



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND  
WORKPLACE RELATIONS

**Reference: Fair Work Bill 2008**

THURSDAY, 29 JANUARY 2009

PERTH

BY AUTHORITY OF THE SENATE

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

**Thursday, 29 January 2009**

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

**Participating members:** Senators Abetz, Adams, Barnett, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Colbeck, Coonan, Cormann, Eggleston, Ellison, Farrell, Feeney, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Mason, McEwen, McGauran, McLucas, 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, Mark Bishop, Boyce, Cameron, Cash, Jacinta Collins, Fisher, Humphries, Marshall, Polley, Pratt, Ryan, Siewert and Sterle

**Terms of reference for the inquiry:**

To inquire into and report on:

Fair Work Bill 2008

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**Committee met at 10.15 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 in 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. I welcome our witnesses and senators to this inquiry, and those members of the public that are here to view it, and I ask everyone to please switch their mobile phones to either off or to silent.

[10.17 am]

**EMMANUEL, Ms Toni, Principal Solicitor, Employment Law Centre of Western Australia**

**GEELHOED, Mr Michael Gary, Paralegal, Employment Law Centre of Western Australia**

**KANE, Miss Sara, Manager, Employment Law Centre of Western Australia**

**CHAIR**—I welcome our first witnesses, from the Employment Law Centre of Western Australia. I invite you to make some opening remarks to the committee, to be followed by questions.

**Mr Geelhoed**—The Employment Law Centre of Western Australia, which we will refer to as the ELCWA or ELC, is to the best of our knowledge the only employment law organisation within Western Australia providing free legal advice for non-union employees. The centre is staffed by one full-time solicitor, a manager, an admin assistant, a number of casual paralegals and various volunteers. Aside from the estimated 4,000 calls that our paralegals answer every year, we also coordinate an evening legal service, run weekly self-help sessions, and provide community legal education throughout the state, including regional, remote and rural areas where a large number of our clients reside.

Overall, ELCWA approves of the Forward with Fairness reform program. The Fair Work Bill is a well structured and intelligible piece of legislation, and our written submission outlines specific changes that we are very pleased to see. ELCWA is also grateful for the opportunity to participate in a genuine and measured consultation process for such an important piece of legislation which will undoubtedly have major repercussions for our current and potential clients.

We do have concerns about the operational fairness of some elements of the bill—namely, the failure to grant community legal centres an automatic exemption from the requirement to seek leave to appear before Fair Work Australia, the seven-day limitation period for unfair dismissal claims, the continuation and extension of qualifying periods for unfair dismissal claims, and certainly inadequacies in the Small Business Fair Dismissal Code.

An exemption from the requirement to seek leave to appear before Fair Work Australia is currently granted to representative organisations and peak councils. This exemption should be extended to include community legal centres, which I will refer to as CLCs. ELCWA might be considered a typical CLC with regard to our limited capacity. We are unable to answer an estimated 4,000 calls per year and, to achieve our current workload, we rely on many hours of pro bono and volunteer assistance. Because of these limitations, we represent clients directly only where there is a significant disadvantage and/or vulnerability present and a meritorious claim. In the absence of policy reasons for CLCs not to be included within the same class of organisations currently granted exemption under the bill, we would argue that our service limitations, and those of CLCs generally, provide compelling reasons as to why we should be allowed the benefit of a reduction of process requirements.

In relation to the employees we advise, the most concerning aspect of the bill is the seven-day limitation period for unfair dismissal claims. We estimate that the majority of our clients make contact with us in the latter third of the current 21-day limitation period. The reasons for this delay include geographical limitations, a lack of knowledge of dismissal rights generally, an inability to contact us immediately due to our service limitations, and an inability to recover swiftly from the emotional consequences of losing one's job.

From a global perspective, the current 21-day limitation period is already at the briefer end of the scale when looked at in relation to comparable jurisdictions. The three most directly comparable jurisdictions—the UK, Canada and New Zealand—all currently provide 90-day limitation periods for unfair dismissal.

This issue will also not be properly addressed by the provision for out of time applications. The most common reason we see for delay—that an individual simply was not aware of his or her unfair dismissal rights—is highly unlikely to satisfy the bill's definition of the exceptional circumstances required for out of time applications. The number of clients who are unable to contact us within a week of their dismissal leads us to believe that a seven-day limitation period may operate to exclude a similar proportion of dismissed employees from unfair dismissal rights as does the current '100 employees or under' exemption.

We also fail to see the necessity for lengthy qualification periods for unfair dismissal claims, given the potential for optional probationary periods. Furthermore, the proposed extension of the qualification period to 12 months for small businesses seems counterintuitive, given that it should take less rather than more time to assess the suitability of an employee in a small business environment.

We also have concerns about elements of the Small Business Fair Dismissal Code in light of the finality of decisions due to a limited appeal process and the reduction in formality of procedure proposed with regard to Fair Work Australia. Specifically, we have issues with a lack of definition within the code, particularly with regard to definitions of serious misconduct and reasonable periods of time; the automatic legitimization of a summary dismissal in a situation where a police report is made; and the elevation of the code checklist to the status of evidence alongside signed witness statements and written warnings. We are happy to expand on any of these issues concerning the code during question time.

Finally, we would also suggest that the new unfair dismissal laws should become operative immediately upon the passing of the Fair Work Bill. While there are other issues raised in our written submission, we believe that fair treatment in the key areas we have mentioned today will prove most important to ensuring security, dignity and fairness in employment during tough economic times, when the frequency of dismissals and, by extension, unfair dismissals are certain to increase, as are the consequences of dismissal due to a decline in the job market.

To recap, these issues are: the necessity for CLC practitioners to have an automatic right to appear before Fair Work Australia; the insufficiency of the seven-day limitation period for unfair dismissal claims; the excessiveness of unfair dismissal qualification periods; and inadequacies of the Small Business Fair Dismissal Code. That concludes our opening statement.

**CHAIR**—Thank you.

**Senator HUMPHRIES**—Thank you for your presentation today and for your evidence. Could I start by just asking you about the fair dismissal code and the recommendations you make in that respect. You refer to the code and the accompanying checklist. What is your understanding of how an employer is expected to use that checklist at present? In other words, is it expected that an employer will treat the indications in that checklist as being a list of things they must comply with or as an alternative list of things and that they should comply with at least one thing on that list but not necessarily everything?

**Mr Geelhoed**—At the moment we understand that they need to fill out the checklist in full—that they have to comply in full with the code; that the checklist is used to ensure that they have complied with the code; that it is a guide to ensuring compliance with the code; and that that must be complied with.

**Senator HUMPHRIES**—I have not seen the checklist, but an employer who only satisfied, say, two items on the checklist would not be regarded as having satisfied the fair dismissal code?

**Ms Emmanuel**—Like you, I have not got a copy of it in front of me. I think that there might be an issue where employers working their way through the code—for example, where serious misconduct or an issue around misconduct arises—might only get that far down the checklist and then consider that they do not need to go further and comply with other aspects of the checklist.

**Senator HUMPHRIES**—But your understanding is that under the terms of the code they do need to comply with all the elements on that checklist, or would they need to satisfy some of the criteria or issues laid out in the checklist but not all of them?

**Mr Geelhoed**—There is a part of the checklist which states, ‘If you have answered yes to the above questions you don’t need to fill out the remainder of the checklist.’ It was that specific element which we referred to in our submission. With regard to other serious misconduct, our concern was that an employer’s perception of what constitutes serious misconduct might not accord with what is serious misconduct under the law; therefore, if they did not fill out the rest of the checklist when they might have a claim and a good argument aside from the fact it is not serious misconduct, they would be wasting the time of Fair Work Australia by not having filled it out in full and considered that, although it might not be serious misconduct, they might still have a good argument for a fair dismissal.

**Senator HUMPHRIES**—What I am getting at is that the examples of serious misconduct by an employee could be as various and diverse as the number of workplaces there are in Australia, in a sense, and a checklist may or may not be helpful in identifying what those various grounds might be. What is the substance of what you are suggesting here to achieve this? When you say that the employer should fill in the whole of the checklist, are you suggesting that should be a mandatory requirement on their part in order to satisfy any later review by, say, the Fair Work Ombudsman that there has been an adequate process of determining that there was serious misconduct in that case, or are you suggesting some other formula to address that issue?

**Mr Geelhoed**—We are suggesting that, in the interests of the claim being more efficient, they should fill out the checklist in full in the situation that they have incorrectly diagnosed a case of serious misconduct from the point of view of Fair Work Australia.

**Senator HUMPHRIES**—That is ‘should’ as in make it mandatory under the law to fill it in?

**Mr Geelhoed**—No, we are not suggesting it should be mandatory under the law.

**Ms Emmanuel**—We do think it would be helpful if employers could fill out the checklist in full.

**Senator HUMPHRIES**—Yes. There is the potential for the checklist, in that sense, to help or to confuse the employer, in that if they see that there are some elements on the checklist that they cannot satisfy, it may lead them to believe that they in fact are not able to show that there is serious misconduct, when in fact it is the case that the conduct of the employee is such that it warrants dismissal. It is a question of how clear it is to employers. These people, as you would expect, are not always going to be experts in the law; they are rarely going to be experts in the law.

The suggestion you are making is that that should be made more clear in the terms of the checklist. You have not actually set out in your submission exactly how you think that should change. You might like to take on notice the question of what you believe should change in the wording of the code or the checklist in order to achieve the objective that you are after.

**Mr Geelhoed**—I believe it was specifically that section which states, ‘If you have answered yes to the above, you don’t need to fill out the remainder of the checklist.’ Yes, perhaps it would have been beneficial for us to have rewritten that particular clause.

**Senator HUMPHRIES**—That would be helpful, if you could indicate how you intend to deal with this, given that this would be unclear to many employers potentially.

**Ms Emmanuel**—I think that is something that we are not in a position to do today.

**Senator HUMPHRIES**—Of course not, no, but if you take that question on notice and come back to us with a suggested format, that might be useful for us. Could I also ask about a political context for this. You are I think the 13th or 14th successive set of witnesses to come before the inquiry urging changes to the legislation. We need to work out what freedom we have as a committee or what opportunity there is for the committee to recommend changes to the government’s legislation. The government claims, I think quite fairly, that it has a mandate to legislate for the repeal of Work Choices and changes in the structure of industrial relations legislation. How would you recommend that we deal with the sorts of variations to the legislation that you, among others, are suggesting, particularly where we have the question of these issues being laid out by the government before the last election in its Forward with Fairness package? It made suggestions or specific promises about what it wanted to do in its legislation. Should we only recommend changes that do not fly in the face of those promises? Should we recommend changes to what was actually in the Forward with Fairness recommendations? How should we handle that issue, do you think?

**Ms Emmanuel**—Again, not to be obstructive, but I am not sure that we are in a position to assist the inquiry with that matter.

**Senator HUMPHRIES**—Okay.

**Ms Emmanuel**—We are here today to speak to the issues that we have raised and we have certainly got many suggestions about how we think the bill could be improved; and we speak, of course, on behalf of the people in WA that we service as a community group. Beyond that, I am not sure that I could assist with your question.

**Miss Kane**—No, we are not in a position to direct the committee in the way that they take on our information; so again, reiterating Toni, we are just representing our client base, and that is about 4,000 people a year that access our service.

**Senator HUMPHRIES**—You can see the nature of the problem I am putting to you, though, can’t you?

**Miss Kane**—Sure.

**Senator HUMPHRIES**—It is not like any ordinary bill where you might just say, ‘Oh, yes, change this and change that.’ There is a question of mandate here which is difficult to deal with. Thank you for that response.

**Senator FISHER**—I have a supplementary question to Senator Humphries’ questions about the code for small business in the context of unfair dismissal, and you may choose to take it on notice. Do you think it is

clear to anybody reading the code whether one, some, most or the whole checklist has to be satisfied in order to jump the hurdle and not fall foul of the law?

**Mr Geelhoed**—I do not have it in front of me. I guess it can be construed as a guideline to ensuring that you comply with the code or it could be construed as a stricter checklist. Our opinion would be that it would function most effectively as a guide rather than as a mandatory requirement. What the intention was behind the checklist, I obviously cannot speak to, but it would be our opinion that it should function as a guide to ensuring compliance with the code.

**Senator FISHER**—I understand your view as to how it should operate, but you are also saying that at the moment, as currently drafted, it is at best unclear?

**Ms Emmanuel**—That is correct. I think an issue arises where an employer believes they have complied with the code because they have made a certain assessment about the nature of the behaviour and have considered it to be serious misconduct, and they have then decided that under the code they do not need to go further, and they have complied with it to that point. The issue arises later, if an action were to be brought and Fair Work Australia disagrees with their assessment. If they have not correctly interpreted the instance of misconduct, then they in effect would not have complied with the code. I think that is where it becomes problematic.

**Senator FISHER**—So an attempt to provide guidance and some certainty acts in the opposite direction perhaps?

**Ms Emmanuel**—We do agree that the code could be clearer, but we will take your question on notice.

**Senator FISHER**—Thank you. I want to ask you more about your recommendation in respect of your organisation being provided with a right to appear before Fair Work Australia, but as the lead-in to that: you have talked about your clients in Western Australia. Who are your clients. And you are a not-for-profit organisation. Who pays your wages, if I may? Who funds you?

**Miss Kane**—We get the majority of our funding currently from the state government, the current Department of Commerce, previously Department of Consumer and Employment Protection. We also receive a small portion of funding from the Public Purposes Trust and, per project based, from Lotterywest. We are in the process of perhaps losing some of that state funding and are working at the moment quite actively on trying to retain some of it, but we will be looking for additional funding to retain our service as of July.

**Senator FISHER**—What is your charter? For what purposes does your organisation exist, and where is that set out?

**Miss Kane**—We represent non-unionised workers—the most vulnerable, because of our limited capacity to respond to the number of callers we get. We are able to respond to 4,000 and we miss another 4,000 based on what we can record.

**Senator FISHER**—Are you allowed to service workers who are union members?

**Miss Kane**—As our policy, no. We refer union members back to their unions. We only deal with non-unionised workers.

**Senator FISHER**—So you take a worker's say-so, do you, on whether they are a union member or not?

**Miss Kane**—Yes. Again, within our capacity we then have to filter it down to those that we can actually represent, so most of the time we represent people that are from non-English-speaking backgrounds, that may have a disability, that may have dependants, because a lot of our advice other than on the phone is provided by pro bono support and volunteers.

**Ms Emmanuel**—Can I add to that that previously we had federal funding, but that ceased in November 2006. Because we have a statewide mandate and offer free employment law advice to non-unionised employees in Western Australia, we necessarily give advice to those in the federal system and those in the state system.

**Senator FISHER**—Of course. Because time is short and my colleagues will have questions and your evidence is very interesting and valuable, let's go to your submission in respect of having a right to appear before Fair Work Australia. You are suggesting that organisations like yours should be exempt from the requirement to seek leave to appear, as are peak organisations of employers and unions, and you say on page 10 of your submission;

... in the absence of any policy reasons for CLCs not to be considered alongside peak bodies in this context ...

Your organisation is clearly not a peak body in the traditional sense. For what reason do you think exemption may be being given to peak organisations and not to organisations like yours?

**Ms Emmanuel**—Perhaps I could answer by saying we understand that currently union members would be able to be represented by their union in an unfair dismissal proceeding without having to seek leave first for the union representative to appear. The state government pointed out in their submission to this inquiry that only 15.7 per cent, I think, of Western Australian employees are union members. In our view, vulnerable workers should be afforded the same rights as those who are union members, even if they are not, and we think the process could be much assisted by having our input and by allowing us to represent those vulnerable employees through that process. I should say, I do not think—

**Senator FISHER**—Sorry, may I interrupt you there. Are you suggesting that, effectively, Fair Work gives a leg-up to unions to represent union members as opposed to organisations like yours to represent non-unionised workers?

**Ms Emmanuel**—No, I am just saying that clause 596 of the bill currently allows for certain practitioners to appear without the need to seek leave, and it is our view that we should be included.

**Senator FISHER**—Okay. Your organisation employs practitioners?

**Ms Emmanuel**—One practitioner.

**Senator FISHER**—You, the lucky girl. Peak organisations employ practitioners too—employer organisations and employee organisations—yet, on the basis of what you are saying, lawyers working for unions and employer organisations would be able to represent members as of right.

**Ms Emmanuel**—That is right.

**Senator FISHER**—But your organisation would not be able to. Lawyers—you, Ms Emmanuel—would not be able to represent your clients as of right.

**Ms Emmanuel**—Not without seeking leave first.

**Senator FISHER**—Do you see why there would be any reason for a differentiation between a lawyer working for one organisation versus a lawyer working for, employed by, another organisation in this respect?

**Ms Emmanuel**—We think that we should be in an exempted category because of our client base and the people that we service and who need our services, and that going through the process of seeking leave would add to the burden that we face already.

**Senator FISHER**—Of course—and, indeed, would reduce the attractiveness for your clients to come to you for help. It would in fact arguably increase the attractiveness of your clients to become, for example, where they are employees, union members and to utilise the services of unions, who would not face the same hurdle as you, Ms Emmanuel.

**Ms Emmanuel**—I am not sure I could comment on that.

**Senator ABETZ**—It is pretty obvious, though, isn't it, that that is the case: that an individual worker that is not a member of a union cannot be represented? That is the case, isn't it?

**Ms Emmanuel**—I think those are two different propositions. What Senator Fisher is putting to me is that people might join unions specifically because of that outcome, as opposed to that unions are allowed to appear without seeking leave.

**Senator ABETZ**—But shouldn't it be the fundamental right of an individual to be represented other than by a union?

**Senator FISHER**—Or, indeed, by whatever organisation or person they choose.

**Senator ABETZ**—Yes.

**Ms Emmanuel**—I think there are a variety of reasons why Fair Work Australia would seek to exclude some lawyers. In our view, given the special circumstances of our particularly vulnerable client base, we think we should be an exempted—

**Senator ABETZ**—Yes, but if I am a local suburban solicitor and somebody comes along to me who is a vulnerable worker—to use your term—and I say, 'I think you've got a pretty good case. I'll do your case pro bono,' I will be excluded. I will not be allowed to represent the worker. Why should the suburban lawyer who wants to do it pro bono be excluded but the ELC be allowed? I cannot get my head around the logic of that concept.

**Ms Emmanuel**—I think to some extent it might have something to do with the capacity to go through further processes in terms of seeking leave.

**Senator ABETZ**—We are becoming circular now. Why should you have to seek leave? The union is entitled as of right. You are not. The local suburban lawyer is not.

**Senator FISHER**—And why should your organisation be judged according to your ability to fight—

**CHAIR**—One senator at a time.

**Senator ABETZ**—No. We are doing a good tag team here.

**Senator FISHER**—We are a team, Senator.

**Senator CAMERON**—World Series Wrestling. It is a bit funny at times.

**CHAIR**—Do you want the question repeated?

**Senator FISHER**—Are you suggesting then that it is acceptable for organisations to be judged on their resource ability to seek the right to appear? Surely the logical consequence of what you are suggesting is that, yes, it is okay for unions to not have to demonstrate, because part of the thinking is that they have the resources to fight. As Senator Abetz has said, it is circular, because your very point is that you do not have the resources to argue, yet you can undergo the process, so why should you have to dedicate resources to jump in through the gate. Senator Ryan has a question coming out of that.

**Senator RYAN**—You mentioned that you thought you should be an exempt category. Following on from Senator Fisher and Senator Abetz's questions, what characteristics would you define this exempt category by?

