattern. But I think in a sense what is missed in all that is what can be discerned from a press release that the Workplace Ombudsman put out on 19 January which said ‘Pay protector finds 15- to 24-year-old workers vulnerable to exploitation’. It went on to say:

More than 1500 young workers throughout the country have been back-paid over half a million dollars ...

... ..

Random audits—

this is by the Workplace Ombudsman—

of 400 employers ... by the Federal Workplace Ombudsman found that 165—or 41 per cent—were underpaying their staff.

Let me say that this is what it has come to as a consequence of Work Choices and as a consequence of keeping unions out of workplaces, keeping them from doing their regular business of assisting with compliance with law. Now it is almost at the stage where it is as common to find a breach of employment rights, if you go around and audit them, as it is to find that someone is doing the right thing. There can be a lot of kerfuffle about whether someone’s esoteric right is offended by someone going into a workplace and looking at records, but the truth is, by letting people go in there and look at those records, what is really found out is the day-to-day massive abuse of people’s employment rights through underpayment of wages, lack of holiday pay, lack of penalty rates—all of those sorts of things. That is the issue. Never lose sight of what this legislation is trying to do. That is the bigger purpose, not these other factors.

Senator CROSSIN—I put it to you, then, that those people who may suggest that access to employees’ records is inappropriate because a trade union official might access details about whether or not you are paying child support, whether you have got a medical illness—they might even want to look at your job application—are using that as a smokescreen for what is actually a genuine reason to access records?

Mr Story—I think so. I think people do not want unions in there, because what they do is turn up the widespread underpayment of entitlements. That is it.

Ms Giles—We have found that, yes.

Mr Story—These other things are the smokescreen. There are provisions in there, courtesy of the Privacy Act, which insist that people do keep sensitive information confidential. I think those protections are quite adequate as they stand in the current legislation, but just so soon as you start further fettering the right of employee representatives to go in there and look at the books, the logical outcome is that the situation will continue—widespread roting of employees' entitlements.

Ms Giles—We have had that reflected in the underpayment claims made within Young Workers Legal Service.

Ms Guarna—The Young Workers Legal Service is a one-day-a-week operation which runs with volunteer advisers, but it also is a one-person industrial officer arrangement. We have operated for about five years and we have recovered—I will just check in our latest report—just over \$500,000 in unpaid wages, entitlements and also in damages in sexual harassment and discrimination claims, and that is only for one day a week where we see young people.

If I may make one additional point, following on from Mr Story, concerning the records of employees: unfortunately, during the operation of Work Choices and continuing now, we have heard stories of young people who have inquired as to their rate of pay, or asked a question about their timebook, have wanted to see a copy of their timebook, or asked a simple question about their superannuation or their taxation, for example, and then have subsequently lost their hours for that week, or not been offered any other further work, and that is asking a simple question about it.

We are obviously very concerned about that, because in some cases they were not able to follow up unfair dismissal. If it did turn out that they were actually underpaid, then of course they can go back and make an underpayment of wages claim, but that does not fix the problem of them now being out of work. That is obviously another major concern that we have for young workers, but also for workers generally.

Senator CROSSIN—Mr Story, would you be able to table that press release from the Workplace Ombudsman? That might be quite useful.

Mr Story—I can. I have it here. I might add that on the Australian government Workplace Ombudsman website there is an extended version of the press release and the research which is referred to in the press release. I compliment the Workplace Ombudsman, Nicholas Wilson, an ex-Business SA representative here from South Australia, and Craig Bildstien, ex-*Advertiser* journalist here, who has put out this report.

Senator CAMERON—It is a job reference, is it?

Mr Story—A former Liberal member, Senator. Both of these gentlemen, with impeccable employer and Liberal Party credentials, can see a con coming when it is under their nose. They have done good work.

Senator CROSSIN—Ms Giles, are aware of any demarcation disputes that are active in South Australia at this point in time in your role?

Ms Giles—No, not that I am aware of. Essentially, these days in the union movement, if there is an issue around membership, we have got good relations between unions and they tend to sit down and work it out between themselves and do not pursue legal remedies or any other remedies to deal with those issues around the coverage of membership. We have not seen that sort of behaviour for some years in South Australia. In fact, I think people who talk about demarcation disputes are really stuck back maybe in the 1970s.

Senator SIEWERT—I noticed in some of your opening comments you were talking about the impacts of Work Choices and the issues around pay equity. Have you done an assessment of the new bill and in particular the award modernisation process, NES et cetera, to look at addressing pay equity issues?

Ms Giles—We have made a submission into the pay equity inquiry, which we could provide to you for information, but we have not done any more analysis since that time.

Senator SIEWERT—Having that submission would be useful. I am interested to look at whether the bill is adequate to address the issues that we need to in terms of pay equity. So any additional comments you have got would be really useful.

Ms Giles—We will take that on board, yes.

Senator SIEWERT—Going back to unfair dismissal, the seven-day rule, you were here I think when we were having that discussion with Professor Stewart around the seven days and the remedy he was suggesting, whereas when we had the discussions yesterday there was clear support for making it simpler and going to

either 14 or 21 days. Would you rather the 21-day suggestion be taken up or Professor Stewart's recommendation?

Ms Guarna—Certainly in our experience the 21-day time limit, which it has been for as long as I can recall, works effectively and is an adequate time. It allows people to come to terms with the fact that they have just lost their job, to deal with that, and then also to seek out advice and assistance. If they are not in a union, for example, then they are going to have to make inquiries that they possibly have never made before in their life, and to look up and deal with departments and agencies and other organisations that for the first time they are hearing about. It is a lot for someone to deal with, and even three weeks goes by very quickly, we have found. Our experience is that seven days, especially for a young person, really is not sufficient time, because they are dealing with the fact that they have lost their job and they need to find out the advice and information that they simply just do not know beforehand.

CHAIR—We are going to have to leave it there, I am afraid. Thank you for your presentation to the committee today.

Proceedings suspended from 10.48 am to 10.59 am

FRITH, Mr David Neville, Director, Policy, Business SA

SHEEHAN, Mr Michael Alan, Senior Business Adviser, Business SA

WALLGREN, Mr Henrik, Business Adviser, Business SA

CHAIR—I welcome our next witnesses, from Business SA. The committee has received your submission, so thank you for that. I invite you to make some opening remarks to the committee, to be followed by questions.

Mr Frith—I would like to thank the committee for the opportunity to provide evidence. In relation to our submission, we have purposely kept it brief. In the submission we have identified who Business SA is and who we represent. We work closely with our members through a variety of methods. We are well placed, therefore, to reflect the views of the South Australian employer community and to convey their views and concerns. The vast majority of our members are small to medium businesses and, as you would be aware, small to medium businesses are the engine room of the South Australian economy and indeed the Australian economy. Their feedback to us clearly indicates that their priority at this time is the need to preserve jobs and stay in existence, and this needs to be within an appropriate and flexible workplace relations system.

In the introduction to our submission we state that the bill must ensure a number of key outcomes, and these are not in any priority order. Those five key outcomes are: to increase productivity and employment; to provide industrial relations stability and certainty; to function under diverse economic and business conditions; to function under diverse employment and union contexts; and to respect employer body and union representation.

I would like to elaborate on two or three of those. With respect to functioning under diverse economic and business conditions, we are concerned that this bill is based on policy developed when the economy was at the height of its growth cycle, and the bill has not been changed or recalibrated to cater for the conditions that now apply. We are concerned that the bill would add a significant body of labour market regulations at a time of severe economic stress. The IR system that is established must be effective in prosperous economic times but also must be equally effective in the economic cycle of a recession. It must be effective in high and low inflationary environments and in periods of growing or receding unemployment. It is our belief that the bill in its current form fails to establish such an IR system, one that Australia needs now and into the future.

Secondly, the bill must function effectively and provide an appropriate environment that is supportive of diverse employment and union contexts. Inflexible IR laws do not cater for diverse circumstances or changing circumstances and add to cost and economic inefficiency. In particular, the move towards mandated employment conditions in legislation or in reactivated industrial awards or the application of collective bargaining needs to be assessed with these conditions in mind. Ultimately, labour laws that do not cater for a diversity of circumstances or are unable to adapt to changing conditions are not durable laws, and we contend that at this time—yet again, I stress—Australia needs an IR system that is going to take it into the future.

This year, 2009, is set to see the most significant changes in nigh on a century of Australia's federal industrial relations laws. In the space of this year the entire workplace relations statute is to be replaced, a new arbitration court inspection advisory body is to be established, new mandatory national employment laws are to be introduced, over 4,000 awards and 100,000 wage rates are to be replaced by a new body of occupational industry modern awards, compulsory collective bargaining and so on and so forth.

Businesses in South Australia are clearly indicating that few will be welcoming the fact of another widespread legislative change to workplace arrangements, irrespective of one's views on the substance of changes. Each change itself brings compliance costs for business. The proposed timing of the changes is also of major concern—that is, 1 July 2009. At a time of unprecedented downturn in economic conditions, business will be required to implement and participate in a whole new system. In addition, the new, modern awards commence on 1 January 2010, another major challenge if business is to know, understand and implement them. If common sense prevails then clearly consideration must be given to a commencement date that will be relevant to all employers and minimise disruption. Clearly also, there is insufficient time being given for major information and education programs that are essential if industry and businesses are to understand, know and implement the new systems. We call upon the government to meet its original commitment of commencing Fair Work Australia on 1 July 2010 or at least to introduce all changes on 1 January 2010, after a major education campaign has been undertaken.