**Ms Emmanuel**—Community legal centre practitioners.

**Senator ABETZ**—But not a pro bono suburban legal practitioner.

**Ms Emmanuel**—No.

**Senator ABETZ**—Why not?

**Ms Emmanuel**—That is outlined in our submission.

**Senator ABETZ**—Yes. But why not?

**Senator RYAN**—I suppose that is what I was trying to get to: why only one particular form of centre; why not a voluntary cooperative of people that get together without being an officially funded community legal centre?

**Ms Emmanuel**—I am sure you will appreciate the scope of the bill is enormous. We have a really limited capacity, given the burden on our centre, so we have turned our mind to the issues that are of main concern to our clients, and I do not think beyond that we can assist you.

**Senator ABETZ**—To put it in a nutshell, you are saying: 'We want the right, but we haven't turned our mind to anybody else. We just want the right, but we haven't thought about anybody else having the right to be appearing at these tribunals.'

**Ms Emmanuel**—I do not know that I would put it quite like that.

**Senator ABETZ**—Then put it how you would like to.

**Ms Emmanuel**—I think I did put it the way that I would like to, which is that we have limited capacity, and we have really focused on the area of main concern to our client base, which is the disadvantaged, non-unionised employee in Western Australia.

**Senator FISHER**—Thank you, Ms Emmanuel.

**CHAIR**—We are going to have to move on.

**Senator FISHER**—Can I give one question on notice to finish that area—

**CHAIR**—Yes, one question on notice.

**Senator FISHER**—before Senator Abetz moves to a different area, if he may.

**CHAIR**—No. We will be moving to the government and the Greens now.

**Senator ABETZ**—All right.

**Senator FISHER**—Could your organisation please consider on notice what you think might have been the intent behind the current provisions in section 596 and whether or not that intent is acceptable to the practical operation of your organisation?

**Ms Emmanuel**—Certainly.

**Senator FISHER**—Thank you.

**Senator ABETZ**—Senator Marshall, could I quickly ask two questions on notice?

**CHAIR**—Yes, all right.

**Senator ABETZ**—Thank you for that indulgence. In section 5 of your submission, ‘Summary dismissal’, you refer to an employer potentially having to make a police report. Can you confirm to us that it is a criminal offence to make a vexatious or false report to police. Also, in the third paragraph of section 5 you say:

The idea that an employee not proven guilty or even proven innocent ...

That is a new legal concept for me. If you could just flesh out or give me any precedent where a court has proven somebody innocent. If you could take that on notice for me.

**Senator SIEWERT**—I would like to go to unfair dismissals as well. Your comment on the seven-day limit has come up, I would say, through the vast majority of our submissions. It has been commented on in one way or another. Yesterday we were talking to Professor Andrew Stewart about this issue as well, and he was suggesting that, instead of changing the day limit from seven to another one—whether it be 14 or 21; people are suggesting various changes—because he thinks it needs to be dealt with as quickly as possible, an amendment could be that an employer be encouraged to give written notification to the employee saying that they have a right to claim within seven days; that the ability to be able to apply for an extension still be in the legislation, but that it would be looked on more favourably if the employer had not given notification. What is your response to that suggestion, rather than expanding the time limit?

**Ms Emmanuel**—We would say that might address one aspect which is concerning, being that people do not know their rights, so them actually getting written notification about the seven-day limitation would address that aspect, but it does not address all of the concerns—namely, that people can experience a great deal of distress and dislocation after losing their job and they may not be well placed to go forward with an unfair dismissal claim. Equally, many people have more pressing concerns like sorting out their finances, meeting their obligations, looking for new jobs, and in terms of priority for the subsequent days following their dismissal I do not think that Professor Stewart’s suggestion addresses those issues.

Another factor that we would note is that it can be very difficult for employees to access affordable or accessible legal advice and, in our view, people should be getting legal advice as to the merit of their claim. The issue is not just about the process, but whether or not it is appropriate at all for them to make a claim. Speaking on behalf of the Employment Law Centre, I can say it is very unlikely that we would ever be able to meet the need to give legal advice to clients within that time frame.

As it is, we are only able to answer about half of the calls that are coming through our service. Many people tell us they have been ringing for weeks and they cannot get through sooner, and it is our view that it would not be an exceptional circumstance that somebody did not manage to get their claim in in seven days; it would likely be the norm. Equally, going through that process of making an out of time application were that process to be relaxed, on the part of our client it is really viewed as an additional hurdle, and the whole thing may just be too overwhelming for people to deal with.

**Senator SIEWERT**—Can I go back to the issue that we have been covering quite extensively, and I am sorry for going back again over it. This is the exemption of the requirement to seek leave for CLCs. Could you just go into a little bit more detail. I am aware of the situation in WA, but community legal centres in some of the other states are not specific employment centres, are they? As I understand it, some of the general community legal centres handle employment issues. Is that a correct understanding?

**Ms Emmanuel**—I am not sure that we could speak to exactly what they handle, but it is certainly the case that there are generalist community legal centres and specialist. We are the only employment law specialist in the state. We are familiar with JobWatch in Victoria being a specialist CLC that deals with employment law issues. My understanding is that there are other community legal centres around the country which have a specialist employment law division—that is the wrong word; an employment law practitioner who does some employment law work—but there are fewer CLCs that deal with employment law rather than other issues; for example, criminal law and family law.

**Senator SIEWERT**—Domestic violence. Yes. What I am trying to get to is the level of demand there would be for CLC services. After the union movement, would CLCs be the next biggest group of organisations that particularly vulnerable workers would go to for assistance?

**Ms Emmanuel**—Yes, that is my understanding. Certainly in Western Australia, Legal Aid refers their employment law matters to our centre. So other poverty law organisations are not necessarily in a position to assist with these matters, but I think that CLCs are providing the most service to vulnerable who cannot afford private solicitors.

**Senator SIEWERT**—How many people would you say across Australia would be seeking assistance from community legal centres on employment matters?

**Ms Emmanuel**—I would think tens of thousands, but I am not sure. I do not know that I could make an accurate assessment.

**Senator SIEWERT**—Could you point us perhaps in a direction where we could find that information out?

**Ms Emmanuel**—We can certainly take it on notice and get back to you, but equally I think that the convener of the Employment Law Network, who speaks on behalf of the national community CLC association, NACLCL, would probably be in the best position to answer that in terms of employment law issues; otherwise, the peak body for CLCs is NACLCL, and I would say that the convener would be best placed to answer that.

**Senator SIEWERT**—Thank you. If you could take it on notice, that would be appreciated. I am aware of your workload, so I was a bit hesitant to ask you to take it on notice. When you stopped getting funding for the centre in 2006, was that related to the fact that there were certain directions then placed on funding and around the types of services you could provide to people?

**Ms Emmanuel**—That is my understanding.

**Senator SIEWERT**—So when you said your funding is under a cloud, shall I say, why is that?

**Miss Kane**—As I mentioned earlier, we predominantly get state government funding and, be it the change of department and focus, I think a lot of the funding has been pulled back across all of the public sector at the moment, and public funding, so we have been put on notice that our funding is being perhaps reduced.

**Ms Emmanuel**—And I should point out that our current funding arrangement which Sara is referring to with DOCEP expires at the end of June, so we are in a position of needing to secure ongoing funding in order to still meet the need and continue operating the service.

**Senator SIEWERT**—Have you noticed any change in the number of people using your services under Work Choices? Was there an increase? Has there been a decrease now?

**Ms Emmanuel**—I would say that there has been an increase in the number of calls that we get. Equally, there have been increased complexities and, naturally, the advice can take longer than it might have before, with all the transitional arrangements and the different legal options for clients, particularly where, in WA, we are dealing with a dual system for some people.

**Miss Kane**—Yes, we have noticed that our phone time with clients has doubled because of the complexity of the law and we have noticed, with our website access, that it spiked in the last three to six months with the current economic climate, and the most accessed information that we get is for unfair dismissal and recently redundancies.

**Senator SIEWERT**—I want to take a bit of a different tack. Have you looked at the low-paid bargaining stream at all in the legislation?

**Miss Kane**—No.

**Senator SIEWERT**—Okay. I was interested in your comments on that if you had read it, because it is out there. It is going to affect your clients. Your clients are going to be a group that are going to be obviously accessing that particular stream and I was wondering if you had looked at it.

**Miss Kane**—Sorry, we cannot assist.

**CHAIR**—Just so I am clear: you do all employment related matters for—

**Ms Emmanuel**—With the exception of workers compensation.

**CHAIR**—With the exception of workers compensation, and that is the limit to what you do and it is exclusively for non-union and vulnerable.

**Ms Emmanuel**—That is correct.

**CHAIR**—How do you define what ‘vulnerable’ is?

**Ms Emmanuel**—We have a set of criteria which we apply. It involves being in a lower income earning capacity, and generally then we would prioritise clients with two or more of the other factors—like, as Sara said, clients who have disabilities, who have literacy issues, who are sole income earners in a household, of non-English-speaking background, or Aboriginal or Torres Strait Islander descent.

**CHAIR**—So there is no confusion, the state government is clearly aware that you provide that service to non-union vulnerable workers.

**Ms Emmanuel**—Yes.

**CHAIR**—And the funding is now in doubt.

**Ms Emmanuel**—Yes.

**Miss Kane**—The majority of our clients are referred by Wageline, which is a state government department’s service, and we also get lots from Legal Aid, so a lot of our referrals are actually from there.

**Ms Emmanuel**—But certainly we would be hopeful that our funding arrangement will continue.

**Miss Kane**—Yes.

**Ms Emmanuel**—What we are just wanting to clarify is that we are not in a position of ongoing secured funding. Our funding comes to an end in the middle of this year.

**CHAIR**—Just to follow on, too, from what Senator Siewert asked about Professor Andrew Stewart’s comments: have you actually had an opportunity to look at his submission?

**Ms Emmanuel**—We have seen his submission, yes. We have not seen the transcript.

**CHAIR**—All right. If there is anything further you want to add in terms of his suggestions in relation to specifically the notice or the time to take to do the application and the other related matters, we would be happy to hear any supplementary information about that and how workable that would be.

**Senator CAMERON**—Ms Emmanuel, is the concern you have about recognition one that you could be excluded unfairly from representing one of your clients or is it that you just want automatic representation?

**Ms Emmanuel**—It is the latter.

**Senator CAMERON**—For many years the industrial commission did not allow legal representations. It is a longstanding issue to try and keep a layperson tribunal operation. Are you aware of that?

**Ms Emmanuel**—Yes.

**Senator CAMERON**—I am sure you have had a look at clause 596 (2) which lays out when Fair Work Australia can grant permission. It says: if it is more efficient, having regard to the complexity; if it would be unfair on your client; and if it would be unfair not to allow the person to be represented. It would seem to me that that is a very broad application in terms of fairness and the right to have legal representation in complex cases. Isn’t it sufficient in terms of you having comfort that, if you have got an issue, you go there, and if you can satisfy these points you would get representation?

**Ms Emmanuel**—We do certainly acknowledge that that ability to seek leave to appear is in the bill. What we are saying is that we feel that we should get an automatic exemption and that our clients necessarily would fit into the category of the sorts of employees who would not be well placed to represent themselves, who are at a disadvantage, and going through the process of seeking leave is an additional matter for us.

**Senator CAMERON**—Have you appeared before current tribunals?

**Ms Emmanuel**—Yes.

**Senator CAMERON**—And you have had to seek leave?

**Ms Emmanuel**—I have not appeared in a hearing matter while at the Employment Law Centre; so insofar as conciliation conferences, yes, but not anything more.

**Senator CAMERON**—Have you ever been refused leave?

**Ms Emmanuel**—No.

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

**Proceedings suspended from 11.00 am to 11.15 am**

**BREUDER, Ms Cara, Manager - Legal and Legislation, Western Australian Government**

**BUSWELL, Mr Troy, Treasurer, Minister for Industrial Relations, Western Australian Government**

**HORSTMAN, Mr Robert Michael Gordon, Acting Executive Director, Labour Relations Division, Department of Commerce, Western Australian Government**

**CHAIR**—I welcome our next witnesses from the Western Australian government. We have had a request from the press to film these proceedings. After consultation with the deputy chair, it has been agreed that that will be allowed. These are public hearings; I am simply advising everybody that it may be on TV. Thank you for appearing today. We have your submission. I invite you to make some opening remarks, to be followed by questions from the committee.

**Mr Buswell**—Mr Chairman, before I do that, is there a period of time allocated for the opening remarks? It is long, and I wanted to make sure I was not too long.

**CHAIR**—There is no fixed period, but I suspect we will have a lot of questions to ask you resulting from your submission. If you were going to go five, 10 minutes—hopefully no longer than 15 minutes—that should be okay.

**Mr Buswell**—Thank you. I firstly thank the committee for providing us with the opportunity to speak, albeit for a period of less than 15 minutes.

**CHAIR**—You can go longer, Mr Buswell. It is just that we will have less time for questions, that is all.

**Mr Buswell**—No, that is fine. What I thought I would do is start with some opening remarks in relation to the Western Australian economy, just to assist the committee in their understanding of the situation here in Western Australia. Indeed, it is the case that the Western Australian economy has in recent years enjoyed a period of sustained economic growth. To give an example, by the end of the 2007-08 financial year, the state's economy, as measured by gross state product, was \$146.4 billion. The important aspect of that is that it has doubled in size since the start of the decade, so there has been a sustained period of significant economic growth in Western Australia. The net result of that is that our state, with 10 per cent of the nation's population, over that period accounted for one-fifth of the growth of the Australian domestic economy, one-quarter of total business investment in Australia and contributed one-third of the nation's exports.

The changing global environment is impacting significantly on our state, as it is on the nation, although we are still expecting to record sound financial growth for the current financial year 2008-09. Our estimates are in the vicinity of six per cent, slowing considerably next year.

The point I want to highlight is that, publicly reported through the media, we estimate there have been in recent times some 5,000 jobs lost in Western Australia, predominantly in the resources sector, although it is our belief that the actual figure is significantly higher than that because, of course, there is no compulsion on people to report job losses in the media. We suspect that that really is the tip of the iceberg, unfortunately. It is also our understanding that in recent months there has been some \$10 billion of resource projects that had been planned for Western Australia that have been cancelled, delayed or had their scope reduced in some way, shape or form. The situation for our state moving forward is that we are expecting a significant slowdown in the rate of growth of private investment, and that will impact on our economic growth, in particular in the 2009-10 year.

We are at a time in this state, as in the rest of the nation, where we are keen to focus on employment, and it is within the context of that employment framework that I want to couch a lot of my comments this morning, because it is our view that the Fair Work Bill 2008 has the capacity to have a detrimental impact on employment in Western Australia. Indeed, it is also our view that, in the medium to long term, it has the capacity to have a negative impact on our state's ability to attract foreign investment, in particular into the resources sector.

Why is that? There are a couple of reasons. Firstly, we believe that reregulating the labour market and reducing the flexibility that has previously existed in the labour market—in particular in Western Australia—will adversely impact on the competitiveness and the productivity of our businesses, and we believe that that will have a flow-on, detrimental impact on businesses that are endeavouring to do the right thing in these difficult economic times, and that is to retain staff in the long term and also to invest in productive capacity.

I also want to make the point that the Western Australian economy and individual employers and employees within that economy have benefited significantly from choice and flexibility of options that have previously

been available to them under workplace instruments. Of particular note has been the significant take-up, in the Western Australian resources sector in particular, of individual flexible agreements. It is our view, to reiterate, that at this time in particular we need to be focusing on maintaining employment and, where possible, on economic growth.

Our principal concerns with the legislation revolve around three main areas, and I will briefly touch on those. In summary, they are: the expansion in the role and power of trade unions, which largely revolves around the changing right of entry provisions and the roles that unions will now be able to play in the bargaining process and as bargaining representatives; reduced flexibility within the proposed Fair Work Bill for business, including, for example, restrictions on maximum working hours; the unnecessary restrictions on individual flexibility agreements; and issues surrounding the transfer of business rules. It is also our view that changes to the unfair dismissal regime will have a detrimental impact on small business and, in particular, on the employment decisions made by small businesses in Western Australia.

I will quickly speak to each of those three points. In relation to the role and power of trade unions in the workplace—in particular as it relates to bargaining the right of entry—it is our view that the bargaining provisions within the Fair Work Bill will negatively affect Western Australian workplaces. We support employers and employees being able to freely negotiate enterprise agreements with minimal third party involvement. We are not supportive of the expansive rights conferred on unions under this bill, particularly in this case as it relates to their position as bargaining representatives, and we certainly do not support unions being the default bargaining representative of employers.

I would like to make the point in relation to that that in Western Australia only 15.7 per cent of employees are union members and more than 86 per cent of Western Australian employees in the private sector are not union members, and it is our view that they should not be forced to accept unions as their default bargaining representatives. It is also our view that the requirement for employers to bargain with multiple bargaining representatives at any one time may frustrate the bargaining process due to the potentially large number of participants in the bargaining process.

We have some specific concerns relating to employers intending to make a greenfields agreement, and those concerns revolve around the requirement for them to notify all relevant employee organisations. It is our view that this could frustrate negotiations where unions have overlapping coverage of employees or a history of demarcation disputes. Greenfields types of developments are very important in Western Australia because of their project base nature, particularly in our resources sector.

As you may be aware, under the Workplace Relations Act the Western Australian construction industry in particular, we feel, was well served by employer greenfields agreements, which could be made without union involvement for a period of 12 months. Employers have indicated to us that they had the benefit of being able to negotiate with a preferred union before a project commenced on the basis that that project was indeed a greenfield project or undertaking.

I will give you an example. In the construction industry, that could involve employers having to deal with up to five unions as part of the process, and we see that as being a major concern—particularly of major concern to the Western Australia economy, where, as I said, the large project based nature of the resources sector has been critical to the state's growth. Similarly, we are strongly opposed to the bill relaxing existing right of entry provisions and support retaining those currently provided for under the Workplace Relations Act.

We have seen in Western Australia in years gone by—in particular, from 2001—what happens when trade unions abuse right of entry provisions. I am not going to go into the detail of some of the evidence that has been presented in other forums like the Cole inquiry, but there is plenty of evidence on the public record that outlines some of the experiences that we have had to endure in this state when right of entry provisions are misused.

We are strongly opposed to unions having the capacity to inspect nonmembers' records under the bill and propose that nonmembers' consent be required as a condition of inspection. Again, I make the point that union coverage amongst our private sector workforce is very low, and it is our view that you are subjugating the 86 per cent of employees who are not union members to a level of intrusion on their rights that is neither fair nor appropriate. We are also concerned that industrial and demarcation disputes may well arise from right of entry, particularly when you have overlapping coverage potential in certain areas.

We also have concerns that the proposed Fair Work Act significantly increases union rights to bypass the law of trespass and get access to workplaces and private employee information of nonmembers. This is, and

represents, a significant change to the status quo, which effectively, we believe, expands union rights in a way that is not appropriate.

I would also like to touch on unfair dismissal. Again, it is the Western Australian government's view that the removal of the current unfair dismissal exemption will deter small businesses from employing new staff, particularly in the current economic climate. Approximately 88 per cent of Western Australian businesses that employ workers employ fewer than 20 workers. The state government does not support the inclusion of short-term casuals in determining whether an employer is a small business employer. Including short-term casuals in the definition of 'small business' is overly complex and means that employers with a high turnover of casual labour could be, effectively, a small business one week and not a small business the next week.

The Western Australian government opposes the expansion of unfair dismissal rights by the removal of the genuine operational reasons exclusion from unfair dismissal. This will prevent businesses, in our view, managing their workforce in a way that is responsive to commercial imperatives.

The WA government considers that the operation of the Small Business Fair Dismissal Code has the potential to create uncertainty for small business and ultimately the operation of that code will depend on how Fair Work Australia chooses to apply it. Other areas of uncertainty about the code include, for example, that there is no comprehensive definition of 'serious misconduct' in the code and it is not clear whether the code will be complied with if an employer reasonably believes that there is a valid reason for dismissal.

The last principal area I would like to talk about is what we see as being a reduction in flexibility as a result of the bill. We are concerned that the Fair Work Bill reduces existing flexibility for business and, in the current economic climate in particular, this is likely to be detrimental to business and, subsequently, to employment.

The Western Australian government opposes the bill restricting maximum working hours to 38 hours per week under the National Employment Standards. These provisions do not, in our view, provide flexibility for industries where employees regularly work more than 38 hours per week. As an example, in the Western Australian mining, agriculture, forestry and fishing industries employees typically work more than an average of 38 hours a week. Mining employees work 44.4 hours per week on average; employees in agriculture work 42.8 hours per week on average. The government supports an award or enterprise agreement providing ordinary weekly hours in excess of 38 to accommodate the existing arrangements that exceed 38 hours.

The bill prevents an employer from making an offer of employment conditional on entering an individual flexibility agreement and our government considers this to be unduly restrictive on an employee. The Western Australian government is also concerned that the ability for one party to unilaterally terminate an IFA by giving not more than 28 days written notice undermines the effectiveness of IFAs. The bill seemingly enables IFAs to be terminated immediately on the provision of written notice. This could cause both employers and employees difficulties if they have arranged their affairs around the particular flexibility agreement. The WA government supports employers and high-income employees being able to negotiate terms and conditions of employment without reference to modern awards.

I want to quickly touch on issues around transmission of business. It is our view that the amendment to transmission of business, as proposed in the Fair Work Act, will create regulatory confusion which could hinder, for example, outsourcing, restructuring and genuine sales of business, which are important here in Western Australia, as they are no doubt across Australia. The proposed Fair Work Bill introduces two significant changes to these rules, which previously stipulated that employees transferring from one employer to another would retain their existing employment instruments only for 12 months and only when a genuine sale of the business was occurring. In other circumstances they would have had to move to the employment instrument of the new employer.

The net effect is that, in the event of any movement of an employee, whether by sourcing, outsourcing, a restructure or genuine sale, the employee takes their old industrial instrument to the new employer and it continues to apply forever. This means the employer acquiring employees in any of these situations also acquires the instrument of employment. Our view is that this regulatory burden will make companies think twice about making changes that may well be in the best interest of that business and indeed the long term of their employees.

In closing I want to touch on one other point, and that is the Western Australian industrial relations system. To inform your committee, the Western Australian government has made a decision that we will not refer our state based industrial relations powers to the Commonwealth. As a result of that, we of course have a job of work to do now in reforming our state industrial relations system, which is a very tired and non-contemporary

piece of legislation. That is a decision which the government formally made late last year. I am not going to take up any more of your time talking. I am very happy to take any questions that you may have.

**Senator CASH**—Thank you very much for your submission, Mr Buswell. There are four areas that I would like to canvass with you in the time that we have. The first is briefly in relation to the averaging of hours or the maximum weekly hours. Could you describe the industries in a little bit more detail and why they would prefer or require hours to be averaged over 52 weeks as opposed to the 26 weeks? If a decision is made that hours are to be averaged over 26 weeks, how will this impact on those industries and, in particular, in relation to flexibilities and the projects that they undertake? If this flexibility is lost, what will be the resulting impact on productivity and employment? I would also like to understand the WA government's perspective on how we protect employees from working unreasonable additional hours in the event that hours are able to be averaged over 52 weeks.

**Mr Buswell**—That was a very short question. Thank you for that. Again, if I could make the point: in certain sectors in Western Australia it is the case that employees work longer hours than 38 hours. I know some people have a view that reducing the number of hours that people work in a week is actually a good thing for an economy. People may well attempt to link it to the French experiment, for example. But notwithstanding that, in Western Australia in the mining and resources sector, the capacity and the fact that people work longer hours is well established. It is one of the requirements and one of the key aspects of the flexibility that workers and employers have enjoyed in Western Australian workplaces.

The capacity to basically craft a working environment that suits both employer and employee I think is fundamentally important. The resultant productivity gains that have happened in the Western Australian mining sector in particular stand as an example of the importance of this type of flexibility to Western Australian workplaces. So it is not just about hours worked, it is about a number of other aspects of flexibility, but hours worked is critically important. It also has to be understood that these arrangements have by and large arisen because of an agreement between employers and employees. It is not a situation of people being forced out onto the work site for extended periods of time. These things have been arranged by agreement.

When you have a look at the wage levels that have historically been enjoyed in the resources sector in particular, you can see that it is a win-win situation. Companies win through advances in productivity; employees win because of improvements in the salaries that they take home. Any step that takes away that basic flexibility, in our view, is a backward step.

It is our view that, if there are issues around the length of time that people are working, there is an occupational safety and welfare regime that we believe should have the capacity to deal with those issues. We have seen that in the transport industry, for example, in relation to fatigue management plans, and I think that there are plenty of instruments available to deal with any of those associated issues. But this is a well-established longstanding practice. By averaging it out over a shorter period of time it does not recognise the realities of some Western Australian workplaces.

**Senator CASH**—What then becomes the ultimate impact, though, on the Western Australian economy, on productivity, on employment, if this particular clause does go through as it is currently drafted?

**Mr Buswell**—I cannot give you a statistical specific answer in relation to that, other than to say that it would have to have an impact on productivity on workplaces in Western Australia, particularly in the resources sector. Ultimately, any impact on productivity is bad for employment, for two reasons—firstly, because of the direct flow-on impact on employment and the decisions that companies make; secondly, as a state, we have to maintain our international competitiveness in terms of our ability to attract foreign capital investment. It is fundamentally important. Anything we do that undermines our capacity to attract foreign capital investment—for example, introducing things which are detrimental to productivity—is going to have a significant negative impact on Western Australia. So there is a short-term impact and a longer term impact as well.

**Senator CASH**—I want to run through with you again the point that you made that these rosters, these hours et cetera are not imposed by employers on employees; they have been subject to long-term negotiation and have been agreed between the parties as something that both parties are prepared to do. So there would be a trade-off for employees for working the additional hours or the longer hours.

**Mr Buswell**—There is no doubt that, through flexible workplace agreements, employees have been prepared to take on working additional hours and the trade-off has generally been through the salaries that they are paid. I do not think that has always been something that is clearly understood; that the vast majority of

these arrangements are arrangements which are mutually beneficial to the employee and also to the employer. That is why there are so many of them there.

**Senator CASH**—Thank you, Mr Buswell. Moving on to the transmission of business, we heard evidence in Brisbane from AMMA. I would like to put a quote to you and get your opinion on it:

AMMA contends that the Fair Work Bill's approach to the transfer of business is too restrictive and goes beyond the existing notions of a transmission of business. The operation of the transfer of business provisions is a disincentive to employ persons who worked with the old employer.

And:

This will result in increased unemployment.

Could I get your comments on that proposition by AMMA.

**Mr Buswell**—I would endorse that very strongly. It is our view that the transmission of business rules as proposed in the Fair Work Act will hinder some of the activities that have been driving economic and employment growth in Australia, like business acquisition, like outsourcing and a range of other activities that are fundamentally important.

If you make that more difficult and put more roadblocks in the way, then it is far less likely that businesses will engage in that process. That impacts on the business that could have been, for example, engaging in a buyout of another business but also impacts on the employees in the business that would have been bought out because it denies them potentially the capacity to perhaps sustain their employment or to move into an employment environment which would have greater long-term rewards. So we think it is complex, it is confusing, and it will certainly be a roadblock to a range of commercial activity in this jurisdiction and, I am sure, across Australia.

**Senator CASH**—What is the particular issue in relation to the current drafting of the proposed clause?

**Mr Buswell**—I will give you an example, if I can: a transferee—a new employer if I could use that term—will inherit an enterprise agreement, workplace determination or named employer award of the transferor or the old employer, even if only one employee is involved in moving across and even if the new employee is already covered by an enterprise agreement, so it is a very prescriptive, controlling aspect to the legislation which, in our view, will be detrimental to employment growth and, in particular, to maintaining employment demand.

**Senator CASH**—Would you see the drafting of this clause as an incentive to not employ employees from the old business?

**Mr Buswell**—I can only presuppose that it is a factor which would impact on the new employer's decision to, firstly, move employees across, but also to make the investment decision, for example, of buying a second business. It is particularly important at the moment where we see, unfortunately, businesses in Australia failing. What you are going to see is a situation where you will have business opportunities or businesses that perhaps are failing or are looking to reduce their scale of operation or indeed to close, and there may well be other businesses in the economy who can take them over, buy them out, and pick up their productivity capacity. The last thing you would need is to make it more difficult for businesses to engage in that process. I think there are significant long-term ramifications from the transmission of business provisions.

**Senator CASH**—Do you have any suggestions as to how the clause could be amended?

**Mr Buswell**—Our view is that the amendment would be so that we do not have any changes to the regime that applied previously. We think that that gave the flexibility and the fairness that we should apply, so I suppose the amendment would be that the components of the bill that render those changes be not applied.

**Senator CASH**—If I could move on now to greenfields agreements, you have said they are varied. The current regime is important to the Western Australian economy in terms of choice and flexibility of agreements. You say in your submission:

The requirement to notify all 'relevant employee organisations' could frustrate negotiations where unions have overlapping coverage of employees or a history of demarcation disputes.

Could I get you to elaborate on what you see the impact of the proposed change will be on projects in Western Australia.

**Mr Buswell**—Our view is that the changes to greenfields agreements and the requirement now whereby employers will be required to notify all relevant employee organisations has the capacity to significantly—and

I highlight significantly—frustrate negotiations where unions have overlapping coverage of employees. Why is that particularly important in Western Australia? I talked about our economic growth earlier and the stellar economic performance of our state's economy in this century—well, over the last seven or eight years. That has been primarily driven by investment in capacity building in the resources sector; in other words, by construction activity building capacity in the resources sector.

In our state, there is a well-documented history of issues dealing with certain unions in the construction sector, and we do not want to allow a situation to arise, for example, where unions like the CFMEU have the opportunity to frustrate the development of projects which are of significance to Western Australia. We will not sit by and let that pass unchallenged because that particular organisation—and I most certainly do not apply my views of that organisation across all industrial organisations; that is not the case—has a particular history in this state, and we do not encourage any changes to legislation which would let that organisation in particular frustrate the economic development of Western Australia.

So we are gravely concerned about the encumbrance upon employers to have to notify all relevant organisations; and that is based on memories which are not pleasant of having to deal with certain unions in the construction sector in the past and given the significance of the construction industry to this state. You have to remember that large components of our economic growth are project based. These are significant projects, often the type that fit the category of greenfields agreements, and we are very concerned about the impacts on those.

**Senator CASH**—But you are certainly not saying, I would hope, that you are opposed to union involvement in the workplace?

**Mr Buswell**—No. What we are opposed to here in particular is that employers are forced to go out and notify all relevant employee organisations. That is our concern. It is basically opening the door to potential demarcation issues and, in my view, there is no more frustrating type of industrial activity than demarcation disputes. It also opens the door on making the process of getting approvals and getting things happening far more complex.

**Senator CASH**—What happens to the project whilst the disputes are happening?

**Mr Buswell**—My understanding is that there would be nothing happening to the project. You basically have a situation where, until you get the workers on the site and get it bedded down, nothing happens. Again, I want to highlight the point that we have to make sure that we operate in an environment, in this state, which enables us to remain a competitive source of international capital. The workplace regime is one factor that impacts on that competitiveness. I think that is clear and it is something that we have to be cognisant of.

**Senator CASH**—On right of entry, you say in your written submission:

The WA government opposes the relaxing of right of entry requirements ...

What is it about the proposed laws that you say are a relaxation from the current regime, why you oppose this relaxation, and what you see the impact will be of a potential relaxation of the right of entry laws on industry in Western Australia?

**Mr Buswell**—I need to clarify that the issue from our point of view is not necessarily right of entry per se. The issue is the capacity of unions to attend sites where they have limited or no coverage, or potential coverage. That is the issue we have: the capacity of WA workplaces to again be opened up to unions visiting sites for reasons that are not necessarily related to either employee welfare on that site or industrial issues. I have to say that there is ample evidence in Western Australia of what happens when you operate in a relaxed environment.

I am not going to quote from evidence given to the Cole inquiry, but if you want to understand what does happen, I would ask you to reference the Cole inquiry. There are a range of incidents. The one I often refer people to is called the Dependable Roofing scissor lift incident. In that particular incident 20 unionists surrounded a scissor lift with workers on it, turned it off, threatened the workers, chased them into the lunch room and tried to tip the lunch room over, simply because they were not members of the CFMEU. We cannot go back to those sorts of days in Western Australia. I am aware that that does not happen on work sites right around the country, but it has happened here. That is why it is a very sensitive issue for the state government.

**Senator CASH**—I notice in your submission that, in relation to access to employee records, the amendment you propose is that the consent of a non-union employee be provided before the record is accessed. So you would be happy to live with that type of amendment to the proposed clause? You are not

saying that no access to these records should be provided; it is on the basis that the employee's consent is given.

**Mr Buswell**—Yes, and thank you for highlighting that point. As I indicated earlier, in the private sector in Western Australia 86 per cent of employees—nearly nine out of 10 employees—are not members of unions, and our view is that we should not be giving unions the right to access the records of those employees through this form of legislation. If the employee gives consent to the union having access to the record, we do not have a problem with that at all. That, at the end of the day, is the employee's decision—one would hope a decision made without coercion—but to just give a union the right to go into a workplace, remembering that 86 per cent of the workers are not members of unions, and have a look at their records in our view is not appropriate.

**Senator CASH**—If I could turn now to modern awards and flexibility terms, on page 4 of your submission you say:

... the WA government supports an amendment to clause 144 so that employers may offer employment conditional on a prospective employee entering an IFA ...

How do we ensure that employees' rights are not overridden by employment being offered conditional upon entering into an individual flexibility agreement?

**Mr Buswell**—I think that would be picked up because the IFA would still have to satisfy the better off overall test. Provided those provisions are still there and that requirement is still there, then you still have those protections in place. The other point is that employees still have the opportunity to terminate IFAs should they see fit. We think that that gives the flexibility that may well be required but still provides adequate protection to the employees.

**Senator CASH**—Thank you very much, Mr Buswell.

**Senator JACINTA COLLINS**—Mr Buswell, can I take you back to some comments you made during your opening statement following on from the earlier discussion about the level of unionisation in Western Australia. I think you said in those comments that unionisation was at 15.7 per cent and then indicated that as the basis for saying non-union members should not be forced to accept unions as their bargaining agents. Can you take me to the provisions in the bill that force unions as bargaining agents on non-union members?

**Senator ABETZ**—It is the default provision.

**Senator FISHER**—Silent but deadly.

**Mr Buswell**—I am just getting some clarification in relation to that.

**Senator JACINTA COLLINS**—Mr Buswell, we are very limited in time, so perhaps you might like to take that question on notice, if you do not have it immediately to hand, because I would contend that there are no provisions in this bill that provide for non-union members to be forced to accept a bargaining agent.

My next question is in relation to your comments about maintaining the status quo with respect to unions inspecting records and the records of non-union members. The status quo you are referring to is, of course, the status quo under Work Choices, isn't it? You are not referring to the longstanding status quo since about 1904, I think in earlier evidence before us, about the role of unions in inspecting records in workplaces?

**Mr Buswell**—Work Choices?

**Senator JACINTA COLLINS**—Yes. Despite the last federal election results, you are saying that this is one aspect of Work Choices that the federal government should maintain.

**Mr Buswell**—What I am saying to you is that, in a state where 86 per cent of employees in the private sector choose not to belong to a union, it is our view that it is not appropriate for unions to have the right to enter a workplace and inspect their records without the prior consent of those individuals.

**Senator ABETZ**—And Ms Gillard promised to keep right of entry laws—

**Senator JACINTA COLLINS**—Sorry, Senator Abetz, you have had your opportunity.

**Senator ABETZ**—as is under Work Choices.

**CHAIR**—You had your turn, Senator Abetz.

**Senator ABETZ**—That is what she promised.

**Senator JACINTA COLLINS**—Mr Buswell, you were asked earlier, in relation to the inspection of records issue and maintaining the status quo, if you could please submit what amendments should be considered. Can I ask you to look at that issue in terms of the other changes that are being proposed to the

system, the role of unions within the new system and how you believe the status quo under Work Choices, as you have described it, could now be accommodated given the other changes that are proposed in the system.

**Mr Buswell**—In relation to access to records?

**Senator JACINTA COLLINS**—In relation to unions no longer being parties to agreements or parties to awards in the longstanding fashion in which they were in the past.

**Mr Buswell**—I am not sure I have grasped the nub of the question.

**Senator JACINTA COLLINS**—The nub of the question is that there are some changes to issues around right of entry matters for unions that are a consequence of the changes to the system as we have moved fully under the corporations power and we will no longer have unions as parties to awards and agreements by a basis of interstatedness.

**Mr Buswell**—Again, we can provide an additional detailed response in relation to an amendment that we think would address that. I do not apply this across all Australian workplaces, but you are here in Western Australia and I would encourage you to have a look at what has happened in this state. Right of entry provisions have been misused. Some of that has occurred under state based right of entry provisions, and that is a matter we have to deal with—

**Senator JACINTA COLLINS**—I am sorry to cut you short on that point, but I have participated in many Senate inquiries that have looked at the issues that you are talking about, so I am well briefed on those matters. My final question, because I do not want to take too much time, is in relation to the situation regarding employers in Western Australia. Many major employer and employee organisations have supported a national unitary system. They are concerned to ensure that simplicity and uniformity apply across their operations.

You have indicated today, although it was not covered in your submission, that the Western Australian government has decided not to refer powers in relation to industrial relations. I understand that you are doing a review of the current Western Australian act, but I ask: what are employers in Western Australia saying to you about the lack of uniformity and simplicity that is likely under those circumstances to apply in Western Australia?

**Mr Buswell**—That is a fair question. Most employers who have employees across state based jurisdictions—in other words, the large employers in this country—are, as I understand it, by their nature corporations and are generally picked up in the use of corporations power, which has a long history in Australia. Our view is that that argument of uniformity and of making it easier for employers in relation to workplace arrangements as they apply across jurisdictions is adequately addressed.

Our position is that we have to craft the best industrial relations system for public sector workers and those people in the private sector who are not picked up under the use of corporations power for Western Australia. We have a constitutional right to do that and we intend to that. I defend that decision.

**Senator JACINTA COLLINS**—What proportion of your workforce is that likely to encompass?

**Mr Buswell**—The advice I have is that that is a floating target, but somewhere between 15 and 30 per cent is the rough figure. I have asked the same question. I think the reason it is a bit of a floating target is that there are a significant number of employers and employees who operate in that sort of grey area around the edge of the industrial relations system who often are not involved in the formal part of the system. There is also some debate about whether some organisations—for example, some trust set-ups—are constitutional corporations, but we think it is around that. My view is that the vast majority of those would be in the small business sector, the very small business sector. Again, just to remake the point, most of those small businesses, from my experience, do not trade across state boundaries, so the argument about uniformity in relation to them is null and void.

**Senator CAMERON**—Good afternoon, Mr Buswell. I am interested in your submission where it says that individual flexibility agreements should be a term of employment; that before a worker can be employed, the employer should have the right to get a commitment for an individual flexibility agreement. How would that work in practice?

**Mr Buswell**—I imagine that would be part of the discussion and the understanding during the decision to take a job or not.