Our members are clearly expressing frustration at the costs associated with an ever-changing IR system—changes that in the eyes of many are driven by narrow political ideology and vested interests rather than based on well-founded principles and identified need for reforms to benefit all parts of the Australian community. We believe we are beholden, based on the information from our members, from this committee to the wider Senate, to government, employers and unions, to do all we can to get the new system as right and effective as possible, to establish a system that will assist Australian businesses, particularly small and medium enterprises, meet the huge economic challenges ahead, as well as being appropriate when conditions change and better economic conditions return.

Our members are also greatly concerned that there is no knowledge of what transitional and consequential issues will arise. Employers and this committee are being asked to sign up to a system before seeing the important transitional and consequential legislation that may impact on employers and the operation of the system as a whole.

In assessing the bill and its impact on South Australian businesses, Business SA identified 10 key issues of concern. We are not saying that they are the only ones, but we have highlighted those 10 key issues of concern and they are presented in our submission. I would now like to invite questions regarding those 10 key issues or any part of my opening statement.

CHAIR—Thank you very much.

Senator CAMERON—Thanks, Mr Frith. You said there are 10 key areas, but it seems to me that you are seeking a whole raft of changes, which go to far beyond 10 points, in the bill that is before us. You say that we need to recalibrate to the economic cycle and we need durable laws, so I assume you are saying that the proposed laws will not be able to be recalibrated and they will not be durable. Is that your view?

Mr Frith—It is our opinion that the Fair Work Bill needs amendment. We are looking to the Senate and all parties to amend the bill to make it a durable bill that is appropriate for now, in the current firestorm that is facing business, but is equally valid when the economic cycle turns. It is our contention that the bill is not, in its current form, appropriate to be that sustainable system that is required.

Senator CAMERON—Would Work Choices be a durable system?

Mr Frith—We have indicated in our submission 10 issues that we believe would assist in making the bill durable and have drawn them to your attention.

Senator CAMERON—I am asking you: if Work Choices was still here, do you believe that that would be durable?

Mr Frith—Sorry, if Work Choices—

Senator CAMERON—Would you support a proposition that Work Choices stay?

Mr Frith—I think Work Choices is dead; long live the new IR system! We need a new system that is not going to be changing from one system to another. It is time that Australia had a durable system into the future, so we are now looking to the current bill—what is in the bill and what needs to be there. We are not looking back at Work Choices.

Senator CAMERON—You say Work Choices is dead, but one of the key issues in Work Choices was individual contracts and AWAs. You argue in your submission that there has to be a diverse employment context, and it seems to me that says that you are still yearning for the capacity for your members to have individual contracts. Is that correct? Is that what your submission is saying?

Mr Frith—In our submission we are saying that the bill must be flexible, to provide for a variety of conditions. We have not spelt out in our submission that it is about individual agreements. We are saying that it is about the flexibility to meet a diverse range of conditions.

Senator CAMERON—Let me get it clear: are you saying Labor should maintain AWAs or individual contracts? That is what I read in your submission.

Mr Frith—I respect what you are reading into our submission. We have not specified individual agreements. If, in the wisdom of the Senate, the bill is amended so that it allows for that, then I will respect the wisdom of the Senate in making that amendment.

Senator CAMERON—You are asking us to take your submission into consideration, so we need to be clear what it is. What I see you saying here is that ‘diverse employment context’ means individual contracts.

Are your members saying to you that they want individual contracts? Are you saying you want individual contracts? If you are saying, no, you do not want individual contracts, tell me; I'm happy!

Mr Frith—If I may come back to what I did not read out in our submission to save a bit of time, when we are saying that it must be flexible to meet a diversity of circumstances, that includes small businesses with just one employee as well as medium and large enterprises; flexibility for enterprises with a mix of employees, contract labour and other work arrangements; enterprises with little or no expert resource support; enterprises with a history of collective bargaining; enterprises with no collective bargaining; enterprises with union presence and those without.

Senator CAMERON—Yes, I understand.

Mr Frith—So there is a whole broad range of those to consider.

Senator CAMERON—Yes. I understand what you have said there, but I am trying to get the meaning. Does that mean that Business SA want AWAs and individual agreements? You are putting the submission to us. Do you want individual agreements? Do you say there has to be a maintenance of individual agreements?

Mr Frith—I can only repeat what is in our submission. The submission is there, and I will repeat what I said before: if the bill is amended to enable that flexibility—

Senator CAMERON—No. Is your submission a code for individual agreements?

Mr Frith—Our submission is not a code for individual agreements.

Senator CAMERON—Okay.

Mr Frith—Our submission is there very much to encourage this—

Senator CAMERON—So there are no individual agreements. That is not a problem.

Mr Frith—We have not mentioned individual agreements in our submission.

Senator CAMERON—If there are no individual agreements, it is not a problem for Business SA. Is that correct?

Mr Frith—I am not in a position to state whether individual agreements should be in or out. What we are saying very clearly to the Senate, to the government, to all parties, is that the IR bill must provide greater flexibility than is there at the moment.

Senator CAMERON—Including individual agreements.

Mr Frith—If the bill is amended so that it allows individual agreements, I bow to your wisdom in that matter.

Senator CAMERON—I will move on. You are being evasive. I will move on. You ask in here—you basically demand—that the government model its legislation on its effects on employment and the economy. Did Business SA ask the Howard government to model Work Choices and, if not, why not?

Mr Frith—We have represented all along, on behalf of the South Australian business community, that we need a stable, viable IR system now and into the future. I do not recall under Work Choices that indeed we had a Senate inquiry to give a submission to. If we had, we would have given the same request and advice to them as we are giving now. The IR system in Australia has got to stop flip-flopping from side to side and become a stable, robust system, especially at this time, given the economic firestorm which is descending upon us. It must be that flexible, robust system, providing some surety and certainty. All of us read in the paper every day what is descending upon the Australian economy, and it is frightening stuff.

Senator CAMERON—I am sure you can make those submissions if someone else asked you that question. But I am pretty keen to get my question answered.

Senator CASH—And he is keen to give his answer.

Senator CAMERON—Who's that? Who's that voice in the wilderness there?

CHAIR—Senator Cameron, keep going.

Senator CAMERON—You say that Business SA needs a Senate inquiry to ask a government to do something. You did not need a Senate inquiry to ask the Howard government to do econometric modelling, did you? You could have asked the government to do that.

Mr Frith—We could have asked the government.

Senator CAMERON—Why didn't you?

Mr Frith—Given our correspondence, our communication and interrelationship with members of the government, the questions may well have been asked, both at a formal and informal level. I am not necessarily privy to that. We are cognisant that the world has moved on.

Senator CAMERON—But you are the chief executive. I am asking you: did you formally ask the Howard government to model Work Choices? If not, why not, and then why is there a separate standard for a Labor government from Business SA?

Mr Frith—Let me see. You have put five questions in there. No, we did not seek to provide a formal submission to the Howard government on it. The legislation was announced. We have done our best to support our members by implementing the legislation that was passed. Now with new legislation being proposed, and a Senate inquiry, we are providing that information in our response to it. We are duly following what are the correct and proper processes.

Senator CAMERON—One last question.

Mr Frith—Sure.

Senator CAMERON—You indicate that you support freedom of association.

Mr Frith—Yes.

Senator CAMERON—Freedom of association has to be meaningful. Do you accept that?

Mr Frith—Yes.

Senator CAMERON—That means that workers who elect to join a union should have access to trade union representatives while they are at work. I am putting this to you: there should not be freedom of association that is there in theory; it should be a practical freedom of association, where workers get access to and advice from their union representatives during working hours. Is that your position?

Mr Frith—During working hours, so long as it is not disruptive of the productivity and the activity taking place at the workplace. It is appropriate to do it during breaks, before and after work et cetera, for a member of a union. We have maintained this for a long time. We are not anti-union. The unions have, indeed, a right and a place and we respect that right and place. If people wish to join a union, then we are supportive of that; that is what freedom of association is about. If they wish to meet with their union delegates, that is appropriate and should occur, but it should not be at the expense of the organisation in terms of trying to stay in existence and being disruptive of its activities and its processes. So therefore a time must be chosen when it is not disruptive to the organisation.

Senator CAMERON—If those workers want to negotiate a collective agreement—they are members of a union—they should have that right under IR law convention. Is that correct?

Mr Frith—If the members wish unions to be participating on their behalf and make that election, and that has followed due process which is an appropriate one, that is their right to do so—if the workers themselves have chosen that that is the method that they would like.

Senator CAMERON—Is Radio Rentals a member of Business SA?

Mr Frith—I am not in a position to be able to know that. We have many thousands of members. I do not know each individual member.

Senator CAMERON—You do not know if a major high-profile employer is a member of yours or not? You are trying to tell me that seriously?