**Senator CAMERON**—So, 'It's my way or the highway.' We are back to Work Choices.

**Mr Buswell**—It is our view that ultimately employers and employees have to come to that. The best way for employers and employees to come together in the workplace is to have flexibility to arrange their affairs as they see fit. There is a long documented history of the success of those types of arrangements on different types of—

**Senator CAMERON**—But this is not them arranging their affairs as they see fit. This is about a precondition for employment. I would ask you to confine your response not to the rhetoric of this but to the practical implication of forcing a precondition of employment on a prospective employee for an individual flexibility agreement. What would that contain? How could it work?

**Mr Buswell**—It works by people clearly understanding that that is a precondition of employment. You do not have to take the job at the end of the day. Can I also say, sticking to the detail of the legislation of course, that we feel there are good safeguards in relation to the better off overall test as it applies to an IFA. I do not want to get involved with the rhetoric, but often the reason you have IFAs is to deliver better outcomes to employers and employees in the workplace, so if an IFA meets the better off overall requirements of the bill and it is the instrument that you are working from on a work site, I do not see what the issue is.

**Senator CAMERON**—I am sure other people do see the issue.

**Mr Buswell**—No doubt they do.

**Senator CAMERON**—I want to take you now to the unfair dismissal argument.

**Mr Buswell**—Yes.

**Senator CAMERON**—You seem to be perpetuating the arguments that were run some three years ago about unfair dismissals. Given that you have raised this here, did you have a look at Professor Don Harding's analysis on unfair dismissal that was used by the federal government to justify their position?

**Mr Buswell**—No.

**Senator CAMERON**—So you are not aware of the Harding analysis on unfair dismissal?

**Mr Buswell**—No.

**Senator CAMERON**—You are probably not aware then of the Oslington-Freyens analysis on the claims that providing more flexibility through the right to dismiss workers at an employer's wish is not sustainable. You are perpetuating that argument here.

**Mr Buswell**—I will explain why I have this view, and it is based on the view of a person who has been a small business operator who has employed people; it is based on the view of a person who has spoken to numerous small business operators who also employ people.

**Senator CAMERON**—A summary of one, is it?

**Mr Buswell**—No. This is what actually happens to a small business operator who, for legitimate reasons, has dismissed an employee. The employee turns up on the doorstep and says, 'Well, you've got two choices.' It used to be in the Western Australian system that you either signed up for the \$5,000 package or the \$10,000 package and you had no choice. I have seen people where it has had a huge impact on their health and the health of their business. Do you know what they do next time they can employ someone? They do not. You can quote all of these studies.

I am telling you what happens to individuals who employ people, and it is a significant issue. I can provide you with examples. I am not going to do it here, but I can provide you with examples of people in my own constituency—small business operators—who have gone to hell and back in relation to unfair dismissal and, at the end of the day, signed the cheque because it was easier. That is not fair and that is an inhibitor to their next employment decision.

**Senator CAMERON**—Could I ask you to take on notice my question for you to have a look at the Oslington-Freyens analysis and the statistics that are in there in relation to the amount of money that is paid for unfair dismissals and see whether you still maintain this position. I would like you to have a look at that, please.

**Mr Buswell**—I am happy to do that and, by the same token, I can provide you with significant bodies of research which will support my argument. We can sit here all day—

**Senator CAMERON**—I have not seen any of that.

**CHAIR**—Order!

**Mr Buswell**—I am happy to do that.

**CHAIR**—Mr Buswell, you are welcome to provide the committee with any evidence that you wish. We are happy to accept it.

**Senator CAMERON**—If we take rights away from workers in relation to unfair dismissal, how do employees end up being treated with respect on the job if an employer can simply dismiss them at the employer's whim? What if a female worker is subjected to sexual harassment, if a female worker is subjected to—

**Senator ABETZ**—This is very tacky.

**Senator FISHER**—Exactly. And that is not what the submission says.

**Senator ABETZ**—Very tacky. Always the lowest common denominator for you.

**CHAIR**—Order! The committee will come to order.

**Senator CAMERON**—I am entitled to ask a question. It is a legitimate question. I am interested in the minister's response. How do female workers under your proposals have respect on the job and not be subjected to sexual harassment, sexual humiliation? How do they ensure that does not happen? Why should there be different proposals for different people?

**Mr Buswell**—I am sure you are aware that there are other remedies available to a variety of workers who, because of their gender and perhaps their race, perhaps their age, are discriminated against in the workforce. I would expect and encourage anybody who suffers that form of discrimination in the workforce to access other remedies that are made available to them. I am pretty sure you are aware of those. That is what I would be recommending. I see there being absolutely no link—no link whatsoever—between the statements you have made and the issue that we have highlighted, and that is the impact of unfair dismissal laws on the employment decisions of small businesses.

**Senator CAMERON**—We had submissions here this morning from the Employment Law Centre of Western Australia, who indicated that they supplied advice and support to an average of 4,000 non-union employees per annum in terms of their workplace rights. They gave some indication that they were concerned about future funding for that centre. Given that you are the Treasurer, I am wondering if there is any advice you can give us as to whether that aspect—

**Senator ABETZ**—Can you announce your full budget now?

**Senator CAMERON**—of support for workers' rights in Western Australia will be considered favourably by the government.

**Senator ABETZ**—Just announce the budget now.

**Senator CAMERON**—It is a legitimate question.

**Mr Buswell**—I will give you an answer. The advice I have received is that they previously received funding from the federal government, so perhaps we might redirect that question to Treasurer Swan.

**Senator SIEWERT**—It was the Howard government that—

**CHAIR**—Order! The committee is not debating it. The question has been asked; it has now been answered, and we will move on. Are there further questions, Senator Cameron?

**Senator CAMERON**—In relation to freedom of association, you have argued that you support workers' rights to belong to a union. If a worker wants access to the union under an existing agreement and the union is not party to that agreement, should that worker have the freedom to have access to their union for advice?

**Mr Buswell**—My advice is that, if it is a union member and it is a legitimate industrial dispute, then the answer is yes. I just want to provide a little bit more substance to that answer. By the same token, if a person does not want to be a member of the union then they should not be held to ransom three storeys off the ground or whatever it was on a scissor lift; they should not be chased by 20 people into the lunch room and then have to cower in the lunch room while people—

**Senator CAMERON**—You have made that point.

**Mr Buswell**—And I will continue to answer it. The point I am trying to make is that there are probably issues that need to be addressed from both sides of the equation.

**Senator CAMERON**—If the worker is entitled to have access to union representation, does that mean that you support those workers having access to that union representation during working hours?

**Senator ABETZ**—And if you are a member of a church, access to your priest?

**Senator STERLE**—Eric, I know you get touchy because you were representing Minister Andrews—

**CHAIR**—Order!

**Senator STERLE**—with your Work Choices in the Senate.

**CHAIR**—Order!

**Mr Buswell**—I think in the first instance you would have to have a look at the industrial instrument that sits over that workplace and understand the framework that it provides for employees on that site to have contact with their unions.

**Senator CAMERON**—I am looking at the proposed legislation, Minister.

**Mr Buswell**—But, again, we have a history in this state of those sorts of meetings, albeit with one employee, and certain members of certain unions closing down building sites for days, and that most certainly is not appropriate. I am not going to answer in a general sense, other than to say that you would think that those matters would be specified in relation to the instrument that sits over that workplace, and I think it depends on the intent of the individuals involved.

**CHAIR**—Mr Buswell, I have one question, coming back to a point that was discussed earlier, because I am still a little bit unclear on the reasoning for the position, and it is to do with the individual flexibility agreements. You made a point that if the employer and the employee wish to make those flexible arrangements they should be able to do so, and, of course, that is exactly the purpose of the individual flexibility agreement. That is why it is there: to enable the employer and the employee to make those agreements. But if they are to be beneficial to both parties—and this is the part that I am unclear about—why do you continue to say that they should be offered on a take it or leave it basis?

**Mr Buswell**—Pre the decision to enter into that employer's employ? Is that what you mean?

**CHAIR**—Yes, of course. Or at any time. Are you suggesting that any time during employment employees should be able to put—

**Mr Buswell**—No. I am trying to get my notes. I think the specific issue we raised was in relation to the offer of employment being conditional on the prospective employee entering into an IFA. That is the issue we were dealing with.

**CHAIR**—Yes.

**Mr Buswell**—I will use an example: the situation where you may have an existing business with existing employees who, through a properly constituted IFA, have decided with their employer to alter start and finish times, for example, and that is how the business operates. A new employee comes along who basically has a view that they do not want to do that. They are not going to accept that particular condition of that IFA, which is fundamental to how the business operates. My view is that if you are not prepared to accept the IFA, which may have a specific application to that individual business, then do not work there, because it could clearly have a material impact on the operation of that business. And, again, the IFA that all of those existing workers have negotiated with their employer would have to be properly constituted, would have to have met the better off overall test, and you can only imagine would have resulted in improvements for both employer and employee.

**CHAIR**—I think there is a clear misunderstanding of the purpose of an IFA, because they are about individual flexibility agreements, not those things that are negotiated collectively.

**Mr Buswell**—I did not indicate they were—

**Senator FISHER**—That was the example you gave.

**CHAIR**—You did. You talked about the IFA—

**Mr Buswell**—No.

**CHAIR**—Mr Buswell, I am just trying to clarify the position, and your position in particular in the evidence that you are giving to the committee. The example that you gave was when an IFA that applies to the rest of the workforce is in place: you want to make that a condition of employment for an individual coming in. But if it is one of those matters that applies to the whole of the workplace, that would have already been negotiated collectively, and of course it automatically applies to a new employee. What individual flexibility agreements do is give the ability for individuals with the employer to negotiate outside of the collective.

**Mr Buswell**—If I can make a point, it is my understanding that there are workplaces, and in particular workplaces at the smaller end of the employment spectrum, where you may have a group of workers who are on individual flexibility agreements that do not constitute a collective arrangement in relation to their employment with that specific employee.

**Senator JACINTA COLLINS**—Yes. That is the old version, the default AWAs.

**CHAIR**—All right. I think you need to have a further look.

**Senator FISHER**—You kept default AWAs, Senator Collins. They survive in perpetuity under your laws.

**CHAIR**—Senator Siewert.

**Senator SIEWERT**—Thank you.

**Senator FISHER**—They survive in perpetuity under your laws.

**Senator SIEWERT**—I have got a couple of questions—

**Senator JACINTA COLLINS**—That is still not quite accurate, Senator.

**CHAIR**—Order!

**Senator SIEWERT**—following up on what we have previously discussed. But first I want to go to the issue that you raised during your initial opening statement that WA is not going to refer powers.

**Mr Buswell**—Yes.

**Senator SIEWERT**—As I understand it, you are therefore now undertaking a review of the WA IR system. In that, does the WA government intend to introduce individual statutory agreements?

**Mr Buswell**—My direction to the person who will be conducting the review, which has not quite been finalised yet—and this does not apply right across the Fair Work Bill, because obviously we have issues with certain areas of the Fair Work Bill, and they are what we are discussing today—is that there are significant areas of the Fair Work Bill where the state should be guided in terms of the legislation that we develop. I have made the point and our submission makes the point that we do not agree with all aspects of the Fair Work Bill. However, in areas like individual agreements, notwithstanding some minor issues around them, we believe that we should be looking to the Fair Work Bill as a guide to start that review process.

So I can answer your question: there is no intent to revert to what was known in Western Australia as the Kiereth industrial relations regime—none whatsoever. The issue we have in Western Australia is that our Industrial Relations Act is an old, tired piece of legislation and we need to have a more contemporary legislative framework to provide industrial instruments for those people who do not employ employees in the private sector under the auspices of a corporation.

**Senator SIEWERT**—So there will not be a state system of statutory individual agreements?

**Mr Buswell**—There currently is in Western Australia. They are called employer-employee agreements. There will be in the federal system under IFAs and there will be in the state system. But, as I have said, our starting point for that review will be, where appropriate, the Fair Work legislation.

**Senator SIEWERT**—Given your submission to this inquiry around what we were just talking about, the individual flexible arrangements, under the state legislation will employers be able to offer take it or leave it arrangements?

**Mr Buswell**—I cannot presuppose what the outcome of the review will deliver, but I think I have just outlined what my view is in relation to that.

**Senator SIEWERT**—Going back to the discussion that we were having about individual flexible arrangements, under the bill there is no process where you register agreements or arrangements like there used to be under Work Choices, so in fact there is no-one that goes through and checks them like they used to under the Work Choice arrangements. If that was accepted by the government—which one hopes it is not, but if it was—would you then be suggesting that there therefore is a process where they are gone through and checked and registered et cetera, like there was under Work Choices?

**Mr Buswell**—I am just getting some advice in relation to it. I would have imagined that the federal government or the legislation would have addressed concerns surrounding protecting employees' rights as they enter into individual flexibility agreements. I would have to take some advice on the detail of that before I can provide a definitive answer.

**Senator SIEWERT**—You might want to look at the *Hansard* of the two previous days inquiries that we have had, because I have been asking about this issue; it has come up.

**Mr Buswell**—Okay.

**Senator SIEWERT**—Could I go back to the jurisdictional issues in Western Australia. We have covered some of the private industry issues. We have not covered local government and non-government organisations. Non-government organisations in particular work across state and federal jurisdictions. Have you given any consideration to how non-government organisations and local government will be affected by the nonreferral of powers?

**Mr Buswell**—My understanding is that that specific issue is basically dealt with on a case-by-case basis. That really is not a matter that my advice suggests that we can determine or we can impact on under our proposed state legislation. Ultimately it depends on the determination as to whether they are deemed to be a training corporation or not. I cannot provide any further advice as to how the state legislation can help bring clarity to that grey area on the industrial relations spectrum.

**Senator SIEWERT**—We are still going to have a grey area, in other words.

**Mr Buswell**—Yes, I understand that, but by the same token I am not sure of the extent to which the state could impact on that, even if it wanted to.

**Senator SIEWERT**—Going back to the jurisdiction and the Employment Law Centre, my understanding is that they are going to continue to get a lot of referrals because of these grey areas now, because we are going to have a federal and state system, and that a lot of the workload they get will not be caused by the federal government; it will be caused because the state government has not referred powers. So, with all due respect, the pat answer you gave about going back to the federal government—I would have thought the state government has a pretty large responsibility there, too, given that the nonreferrals of power will generate a lot of work for them.

**Mr Buswell**—That is a view. I am not aware of our funding arrangements and no doubt I will be made aware of those as part of the state's budget process. We operate a state service with Wageline.

**Senator SIEWERT**—And we heard evidence this morning that your state service actually refers clients to them.

**Mr Buswell**—Exactly, yes. That is once we have made the determination.

**CHAIR**—We have to wind up. Maybe, Mr Buswell, you could take that question on notice.

**Senator CAMERON**—Could I ask one question on notice?

**CHAIR**—All right, one last question on notice, and then we will finish.

**Senator CAMERON**—My question on notice, Minister, is: has the government done any econometric modelling of the cost of setting up a separate workplace relations system in Western Australia and, secondly, could you provide us with the details of the budget implications of a separate system in Western Australia.

**Senator ABETZ**—Unlike Rudd Labor.

**Mr Buswell**—I most certainly can, because we have already had one, and—

**CHAIR**—But we are well over time, so I would ask you to take that on notice as well. Thank you, Mr Buswell. Thank you for your appearance before the committee today.

**Proceedings suspended from 12.24 pm to 1.15 pm**

**BLYTH, Mr Geoff, Member, Chamber of Commerce and Industry of Western Australia**

**BORLASE, Mr Michael, Member, Chamber of Commerce and Industry of Western Australia**

**KUHNE, Ms Marcia Helen, Director, Workplace Relations Policy, Chamber of Commerce and Industry of Western Australia**

**LEE, Mr Daniel, General Manager, Workplace Relations, Chamber of Commerce and Industry of Western Australia**

**CHAIR**—I welcome to this inquiry our next witnesses, from the Chamber of Commerce and Industry of Western Australia. Does anyone have any comments to make about the capacity in which they appear today?

**Mr Borlase**—I am the Group Industrial Relations Manager for Clough, a construction company in Western Australia and operating across Australia, and we are a member of the Chamber of Commerce and Industry of Western Australia and are here to support those submissions.

**Mr Blyth**—I am the Group Workplace Relations Manager of Compass Group (Australia), a member of the Chamber of Commerce and Industry of Western Australia.

**CHAIR**—Thank you, and thank you for your submission. I invite you to make some opening remarks to the committee, to be followed by questions.

**Ms Kuhne**—Thank you very much, Mr Chairman. We propose to make a short presentation summarising the key aspects of our written submission. CCI has come to the inquiry with members who are key members in a number of different industry sectors, who will be affected by different aspects of the Fair Work bill. Mr Daniel Lee, my colleague from CCI, heads up a group of people that provides employee relations services to contractors on engineering projects around the state, including putting people on site to assist contractors to manage their employee relations matters, including right of entry types of issues, and this also includes negotiating agreements with unions for those projects.

I will give a broad summary of our statement. I would like to have an opportunity to invite our members to make some specific comments at the end of my short statement and, of course, then leave it open to the committee members to ask us questions in relation to our submissions.

**CHAIR**—That is fine.

**Ms Kuhne**—In relation to the time frame, I would place on the record that the short time frames have provided quite a limited opportunity for CCI to canvass all of the issues that present problems in terms of our written submission and, in terms of today's hearing, we will of course only concentrate on the subset of critical issues contained within the written submission and we will try very hard to keep within the time frame. We have no choice there, I understand.

**CHAIR**—Within reason.

**Ms Kuhne**—Thank you. Our submission is, of course, put in the context of the objects of the bill, the objects being promoting national economic prosperity and social inclusion, driving productivity, being fair for workers and flexible for business, and promoting productivity and economic growth—all aimed at achieving productivity through enterprise-level collective bargaining. We have grouped our matters for discussion under three key area headings, and they are agreement making, areas of inconsistency with government policy, and unfair dismissals.

Agreement making is a key area of focus that will affect a significant proportion of our members across all industry groups, large and small. The issues apply equally to greenfields agreements and to collective agreements, but we would like to deal with some specific issues relating to greenfields agreements at the end.

Business wants agreements that are easy to use and easy to make, in a fast and efficient process. They do not want a process that is so convoluted that it will interfere with the running of the business. That is really the nub of it. They also expect, of course, productivity at the level of the business, and that is what the objects of the enterprise agreement provisions, as well as the general objects of the act, promise them. We are worried that the bill is so full of regulation that it cannot deliver agreements that are simple to make, and that means not delivering effective outcomes.

I would like to put to you a number of aspects of the bill in relation to the agreement-making provisions that we say will delay and frustrate the agreement-making process. They are: the good faith bargaining requirements; representation rights; opportunity for scope orders and determinations to be made by Fair Work

Australia; the application of the BOOT test; access to arbitration on three points; expanded permitted matters—

**Senator CAMERON**—It might be easier if you just tell us what you do support.

**CHAIR**—Order! Senator Cameron, please. I am sorry, Ms Kuhne. Please proceed.

**Ms Kuhne**—I will try and explain what we mean by those aspects as we go along—and potential for increased industrial action. We think that the reality of expanded and complex rules will mean more bureaucracy and reduced flexibility and efficiency; that is our worry.

In terms of good faith bargaining requirements, we believe that they are so ambiguous that they will lead to argument and litigation and this will extend the bargaining and not make it more efficient. For example, one of the requirements under the good faith bargaining principles is that parties must refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining. That, in particular, we think will give rise to arguments: what is capricious conduct?

It is likely to be interpreted in many different ways. It does already seem to have been recognised by the government. Natalie James in her comments to the committee back in December did mention that it is uncharted territory and made the comment that she imagines that there will be some new law made in the area. A second aspect of the requirements is giving genuine consideration to the proposals of other bargaining representatives. We think that most if not all of the requirements have the potential to give rise to argument and litigation and this leads to significant delay in agreement making. We have put forward a number of proposals in our submissions, so I will not go into them.

The second issue is representation rights. Leaving aside the greenfields agreements issues for a moment, the bill gives a union an automatic right to sit at the bargaining table, as long as they have, of course, one member, even if the business employs many hundreds or thousands of employees. As employees and any union with constitutional coverage have representational right, it is conceivable and we think likely in certain industries that a large number of bargaining reps could legitimately participate in bargaining, either representing themselves or representing others.

Although the employer is able to apply for a determination for Fair Work Australia to endorse a particular representative to represent all other representatives, we have a fear that the practicality is that that person who is endorsed then has the mammoth task of managing the negotiations for all others with whom it will not necessarily have the same points of view and there may be conflicts of interest between the views of those respective parties. In practical terms, we think that there is nothing to stop one union not endorsed by Fair Work Australia from undermining an endorsed representative, notwithstanding that there are the good faith bargaining requirements. Key areas that will be affected in this area are health, community services, and construction and mining.

Briefly on scope orders and determinations, as there is no opportunity for industrial action and limited opportunity for interference by Fair Work Australia with multi-employer agreements, it stands to reason that unions will favour single enterprise agreements, whereas employers such as franchisees will prefer multi-employer agreements. This means that unions are likely to apply for majority support determinations and possible scope orders, where possible, to stop multi-employer agreements being pursued. We are worried that the employers could find themselves in both streams and we think that that needs to be stopped so that the employer is not forced down two bargaining streams.

Then there is the low-paid bargaining stream, which is particularly problematic because there are not definitions as to what constitutes the low-paid bargaining streams. It looks like pattern bargaining and, contrary to government promises, it can lead to arbitration. As well, the wording of the provision in terms of the circumstances in which a low-paid determination can be made has been done quite carefully, we think. It reads to say that a determination can be made only if the employer has not been covered by an enterprise agreement, and ‘enterprise agreement’ is defined within the section of the bill. In other words, it does not refer specifically to previous enterprise agreements that might have been made. This has much wider scope for the low-paid bargaining stream. If there is no recognition given to previous agreements—entered into under previous legislation, that is—then the scope for bargaining is quite significant.

Mr Kovacic of DEEWR did say in his evidence on 11 December that the criteria require employees to be both on the safety net and to have never had a collective agreement. If that is indeed the government’s intention, that needs to be very clearly reflected in the legislation. That would certainly resolve the issue, but it

needs to be reflected in the legislation, unless it is going to be dealt with in the transitional legislation, which of course we have not seen yet.

Moving to the BOOT test, which must be applied against each and every employee since 1993, a collective agreement, as I am sure you are aware, was approved if the agreement did not result in, on balance, a reduction in overall terms and conditions. Applying the new BOOT test to each and every employee means greater delay and frustration from not being able to implement a finalised agreement. Our solution there is simply an 'on balance better off overall test' but again all of those issues are covered in our submission.

We think also that access to arbitration is too easy. The government previously promised that arbitration would only be available in very rare, intractable cases, where it is now available under the bill as soon as negotiations become difficult. We think that this undermines the bargaining system in three specific areas. I will not go into them.

Permitted matters for bargaining have been significantly expanded, leading to the likelihood of more protracted bargaining, including extra time being wasted over arguments about what is or is not a permitted matter. Scope of permitted matters pertaining to employee-union relationships should be explicitly linked to the delivery of productivity benefits at the enterprise level, consistent with the objects of agreement making within the bill itself. Expanding of permitted matters will result in more protected industrial action because employees can go on strike over any union related matter in the bargaining process, so it is a matter of: the more matters there are to bargain over, the more argument, the more disagreement, the more industrial action and more delay in getting an agreement.

That is what I have to say in relation to agreement making. If I could just make a few other comments in relation to areas of inconsistency with government policy, the first stand-out one is in relation to right of entry.

**CHAIR**—Ms Kuhne, I am not going to attempt to wind you up, but I just point out that it is 15 minutes in and you did indicate your other colleagues wanted to say something. I just draw your attention to the time, but please proceed as you see fit.

**Ms Kuhne**—Thank you very much. I will very quickly mention that, in relation to right of entry, we see that the government has clearly not kept within its mandate. Mr Lee and Mr Borlase will discuss their concerns with that particular area in relation to the construction industry in a minute.

In relation to transition, we are quite concerned that there has been no transitional legislation made available for scrutiny at the same time as the bill, which is quite a comprehensive rewrite of legislation, with many areas of concern. Members are quite uncertain as to how, for example, the BOOT will apply without the NES or modern awards or other areas being enacted or even knowing how they are going to pan out.

We have some concerns about workplace rights and adverse actions being a new area not previously signalled. It is a bit unclear as to how it is all going to pan out. There was no warning about the provisions and no policy details, so that creates some concern.

In relation to transfer of business, members do have significant concerns about the unexpected but quite comprehensive change to those provisions. We have detailed quite a number of concerns in our submission, but Mr Blyth from Compass Group will focus on that particular issue, as it is quite critical to his company.

**Mr Blyth**—Thank you, members of the committee. As I am sure members realise from the profile that I understand has been provided, Compass Group is a major contractor in Australia. We employ over 10,000 people at over 650 sites. It is a significant contracting business, providing catering and related services to a wide range of business sectors. So the question of the transfer of business provisions in the bill is a very important matter to Compass Group.

The critical question that we pose in looking at this aspect of the bill is that it appears to talk about a transfer of business but we say that it wrongly describes that transaction. It is not about a transfer of business at all; it is about the employment changing from one company to another company without there being any real transfer of the business. The existing provisions in the legislation that deal with a transmission of business, which have existed in legislation for many years, are relatively well understood by businesses and we do not quarrel, for the purposes of our point on the new provisions, with those pre-existing provisions, but it is clear that the bill substantially changes the law as it now applies, and that is of critical concern to us.

The notion that there is a transfer of business if employees change from one employer to another, that the work they are doing is substantially the same and that there is some connection—and the question of the connection is then the critical thing—is, we think, a misguided approach to trying to characterise something as

a transfer of business. The reality is that the business does not transfer. The business stayed previously with one employer and it is a new business with the new employer.

The notion of a contractor going to a business, urging that business to outsource what we would describe as its non-core activities to a company like ourselves, Compass Group, and encouraging that business to do so on the basis that business efficiencies can be achieved and, through those business efficiencies, our client's business is better off, and our business is indeed better off, provides us with an opportunity to provide job growth and job security. If that equation is interfered with, then the prospects that the Fair Work Bill will deliver on its broad objectives of more jobs, more productive jobs, we think will simply fail.

The suggestion in the bill seems to give rise to the concept that the employee's job is being transferred from one employer to the next in the context of, for example, outsourcing, and we think that that is a flaw. It is not the same job and it is not the employee's job. To describe it as the employee's job transferring we think unreasonably creates this expectation in the bill that the employee should therefore not be potentially disadvantaged. But the reality is that the employee of the old employer has no claim at all to the job that is created in the circumstances of outsourced work. The employee's previous relationship with their previous employer is exactly that.

The way the bill is structured, what it fundamentally will do is put businesses such as ours in the position that we will say that, unless there are very good, compelling reasons to take on existing employees from the client, frankly we will not do that. It will be less convoluted for us to simply employ fresh people and then not be burdened with the transfer of business provisions. We say that is not good public policy.

At the moment, when we take on fresh work from outsourced business, ordinarily we will review employees' performance, we will interview them and we will look at selecting experienced people, because frequently, as a contractor taking on new work, it is beneficial to us and to our client to take over those experienced staff. But if they come with the encumbrances of their previous employer's industrial agreements, then that equation is no longer favoured for the employee.

The further question that arises in the consideration of those industrial instruments transferring is that, as I am sure members of the committee will know, industrial agreements, or enterprise agreements, frequently have a connection to the award that applied to that employer and in many cases they will be awards relevant to the industry of the particular employer, our client. If the transfer of business provisions, as they are now described in the bill, were to apply, not only would we inherit what we would say is the mess of our client's industrial agreement but the mess of that particular industry award.

As members will obviously be aware, the bill promotes the concept of modern industry awards. For a business like Compass Group, we see that a modern industry award is a good step forward. To rationalise awards nationally and reduce the complexity of different awards in different states that apply to our business is a positive step. The approach in the transfer of business, with the connection between industrial or enterprise agreements connected to awards, infecting our business with the provisions of those clients' agreements and their awards, will complicate our business to a point where again that will be a reason that we would see is against us offering employment to employees of the previous employer.

**CHAIR**—Mr Blyth, I would encourage you to try to conclude your comments, because I understand there is another speaker as well.

**Mr Blyth**—Sure. The only other comment that I wanted to make, in dealing with this by way of introductory remarks, is that the bill might be said to have some remedies available in it, in that an employer in a situation such as ours can apply to the commission or Fair Work Australia to not have those transferable instruments of transfer. We say that those provisions simply will not work. The time frame that is ordinarily presented to us when we have tendered for work and been successful with a contract to when we then want to commence to employ people and have people employed simply means that it would not be practical at all for us to apply to the commission to seek an order of the kind that the bill proposes. The time frame is impractical. The expediency of taking the work on and getting on with it would mean, again, that that would be a reason why we would simply not take on employees who were previously working for the business that was being outsourced.

**Ms Kuhne**—Could I ask for Mr Lee and Mr Borlase to make some specific additional comments in relation to the greenfields agreements provisions?

**CHAIR**—Okay.

**Mr Lee**—Thank you. I will keep it very short with regard to greenfields agreements in particular. Greenfields agreements are particularly important in the construction industry where you have got very short time frames to basically win a contract, mobilise to site, and do your bit of a project. Typically, it could be a matter of weeks; the actual time on the project could be as little as a few days or weeks to a year or so. Greenfields agreements provide a very efficient means of putting in place the industrial instrument, providing certainty to the employer and to the project and also certainty in talking to potential employees about the terms and conditions they are going to work for.

I am involved in negotiations with many unions with regard to union greenfields agreements currently and they are, like I said, a very efficient means of actually getting agreements in place. One of our concerns is the process in terms of notifying all relevant unions, and committee members will probably be aware of the complexity of union rules and constitutional coverage, overlapping coverage, and what I would call blurry coverage, particularly in the construction industry, so that you potentially have to notify and negotiate with a large number of unions in a relatively short period of time.

The other issue is that the bill as it is currently drafted implies that you need to reach agreement with each of the unions involved who would be potentially covered by a particular greenfields agreement. Again, it complicates and drags out the process, particularly when you have some unions whose constitutional coverage may be involved in the early stages of a project and other unions who are involved in a later stage of the project. The actual impetus for reaching agreement with all of those unions is very difficult to in fact achieve. We would like the situation clarified to make sure that you can in fact reach agreement with a union to cover the work and get in place on the ground fairly quickly.

Tied to that—and it is to do with the right of entry provisions—is that currently you have a situation where the right of entry provisions are tied with the agreement provisions so that the unions which are parties to an agreement obviously have the right of entry. Under the proposed change, where it is tied to constitutional coverage, you have got potential for unions not involved in an agreement to then come on and have access to the site throughout the project and use it as an opportunity to disrupt work and undermine the agreement that has been reached with one union and get involved in basically demarcation issues between the different unions.

**Mr Borlase**—Thank you, members of the committee. I will be very brief. I understand that there has been a background document provided to the committee. One additional thing that I think should have been put into that document is to highlight that, when you are dealing with a construction project, time lines are absolutely essential in terms of meeting schedules, and there are significant penalties associated with time delays in contracts that are associated with construction and projects. Consequently, it is extraordinarily important for a construction project to have certainty in regard to the industrial instruments that are in place.

As you have heard, contractors can be on site for a relatively short period of time or they can be on site for in excess of a year, and the difficulties that are obviously associated with those aspects mean that an individual company will have extremely short time frames in which to be able to negotiate agreements and, where you have got competing union interests, different competing union agendas, that is going to make the process of reaching an agreement in that time frame that you have between when the contract is awarded to you and when you are required to mobilise the site extremely difficult. If you do not have an agreement before you go onto site, then you are obviously faced with the increased potential for industrial action during the course of the execution of your project, for which there are associated penalties for any delays that occur in terms of the completion date.

Alternatively, there are increased costs to avoid the penalties because you are working significantly more overtime or you are having to employ more people to be able to achieve those schedules, and at various times, depending on the strength of the economy, the ability to employ more people is simply not there, and then the issue of working additional time to be able to make up a schedule is also fraught with a whole range of dangers that link back to occupational health and safety concerns, which in our organisation is a situation of absolute prime concern. Our CEO has the view that it is absolutely immoral for us to injure an employee during the course of company work.

In regard to a number of the concerns that I have indicated in that outline document that we have in relation to the industrial relations system, a lot of the concerns emanate from the increased involvement in the processes that have been written by the unions, and that is in terms of starting off with the number of unions that you may need to have involved in an agreement-making process. We all know who the relevant unions are. We could have one classification in which there are potentially three or four different unions who may

have constitutional coverage, and that means, for instance, with the increased right of entry provisions as they currently stand, we have the potential for disruption, of people's attention being drawn away from the job that they are doing as unions compete for the membership of those individuals.

There have been a range of alliances that have been made which we are seeing at the moment breaking down in preparation, in our view, for this broadening out of the access to workplaces that unions will be able to achieve, and for us that simply means that there is going to be greater difficulty in managing the workforce and managing union issues.

The other aspect that we are involved with in projects and construction is, instead of just being an employer of labour, we are actually the engineer and, for want of a better description, the coordinator of all of the other contractors that would come onto site in order to be able to construct a project. Even on a very small project that might only run for four or five months in terms of on site, you could have 20 to 30 different contractors coming on board. Under the right of entry provisions, we are usually deemed to be the occupier of the site if we are constructing something for a client, and in that regard we are responsible for determining right of entry.

When you are looking at 20 to 30 different companies with any range of different unions, who may or may not have constitutional coverage, it would be an absolute nightmare for an organisation such as ours that is in that role to determine who can come on site and who cannot. At the moment, it is quite clear: those unions who are party to any of the agreements with any of those companies come on board. From that perspective, it is a relatively simple process to be able to manage, with minimal risk of putting a foot wrong and incurring the potential for the fines that might be associated with wrongfully denying any actual access. I might leave it at that particular point to allow questions.

**CHAIR**—That does relieve the chair. We do have some time for questions, but I am sure that all senators will not get an opportunity to ask the questions they probably want to. If it is okay with you, Ms Kuhne, I will invite senators to put written questions on notice which we will forward to you by early next week, if they have questions about your submission or want further information et cetera.

**Senator ABETZ**—Thank you very much. If you could, try to keep your answers as brief as possible. First of all, thank you for the attachment A to your submission; that is very helpful. I was wondering, Chair, if the secretariat could make that available to our last witnesses, because I would be very interested in their commentary on that in relation to union coverage.

I want to raise a very specific issue in relation to parental leave. Part of the legislation talks about parental leave for those with children under the age of six. What would the employer attitude be if that were expanded to include parents of disabled children? Do you want to take that on notice?

**Ms Kuhne**—So to allow employees of disabled children to access the entitlement or the provision that is currently contained within the NES?

**Senator ABETZ**—Expand 'children up to the age of six' to include 'children that are disabled, up to the age of 18'.

**Ms Kuhne**—I see. Yes, I think we should take that on notice.

**Senator ABETZ**—All right. Thank you very much. I note in paragraph 23 on page 19 of your submission you deal with the issue of supported employment services. I was just wondering whether you have raised that with the government as yet and what the response has been, if any.

**Ms Kuhne**—The answer to that question is: no, we have not raised it with the government directly at this point in time.

**Senator ABETZ**—And in that you talk about low-paid authorisation. Are you aware of any definition of 'low paid' in the legislation and is it clear to you what is meant by the term 'low paid'?

**Ms Kuhne**—No, we are not aware of a definition in the legislation and we are not entirely clear as to what is meant. I am conscious of the comments that Mr Kovacic made to the committee earlier in which he suggested that that stream would only be available to those persons, to employees, who were on the safety net and who had never been the subject of any previous enterprise agreement. We say that that is not clear in the legislation and that that is one of the very big problems of the legislation. We see it as wide open for all sorts of companies to be the subject of claims seeking low-paid determinations because it is simply not clear where the line is drawn. If it is the case that it is subject only to the low paid and only where there has never been—

**Senator ABETZ**—If I can cut in: to you guys it is quite unclear and you want it to be specified.

**Ms Kuhne**—Yes, that is correct.

**Senator ABETZ**—In relation to the BOOT or better off overall test, is it your understanding that in a particular workplace everybody has to be better off overall? For example, if you have 100 employees and 99 of them say, ‘Yep, we’re better off,’ but one says, ‘Ooh, this might impinge by five minutes on my family life and therefore I don’t think I’m better off,’ can that one employee’s concern about his or her five minutes less family life—and I am using an extreme example; I accept that—block the totality of the changed agreement because it would no longer be better off overall as there is one person who claims to suffer from diminished employment circumstances?

**Ms Kuhne**—That is how we read the provisions of the bill in respect of the BOOT test, yes.

**CHAIR**—Mr Blyth, I was just wondering what you thought about the benefits of a unitary system for industrial relations, given the coverage that you have with the industries that you have.

**Mr Blyth**—Without question, for a business such as ours, which is national in Australia—and it is in that context that I am responding to the question—a simplified system is a benefit. Frankly, we do not care whether that is delivered through a unitary system or through harmonisation—as is the term often used—between state systems and federal systems. What is critical to our business is that there is uniformity in the industrial regulation that applies to our business.

**Senator CAMERON**—Ms Kuhne, could you point me to where the legislation provides for arbitration as soon as negotiation becomes difficult.

**Ms Kuhne**—There are a number of different parts to the legislation.

**Senator CAMERON**—Do you want to take that on notice? I am sure there would be lots of people interested, who simply have difficulty, if arbitration is available.

**Ms Kuhne**—Yes. There are basically three areas. One of those areas is in relation to the low-paid bargaining stream where the bargaining has not been effective, and I do not have the provision to mind right at the moment. Another area is where good faith bargaining falls down and a serious breach determination has been made.

**Senator CAMERON**—Is there a difference between ‘serious breach’ and ‘become difficult’?

**Ms Kuhne**—Under the bill, where good faith bargaining becomes protracted, it is open for one or more parties to apply to Fair Work Australia for a serious breach determination.

**Senator CAMERON**—But bargaining can be difficult, can’t it?

**Ms Kuhne**—It can indeed be difficult. We would say that that is all part of the process of bargaining. Bargaining is difficult and there should be robust discussion.

**Senator CAMERON**—But there is nowhere in this legislation that, if bargaining simply becomes difficult, in general terms workers or an employer have got access to arbitration, is there? It is not there.

**Mr Borlase**—Forgive me that I cannot point you to the specific provisions, but—

**Senator CAMERON**—Why don’t you just take it on notice. If it is there, I am interested in it. I am interested in this myself.

**Mr Borlase**—The particular provision I was thinking about is where industrial action is taken; there may have been a response from an employer; employees can engage in further industrial action; and, effectively, as a result of what they may claim to be self-harm because there is somebody that is suffering harm as a consequence of their own industrial action, they can go off and seek a Fair Work Australia—

**Senator CAMERON**—But that does not meet this definition of ‘difficult’.

**Mr Borlase**—And, to me, that is even worse.

**Senator CAMERON**—I am really trying to make sure that we do not have this myth perpetrated out of the committee hearings that you can get arbitration of things that are difficult. That is what has been put to us today and I would like that clarified from your perspective.