Mr Frith—Yes. We have 5,000 members.

Senator CAMERON—Okay. Fine.

Mr Frith—All of our members are equally important to us, whether they are small or large. I am not in a position to keep track of 5,000 members.

Senator CAMERON—Even if they were a member, they were part of one of the biggest industrial disputes in the last decade in South Australia. You do not know if they were a member?

Mr Frith—No.

Senator CAMERON—Okay. I have no more questions.

Senator JACINTA COLLINS—Mr Frith, following on with a further point from the discussion that you have just had with Senator Cameron, I am looking through the summary of your recommendations on page 4

and I have listened to you say to us today that, in a sense, you support a middle, stable road for future ongoing industrial legislation. I think you would find that the current government and the minister would say that that is what they believe they are delivering, and a system that will be sustainable through economic changes, whether that is the crisis we are currently looking at or ongoing circumstances. You have said to us that you propose more consultation, even though we are going through exhaustive consultation that I think you might accept has occurred on this occasion, unlike what occurred with Work Choices. But you are actually proposing that we go through further consultation and extend the life of many aspects of Work Choices even longer.

The main point I want to pick up in relation to this middle road is your recommendation that section 183 of the bill should be removed. What possible justification, within an industrial relations system purporting to be a middle road, could there be for denying unions access to coverage by an agreement?

Mr Frith—What we are saying in there—if I turn to the default bargaining representation, and partly in response to Senator Doug Cameron's comments—is if the workers elect to have the union as their representative, that is not a problem. What we have in here is that it is axiomatic that the union is involved, whether they choose it or not. The union is a default bargaining position, which you then have to try and escape from rather than one that you elect to. My understanding of what we are saying is that we are seeking that the workers themselves elect who their bargaining representatives will be and, if they are union members and they wish to have the union represent them, that is part of what that freedom of association is about. Our interpretation of the bill is that it imposes as a default position, with no minimal choice, that the union would be the bargaining representative.

Senator JACINTA COLLINS—But I do not see in your recommendations a proposal that even reflects that. It simply seeks to remove section 183 and prevent unions from being covered by an agreement—and, frankly, I disagree with your argument there and I took that up with AMMA yesterday—regardless of whether it is a default circumstance or not. That is hardly the middle road.

Mr Frith—Our position is that—

Senator JACINTA COLLINS—Sorry, I am concluded, Senator.

Senator RYAN—Thank you. My couple of brief questions relate to part 9 of your submission about the transfer of business and the change from the concept of transmission of business. You allude—we had some discussion on it yesterday—to the impact that this could have on insourcing and outsourcing efforts. Could you elaborate on your view of the potential impact of that, not just when it comes to mergers and acquisitions and businesses being purchased but if I were outsourcing to, say, a company of Mr Frith and the contract came up to bid and then the contract passed to Mr Wallgren.

Mr Frith—Our interpretation of the legislation is there, and you can see in our submission that we have not said much. There is a concern that, when you transfer businesses from one model to another, there could be barriers to that transmission of business, including those things that we have mentioned. I have to be honest and say that I am not in a position to give a full-depth answer.

Senator RYAN—I would be happy for you to provide further detail on that at another time. We heard yesterday that, because of the change in the definition in section 311 of the bill, which now includes transferring work rather than the old reliance on the transfer of assets, there would be an incentive created in that outsourcing situation I described—for me, if I were Mr Wallgren, a new contractor—in that one of the only ways to guarantee that there would be no transfer of that instrument would be to not employ any of the previous contractor's employees and that that is in fact an incentive to unemployment.

Mr Frith—You are expressing our concern with it—that, if you are looking at transmission of business and are seeking to change work arrangements, your only choice in there would be virtually to wipe the business out, retain the business name and rebuild from the beginning, which could lead to unemployment.

Senator RYAN—Given you have many small and medium businesses who would probably be contracting with larger organisations for services, if the bill did create that uncertainty or that incentive, in your view would we see a lot of those smaller businesses avoid the risk of the transfer of those instruments and simply guarantee that they are not taking on any of the previous contractor's employees? Is that the sort of behaviour we would expect to see?

Mr Frith—That is the sort of behaviour that could occur among small businesses.

Senator RYAN—Thank you. If there is anything else you wish to add on notice on that particular issue, because I know it is a more complex issue than that, please do. The second question I have, which is not

covered in your submission and which again I would be happy for you to take on notice, relates to section 411 of the bill. The department, who drafted the bill, confirmed to us that the change in the protected industrial action section of the bill goes back and predates the 1993 legislation passed by the Keating government in that employer action is now only protected if it is responding to employee action, whereas previously protected action could be taken by either party, subject to the other provisions in the act at various points. Do you have any concerns about the effect of restricting employer industrial action in this sense would actually have on the bargaining process?

Mr Frith—We would be concerned that there are limitations—further restrictions—imposed on employers and their capacity to take action if they are facing action during a strike or by other actions that are taking place. What we need is a system which is providing a bit of a balance and an opportunity for both parties to take appropriate action within that. If there are substantial restrictions on an employer's capacity to respond, during a strike or other actions, then I think that is an inappropriate balance within what needs to be taking place. Both sides to any part of any agreement or through any process need to have the opportunity to provide appropriate action, not excessive, inappropriate action; and we are in a position for others to debate what they may be. But we would be concerned if there are substantial restrictions on the capacity of employers to respond to actions that are being taken.

Senator RYAN—So, in your ideal or view of fairness in this, protected action should be action that can be equally applied to both sides and that one side—whether it be the employer or the employee; in this case the bill talks about the employer—should not have one or both hands tied behind their back while threatened with industrial action that can be initiated by the other party?

Mr Frith—We would be seeking the opportunity for employers to have an appropriate range of responses to the actions that they are facing. As the bill is providing very tight restrictions on employers, that is an area in which we would look to see some amendments.

Senator RYAN—Thank you.

Senator FISHER—Welcome Business SA. I need to declare that prior to joining politics I was employed by wonderful Business SA and, indeed, worked with both Mr Frith and Mr Sheehan. On what basis does Business SA say in its submission that unlawful terms in the legislation should be expanded to include reference to restriction on supply? On page 5 of your submission you suggest that restrictions should essentially be imposed on:

... terms that would require an employer to source only products from a particular supplier ...

My question around that is: have you experienced evidence or instances of that in South Australia amongst your membership and, if so, can you expand on it? You might want to take it on notice. Have you got some particular instances in South Australia where unions have attempted to use the industrial process to restrict an employer's ability to source supply of product or services?

Mr Frith—I will respond to that in two ways, if I may. Firstly, we are not aware, even under the current system, of any attempt to impose illegal terms in any form of agreements. However, we are aware through anecdotal information that there have been questions raised around whether organisations would be prepared to have MOUs or MOAs with unions regarding a range of circumstances, which would be one step removed from actually including them within the bargaining range. I can only stress it is anecdotal, so I am not in a position to provide substance to that. Anecdotally, those MOAs or MOUs are covering a broad range of matters which could impinge upon supply and what is happening in there. But, as I said, this is anecdotal information and I cannot support it.

Senator FISHER—Would you provide on notice some illustrations of the sorts of goods and services that might be attempted to be restricted in this way?

Mr Frith—We are happy to take that on notice.

Senator FISHER—Thank you. In terms of Business SA's concerns about provisions of the bill dealing with low-paid workers—and you say in your submission that the low-paid provisions could ultimately lead to arbitrated outcomes and pattern bargaining in terms of low-paid workers, and you talk about the threat that that might create for jobs, given how employers might then attempt to deal with those consequences—how do you think that will impact in South Australia in particular?

Mr Frith—South Australia is traditionally a state of small and medium enterprises. Our reading of the bill—and I must stress that, if we have interpreted the bill incorrectly, I am happy to be corrected on it—is that there is little opportunity for a small business, with, as I sometimes refer to it, Joe the goose and five offside

in a tin shed on an industrial estate, to say that they are entirely happy. They may be paid by the award or above the award, not being embroiled in any form of bargaining, pattern bargaining or anything. Basically they can be involved whether they wish it or not.

It is a major concern that there is insufficient protection in the bill, in our understanding of it, for small business to say, 'We don't want a part of it. We are going okay, paid the award or better than the award.' The net result, if they start getting involved in bargaining and so on, would be just another impediment to business and another imposition on business. Small business is a volatile sector. They come and go with unfortunate rapidity because of the barriers, the perceptions of the barriers and the impositions that are upon them. The net result could be—and I can only provide some conjecture about it—that small business will potentially find the environment more difficult.

Senator FISHER—If that were to happen, would you predict that the South Australian experience would be less pronounced, more pronounced or the same as that elsewhere? If so, why?

Mr Frith—We are looking at a muddy crystal ball, if I may. My surmise would be that, given the preponderance of small business in South Australia, the impact could be greater, only by virtue of the numbers and the proportion of small business in South Australia.

Senator FISHER—Also the percentage perhaps of low-paid workers, howsoever they may be defined, noting of course that the legislation does not define.

Mr Frith—That comes down to what the definition of that is and who is going to be involved in it et cetera. Our interpretation is that there is insufficient protection for those who, at the workplace, are indeed meeting award payments. 'Low paid' is a definition in that respect, and there would be further challenges.

Senator FISHER—Thank you. I have two more questions essentially. You may want to take this first one on notice. Irrespective of what the legislation provides, is it your view that businesses will continue to reach individual arrangements with some of their workers?

Mr Frith—I would surmise that, with the nature of the workplace, there will be attempts to reach some form of individual relationship between an employer and employee. Anecdotally, again, we are very much aware over time in working with our members that in small business in particular the relationship between an employer and employee is a very intimate one, by virtue of the people that are there.

The relationship can result in an employer, if it knows the employee is in some dire strait, saying, 'Here's a bit of extra money.' Then there are Christmas bonuses and all the other things that go on. These are all the unwritten fringe benefits that take place. Those unwritten expectations are part of what happens in small business. I would be extremely scared if that flexibility in small business, whereby they support each other—because they are a team operating that small business—were totally disrupted by inflexible arrangements. There will always be those individual relationships between the employer and employee.

Senator FISHER—Indeed, to the extent that there were Australian workplace agreements registered by South Australian businesses that have not been brought to an end, under Labor's legislation they are able to continue, unless and until the parties decide to bring them to an end.

Mr Frith—Yes. Some may well continue for a time because they are meeting the needs of both parties.

Senator FISHER—Indeed. Time is short, so I will go to my final question. What is Business SA's view of the extent to which demarcation disputes, as they have been traditionally known by industrial relations tragi-comedies, between unions would lessen, stay the same or increase? What is your view of what would happen in South Australia under the Fair Work Bill, were it to become law, and on what basis do you proffer that view?

Mr Frith—We would be concerned that there is the potential for an increase in demarcation disputes, given the nature of the legislation. I was privileged enough to hear part of the evidence from SA Unions. While we are cognisant that there are rules governing union membership, at times they can be very convoluted and complicated, and indeed many employers would not be aware of them or would not necessarily understand them. So if there are unions who are visiting a work site claiming that they have the right to be there because of potential union coverage, an employer would not be in a position to dispute that one way or another. Given the right of access that this bill allows union people, there is obviously the opportunity for demarcation disputes. The media today has actually got an article in it expressing concerns about that very issue.

Senator CAMERON—The *Australian* is an industrial relations expert!

CHAIR—Order!

Senator CAMERON—Am I right?

Mr Frith—I am just reflecting what is in the media. I am just reflecting on that article. I am saying that there is clearly opportunity for increased demarcation disputes in the form of this bill.

Senator FISHER—If I could ask Business SA to take this question on notice: drawing upon past practical experiences of your members, can you please provide the committee with some examples of fights between unions that would be permitted under the Fair Work Bill.

Mr Frith—We will endeavour to do so.

Senator FISHER—Thank you.

Mr Sheehan—If I can add one final comment?

Senator FISHER—Thank you, Mr Sheehan.

Mr Sheehan—We will obviously take your question on notice. The issue is in relation to the modernisation process that is currently underway. Modern awards, unlike existing awards, do contemplate the inclusion of various sectors in a common award, which does include therefore the possibility that you could have multiple unions involved as an interested party in a particular award. This could obviously lead to some demarcation issues.

Senator FISHER—Thank you, Mr Sheehan. You may care to illustrate that by example with some particular awards and some particular unions, according to the South Australian experience, as a question on notice. Could you please do that?

Mr Sheehan—We will do that.

Senator FISHER—Thank you.

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

[11.38 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 our next witnesses, from Master Builders Australia. We have received your submission. Thank you for that. I invite you to make some opening comments to the committee, to be followed by questions.

Mr Harnisch—Master Builders very much appreciates the opportunity to address this committee on the Fair Work Bill. Master Builders has been involved in the consultation process on the bill and very much commend the government for the level of consultation that has occurred. In terms of overview, as indicated in our submission, Master Builders is concerned with elements of the bill which may have an adverse effect on productivity and employment, both key policy objectives of the current government.

We have made 37 recommendations for change, for amending the Fair Work Bill, relating to such issues as union rights to enter work sites to inspect books and documents and to recruit members and to act for workers who are not members of the union. We have focused upon agreement-making issues, because agreements make or break productivity, particularly in the building and construction industry.

On the issue of productivity, it is critical that, during the adverse economic times that we are facing, measures which facilitate productivity in agreement making be in place, rather than measures which may hamper bargaining or productive work practices and employment. That is why, amongst other things, our submission has focused upon our assessment of the impact of the bill on these two key policy outcomes. There are elements of the bill that would negatively add to labour market inflexibility at a time of economic crisis, a crisis of unprecedented economic uncertainty that will severely threaten security of employment in the year or years ahead.

Having said that, the bill does have many good features that Master Builders supports, but in some areas we consider it too favourable to union interests and thus likely to lead to a revival of unwarranted union power—and we emphasis ‘unwarranted’, as opposed to legitimate union power—that has the potential to increase levels of industrial disputation.

It also contains provisions, in our view, that will adversely affect agreement making and productivity. On that matter of productivity and agreement making, we are of the view that, where agreement making has minimal third party involvement, it tends to be more productive, especially in an environment where union militancy, as is the case for the building construction industry, is worn as a badge of honour. This is one reason we have highlighted the issue of greenfields agreements in our submission. I will focus upon this area in depth, because the issues we have raised directly affect productivity and employment.

Master Builders does not believe that unions, which have traditionally been in bitter conflict, should be advised of the intention to make a greenfields agreement with their rivals. In addition, the bill is unclear concerning whether or not an employer is required to make a greenfields agreement with all unions who are entitled to represent employees who will be covered by the agreement or, as appears to be the government’s position, whether making an agreement with one union is sufficient.

Whilst we understood that government policy is that greenfields agreements are able to be made only with one union, we believe that this matter should be put beyond doubt and that the bill be amended to make that point clear, as well as to change the notification requirements, which could be like throwing petrol on fire.

A member, who wants to remain anonymous, has informed us of their experience with making a current union greenfields agreement. That company has informed us that making a greenfields agreement with one union rather than with the union’s rival organisation was estimated to have saved up to \$80 million on one project and around \$15 million to \$20 million on another project. If you were to extrapolate that to the government’s proposed well-founded reinvestment in Australia’s infrastructure, you can see the economic and, obviously, the budget consequences of escalating those costs. That member has indicated to Master Builders that it would be prepared to provide substantiating evidence to this committee, but only in camera. These are savings which relate to infrastructure projects and moneys that are better spent on that purpose than on escalating the cost of those projects.

We cannot emphasise enough that confidentiality in making a greenfields agreement with one union is an outcome from the bill that would be a great boost to productivity when compared with the proposed scheme—or, at least, the ambiguities that we believe are the case.

On the matters of agreement making and independent contractors, we believe that agreement content is also a very critical issue. In particular, Master Builders is disappointed that the new laws or proposed laws would open the way for the regulation of the terms of engagement of independent contractors under the guise of ensuring employment security. We have extensively analysed how this is able to occur in our written submission, which shows the amount of legal hair-splitting that will result, hence the potential for disputation, and we believe it is against what the Labor Party committed itself to prior to the election.

Master Builders has recommended that the bill be amended to make unlawful any matter on an enterprise agreement that restricts the use or non-use of independent contractors or labour hire workers. We believe that it will also better reflect, as I said earlier, the government's pre-election policies with regard to independent contractors. We submit as part of recommendation 4 in our submission that all matters relating to independent contractors be excluded from the bill. This subject is well regulated under the Independent Contractors Act.

In terms of processing of agreements, we believe that the processing of agreements should be undertaken with the greatest efficiency so that the process does not become a drag on the system. Accordingly, we have expressed our concern about a comment in paragraph 768 of the EM to the bill:

... that FWA will usually act speedily and informally to approve agreements, with most agreements being approved on the papers within 7 days.

We believe that this may be well intentioned, but really is tantamount to wishful thinking, unless there are obligations legislated and unless there are mechanisms in place which permit the agreement to take effect seven days from lodgement. Fair Work Australia should be given power to rectify any deficiencies identified in the lodged document.

In conclusion, our submission points out other areas where there is potential for productivity to be damaged or, conversely, improved. In particular we highlight the area of demarcation disputes as having a potential to be reignited in terms of the bill, and we seek changes to industrial action provisions of the legislation. The recommendations we make, we believe, would add more balance to a system that has the potential to generate further turbulence in a time of already considerable economic uncertainty and where security of employment is under severe stress. Thank you.

CHAIR—Thank you.

Senator CASH—Thank you for that submission, Mr Harnisch. In relation to the greenfields agreements, I personally would like to take up the offer of the evidence being provided in camera. Are you happy with that, Chair?

CHAIR—It is a matter that the committee will have to determine at a later private meeting.

Senator CASH—One thing I would ask is: are there any further examples that you could provide to us today or is that something that you would need to take on notice?

Mr Harnisch—We will take that on notice, but there is a history within the building construction industry of demarcation disputes having troubled this industry over many decades.

Senator CASH—And you will provide further examples to us?

Mr Harnisch—Yes, we are happy to do that.