**CHAIR**—Last question, Senator.

**Senator CAMERON**—Last one?

**CHAIR**—Yes, I am afraid so.

**Senator CAMERON**—There are a number of questions I would like, then, to put on notice.

**CHAIR**—Yes.

**Senator CAMERON**—You say you had no warning about some of the legislation. You also say there should be econometric modelling done. Did you receive any warning about the legislation from the Howard government when the industrial legislation changes were made? Did you ask for any econometric modelling of the Howard government's legislation, and if not, why not?

**Ms Kuhne**—There certainly were approaches made to the previous government in respect of a number of those different issues. I am not in a position to be able to say categorically today whether or not econometric modelling was called for. I was not in this position at the time.

**CHAIR**—Could you take that on notice, Ms Kuhne.

**Ms Kuhne**—Certainly.

**CHAIR**—Senator Siewert, could you ask a question. Then we will have a couple of moments for senators to put verbal questions on notice, but could we try and limit that, and then if you have further questions we could follow them up in writing.

**Senator SIEWERT**—I want to go to the right of entry issue. My understanding is that you are suggesting that we just go back to the legislation as it stands under Work Choices. Various submitters have suggested an alternative is that, with non-union employees, permission is sought to access their records. Have you given any consideration to that or do you purely want to go back to Work Choices?

**Mr Borlase**—Effectively our understanding of the ALP policy all through the election process was that there would be effectively no changes to the right of entry provisions that were in place under the Workplace Relations Act. The way we perceive the legislation is that there is a significant change to that. So our position is not one that says, 'Go back.' It is one that says the legislation should simply remain consistent with what ALP policy had been during the election campaign. Our understanding of that was clearly that there would not be any change to that which was in place already. As I said, our reading of the legislation in a number of different areas means that it has actually radically changed.

**CHAIR**—Senator Humphries, you had a couple of questions on notice.

**Senator HUMPHRIES**—Yes. There were a couple of things that were put to the committee yesterday in Adelaide by Professor Andrew Stewart. You will need to go and read what he said on the record to respond, so you cannot respond to it now. But two things he said I would like you to respond to: one was the comment he made that he felt this legislation would be employment neutral; it would not have an adverse effect on overall employment in Australia. The second point was that, when we put to him that the government's position on right of entry provisions was inconsistent with its election policy, he said, 'It's inconsistent with the heading in the Forward with Fairness policy on right of entry, but it's not inconsistent with the body of the policy,' the detail that follows that heading. If you could look at what he said and respond to those two issues, please.

**Senator CASH**—I have one question to go on notice. It is in relation to the averaging of hours of work and the proposal that you can average them over 26 weeks, as opposed to 52 weeks, and the implications for rosters. If I could get your comments on the implication for your various industries on that.

**Senator RYAN**—I have an issue not addressed in your submission relating to clause 411 of the bill, which restricts employer industrial action to responsive action which represents—as has been made clear to the committee—a change to law that was settled as far back as 1993. I wanted your analysis of the potential of the impact of that change in removing the right of employers to take industrial action or protected action on the same basis as employees.

**Senator BOYCE**—In Queensland we had some evidence from the Queensland Council of Unions suggesting that there had not been any misuse of the provisions for right of entry which exist under the Queensland current regime. Would you like to comment on misuse of the current provisions for right of entry, or allegations around misuse of record use in the Western Australia context.

**CHAIR**—I have a question in relation to permitted matters that follows on from Professor Andrew Stewart's evidence yesterday that Senator Humphries referred you to and his position about the government's position about employers being free to negotiate about any matter that suits them and how that fits in with your position. I would also like you to tell us what your view of a definition of a low-paid worker would look like.

**Senator CAMERON**—I would like Mr Blyth to advise what rights he believes the workers should have who lose employment with one company as a result of work being transferred to your company, if any.

**Mr Blyth**—Do you want me to respond now?

**CHAIR**—No, we do not.

**Mr Blyth**—Their rights rest with their previous employer. Full stop.

**CHAIR**—You might send us a brief note to tell us that. Thank you very much for your submission and your presentation to us today.

[2.06 pm]

**JEFFRIESS, Mr Brian Charles, Director, National Aquaculture Council**

**McCALLUM, Mr Brett John, Vice-Chairman, National Aquaculture Council**

**CHAIR**—I welcome our next witnesses, from the National Aquaculture Council. I invite you to make some opening remarks to the committee, to be followed by questions.

**Mr Jeffriess**—I will make a very short statement on exactly what we are asking the committee to recommend and then Mr McCallum will expand on that in terms of a particular part of the industry. First of all, we support the safety net provisions in the bill. We have concerns about specific parts of them in terms of the practicality, but we certainly support the concept of the safety net and associated provisions on minimum wages. We are asking the committee that the bill be much clearer on the position that industries do not need an award, as long as they conform with the safety net and associated provisions. The large majority of the industry is currently non-award, and we regard that as another layer of regulation which is not required when the safety net and sometimes associated enterprise agreements are the framework in which it is necessary to operate.

Secondly, on the specific issue of the time that you are allowed to spread the hours in excess of 38 hours, the bill does discriminate between non-award industries at 26 weeks that you are allowed to spread it and award industries at 52 weeks. We ask that that discrimination in terms of non-award and award be eliminated and that all industries have 52 weeks. The third point is one that we have put to the AIRC and to Minister Gillard: that, because we do not wish to have an award—either those who do not have an award now, which is a large majority of the industry, and the small group who does—we do not wish to be included in the award modernisation process. We have put that to the commission itself and to the minister and they will be responding in due course. But it would obviously assist if this committee was to recommend whatever was in your mandate to do so.

Just quickly about aquaculture: we have included all the data in the submission. You can see it is a growth industry. It is a growth industry in regional areas. It is assisting with employment in areas where there are traditional industries which are declining. We have a situation where we have a very low turnover of staff. There is a training culture. It is a research culture. It is a multiskilling culture et cetera. The fundamental basis on which we have built this international competitiveness and the growth of the industry is flexibility of hours. Anything which threatens that flexibility of hours will make us internationally uncompetitive and Australia will not have an industry. Aquaculture is by far the fastest growing food industry in the world over the last 25 years. Australia has shared in that growth and that has been built on flexibility.

One interesting comment I might say from Commissioner Lewin of the AIRC is that it does not seem to matter what number of hours you work on ordinary time or whatever it may be, as long as they are appropriately spread over the statutory period, but it is the gap between the shifts which is really the issue as far as work safety and worker goodwill is related. In summary, there is an industry here which is a growth industry and it is bringing huge benefits to Australia.

We are not asking for anything different; we are just asking that non-award industries be allowed very explicitly under the bill, rather than implicitly, that we not be part of the award modernisation process and that the period in which we are allowed to spread the hours be much longer for non-award industries. Mr McCallum could outline the specifics relating to the major Western Australian aquaculture industry.

**Mr McCallum**—My day-to-day role is as the executive officer of the Pearl Producers Association and we represent the maximum pearling industry across the country—the Northern Territory and the Kimberley in Western Australia.

This is to give you some idea of the implications of the need for flexibility within our industry and the necessity for our industry to be award free. We too interpret the bill to specifically allow for award-free industries, as long as they provide the National Employment Standards, and we believe it is inefficient for government to require a duplicated framework where these National Employment Standards are already met by an industry.

We do operate under enterprise agreements, which meet and in most cases exceed the NES and FWB requirements. So to put further requirements on top of the industry, especially where we need international competitiveness, is not supportive. We also take the view that the minister's request to the commission to

undertake award modernisation was for the coverage of those industries which have historically been regulated by awards. The aquaculture industry has not.

For pearling specifically, just to give you an idea of some of the requirements for the flexibility and nature of our industry, we operate in very remote regions of the Kimberley and the Northern Territory. A number of the senators here will be well aware of that situation. It is a relatively new industry—since the 1980s. Whilst pearling itself has been in place for 150 years, the culturing of pearls was only developed in the 1980s. Pearling is the largest employer in the Kimberley region. Oil and gas may come and take that over fairly soon, but it has been for the last 20-odd years—

**CHAIR**—Sorry, who might take it over?

**Mr McCallum**—Oil and gas. It does create substantial economic benefit to the remote region of the country, and I think that is something that the bill needs to take into account. It is not just in those areas where it is large businesses; it has an effect in remote areas.

We are an industry that is accessible only by air and sea, and that is not by Qantas or by Jetstar. This is air by small seaplanes, which usually have to be owned and operated by the companies themselves. There are no roads; there are no land bases; everything is done on the water. Small aircraft only have very low payloads and are dependent on weather conditions in all cases as to whether they can operate or not.

Seasonal work is crucial to the aquaculture industry, and I will use the pearling industry as an example of what happens in aquaculture—and this could be applied to tuna, salmon, prawns or abalone, whichever industry you are looking at. There are a large number of components. In our case, similar to tuna, we have a fishing season. That season is dependent on the ability to have clear visibility. So cyclone seasons, which run late into the year, will actively change when we can go fishing.

There is a seeding requirement. The seeded oysters then need to be transported. They go through a significant cleaning regime on a regular basis—every 10 days—and then move through to the harvesting period, where the pearls are removed from the oysters. In each of these cases, the timing of that activity is purely dependent on the environmental conditions—the strength of the tides, the length of the cyclones, the period of the cyclones, the water temperature, the visibility of the water and the welfare of the animals. You cannot just run to a schedule and ask an oyster to be prepared to spawn tomorrow because you are busy changing over your work people.

You have to have a multiskilled group of people. You cannot tell the water temperature to hold off for a couple of days while you bring the new people in because the award requires a different arrangement. You have to have the people ready to move. They need to move immediately when that is required.

It takes two years to grow a marketable pearl. That is not unknown to most people. This means you have to go through significant threats to the industry—the variables of the environment, such as cyclones, rainfall and tides. All of these things mean you have to be ready to move at any time. If there is a particular rainfall problem in an area, you have to actually physically pick up the shells and move them to another area, or else they will die. This requires the workforce to be ready to move and multiskilled to move in any way. As I said before, the work schedule is totally controlled by the environmental influences, and tides in the area move up to 10 metres. This requires flexibility in the operations for ships, for boats and also for crew.

Most of the aquaculture industries in Australia are export industries, in highly competitive international markets. With pearling, we are in a strange industry called the fashion market. If there is anything more requiring of flexibility than that, we only have to think about the changes in that view. That has particular vagaries, which again require significant flexibility in our industry. Our main competitors are Indonesia, the Philippines, Burma and China, which, as you will all know, have very low wage cost structures and substantial production subsidies from their governments. Australia is competitive because of our efficiency in production husbandry, by having the flexibility and the opportunities to be able to move very quickly, and we also have the highest quality achievements due to our environmental conditions and, again, our professional and technical abilities. However, that gap continues to close as the world's market forces close, and in some cases, as I mentioned to Senator Cash this morning, the Australian government is assisting our competitors to actually pick up our competitive advantages, but I will leave that for another Senate hearing.

Any legislation, we believe, must have regard to national and international competitiveness, and I understand that is an objective of the Fair Work Bill. It is also an objective of the Fair Work Bill to reduce the regulatory burden, which is important for our industry to remain competitive, and introducing an award would

be adding a level of regulation to an industry which already meets all the National Employment Standards in an award-free environment, and we would ask that that continue. Thank you.

**CHAIR**—Thank you.

**Senator ABETZ**—Whilst not purporting to be a witness to this committee, can I simply say that I would vouch for the dynamism of the aquaculture sector. It is multiskilling; it is a sunrise industry; it is into innovation et cetera. That was my observation of it when I had the opportunity to look around it. One other thing I also noticed was, talking to workers, that there was a general sense of job satisfaction and longevity in the job. Is employment in the sector relatively stable?

**Mr McCallum**—Certainly at the level of the senior management, that is for sure, and at the major executive levels, and then down into the field operations. Certainly in the fieldwork itself, like any seasonal work, you would have people move through the areas. But in the main areas for technicality and being able to maintain the workforce, we certainly do have a continual workforce and people coming back on a regular basis to work through that process. The industry does require a casual labour arrangement in various places, and many people do come back and fulfil that on a regular basis.

**Senator ABETZ**—I would have thought in Western Australia in particular, and the pearling industry, there may potentially have been challenges from the resource sector to provide better conditions, better wages et cetera in the event that the aquaculture sector was not looking after its workers in a proper manner—they may have had the opportunity to depart the scene and move into the mineral resource sector.

**Mr McCallum**—There has been a percentage of that happening, but certainly the aquaculture and fishing industry does tend to hold its people over long periods of time.

**Senator ABETZ**—Which would suggest then that there is a degree of job satisfaction. Your employees—and I will use the jargon of some of my colleagues across the way—who do not have the protection of an award, by their own decisions have been willing to stay within the industry, albeit they do not have an award to cover them.

**Mr McCallum**—That is correct.

**Mr Jeffriess**—They do live in small communities. All these industries are based in small communities. Exploitation in the traditional sense would not be an option.

**Senator ABETZ**—In relation to my home state of Tasmania, that also has a very proud aquaculture sector, especially in the Atlantic salmon; I understand they in fact have entered on the state level into an enterprise award, is it?

**Mr Jeffriess**—There is a Tasmanian crustacean award, but the dominant company does operate under an EBA which is not necessarily based on the award, but obviously exceeds the award. The employment framework in those cases, even where there is a state award, is based on EBAs, not the award itself.

**Senator ABETZ**—For your members—and I think you made the point well—flexibility is an important issue, given that you cannot control the seasons, the tides and the weather.

**Mr McCallum**—That is correct.

**Mr Jeffriess**—In our case, last year we were at sea for one month and there was not one day we were able to catch fish.

**Senator ABETZ**—When you say ‘we’, that is the tuna sector?

**Mr Jeffriess**—Tuna, yes. This year we have caught all of the fish in one month, which is unprecedented. It just shows the degree of difference between year to year and why you have to have flexibility.

**Senator ABETZ**—I thought that was because we stopped the Japanese from overfishing, but chances are I cannot claim that. It is good to hear that you had success more recently. In relation to the countries with which the pearling industry competes, you indicated that there was a lower wage structure in those countries. They also have, I would imagine, a lower occupational health and safety standard.

**Mr McCallum**—You can say that, yes.

**Senator ABETZ**—Yes, I can say that. But, nevertheless, you are able to compete on the world market because of quality, and that quality is undoubtedly due part and parcel to innovation, but also the contribution of your workforce.

**Mr McCallum**—Absolutely. The technical capacity in being able to produce the highest quality pearls in the world is because of the staff's ability to be able to husband their particular animals. If you are unable to maintain that technical capacity and the flexibility to be able to move when you can, you can affect your quality quite substantially.

**Senator ABETZ**—So there is the technical aspect. There is also the husbandry aspect of looking after the animal or shellfish during its growth period.

**Mr McCallum**—That is the critical factor. We are the only country in the world that can get more than one pearl seeding out of an oyster. So that sort of husbandry technology and capacity to be able to keep the oysters in a condition to do that is a specialty, and our staff and our ability to understand what is happening within the environment gives us that edge. So long as we do not export too much of our expertise overseas, we will be fine.

**Senator ABETZ**—And despite the huge pressures from the resource sector offering quite attractive packages, at least in dollar terms, you have been able to maintain, in general terms, a stable workforce on the basis of the conditions that you have been applying, despite not being covered by an award.

**Mr McCallum**—That is correct.

**Senator ABETZ**—Thank you.

**CHAIR**—I do not know anything about your industry so I would like to seek clarification on a few things that you have said. You said that you were out fishing for a month but never caught any fish. What does that mean in terms of the employment situation? Surely, if people are out fishing, they are under the same conditions whether they are catching fish or not, aren't they?

**Mr Jeffriess**—Yes, they are.

**CHAIR**—So they still get paid, even though they are not catching fish.

**Mr Jeffriess**—They are. What we are talking about then is that, if someone is out on a boat, we pay them a fixed amount per week—\$1,500 a week, for example. But we expect them to be available to work when the fish are there. So, for example, the fish are only there at dusk and dawn; if that is the case, that is when they will work.

**CHAIR**—Yes.

**Mr Jeffriess**—The doubt that is in some people's mind is if there is no flexibility within a work day. Even when the fish are in the farms the trip to the farm is often four hours steaming. Some days when you really need to feed intensively for marketing the week after, then you have to work. That is the only way this industry can operate—is 14 or 15 hours a day.

**CHAIR**—Apart from your request of remaining award free, where you are already, do you have any other concerns with the bill?

**Mr Jeffriess**—We have some concerns, but they are issues on which the government made its position very clear before the election. We are not political people. So if someone has told us what the situation will be if they get into government—for example, the unfair dismissal laws, while they may seem fairer, we think will definitely lead to people being more apprehensive about employing. That is human nature. That is the nature of a business person; the nature of the risk they know they take when they employ someone. But, to my mind anyway, the current government made that very clear before they got into power. Our philosophy on these things is not to seek change or whatever it may be unless there is an issue on which the government's position has not been made very clear.

**CHAIR**—If you were not successful in your request to remain award free, what is the process as you understand there? There would have to be the development of a specific industry award for your industry.

**Mr Jeffriess**—That is correct.

**CHAIR**—Which would look at all those conditions that are there now, like fishing and being out on boats.

**Mr Jeffriess**—First of all is the point that Brett made: there is a very clear safety net framework which we support, which we meet quite easily, to my knowledge in every instance. That includes the minimum wage annual hearings et cetera. The extra layer of a new award would seem at odds with the government's stated intentions in the second reading speech and other places that they are trying to reduce regulation and increase competitiveness.

**CHAIR**—What instruments govern the employment relationships now?

**Mr Jeffriess**—There are reasonably standard conditions across the industry, because they are small communities. But they are fundamentally common law contracts. The issue of Work Choices and the individual contracts that flowed from it in our case were never really implemented in our industry because there was no requirement for it one way or the other.

**CHAIR**—Is there actual bargaining taking place in your industry? You said that they are standard conditions, but they are common law contracts on an individual basis, of course.

**Mr Jeffriess**—There is. But to some extent there is structure there, because most of the industry works on statutory tickets to go to sea. To drive a boat, for example, you need a master 5 or 4, which is a national qualification to drive. There is a fairly standard set of conditions across the industry. Where it may differ from company to company is that some companies have different marketing strategies and that requires different hours per day. As Brett said, the husbandry of the animals is really the critical issue.

Some companies believe in duplicating the feeding in the wild and therefore feeding only at dawn and dusk is a superior way of raising the animal. Another company may have a different view. So they need to be different across companies, but there are reasonably standard conditions. We have quite a reasonable relationship with various unions, though we do not deal with them on a business basis. To enter a whole new set of negotiations could only lead to conflict, which leads to counterproductiveness in the sense of people not wanting to stay in the industry.

**CHAIR**—I do not understand what you said then. You have a good relationship with a number of unions, but you don't deal with them?

**Mr Jeffriess**—For example, we import large amounts of product. We have always had a relationship of some type with the union that represents the wharf labourers. We have been required to have those relationships, but not in our employment business as such. We have no philosophical objection to anyone being a stakeholder as such. What we are saying is that this industry has proven over a long period that it works outside an award structure and can easily work within the government's stated intention of the NES safety net structure.

**CHAIR**—I hear what you have said and you have made that point. I am just trying to understand a bit more about how it actually works.

**Senator CAMERON**—Mr Jeffriess and Mr McCallum, I have just had a look at your submission again, and you have set out four reasons why the industry is unique: that you are largely at sea and heavily dependent on the weather; that you are often in a remote region; that you have got pronounced weekly, monthly or seasonal peaks; and that you are largely export focused. That is really not unique in Australia. Some farming sectors have got exactly these issues, other than they are not at sea.