Senator CASH—Thank you. In relation to recommendation 1, averaging the hours of work under clause 64, you argue that you would like that to be changed back to 52 weeks. Can I ask what the impact will be on your industry of the proposed law and why you would like it to be changed back to 52 weeks?

Mr Harnisch—I might pass that on to Mr Calver for greater elaboration.

Mr Calver—A lot of projects go beyond 26 weeks and construction is governed by periods of frenzied activity in respect of the management of projects. Certainly our project managers, in one week, may be required to work 60 to 80 hours, given the peak of the activity of that construction work, and then there would be a quiet time, so where the project extends over more than 26 weeks you need to average out those hours, particularly for project managers and people in critical roles, so that they can efficiently supervise the particular project. That is the current law. I think that other sectors—for example, the mining sector—also want 52 weeks for the same reason.

Senator CASH—What then would be the practical effect of not having it changed back to 52 weeks for your industry?

Mr Calver—A very practical effect of needing perhaps to employ another project manager and escalating costs.

Senator CASH—So that would have a direct impact on the costs of the project?

Mr Calver—A direct cost impact, yes.

Senator CASH—In relation to the transmission of business, you say that the proposed changes to the current law will create uncertainty and increase costs. Can I get you to expand on why you say that and, particularly, do you see proposed laws as having an impact on job losses?

Mr Calver—This is an area where the law is new. It is unexplored. The conceptual basis has gone from transmission of business, with the underlying High Court case that we have mentioned in the submission governing the law, to an area that is now called transfer of business. We use a somewhat attenuated example in paragraph 16.4 of the submission to indicate the extent to which a connection between the transferring employer and the new employer would be maintained—that is, if the new employer used equipment that had been abandoned by the old employer, because there would be an asset connection between the two employers. We think that is a step too far.

The other area of concern is that at the moment the law limits the period in which the transmitted instrument has effect. The Fair Work Bill does not contain such a limitation, so after a period of 12 months currently, the transmitted instrument has no effect or can be folded into the new employer's particular work arrangements. In both of those areas we think that there is going to be uncertainty. If you are an employer association, as we are, and you are asked to advise a member in an area of uncertainty like this, the best advice to give to eliminate that uncertainty would be to say, 'Don't employ the employees of the old business.' That may well in a time of turbulence, as Mr Harnisch has illustrated, lead to greater redundancies, and we would not want that to occur. So we have asked for the conception of this test in the current environment to be reconsidered.

Senator CASH—I am from Western Australia, so I am familiar with the industry that you represent. In your oral submission, Mr Harnisch, you said that you were concerned, in relation to right of entry laws, with what you say is potentially unwarranted additional union power. Can I ask upon what basis you are making that claim, but in particular linking it back to Western Australia?

Mr Harnisch—The building and construction industry has an unfortunate and terrible history, and that history showed that prior to the building and construction industry act there was effectively unfettered access by unions to building sites. What happened in terms of access was primarily done on the basis of potential breaches of occupational health and safety. But the practice and the history has shown, not only through the courts but elsewhere, that the real reason was to cause disruption, and we are very concerned that reintroducing this back into the industrial relations instrument and law would just create absolute havoc for this industry. We are not saying that unions should not have legitimate rights in terms of accessing building sites, but they should not have, as we see it, really an 'open hand' of coming back on building sites.

Senator CASH—How, under the proposed legislation, do they have that open hand?

Mr Harnisch—We are concerned that that would come back once again under the guise of occupational health and safety. In relation to the issue of them being able to inspect the employer's records and books, we believe that that would just become a fishing expedition for unions to enter into other areas, which really is not the primary intention under the proposed law.

Mr Calver—There is a Western Australian example in paragraph 18.1 of our submission, where Master Builders has at length gone into the history of demarcation disputes in the building and construction industry and the recent announcement by the CFMEU construction division of WA that it would not join up with a proposed 10-point agreement between unions in Western Australia designed to avoid demarcation disputes among that state's unions. That, we think, is the start of the turf wars that previously occurred between the CFMEU and other unions, because this will be one way of cementing agreement ahead of those provisions. That is why we have illustrated that, and it particularly arises in WA.

Senator CASH—In WA was there a decrease in industrial activity on sites under the previous regime?

Mr Calver—If you want statistics, I think we should take that on notice.

Senator CASH—If you could, that would be appreciated.

Mr Calver—Yes.

Senator HUMPHRIES—You mentioned that you saw elements of this legislation leading to an increased level of industrial disputation and that this might affect productivity and employment. I take it that you were describing generally what might happen across the economy with this legislation, but I also took it that you were saying this is a particular problem for the building and construction industry, in that you are more likely to experience these problems as a result of these changes. Is that correct?

Mr Harnisch—Yes.

Senator HUMPHRIES—I am trying to tease out what the key elements of the present environment are with respect to a relatively industrial-disputation-free environment that need to be preserved into the future. What are the key things? I suppose another way of putting this question is: when you have a demarcation dispute affecting a particular part of the industry, what elements of that dispute actually cost industry the most? Is it industrial action aimed, effectively, by one union against another union? Is it the use of entry rights in order to start to wear away at a union's toehold in one particular workplace? How exactly does it translate into higher costs for industry?

Mr Harnisch—I suppose the one key feature that has led to greater productivity and industrial harmony has been the lack of third party involvement in agreement making between employers and employees. That has been singly the greatest issue. The issue about right of entry certainly has significantly helped in terms of less disruption.

The sorts of comments we are getting from our members are that for the first time we are actually now engaging with our employees in terms of making arrangements that work for individual employees, that are friendly to their own family and personal circumstances, rather than being dictated to by a third party through industrial agreements. Those things are the sorts of straight anecdotal evidence in terms of productivity. Certainly there are other studies that suggest that that has also occurred, but I am sure Mr Calver can offer more examples.

Mr Calver—There are institutional structures now which are very effective in helping the building and construction industry. The first is the Building and Construction Industry Improvement Act 2005, which establishes the ABCC and the specific rules for the industry which it administers. There has been a noticeable change and the adherence to the rule of law. It came in from September 2005, with some retrospectivity from March 2005.

Senator CAMERON—It is going in 2010, thankfully.

CHAIR—Let's keep on track.

Mr Calver—The second platform is the regulation of content, particularly through the government's national code and implementation guidelines, where certain matters are not able to be included in building and construction industry agreements. One of those issues which is a concern, which we have highlighted here, is the ability now, we would imagine, to regulate the work of independent contractors. That is proscribed for the moment. Also, the code and implementation guidelines proscribe entering into what are known as 'side deals'. When you enter into an enterprise agreement, that is what is applied at the site and that is what is enforced by the ABCC.

There are those institutional structures, which are assisted with the introduction of the rule of law and with a massive decrease in industrial disputes and an increase in the take-home wages of workers—it is just not an employer-centred thing—and building workers have enjoyed an increase in wages and conditions well ahead of those in the rest of the community for some considerable time.

Mr Harnisch—If I could add to that, there has been no diminution of conditions and wages of construction workers as a result of that.

Senator HUMPHRIES—I have just one more question, again going back to this right of entry issue. We were told yesterday by a number of witnesses—representatives of the union movement—that they were aware of very few or no cases of disputes or complaints about the use of right of entry powers under the existing legislation and that therefore those who suggested that the changed laws would lead to problems and complications and issues were probably exaggerating the extent of problems. What is your experience of abuse of right of entry powers, linked as they are apparently in the legislation to investigation of a suspected breach of the legislation, and why is that not a protection against these powers being abused in the changed format?

Mr Harnisch—As I said earlier—and it is well documented, so this is not a myth—unfortunately, the building industry has had decades of problems in this area. The concern that we would have is that the proposed bill, if nothing else, would embolden the building unions to go back to those practices, as Mr Calver said, particularly given the opportunity now to perhaps pinch members from other unions. The whole issue of demarcation disputes can be a real possibility and it is something that certainly our members are very fearful of.

CHAIR—We have only a couple of minutes left.

Senator FISHER—I will focus on one issue in that case—that is, the Master Builders Association’s views about the default representation rights, to which you refer in paragraph 11 of your submission. You say in paragraph 11.5:

The practical effect of having the union as the default bargaining representative deprives the employee of the right to choose;

And you have well put your views as to that. You also note:

... that the default mechanism could arguably operate even where a union member was unfinancial.

So one practical effect may well be depriving an employee of his or her right to choose their representative. Is there a practical effect on unions themselves? What do you think will be the practical effect of these provisions for unions in the building sector?

Mr Calver—Unions will be able to become parties to agreements, even where they were passive during the course of the negotiation of that agreement, because if there is one member at the workplace the union is a default bargaining representative. Subsequently, before the agreement is finalised by Fair Work Australia, the union is entitled under clause 183 to nominate itself as a party to that agreement. It then has rights conferred by the bill, such as enforcement of that agreement. So if I am a rival with another union and I lay doggo during the course of the negotiations I can later assert rights, even though I had nothing at all to do with the bargain, as long as I am a party to that agreement. I can do that to have a go at the other union to try and get in on their territory.

Senator FISHER—Are we talking about demarcation issues?

Mr Calver—That mechanism may well elevate demarcation. That is one of the reasons we used a case study in our submission. It will empower them, even if they have been passive during the course of the negotiation of the enterprise agreement.

Senator FISHER—Do you think it will impact in practical terms on union membership in the building and construction sector?

Mr Calver—I will take that question on notice because it is not a matter that we have given substantive consideration to.

Senator FISHER—Thank you, Mr Calver. My final question around this issue is that you recommend, if the government is minded to retain provisions of this form, in paragraph 11.6:

... there should be the capacity for employees to change the bargaining representative on reasonable notice.

Mr Calver—Yes.

Senator FISHER—You suggest that that suggestion is reinforced when considering Forward with Fairness and you refer to the statement in the government’s policy documents that a union does not have an automatic right to be involved in collective enterprise bargaining. Would you say that the current provisions of the bill comply with that election promise?

Mr Calver—In assessing that, we have used four criteria, which are set out at the beginning of the submission. One of them is whether or not it mirrors what is in the policy. The reason we have stated that particular proposition is that it is arguable that, given the automatic right of representation, with no right then to change the bargaining representative, the union is locked in contrary to that. So it is arguable. We say that if an employee is not happy with a representative who has been given automatic representation rights, then that employee should be vested with the choice to nominate another bargaining representative. At present, on our reading of the bill, once that process has begun you are locked in to that particular representative. There is no mechanism to nominate another.

Senator FISHER—I will take you back one sentence, Mr Calver. If not, then there would be a practical breach of the election commitment, would there not?

Mr Calver—As I said: arguably, that is the case, yes.

CHAIR—How many workplace deaths were there in the building and construction industry last year?

Mr Calver—I am not sure that the statistics are up-to-date in that regard.

Senator FISHER—Is that relevant to the terms of reference for this inquiry?

Mr Calver—We can provide the most up-to-date statistic to the committee if it assists, but workplace deaths are tragic.

CHAIR—Yes. While you are taking that on notice, could you tell us also the number of serious injuries.

Mr Calver—Certainly. We have recently republished our workplace relations blueprint, which has those statistics in it. We can supply the blueprint to the committee.

CHAIR—Thank you.

Senator CAMERON—Mr Harnisch, I am from New South Wales and I also know your industry. I have had a look at some of your statements about Work Choices over the last few years. You were a great supporter of Work Choices. In fact, I would say you were a bit of a zealot about Work Choices, given some of your statements. Given that position, you argue that Labor must implement all of its commitments in terms of right of entry. Does that mean that Labor should also implement its prior election commitments on the right of workers to bargain on any issue?

Mr Harnisch—There are two matters. With the current legislation, we were very strong in support of the building and construction improvement act. Our support was not for Work Choices. Our support was for an Australian economy that is now global and for the need to maintain flexibility and ensure that, for our industry, there were arrangements in place to maintain that flexibility so that the industry would be able to respond to whatever economic conditions that not only the economy but the building industry would find itself in.

Senator CAMERON—Including individual agreements.

Mr Harnisch—Our position was not for any particular agreement. We were very much for choice. As you know, under the previous government our members did enter into union agreements, but at the same time our members and their employees also chose voluntarily to enter into other agreement arrangements. So our position was never against union agreements.

Senator CAMERON—No, I am not saying you were against union agreements. I am saying you were very supportive of individual contracts and AWAs.

Mr Harnisch—We were certainly very supportive about arrangements that suited individuals in terms of their flexibility, their family situation et cetera—yes.

Senator CAMERON—You make much in your submission of productivity.

Mr Harnisch—Yes.

Senator CAMERON—What is the difference between productivity and productive performance?

Mr Harnisch—I suppose the two go hand in hand. Perhaps you could characterise productive performance as something that happens at the enterprise level. But productivity, has major implications for the wellbeing of not only the Australian economy but the Australian community. Those two points are even more important now that we are heading into an unfortunate economic slowdown, where productivity has to be maintained. We have a government that is now, unfortunately, likely to be facing a massive deficit, or a deficit—

Senator CAMERON—Can I put it to you that your response is not correct in terms of the difference between those two forms of productivity. Maybe I can talk to you later about it, or maybe you can get one of your researchers to look at it, but productive performance is a much wider measure of productivity than labour productivity. They are the issues that go to the real improvement on productivity, and you are not clear about productive performance or its formal definition, are you?

Mr Harnisch—I am happy to talk to you about it.

Senator ABETZ—This is not a memory test. Come on!

Senator CAMERON—No, it is not a memory test. I do not think the witness needs your protection, by the way.

Senator ABETZ—It did not stop you intervening before with the trade union movement. So by your own conditions—

Senator CAMERON—If you have got to square up, then we will be okay about that, I suppose.

Mr Harnisch—I am more than happy to meet up with you after this hearing.

Senator CAMERON—Let me tell you, in all the literature I have read, all the international best practice forums that have taken place, productive performance is the main way to improve productivity. It is not about taking workers' rights away. Would you accept that there are more sophisticated ways than reducing workers' rights?

Mr Harnisch—Nowhere in our submission does Master Builders talk about stripping away workers' rights.

Senator CAMERON—You are stripping away workers' rights to have access to the union of their choice.

Mr Harnisch—No, our submission does not say that.

Senator CAMERON—Yes, but in greenfield agreements—let me examine that. Under the previous legislation, your members could do an agreement with themselves. They could just say, 'This is the agreement,' couldn't they?

Mr Harnisch—No. My understanding is that an agreement involves at least two parties.

Senator CAMERON—Well, it is not my understanding of the legislation.

Mr Calver—At the moment employer greenfields agreements are permitted and employer greenfields agreements allow an employer to post terms and conditions—

Senator CAMERON—That is correct, yes.

Mr Calver—by which a person would be engaged on site.

Senator CAMERON—Without negotiations.

Mr Calver—That is right. In respect of union greenfields agreements, you are able to enter into a greenfields agreement—

Senator CAMERON—I am not asking about union agreements.

Mr Calver—I am just completing the answer. You are able to enter into a union greenfield agreement with a union who has the capacity to enter into that agreement through their rules.

Senator CAMERON—Take my union, the AMWU.

Mr Calver—Yes.

Senator CAMERON—The MBA is arguing here that you should be able to go and do a greenfield agreement with a union, even though the AMWU has constitutional rights and legal rights to represent workers, and that that agreement should then apply regardless of the views of AMWU members on the job. Is that correct?

Mr Calver—No. The proposal which is not in the submission, which I can now elaborate upon and which we will give you greater detail about on notice, is that you should be able to make a greenfields agreement with the union of your choice if they have the capacity to—

Senator CAMERON—The union of the employer's choice?

Mr Calver—Yes, if they have the capacity to represent the majority of employees to be employed on that site, so that, just like in all other democratic processes, the majority of employees to be covered would mean that that was a democratic process.

Senator CAMERON—How is it democratic that the union determines the appropriate union on the job? How is that democracy? How does that separate—

Mr Calver—If a union has the capacity to represent the majority of employees to be employed on a particular site, then that will be a way to reach a democratic solution to the issue, which is why that is how Master Builders is intending to expand its answer and its submissions to the government about the way in which union greenfields agreements should operate in the future.

The submission talks about what we think needs to be changed in the bill, and now we have devised a practical solution to deal with the question of democratically choosing the union that will be able to enter into a union greenfields agreement with an employer.

Senator CAMERON—So how does that democracy work? First of all, the employer determines the union. Is that democracy?

Mr Calver—No, the employer cannot determine the union. What the employer will do will be to negotiate with a union that has the capacity to represent the interests of the majority of employees to be employed on site. There would still have to be a negotiation, there would still have to be representation in the interests of the majority of employees.

Senator CAMERON—What if a worker says, ‘I want the AMWU to represent my interests under this agreement that you have bestowed upon another union’? Does that worker have the right for that union to come in—

Mr Calver—It is a greenfields agreement, so at the time it is negotiated there are no employees to—

Senator CAMERON—No, I am talking about down the track a worker has a problem with some aspects of the agreement—

Mr Calver—Workers should be entitled to have a representation of the union that they desire. That is not at issue. What is at issue is the point where there are no employees encouraged: what will confer democracy? So the proposal we are putting is that for the majority of employees to be employed at a workplace, if the union is able to cover them, the employer should have the capacity to negotiate with that union, and we need to confer a sufficient level of democracy to solve the government’s current problem, which is that you can go away and make a greenfields agreement with a union that represents a minority of those to be employed. That is the mischief which the statute is directed at, and therefore Master Builders are saying, ‘The way to solve that mischief is to have a union which represents the majority of the interests of the employees to be employed.’

Senator CAMERON—But it does not restrict a worker saying, ‘I’m a member of the AMWU’—or the CFMEU—‘I’ve been a member for 20 years and I want them to represent my interests under this agreement that binds me.’

Mr Calver—But there are no employees. When the employees are engaged, they will be entitled to nominate the union of their choice to represent their interests. That is not at issue. It is a greenfield agreement, so there is no-one currently employed.

Senator CAMERON—Yes. Thanks.

Senator CROSSIN—I would like to follow up on the questions that Senator Fisher was asking. If an employee in a workplace does not wish to have a particular representative body represent them in negotiations, vis-a-vis a union, isn’t the remedy that they simply resign from that union and/or join another union and/or don’t be a member of a union?