**Mr Jeffriess**—First of all, it does not say 'unique'. It says 'different', which is a bit different from that point of view. But secondly, and more importantly, the difference, we say there, between aquaculture and agriculture is that one is at sea, subject to all the weather conditions that go with being at sea. We agree that, for example, having to travel four hours a day to the workplace at sea is not significantly different from a jackaroo having to travel to muster cattle or whatever it may be, but, as everyone knows, seagoing conditions are totally different from anticipatable, known land/terrestrial conditions.

**Senator CAMERON**—The Maritime Union tell me this all the time.

**Mr Jeffriess**—We dislike operating at sea because we cannot predict our business; it is almost speculation each day. But that is the reality of the environment we deal with.

**Senator CAMERON**—I am a bit like Senator Marshall in that I am not totally across the industry. I am really just asking these questions to get some idea of the specific issues you are raising. You say that you are happy to work with the 10 National Employment Standards, and then the award adds another 10 complementary standards. Can you tell me which of those 10 you cannot live with?

**Mr McCallum**—It is not a matter of living with the 10. It is a matter of not requiring us to move from the situation we have at the moment. What we are saying is that the bill clearly allows award-free industries to operate and what we are suggesting is that that interpretation and the specific allowance of that be able to continue in this industry where it is award free. It is not a matter of whether we agree or disagree with the content of those bits and pieces. It is a matter of: we meet the National Employment Standards and, under an award-free arrangement, a suggestion that it should continue to be—

**Senator CAMERON**—That is fine. That is what you would like. But you have asked the government to consider that and I am just trying to work through why.

**Mr Jeffriess**—We do not know that there would be only 10 more conditions. We have no idea what those conditions would be. If you look at the one piece of evidence that we have in front of us—that is the AWU draft award—that is certainly far in excess of 10 extra conditions. It seeks to vary considerably the types of NES conditions, as we interpret what the bill actually says et cetera. If that is the only piece of evidence, we know that this is going to be a significant long-term battle with a particular union that we have no battle with.

**Senator CAMERON**—That is the issue? It is a battle with a union.

**Mr Jeffriess**—No. It is people's confidence to continue to grow this industry with the kind of culture that is the reason it has developed so far.

**Senator CAMERON**—Just let me ask you these questions. Do you have minimum wages?

**Mr Jeffriess**—Yes.

**Senator CAMERON**—You gave evidence to say that you have arrangements for when workers operated. You have got flexible arrangements for that.

**Mr Jeffriess**—Yes.

**Senator CAMERON**—That is covered. Do you pay overtime and penalty rates?

**Mr Jeffriess**—In certain parts of the business where the person is not reasonably expected to be flexible, yes.

**Senator CAMERON**—Are there any allowances that you pay any workers for anything?

**Mr Jeffriess**—Yes, allowances are paid.

**Mr McCallum**—The other thing to recall is that in our industry all the workers are situated on site. We fly them in at the start of the period and they live on a ship and all of those allowances and requirements are built in to sustain them for that period of time.

**Senator CAMERON**—And workers have leave?

**Mr McCallum**—Yes.

**Senator CAMERON**—Do they have leave loadings?

**Mr McCallum**—I am not sure of all the details with regard to the individual companies, but my understanding is that those requirements are built in to some of the agreements.

**Senator CAMERON**—There is superannuation?

**Mr McCallum**—Yes. They are employees.

**Senator CAMERON**—If there is a problem, is there a procedure to deal with any arguments or disputes?

**Mr McCallum**—Yes. In the case of the pearling industry, there are quite clear standard operating procedures in regard to, mostly, enterprise agreements, or the agreements that are entered into.

**Senator CAMERON**—You actually have every modern award standard covered, so why—

**Mr McCallum**—So we do not need one.

**Senator CAMERON**—It is not that you do not need one, but it would not be an impediment if one covered you.

**Mr McCallum**—That is in regard to those few items that you just raised, but—

**Senator CAMERON**—But they are the formal standards.

**Mr McCallum**—Therefore, our workers will be more than comfortable with what they have at the moment. That is why we can remain award free and that is why they have stayed award free. As Mr Jeffriess raised, the AWU proposed award is far beyond what you have just raised. Perhaps if they come back, with some simplicity, on what you have raised then that would relieve some of the concerns that our members might have, but at the moment, as you say, we have got it all covered, so we are suggesting that we remain award free.

**Senator CAMERON**—But you are not unique. The conditions are not unique conditions.

**Mr McCallum**—We are not suggesting that they are unique.

**Senator CAMERON**—Other workers are covered by awards—

**CHAIR**—I have to ask you to wind up now, Senator.

**Senator CAMERON**—I am fine, yes.

**Mr Jeffriess**—I would suggest that saying they are unique is not an extreme statement. There is no other industry that has to work under such conditions. For example, we sat through all the hearings on agriculture with the AIRC. The exposure draft of the horticulture award will soon be published. We could not claim to be competitive under that award. The difference is that if you go and pick fruit and vegetables you can wear a raincoat if it is raining. If you go to sea and the fish are not there, or indeed the weather will not allow you to fish, it is very different. It is the only seagoing industry and ‘seagoing’ has its own meaning in terms of the requirement for flexibility. We do not like that either, but that is a reality.

**Senator JACINTA COLLINS**—Mr Jeffriess, you mentioned that some in the industry did want award coverage. Who were you talking about?

**Mr Jeffriess**—No. What I said was that Tasmania has a fish and crustacea award which has coverage of some parts of the salmon industry. The large majority of the industry does not operate to that award. They operate under an EBA which is generally far in excess of the award.

**Senator JACINTA COLLINS**—This brings me to the other issue here, which is that what has been proposed with the system is that we promote enterprise bargaining, underpinned by awards. What you are telling me is that you have enterprise bargains, but you have no awards underpinning them, and you want to keep it that way.

**Mr Jeffriess**—What underpins that is that the award has to be registered with the AIRC, and audited, for want of a better word.

**Senator JACINTA COLLINS**—But audited against what?

**Mr Jeffriess**—Audited against the NES under the bill.

**Senator JACINTA COLLINS**—Yes, and only the 10 conditions in the NES, which is the point that Senator Cameron is making.

**Mr Jeffriess**—And the minimum wage associated provisions, not just the 10.

**Senator JACINTA COLLINS**—Yes. The wage and condition provisions are the 10. The other 10 are those that are looked after under the award provisions.

**Mr Jeffriess**—Our point is that even after a long period of gestation—five, six years from now—why would you want to do it when the industry meets all the statutory requirements? Look at the low turnover of the workforce in most of the areas. There is no real dissent from the workforce. Senator Cameron was asking earlier about prescribed conditions: it is not a case of, ‘You will do this no matter what.’ People come to Port Lincoln, to Broome and to Cooe Bay, for example, to work because they know there is a culture of training. Our only problem with the oil and gas industry is that they poached our qualified people, because we trained so many.

You could find the odd worker who shows dissent or whatever it may be and good luck to them. What we are saying is that the government, in its statement in the second reading speech and in all the fair work statements leading up to this bill, made the point very clearly: ‘We are not going to impose new sets of regulations. The thing is to have a safety net for the worker and then competitiveness and no new regulation.’ Imposing an award does not meet those targets. That is why the bill to us, as we interpret it, does not preclude in any way non-award industries remaining non-award.

**Senator JACINTA COLLINS**—I understand that is your interpretation. That is probably a debate for a different day.

**CHAIR**—You have come here asking the committee to support you in one thing really, and that is your application that you have made to the government to keep you award free. We are trying to ensure that all your arguments are in front of us, and I think you have done that. I do not want you to be defensive about the questioning.

**Mr Jeffriess**—No.

**CHAIR**—There is time for another question.

**Senator FISHER**—Chair, if I could, I will place this question on notice and, indeed, it is a convenient starting point. I understand that you have premised your approach to the committee today on the basis that the government keep its promise to not impose new regulations and, in the case of the aquaculture industry, to not impose an award where there is not one today. If your industry is not successful in what is your view of having the government stick to its mandate in that respect, what would be the impact of other provisions in the bill on your industry? Putting that another way, if an award were to swing into operation in your industry, what would be the impact of other provisions in the bill on your industry, and would that impact be positive or negative? Would there, for example, be an increase in regulation as a result of that? But I would ask you to take that question on notice.

**CHAIR**—Yes, take that on notice. It is basically what your whole submission talks about, but if there is anything additional that you need to add to your submission to satisfy that question on notice—

**Senator FISHER**—Actually, Chair, it is not. Thank you, your comment is well intended, but I do not wish my question to be mischaracterised. My question is of the witnesses, in an attempt to take them to a place that I think they have not been because, understandably, they have not been prepared nor seen the need to contemplate a world where their industry is regulated by an award.

**Senator ABETZ**—In breach of an election promise.

**Senator FISHER**—In breach of what they consider to be an election promise. Quite right, Senator Abetz.

**Senator ABETZ**—That is right. These allegations are constantly made.

**Senator FISHER**—If there were to be, in the view of the witnesses, a breach of that fundamental election promise in respect of their industry, what would be the impact of that on their industry under the bill; why and how?

**CHAIR**—You might also take on notice what Senator Fisher just mentioned—that very specific election promise to your industry; point us to that, too, on notice.

**Mr Jeffriess**—Our point, just quickly, is not just the election commitment. It is not up to us to say post election that someone has made a commitment that they have not lived up to. Everything the government has said since about increasing productivity, worker safety nets, training cultures, upskilling et cetera, we meet. I do not see how any government, opposition, or parliamentarian of any persuasion can argue with those things. If someone wants to debate it with us, then please do in another place. What we are saying is that we tried very hard in good faith to meet every requirement. If any government of any persuasion says to us, ‘You aren’t meeting those,’ then let’s debate it. We are a proven employer, proven this, proven that, and we would frankly lose faith. The bottom line of that eventuality is that, if people want to now impose a whole new regulation of the industry which is entrepreneurial, people would lose faith in the appropriateness of government and public sector policy. It is as strong as that.

**CHAIR**—Thank you for your presentation to the committee today. We will have a short break.

**Proceedings suspended from 2.44 pm to 2.49 pm**

**LAMBERTO, Ms Lolita, Member, UnionsWA**

**McGURK, Ms Simone, Assistant Secretary, UnionsWA**

**ROBINSON, Mr David, Secretary, UnionsWA**

**CHAIR**—I welcome our next witnesses, from UnionsWA. Thank you for your submission. Do you have any comments on the capacity in which you appear today?

**Mr Robinson**—Ms Lamberto is a worker and has had experience of the Work Choices regime.

**CHAIR**—I invite you to make some opening comments to the committee, to be followed by questions.

**Mr Robinson**—Thank you, Chair and Senators. I would like to note that UnionsWA supports the current bill and notes very much that it is a leap forward in restoring the balance into workplaces that was so unceremoniously stripped away by the previous government, leaving many workers entirely at the behest of their employer's drive for profit. We note also, however, that whilst this is a strong step in the right direction, it does not resolve all of the inequities promoted by the Work Choices legislation. Our submission and those of our colleagues around the country seek to address some of those matters. Senators, if there ever was a time for improved workplace laws, it is certainly now as the global economic crisis is felt across all nations, with working people suffering considerably from the fallout.

The industrial landscape must change in a way that affords those millions of Australian workers the rights and protections that are necessary in such a global downturn. In making these preliminary comments, we think it is important to remember some basic principles. Firstly, this legislation is not just about words on a page. It is about real people and what happens to and affects real people, their partners and their children. It is about restoring rights and dignity to working people who were battered by the imposition of the Work Choices legislation and who, in November of 2007, voted overwhelmingly for a change in the way they were treated at work. It is about restoring a way of life for working people that recognises that, in part, the reason they work is so that they can provide for and improve their quality of life and develop the relationships that are important to them in their families and their communities, rather than work itself being the sole purpose of their activity.

As I said, we have with us today Ms Lolita Lamberto. She experienced firsthand the intimidation and harassment that Work Choices and Australian workplace agreements encouraged in her workplace and many other workplaces. Of course, Senators, you are welcome to ask Ms Lamberto about her experience and the impact on her and her family. But the evidence is well and truly in in relation to the impact that AWAs have had on many people and the treatment that they have suffered. Lolita's story is just one of the many that we now know to have occurred. The intimidation and the pressure placed on so many workers to sign up to unacceptable, below-standard AWAs is also now legend.

The current federal government's move to discontinue these instruments is supported, although we would say that there must be a definite and finite end to each and every one of them. We know all too well that any so-called agreement to continue them may well not be a genuine agreement on the basis of what has gone before. I will briefly turn to some specific areas of our submission and to some of the commentary that has been made over the last few weeks as this bill has been debated in the wider community.

I would like to deal with right of entry and inspection of records as the first point. Much has been made of these provisions, suggesting that all manner of ills will befall employers and businesses, befall individuals and the nation as a whole. These are completely unsubstantiated speculations that have no basis in historical record. The proposed legislation imposes greater regulation than at any time except for the discredited Work Choices laws, which the community knows went too far.

If we compare WA state law against the Fair Work Bill, it is apparent that WA law is far less restricted in terms of right of entry and inspection of records, yet there have been no complaints about any general abuse of right of entry in WA or of invasion of an individual's privacy or declining productivity and increased turf wars in the WA system. This has existed in WA and operated successfully for all parties. I note that Chris Platt from AMMA raised the allegation in your Brisbane hearing that unions had used access to records for political purposes here in WA. I can think of no way of describing that allegation except as a piece of errant scurrilous nonsense that remains unsubstantiated, and I would welcome him providing the evidence for that.

Indeed, our experience is only that nonmembers may be underpaid as much as any union member will be. Nonmembers gain the benefit of an inspection of time and wages records where breaches have occurred and are resolved. In my 23 years in the union movement, I have never had nor never heard of a complaint from a

nonmember—and nonmembers do complain to union secretaries, let me tell you—with respect to the inspection of records. In most cases they recognise the indirect benefit to them, and I would refer you to submission No. 7 from Mr Alex Falconer; in fact, he highlights this very point in that brief submission.

Finally, we think it is important that an employer—and this goes to location for meetings—not be able to nominate where discussions are held with members. We believe this should be in a place where members might regularly meet, such as a lunch room or a crib room, or whatever is deemed appropriate by the employees, noting that the meeting will generally be in their own time anyway. Our experience here has been that many employers have made this aspect very difficult, and some examples include asking officials to meet with their members in a disabled toilet, in a room that has security cameras operating in it, in a room next to the manager's office, and on a site in the Pilbara under a sun umbrella in the middle of open ground.

If I could turn to some issues around bargaining, UnionsWA remains completely opposed to any restriction or third party intervention by government in relation to matters that can be the subject of bargaining between the parties to an agreement. This is, and should be, entirely a matter for the bargaining process, and the laws should recognise that bargaining has been a feature of our system for many years now and that parties are mature and able enough in most cases to be able to reach agreement between them. No matter should be excluded by legislation.

Inevitably, though, sometimes there is an ongoing dispute that needs some assistance to aid the parties in resolving their bargaining outcomes. It is here that we say Fair Work Australia should be able to intervene with a view to arbitration on content of an agreement being a readily available option. We know that, more often than not, such a power will often focus the minds of the parties on trying to reach an agreement, rather than perhaps risking an arbitrated outcome that neither party might be happy with. We therefore believe that determinations by Fair Work Australia should be readily available in the general bargaining stream.

With respect to unfair dismissal, our comment here relates to the question of natural justice. If, as most would believe, natural justice should prevail in these matters, there can be no support, in our view, for discrimination on the basis of an employee working in small business or earning \$100,000 or more per annum. What is fair for some should be applied to all. Additionally, we emphasise our submission to you with respect to the seven-day period for lodging an unfair dismissal claim. We can see no logic to this, and emphasise that at least the current 21-day period should prevail, and we have indeed provided our reasons for that.

Finally, the \$100,000 cap: with respect to our submission on this point, again we can see no logic to the provision. Our example of tradespersons working in the resource sector of WA is a case in point. These workers will earn far more than \$100,000 per annum but are traditionally covered by the award system. We can see no basis for such a discriminatory provision to apply. Thank you.

**CHAIR**—Thank you.

**Senator ABETZ**—Thank you for your submission. Can you point to anything in this legislation that is likely to grow the number of jobs in Australia?

**Mr Robinson**—As a specific provision? I think that the establishment of sound industrial relations practices within a company and across the nation, that provide security for employees and an understanding of their rights and a restoration of those rights, leads towards workplaces that are congenial and positive to work in. I do not think there is anything particularly that would of itself increase employment; neither will it diminish employment, in our view.

**Senator ABETZ**—Some may argue that—

**Mr Robinson**—We know that.

**Senator ABETZ**—but I accept that answer. Can you point to anything in this legislation that might promote productivity and economic growth?

**Mr Robinson**—Collective bargaining by its very nature is about the collective workforce working to the goals of both the company and the employees. Indeed, there was a recent example in Alcoa here in Western Australia, where workers joined together to take a position that would try to ameliorate some of the problems that that company is facing under the current crisis. It is very clear that collective bargaining is a positive process in terms of improving productivity, rather than an employer working on an individual basis with each and every employee. I would say that it is collective bargaining that can actually improve and increase productivity.

**Senator ABETZ**—So the key to increased productivity is collective bargaining in this legislation?

**Mr Robinson**—It is certainly one of them.

**Senator ABETZ**—Can I go to a specific—that is, the right of entry powers—and I think you have already said it, but just to be absolutely clear: there will be expanded right of entry powers under this legislation to that which existed prior to it.

**Mr Robinson**—Expanded when you take into context the Work Choices legislation but not when you go back to the previous pieces of legislation. Correct.

**Senator ABETZ**—The Deputy Prime Minister did make certain promises that the right of entry laws will be retained ‘without exception’, but that is a debate for us in the Senate rather than across the table here. You would agree that, compared to the existing regime, under this legislation you will have increased powers, increased access?

**Mr Robinson**—It is a return to what was working very well in the past. That is how I would put that. It is an improvement on the current position, there is no doubt.

**Senator ABETZ**—And how is it an improvement? Because it gives the unions greater access?

**Mr Robinson**—Of course, there were restrictions to right of entry where the workers were on Australian workplace agreements and there may not have been—

**Senator ABETZ**—I understand the current situation. Why do you say it will be an improved situation?

**Mr Robinson**—On Work Choices?

**Senator ABETZ**—Yes.

**Mr Robinson**—As I said, if workers were on Australian workplace agreements in the company, that excluded right of entry, essentially. There are many examples where right of entry would have been necessary in those cases, not the least being for health and safety considerations. Overall, there now is a right to enter workplaces, which there always has been, with the only change, I think, being that the unions will have constitutional coverage of the workers as against eligible membership, and that is just a small improvement.

**Senator ABETZ**—The definition of ‘record’ has been altered as well—the employment record that the union will be able to inspect. Is that right?

**Mr Robinson**—Sorry?

**Senator BOYCE**—Access to—

**Mr Robinson**—Employee records?

**Senator ABETZ**—Yes.

**Senator BOYCE**—has been broadened slightly.

**Mr Robinson**—Sure.

**Senator BOYCE**—That is right.

**Senator ABETZ**—Yes, it has been broadened. Thank you very much. If a non-union member’s record were inspected at a workplace on the basis that the union thought there was a breach because there was discrimination in favour of non-union employees—right? Do you get that scenario?

**Mr Robinson**—Yes, I think I am with you.

**Senator ABETZ**—That would require the inspection of non-union member records, wouldn’t it, to ascertain whether there was that discrimination?