Mr Calver—The problem with merely resigning is that there is some law which says that that union has currency representation even if a person is unfinancial. At the time you resign, if you were a member when the bargaining process commenced and that union was in place, then the union would be the bargaining representative.

What we are looking for is a mechanism whereby, if the employee has appointed that person, they can unappoint them, if you like, so that there is a process where the employee has freedom of choice if they are disgruntled. They have a right to sack a person if they are not doing a good job.

Senator CROSSIN—Let me just get this clear. You are talking about outside the notice period inside trade union rules, which might say, ‘You need to give the trade union one week’s, or one month’s notice of resignation,’ for example.

Mr Calver—Yes. If we are in the middle of a bargaining process and the union has an automatic right to be appointed as the bargaining representative, I am an employee and the union representative has not turned up and has not communicated with me, I can resign from the union—and it may well take, as you say, 21 days for that to be effected. I cannot appoint someone else as a bargaining representative under this bill. That is what we are seeking a mechanism for.

If I am disgruntled with that representative, as an employee I should be given the choice to subsequently sack that person who is not performing and appoint either myself or another party—another union.

Senator CROSSIN—That union will still be in the workplace representing other people, though.

Mr Calver—Maybe, maybe not, because the default mechanism operates. There is only one member of a union at a workplace.

Senator CROSSIN—Can I ask you to take me through your recommendation 14:

Access to a bargaining order should be restricted to situations in which objective evidence exists to show that the good faith bargaining requirements are not being met.

Can you explain that recommendation to us?

Mr Calver—Certainly. At the moment the threshold for access to a bargaining order we believe is set too low. A bargaining representative can apply for a bargaining order based upon the notion that it has concerns that one or more of the bargaining representatives to the agreement have not met those good faith bargaining requirements. So where the focus is that that particular bargaining representative has concerns, we are putting to the Senate that it may well be that that is a subjective criterion, because it is the bargaining representative who has concerns rather than that there has been a criterion that has not been met—for example, the person has not turned up at a meeting; they have not appropriately responded.

Where the bargaining representative has concerns, we think the threshold is set too low. We say on page 39 of our submission:

The test appears to be subjective, a proposition reinforced by the criterion for obtaining a bargaining order set out in Clause 229(4)(d) that the relevant bargaining representative considers the other representatives have not ‘responded appropriately’ to the concerns.

It may well be that I am offended because I have been sworn at. Bargaining negotiations do get heated. I could go off and be offended and then apply for one of these orders. That should not be the case. There should be an objective criterion. So if the use of bad or inappropriate language is what the drafter of the statute is seeking to attack, then it should have that objective criterion, rather than the bargaining representatives themselves thinking that there has been an inappropriate response.

That should not be the case. There should be an objective criterion. So if the use of bad or inappropriate language is what the drafter of the statute is seeking to attack, then it should have that objective criterion, rather than the bargaining representatives themselves thinking that there has been an inappropriate response.

Senator CROSSIN—I am not quite following you here. You are simply saying that you do not object to this clause or the way it operates; you think it needs further clarification to assist either party.

Mr Calver—We think that the criterion should be made objective, not subjective, and that the drafter should reconsider the provision in that light.

Senator CROSSIN—Thanks.

Senator SIEWERT—I want to go back to the beginning of your comments when you were talking about averaging hours of work and your concerns that it is all coming back from 52 weeks, and you gave an example of that. How many projects would exist at the moment that are under 26 weeks?

Mr Calver—We would have to take that question on notice.

Senator SIEWERT—I am wondering what happens to those workers for whom it has been averaged over 52 but in fact they have only worked 26 weeks, for example, or under the 52 weeks.

Mr Calver—Projects are continuous. The number of projects with a duration under a specific period would be very difficult statistically to extract because records are not kept of that generally. We would have to go to the members and ask that question.

Senator SIEWERT—I am therefore interested in your comment about projects being continuous. Would that issue then not apply to the example that you used of the concern of reducing it from 52 to 26 weeks? My concern is the reverse. It is a concern that was raised when we were debating Work Choices in the first place. Allowing an averaging of 52 weeks is open to abuse because employees may in fact lose their jobs prior to the completion of the 52 weeks. They would have in fact worked longer in the beginning of their employment and would not have been adequately compensated because they had left that job. So my question is: what happens with people who are employed for less than 52 weeks?

Mr Harnisch—If I could start the answer by addressing your comment about building workers losing their jobs, it certainly has not been the case. It certainly was not the case for many years. In fact, this industry has suffered severe skill shortages. To say that contractors were laying off workers last year simply does not hold true; in fact, they were looking for workers. A construction project is made up of many contracts, and therefore the question that you have asked in terms of available statistics is very difficult to answer because there are discrete components during a construction project that would be affected by the comments that were made in this area. But I would prefer that Mr Calver give the technical details.

Mr Calver—We would not, and do not, condone any abuse of these provisions. If there is a mechanism which you have in mind that would prevent the abuse about which you are concerned, while at the same time you would achieve the end of having 52-week averaging, then we would be happy to discuss that with you or any other senators. At present though we do not think, because of the sorts of people who are involved in these operations—and Mr Harnisch has spoken about skill shortages—that we are going to abuse the people who we value the most and are in these critical time factor jobs. But if there were to be mechanisms in place, rather than a shortening of the period, which you think would lead to a situation where the provision would not be abused, then we would be happy to have a discussion about those—perhaps off air, given the time.

Senator SIEWERT—Following on from that, yesterday the resource industry was arguing for a specific clause so that industry could deal with this.

Mr Calver—Yes.

Senator SIEWERT—Are you arguing across the board to get rid of this clause or are you arguing for a specific clause for builders—for your industry?

Mr Calver—There is a great deal of symmetry with some of the operations of mining and some of the operations of building and construction. Generally mines have a longer life than building sites have. Some large infrastructure projects can take up to 10 or 12 years to build, so there are a lot of similarities there. There is a very intense period of activity for a short duration of time, and therefore some elements of that process that are critical need personnel to be there. Sometimes that can occur over 12 months. It can occur over a longer period as well. So the building and construction industry has a lot of symmetry with the resources sector in that regard. We would be arguing that our situation is akin to theirs and that averaging 52 weeks should be permitted for us if it were to be permitted for the resources sector.

Senator SIEWERT—I did not quite get an answer to my question. Are you supporting a specific industry exemption for the resources sector and the building and construction sector, or do you just want it gone completely?

Mr Calver—No. What we are saying is that if you were to have a mechanism by which, if this were introduced across the board, abuse could be stopped, we would be happy to have discussions with you outside this forum to advance that particular amendment so that the efficiencies about which we speak could be maintained.

Senator SIEWERT—Thank you.

Mr Harnisch—I would add that conversely we would not want provisions that disadvantage the building and construction industry. I would ask you to consider the particular way that the building and construction industry operates in terms of being project based. It is not like any other industry and therefore there are a set of circumstances, particularly in this case, that could well and truly disadvantage that industry.

CHAIR—We are going to have to leave it there. Thank you for your presentation to the committee today.

[12.27 pm]

McDONALD, Mr Tim, Partner, Sparke Helmore; Lawyer, Yum! Restaurants Australia

WALLIS, Mr Richard, Employee Relations Director, Yum! Restaurants Australia

CHAIR—I welcome our next witnesses who are from Yum! Restaurants Australia. We have received your submission and I invite you to make some comments to the committee which will be followed by some questions.

Mr Wallis—I am appearing in place of Amanda Fleming, who wrote the letter. She has been promoted to the US. We would like to rely on the written submission and add some comments now.

CHAIR—We do not see promotions to the US: it is promotion to Australia!

Mr Wallis—She is doing such a great job. She is taking the Australian way to the US.

Senator ABETZ—Are you now the acting chief people officer?

Mr Wallis—No, I am not. But they are looking for someone, if you are interested!

CHAIR—Thank you, Mr Wallis.

Mr Wallis—I will give you the history of Yum! Restaurants. We operate two brands in Australia and five brands internationally. The two brands in Australia are KFC and Pizza Hut. We have been operating in Australia since 1969-1970. We have a long history of growth within Australia, and we now have 280 pizza restaurants and around 550 KFC restaurants around Australia. We employ about 32,000 people, 80 per cent of whom are young Australians, often in their first job.

We have enjoyed a long relationship with the SDA and currently we have both enterprise awards specific to each brand and enterprise agreements on top of them that are currently in place. We train about 20,000 young Australians annually due to a turnover rate, which is relatively good for the industry, of 60 per cent. We train a lot of young Australians in their first job and give them fundamental work skills. Yum! owns two unique brands in Australia—Pizza Hut and KFC. The operational systems that we have use a structure for each brand. The recipes—11 secret herbs and spices, and our pan dough pizza from Pizza Hut—are unique.

CHAIR—And we are going to ask what they are when we get to questions.

Senator ABETZ—We do have the power to subpoena, don't we?

CHAIR—That is right!

Mr Wallis—The labour allocation and the way we roster are unique by brand. The consumer needs as to both brands are different. The food costs are different as to each brand, but they are unique for each brand. Together these systems form a finely balanced process for differentiating each brand, both from each other and from the market. The systems we have created over a number of years are shaped to suit our business. Each brand acts as a single business. We have 180 franchisees across Australia who are all small business owners. We act as a combined entity. So we act as a group on marketing and supply chain, and we have a common approach to a leverage scale and we make sure that franchisees get efficiency. We get scale and growth relatively easily. The strength of our brands is based on the strength of our franchisees and the strength of the system itself.

Because of this structure—again, it is shaped to suit our business—consumers have confidence in our product. They have confidence in the cleanliness of our units. Parents have confidence in sending their kids to work for us and our franchisees. Franchisees have confidence in investing in the brand and we are asking them to continually invest in upgrading assets, building new assets and growing the brand in Australia. In addition, Yum! as an entity has confidence in investing in Australia. That is due to the finely balanced approach we have to the integration of all those systems within each brand.

In addition, we have got unique industrial relations arrangements. All these arrangements have been approved by the Australian Industrial Relations Commission and have been negotiated with the SDA over a number of years. Yum! franchisees are happy with the guarantee given under Labor's Forward with Fairness implementation plan. I am going to read that out. We have got copies of that if you would like us to hand them out. It is on page 16 and it reads:

Labor understands that enterprise awards have a special status. Many enterprises have worked for years to get their enterprise award in a shape that suits their business. Consequently, Labor guarantees that enterprise awards will continue.

Labor will instruct the Australian Industrial Relations Commission to only review enterprise awards where requested by the current parties to the award.

In essence, we want to be able to reassure our franchisees—over 180 small business owners who employ over 32,000 employees across Australia—that there is certainty in the future for them around the finely balanced overall system, which labour relations is a key part of, so Yum! asks that the bill guarantee the future of the Pizza Hut and KFC enterprise awards, as these awards were developed with the SDA's consent and they were arranged to fit the shape that suits our business. In addition, we believe that the enterprise awards should apply to our entire enterprise and that anyone who works for KFC should be covered by those unique industrial instruments. It should be the same for Pizza Hut. All employees working for Pizza Hut should be employed under the Pizza Hut award as well. That is the key point that we want to make today.

CHAIR—Thank you, Mr Wallis. Is there an aspect of the bill that gives you concern that the enterprise agreements will not continue?

Mr Wallis—There is really no mention of enterprise awards at all in the bill. That is the concern from our franchisees and from us. It is around certainty for the future and making sure that there is tenure for enterprise awards moving forward.

Senator ABETZ—Have you taken this issue up with, say, the local SDA representative who is in the Senate, our good friend Senator Farrell, as to what the government's intention is in relation to this? Have you put this to the government? It seems a legitimate concern that you are expressing.

Senator CAMERON—I thought he was a senator, not an SDA representative.

Mr Wallis—In the past we have met with government representatives to state an industry position, but from a Yum! point of view it is all a part of the strategy—in other words, trying to make sure that we communicate very clearly what we would like to see in the bill.

Senator ABETZ—You have done that. I am just wondering if you have been given any indications from the minister as to this being simply an oversight and they will fix it or this being a deliberate breach of their election promise.

Mr Wallis—No, we have not. We do not know if it is an oversight or if it is a—

Senator ABETZ—Yes, but have you made representations to them about this?

Mr Wallis—No, we have not.

Senator ABETZ—Take the enterprise award that you have entered into, with the agreement of the SDA and ratified by the AIRC. What does that do for your employees in relation to penalty rates as to working on public holidays?

Mr Wallis—They are entitled to double time on public holidays. What it does do is enable them to work within their own times. Take for example nights and weekends. We have 24-hour trade. They can work whatever hours suit them. It provides a flexibility for us to be able to roster them when it suits them and when it suits the business.

Senator ABETZ—Do you allow your franchisees the option to run their own industrial relations for their particular outlets?

Mr Wallis—We do. In this case they understand the process we are going through and we are appearing on behalf of those franchisees as well, but they are free to pursue their own individual industrial relations arrangements.

Senator ABETZ—So basically what you are seeking from us is a guarantee—I think this goes to your second to last paragraph of the written submission—to allow enterprise awards to continue. Have you had any legal advice—say from Mr McDonald? In the absence of enterprise awards in the bill, does it mean that if they are not mentioned they are not allowed, or that they could continue?

Mr McDonald—The concern is that there is no specific reference to enterprise awards. There is a reference to named employer modern awards, but it is not clear as to whether an enterprise award becomes a named employer modern award. There is nothing in the bill that deals with that. It may well be something that would be dealt with in transitional arrangements, but on the basis of the bill there is no mention at all of the enterprise awards, and it is not clear that they would be able to continue. That is on the face of the bill as it stands.

Senator ABETZ—Just so I get this right, the Fair Work Bill does not refer to enterprise awards. But the transitional legislation that the Senate has passed does make such a reference?

Mr McDonald—No, I am sorry. There is no specific mention in the Fair Work Bill. It would be hoped that, in any transitional arrangements that might accompany the bill, some reference would be made as to what happens with these enterprise awards. There appears to be the guarantee that they will continue. Whether they continue as enterprise awards that are now deemed to be named employer modern awards or in some other form, we are not sure. But in reading the bill it is just not clear where enterprise awards fit. There has been no indication that there is an intention not to continue enterprise awards; simply not on the face of the bill there.

Senator ABETZ—Sorry to labour this, but can I refer you to page 1 of your submission. Immediately under ‘Award Modernisation’ you tell us:

The Transition to Forward with Fairness Amendments for award modernisation excluded enterprise awards ... enabling our awards to continue to operate ...

Mr McDonald—Yes, I apologise. In relation to the Transition to Forward with Fairness amendments dealing with award modernisation, there was provision for awards to be modernised and rationalised, but there was a specific exclusion in that legislation for enterprise awards, enabling those to continue. As things stand under the legislation, that is certainly satisfactory in terms of the continuation of enterprise awards. There is concern that there is not that same reference in the Fair Work Bill.

Senator ABETZ—In other words, your concern is that the transitional arrangements allow for enterprise awards that are existing to continue, but there is not necessarily a mechanism or acceptance that new ones can be created?

Mr McDonald—There is no intention on the part of Yum! to create new enterprise awards. It is really to make sure that their existing awards can continue into the new system the way things work at the moment, with enterprise awards standing by themselves.

Senator ABETZ—I can understand that you are only focused on Yum! International, but from a more general perspective—and you will ask me to wash my mouth out—if McDonald’s, Hungry Jack’s or somebody else wanted to follow a similar line, and they may well have, and if a new outlet were to hit the market and say, ‘Yes, Yum! International have got a great model. We want an enterprise award as well,’ how would they be able to go about it under the current structure? That is what I am trying to tease out: that not only is it necessary to protect that which is in existence but that we also need to provide a specific mechanism to allow it to continue for new entrants or other operators that want to change over to that system if it is deemed to be an appropriate way of doing industrial relations business. I can understand Yum!’s disinterest in other players, but we have a broader focus, if I can put it that way.

Senator FARRELL—Just by way of clarification, due to the comments of Senator Abetz, I am now a representative of the people of South Australia but still a very proud life member of the SDA with whom you organise your agreements. Your letter also refers to some of the problems of franchisees and the difficulty of incorporating franchisees into the agreement. Can you tell us something about how the previous system worked in that regard and whether or not the new legislation solves some of the problems?

Mr Wallis—Pizza Hut specifically is a good example. We had the enterprise award coverage for most of Pizza Hut and we commenced selling down from Yum! owned stores to franchisees to a number of small-unit franchisees. Under the previous Work Choices legislation—I think this is outlined in the letter—they actually came off coverage from the Pizza Hut agreement and we now have 14 different pay scales across Australia that Pizza Hut franchisees pay. Tim might be able to explain a bit more about the new system, but my understanding of it is that it allows a much simpler process for transmission of business.

Mr McDonald—Yes. Once a business was sold—and there have been quite a lot of Pizza Hut businesses sold—there would be a loss of award coverage after a period of 12 months, which has meant that a lot of Pizza Hut employees have been left without award coverage. What the company seeks is a fairly simple system so that if someone operates a Pizza Hut they would come under the Pizza Hut award and would have to apply that award. At the moment, because they have fallen off award coverage, there is a question as to whether they fall under some other award or with the award; but in the main, they are left without any award coverage. So it is really just to make sure that there is consistency and an appropriate approach across the brand.

Senator FARRELL—Just on that point, I noticed on the weekend there were some advertisements saying Pizza Hut was changing to Pasta Hut. Is that a franchise of Yum!?

Mr Wallis—It is actually a way of getting attention.

Senator FISHER—It worked!

Mr Wallis—Without letting the cat out of the bag, it has happened in a lot of countries. We do it as a way of indicating we are starting to sell pasta. We are not changing the Pizza Hut brand name, but it gets people's attention.

Senator SIEWERT—What is your objection to using the collective agreement process?

Mr Wallis—There is none. We have a collective agreement in place at the moment for both brands and we have always used the agreement-making process in relationship with the SDA, so we have always had our enterprise awards underpinning our collective agreements.

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

Committee adjourned at 12.45 pm