**Mr Robinson**—Yes.

**Senator ABETZ**—How would the non-union member ever get to know that his or her record had in fact been accessed by the union official?

**Mr Robinson**—That may well come through the employer. The employer may well say, ‘I’m obliged to disclose the records and I am doing that.’

**Senator ABETZ**—Yes, but there is no obligation on the employer to do that, is there?

**Mr Robinson**—No, but I am not sure what the point is really, because—

**Senator ABETZ**—Do not worry about that. I will make the points; you answer the questions.

**Mr Robinson**—Okay. So I have answered that.

**Senator ABETZ**—You indicated to me before that you had never had a complaint from non-union members about unions accessing their records and you have just very kindly assisted this committee by indicating to us that non-union members may well not know that their records had been accessed. As a result, it is not surprising they have not complained about something they do not know about.

**Mr Robinson**—Come on, let's get into the real world. In most cases—

**Senator FISHER**—Yes, let's!

**Senator ABETZ**—Can I suggest to you—

**CHAIR**—Senator Fisher! Order! Senator Abetz, please ask your question.

**Senator ABETZ**—Excuse me, the commentary was coming from the table to me about getting into the real world, to which I did not even respond, and the chair comments to me?

**CHAIR**—No.

**Senator ABETZ**—Excuse me.

**CHAIR**—Excuse me, that is not what happened, as you should well know. A number of people were making commentary and I was bringing them to order—

**Senator ABETZ**—Thank you for that, Chair.

**CHAIR**—including Senator Fisher, who I specifically wanted to bring to order because of her comments.

**Senator FISHER**—Thank you, Chair.

**CHAIR**—If we are now in order, you can proceed, Senator Abetz.

**Senator ABETZ**—Thank you very much, Chair. Can I turn to the issue of the opportunity to hold meetings, let's say in lunch rooms or usual break areas, to which you refer on page 4. On the law of averages, I am told that in Western Australia about 85 per cent of the workforce is not a member of a union.

**Mr Robinson**—Close.

**Senator ABETZ**—All right, make it 80 per cent. Even if it were 50 per cent, all the workers go to this lunch room to enjoy their lunch in peace and quiet. In this particular workplace, why should that be disrupted because a union official wants to talk to a very small minority of the workforce and interrupt the pleasant lunchtime atmosphere of the other 85 per cent?

**Mr Robinson**—The first thing is that, in any given workplace, the 16 per cent density might be a lot higher. I am sure you would appreciate that.

**Senator ABETZ**—Of course.

**Mr Robinson**—It could be 100 per cent.

**Senator ABETZ**—That is why I said 'average'.

**Mr Robinson**—The second thing is that, of course, a lot of nonmembers are very interested in the discussions that go on between the union and the membership, because inevitably those discussions will be about bargaining, rights, and health and safety. Those issues are as pertinent and relevant to nonmembers as they are to members. We have found that, from those discussions, people are very interested in knowing more. So it is actually quite a positive. There occasionally will be the odd complaint, but that would be an absolute minority of occasions.

**Senator ABETZ**—I would have thought that, in general terms, workers these days, if they want to meet with a union official, especially in a small enterprise where there might be only one convenient location—if that, because some of the enterprises do not even have a lunch room in small businesses—there is plenty of opportunity to take half a dozen steps out the door, be on a roadway and go to the local cafe for a discussion: half a dozen steps and you are onto public property, no longer private property. Why should the union have the right to insist on meeting people in a particular venue that they designate, as opposed to that which is convenient for the workplace? I would assume that the lunch room may well be the most convenient place for the majority of workplace situations, but the old one size fits all does not necessarily work.

**Mr Robinson**—It is important that there is a reasonableness test applied to all of this. I cited you some examples where employers were absolutely unreasonable in where and how they directed the union to meet with its membership, which they could do. I do not think there is any doubt that there will be small businesses where there will not even be that sort of a room, as you say. The question here is about reasonable industrial

relations and reasonable relationships between employer, workers and their unions. It is not about one size fits all and there should only be one thing. I think we all accept that.

The legislation says that the employer can stipulate where the workers and the union shall meet. Our experience of that has been horrific in some cases, as I outlined. We are saying there should be a better test than just that.

**Senator ABETZ**—If you believe in workplace democracy, and 85 per cent of the workforce says, ‘We do not want our lunchtime interrupted in our lunch room by some union official coming along to talk to us and inform us with very important information, but we do not want to be part of that,’ in those circumstances why shouldn’t the majority view prevail?

**Mr Robinson**—It may well. It is a matter for the workforce and the employer and the union to negotiate where they might be. There is nothing wrong with a good negotiation on that point.

**Ms McGurk**—The experience I have had trying to discuss those sorts of workers’ issues in workplaces has extended from metal workshops and large companies—Dave Robinson referred to Alcoa—to most recently childcare centres. The big issue for workers, particularly in small workplaces, is that they are intimidated. They do not want to be seen necessarily to be discussing an issue with a union official, if they are complaining or they are concerned about their manager. So they are very nervous about being seen discussing any issues, whether it is health and safety, whether it is their pay and conditions; whatever those issues are.

To say that, when a childcare worker who has 20 minutes break at lunchtime needs to go out of the centre to discuss with a union representative any of those issues, is really unrealistic and unfair to those workers. That is why we say it is a lot better to be able to go into their lunch room where people feel comfortable, where there are other workers there and they can discuss those issues in front of other people and they are not singled out by the employer.

**Senator ABETZ**—Sorry. So there is a problem with them sharing this outside of the workplace, but there is not if the union official comes to the workplace. Aren’t they more likely to be identified as having made a complaint if the union official walks in and says, ‘I’m here to see a few workers,’ and two or three workers turn up? I would have thought it would be a lot more obvious and intimidating, rather than if the employee were to leave or see them after hours.

**Ms McGurk**—No, it is not. I was responding to the scenario where you were saying: ‘Take the worker outside the workplace. Go and meet on the roadside or in some public place.’

**Senator ABETZ**—No. Six steps and you would be on the road and then in a public place. You can go to a cafe or whatever.

**Ms McGurk**—For people with short lunch breaks, and depending on the locality of the workplace, those sorts of options are not there. It is not practical and it is not possible to go and meet people outside the workplace in their allotted lunchtime. So meeting in their usual place of lunch is the most reasonable place for them to meet a union official so that they are not intimidated by their employer and so that they do not feel singled out.

**Senator ABETZ**—So this person sits in a corner with a union official, all the other workers are around having lunch, and the employer is not going to find out about that? I will not labour that point. In relation to your submission, page 4, you tell me:

Workers in small business (less than 20 employees) can be prevented from having discussions with a union official in their workplace if none of them are members and their employer holds a conscientious objection certificate (s485).

Is that right?

**Ms McGurk**—Yes.

**Senator ABETZ**—So we have a definition then of small business as being less than 20. Is that correct?

**Ms McGurk**—I think it was a reference to the conscientious—

**Senator ABETZ**—Objection clause. That is right.

**Ms McGurk**—It was under section 485.

**Senator ABETZ**—Yes. It says:

- (1) This Subdivision does not apply in relation to premises if:
  - (a) no more than 20 employees perform work on the premises;

Whilst the bill does not define it as small business, I was delighted to note that UnionsWA do see the number of less than 20 being a definition to describe small business, because there has been some discussion about that. I wanted to make sure that you see that that section as being less than 20 employees in fact refers to small business. Thank you for that clarification. This particular one refers to conscientious objection certificates. That has been in industrial law, has it not, for some decades; even introduced by Labor governments in New South Wales and Queensland and elsewhere?

**Mr Robinson**—There have, both in state and I guess federal law, been provisions that allow for conscientious objection. That is true.

**Senator ABETZ**—And that has been there for some decades.

**Mr Robinson**—It will vary I think from state to state, but it has been around for some time in some places.

**Senator ABETZ**—Yes.

**Mr Robinson**—But I am not exactly sure whether ‘decades’ everywhere.

**Senator ABETZ**—And it has been in the federal law for some time: if I recall, passed unanimously under Harold Holt whilst he was still minister for employment many years ago. So on the federal sphere it has been part and parcel of the regime for over three, possibly four decades. Are you saying that under the previous regime there was any special protection or that this current clause 485 extends that protection further or lessens that protection for people with specific religious beliefs?

**Mr Robinson**—I need to say to you that we have certainly had a longstanding objection to any provision that exempts anyone from the laws of this land. There is, in our view, no reason why any employer who enters into an employment arrangement with workers should be exempt from the laws. We are aware, for instance, that the Christian Brethren are one example, I think, who would seek an exemption. They run multimillion dollar businesses just here in WA alone. They should be subject to the same laws as any other company and any other small business that might operate. Whilst I do not have the facts here, there are regularly complaints—I accept that they will not go any further; will not be taken any further for other reasons—around health and safety and underpayment of wages. Those are the areas where we believe we should be able to access, on exactly the same basis as anyone else, that employer and that workplace.

**Senator ABETZ**—You are objecting to circumstances where there are no more than 20 employees on the work site, and none of the employees are members of an organisation, and all the employees are employed by a person who holds a conscientious objection certificate that has been endorsed by Fair Work Australia. That protection is only provided once they have been able to satisfy, I think, in the past the Industrial Relations Commission and now it will be Fair Work Australia. So Fair Work Australia says, ‘Yep, these are dinky-di people. No. 2: it is fewer than 20 employees, so if they have a multimillion dollar business with fewer than 20 employees, good luck to them, and none of the employees are members of an organisation or a union.’ I have to say that I cannot understand why you would object to that—and going back to the historical reach that you invited us to do in your opening comments—which has been part of the culture of industrial relations in this country, federally at least, now for some three or more decades. I just find it somewhat intolerant that the trade union movement would bother, in its submission on such a lengthy bill, to spend so much time on such a specific clause.

**CHAIR**—Mr Robinson, do you want to answer that before I move to the next question?

**Mr Robinson**—No, I do not.

**Senator CAMERON**—Mr Robinson, we had Minister Buswell here this morning, and the argument that he was putting forward was that the Fair Work Bill threatens the Western Australian economy. The general view that has been put here by both employers and the Western Australian government is that introducing the Fair Work Bill will be a detriment to productivity, will trample workers’ rights, and all that argument that has been bandied around for as long as there have been employers. There has been this underlying suggestion that unions are irresponsible. Could you tell me what happened at Alcoa when workers there were faced with the employer in some really bad economic circumstances?

**Mr Robinson**—Yes. The Alcoa situation, I think, is quite an important one for the movement. Led by the AMWU and the CEPU, the company disclosed the state of its finances, the state of its future orders, the impact that in fact the crisis was having on its orders and so on, and its circumstances, openly and transparently with the union leadership and some workplace leaders or delegates. The unions then met with their members and explained and went through the circumstances that they were able to disclose, and the workers there in

conjunction with their union leaders determined to defer pay rises for 2009 as a means of obviously trying to support one another and the company and attempting to ensure the ongoing viability of the company and supporting their colleagues in maintaining employment.

What occurred was a willingness on the part of the employer to be transparent and to openly share information and then for the union to in fact work through with its membership—which in some cases, you would appreciate, was not that easy—a series of options about how best to resolve the situation for everybody, which they did.

**Senator CAMERON**—Would you expect the unions to continue this responsible approach to the downturn in the Western Australian economy?

**Mr Robinson**—It will vary in different industries and in different workplaces, and it is important that in fact it is the union leadership with their members, as you would know, who determine how best to approach that circumstance. A key factor here was that it was the Alcoa executives' position that they would openly disclose and take into their confidence the union leadership and, with them, some of the workplace leaders to get an outcome. Where there are circumstances like that that prevail, then on most occasions workers and the unions will respond to that in a positive way.

The doom and gloom that we heard this morning I think is quite disturbing, because this bill is not going to change those circumstances. It will change circumstances for individuals and provide them with the sorts of protections that have been taken away. That is a strong positive in terms of how people work together and work with employers, in my view.

**Senator CAMERON**—Could Ms Lamberto explain her circumstances and how the bill would help her if she had to face similar circumstances again.

**Ms Lamberto**—When I was employed by a company called Harvey Fresh Bottled Milk and Juice—to cut a story down—I had worked there for five months before I was presented with a workplace agreement to sign for the three weeks leading up to Christmas. I said that I would not sign it. I read it and it was not fair. It cut my hourly rate down. I was on an award—there were about five of us left on the award at the time. If I had signed it, it would have cut my hourly rate from about \$18 something an hour down to \$16 flat rate, regardless of the amount of hours I did Monday to Friday. My weekend and public holiday rates were dropped to \$24, regardless of how many hours I worked. Typically, I would work a 60-hour week. I was employed as a casual. I had two young boys at home that had no-one there pretty much. Their father, my ex-husband, also works there.

This new bill will help people like me. I was forced into a situation where, if I did not sign, I would not have a job. I did not sign it; I kept going. It took me three months to finally leave but, the day that I left, the AWA was pretty much forced under my nose and three other co-workers' noses and our hours were cut. My 12- and 13-year-old sons had to feed themselves and do stuff that I as a mother should have been there to do instead of bottling milk all day. There was one break a day, a half-hour break for lunch, and that was it.

**Senator SIEWERT**—There have been a number of claims made about the bill, and you would have heard some of them today and also some made in other hearings. One of the issues is around averaging of hours. The resource sector in particular, the Mines and Metals Council and a number of other industry bodies, have suggested that they want 52 weeks, and that there should be special provisions, particularly for the resource industry because of rostering et cetera: (a) have you read some of those transcripts and (b) do you have any comments?

**Mr Robinson**—Yes, I do. It would be fair to say that we think 26 weeks is too long. There should be no reason in an industry like the resource sector why you cannot establish a six-week—in fact, they are often six-week—or two-month roster or whatever it might be and manage the hours accordingly. We have had stories from workers who have been on 12-hour shifts for up to 24 to 30 days in a row. This is not an uncommon story. Apart from what that does to family life and all the rest of it, there are serious health and safety considerations and some employers in the resource sector are saying that maybe they need to do things a bit differently; that maybe that is not the way to go any longer.

There are ways, by establishing proper rotating rosters and all the rest of it, that can manage that circumstance in a better way than just having an open slather over six months. I know that you have asked some questions about that and, equally, we are concerned about that. There needs to be tight regulation on hours of work, quite frankly. That does not mean that you cannot work a standard 38-hour week and then work additional hours by agreement. Those flexible arrangements are in fact put in place by arrangement and

agreement between unions and workers with the employer, but they are managed and regulated by all of the parties. That is really what should happen.

**Senator SIEWERT**—The other issue we have been talking about earlier, but also this morning with the minister, is around individual flexible arrangements. You will have read the government's submission, and the suggestion from the state government that that should be allowed to be a precondition. I would invite your comment on that. But the broader question, and I have asked both Professor Peetz and Professor Andrew Stewart about this, is: do you have concerns that where they are actually put in place there is in fact no process now where they are checked or registered like there used to be? If you do, do you have any suggestions for amendments to the bill?

**Mr Robinson**—We are absolutely opposed to individual flexibility agreements being a precondition of employment. That is essentially what occurred with Australian workplace agreements: 'Sign or you don't get the job.' What I heard this morning from the minister sounded very much like that to me. We have Lolita here who was already in employment. It is even worse when you are looking for a job and you are struggling to get a current position. So we are totally opposed to that. We do think that there should be some checking mechanism within Fair Work Australia, and my colleague has had a look at this question and can talk about any possible amendments.

**Ms McGurk**—I would have to take that question on notice in terms of specific amendments, but we understand that previously there was some checking line of authority. That is not going to be the case any more. The concern is that, for average workers—and there is obviously a percentage of them that are not members of the union—they do not know what that means in terms of respecting the award or at least the National Employment Standards, so we would welcome some sort of check to make sure that people were better off overall, for people on those individual agreements.

I understand those agreements really to be a recognition of the common law contracts that have stood above the award and above industry conditions and no-one has ever complained about those. Those have been longstanding practices. It is having confidence that they do not fall below that overall that we appreciate needs to take place.

**Senator SIEWERT**—If you could take on notice any suggestions, that would be good. I am going to squeeze one more question in, if I can, that is about the low-paid bargaining stream. We have not had extensive discussions during the hearing process around that stream. Do you have any comments on that stream?

**Mr Robinson**—Yes.

**Senator SIEWERT**—Is it positive? Should it go? Is it satisfactory? Should there be amendments?

**Mr Robinson**—I think this is a fantastic provision, quite frankly. I appreciate you have asked questions about the definition of 'low paid'; I understand that. But leaving that aside for a moment, in terms of the low-paid area, you typically are looking at cleaners, childcare workers, security officers; basically groups of workers who are in very weak bargaining positions—often women. On that point, I would say that in WA we have a horrendous gap between the earnings of men and women; close to 28 per cent, I think.

What this low-paid bargaining stream can achieve is that, firstly, it can perhaps to some extent deal with the pay equity considerations because it will allow an industry to take the wage considerations out of the equation. An employer in a child-care centre, for instance, might not be able to provide the same benefits as other industries might provide because they are working at such a marginal rate, or because it is such a difficult industry. I think the low-paid bargaining stream means that that industry deals with wages and conditions as whole: whatever is negotiated applies across the industry. No-one is worse off and, in fact, substantially better off in that circumstance, so we would support those provisions wholeheartedly.

What is also available with a workplace determination—that is, intervention of Fair Work Australia—if there is not a capacity to reach an agreed settlement. Again, in a circumstance where you do not have bargaining power, that is a strong positive.

**Senator PRATT**—I note you have said quite clearly that in your view the Fair Work Bill will have no impact in relation to managing issues relating to the current economic downturn. The state government is arguing that it will. You have given a clear example in relation to Alcoa. Has the state government approached UnionsWA or any other unions in relation to managing the impact of the economic downturn on workers in the same way that has been done in Queensland, or have they closed the door on that dialogue?

**Mr Robinson**—I have been calling for that certainly for the last two weeks, but particularly since the quite horrific closure of the Ravensthorpe mine which, as I think most of you would know, saw the loss of around 1,800 jobs, depending who gets redeployed. It is apparent to us that the state government needs to take that coordinating and interventionist role and it has not done so. Leaving aside the government for the moment—who have not met with us, I might say, so we have not been on that page with them—we are taking steps to engage in some discussions with the Chamber of Commerce and Industry and the Chamber of Mines and Metals ourselves and start having some discussions there.

This is not an issue around which there should be antagonism or around which there is difference. We all, I think, are aiming for the same outcomes, but it does need the WA government to lead this and unfortunately they are not at the moment.

**Senator PRATT**—Thank you.

**Senator ABETZ**—Can I ask one question on notice, please, Chair?

**CHAIR**—Yes, you can.

**Senator ABETZ**—Thank you very much. We sort of got there with Senator Siewert's question, and that is something that has been exercising my mind: should 'low paid' be defined in the legislation? If not, why not? If it is to be defined, how would you define it?

**Mr Robinson**—I think they are important questions and I am happy to take them on notice.

**Senator ABETZ**—I have been asking employers and, when I remember or time does not run out, I ask employee organisations too. Thanks.

**Senator BOYCE**—Can I put one question on notice, too? I did note your comments about how award coverage should be extended past employees earning \$100,000 plus. Could you, on notice, give me the union coverage of employees on more than \$100,000 a year and the number of union members that are on more than \$200,000 a year in WA?

**Mr Robinson**—We will try to do that. I did try to get that in terms of preparation for this submission. We are struggling to get it out of the ABS stats, but we will do what we can to provide that to you.

**Senator BOYCE**—Thank you.

**CHAIR**—Thank you, Mr Robinson, and thank you for your presentation here today.

**Committee adjourned at 3.40 pm**