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STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

Reference: Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

WEDNESDAY, 29 APRIL 2009

C A N B E R R A

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SENATE STANDING COMMITTEE ON

EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

Wednesday, 29 April 2009

Members: Senator Marshall (*Chair*), Senator Humphries (*Deputy Chair*), Senators Back, Bilyk, Cash, Collins, Crossin 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, Farrell, Feeney, Fielding, Fierravanti-Wells, Fifield, Fisher, 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, Back, Bilyk, Mark Bishop, Jacinta Collins and Humphries

Terms of reference for the inquiry:

To inquire into and report on:

Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

WITNESSES

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Committee met at 9.00 am

CHAIR (Senator Marshall)—I declare open this public hearing. On 19 March 2009, the Senate referred to this committee an inquiry into the provisions of the Fair Work (Transitional and Consequential Amendments) Bill 2009 for report to the Senate by 7 May 2009. This bill is the first of two bills which make transitional and consequential provisions in relation to the new workplace relations system set out in the Fair Work Bill 2008. The bill repeals the Workplace Relations Act 1996 other than schedules 1 and 2; it makes transitional provisions to move employers, employees and organisations from the old Workplace Relations Act system to the new system; and makes consequential amendments to Commonwealth legislation essential to the operation of the Fair Work Act.

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.

We will be finishing at 12.15 today so that senators are able to attend the funeral of the former Deputy Clerk of the Senate. We will reconvene on Thursday at nine o'clock to complete the hearing program. I want to thank witnesses who were scheduled to appear today who have accommodated this committee's need to attend that funeral. We do appreciate it. Much will be said about the former Deputy Clerk, Anne Lynch, in the Senate when the Senate resumes, so I do not intend to say very much today except that on behalf of this committee and its former members and chairs I express that we deeply regret the passing of Anne Lynch. Anne was very highly regarded by the Senate and made a very valuable contribution to our democracy.

I ask participants—those appearing before us and those behind—to switch your mobile phones off or to silent. I welcome our first witness.

Senator HUMPHRIES—Before you do that could I associate my colleagues and myself as deputy chair of this committee with your expression of regret for the passing of Anne Lynch. Certainly, she was highly regarded and her passing is an occasion of great sorrow for a lot of people on our side of the chamber as well.

CHAIR—Thank you, Senator Humphries

[9.03 am]

PLATT, Mr Christopher, Director, Workplace Policy, Australian Mines and Metals Association

CHAIR—Do you have any amendments or additions to your submission?

Mr Platt—No, I do not.

CHAIR—We invite you to make an opening statement to the committee to be followed by questions.

Mr Platt—Thank you. One thing I would like to go through is that there have been a number of changes in our industry and indeed in the economy in general since the Fair Work Act was developed and since the Senate hearings into the Fair Work Act and now the transitional bill. I was at a meeting of industry leaders only last week where they provided some information that was quite instructive. One of the gentlemen was the CEO of a nickel mine and he told us that in December 2007 the nickel price was pretty close to US$30,000 a tonne and the cobalt price, which is also a product that they manufacture, was about US$40 per pound. Their key input was sulfur which cost about US$80 a tonne. In the one year since December 2007 the nickel price plummeted from US$30,000 a tonne to US$10,000 a tonne. The cobalt price plummeted from US$40 a pound to US$10 a pound and yet their input had increased tenfold from US$80 a tonne to a historic high of US$800 a tonne. As a result, the net worth of the company reduced from US$3 billion to US$300 million and the share price reduced from US$6.25 to 28c.

It was also accompanied by changes in profit. From making a profit of $270 million, they were making a loss of $20 million. The CEO told me that, essentially, the last year was a year of two halves. In the first year they were looking at consolidating their production and going forward and opening new businesses. In the second year they were in survival mode. The downturn in the economy in terms of commodity prices and demand had basically removed most of the controls that they had in respect of their business successes. Another CEO told me that their expectation of the ETS impact is approximately $34 billion, which translates to 26,000 jobs. The reason I tell you this is not to rely on the global financial crisis or, indeed, the potential of an ETS system as a foil but to point out that, in this current climate, we have to look at everything we do in the same way that our businesses are looking at every cost that they have, and we have to consider the impact it will have on our productivity and on jobs. As you know, in our sector, about 12½ thousand jobs have already been lost. All but 15 per cent of our industry are considering redundancies, and there are more redundancies to come. Whilst that is regrettable, we need to make sure that the bill that is passed by parliament does not impede our capacity to export Australian materials and employ people. The last thing we want to do is to be exporting jobs.

In relation to the detail of the transitional bill, the report is before you. The key areas that we have are in respect of representational orders. What we are concerned about there is that union rights and demarcation disputes can be dealt with only after the event and we would like to deal with them before. We are proposing that representation orders in relation to union rights of entry should be linked to coverage by an award or an agreement. In relation to the National Employment Standards, we are saying that that should not apply to pre-existing agreements and any no detriment test should be a global test rather than a line-by-line test to take into account circumstances and other benefits that might be contained in agreements, remembering where they were made, without having the future application of the NES in mind. We suggest that there should be more options for Fair Work Australia when dealing with the NES and its interaction with pre-existing agreements.

In relation to modern awards, we have proposed a mechanism to deal with unintended consequences earlier than a two-year interim review. Again, the consequences we are talking about are consequences which have an impact on productivity and/or employment. What we are concerned about is that there are a large number of modern awards. The process is being undertaken at a very rapid pace and we are concerned that something might slip through that needs to be addressed, and we propose that you should not have to wait two years to do that. In relation to enterprise awards, some companies were early adopters of workplace agreement making, and this was a form of a workplace agreement. What we say is that enterprise awards should be retained unless it is in the public interest not to do so.

In relation to take-home pay, we say that such orders represent only half the equation and that there is another commitment that the award modernisation process should not increase costs for employers. We say that should also be dealt with. In relation to agreement processing, we are still experiencing considerable delays from the department, and we ask that something be done to speed that up.

The final point in my summary is that I know Professor Andrew Stewart is appearing later today. We are aware that he is proposing a solution that all of the pre-existing agreements be killed off. We know this has been raised before. We recognise that the government has made a sensible decision to retain pre-existing agreements. People entered into those agreements based on the law at the time, and we encourage you not to resile from that position. To do so would cause chaos within our industry and result in, essentially, a super bargaining round upon the date the agreements would terminate. Those are my introductory remarks.

CHAIR—Thank you, Mr Platt.

Senator ABETZ—Thank you for your very detailed submission. I will use my time to go through elements of your submission, and there is no place like the beginning. In paragraph 1.2 of your submission you have set out a number of questions that you believe have been left unanswered. Can I ask whether AMMA was involved in the consultation process with the department in the development of this legislation?

Mr Platt—Yes. I attended COIL, the Committee on Industrial Legislation, on behalf of AMMA. There were also a number of meetings between me, DEEWR officials, my CEO and members of the government.

Senator ABETZ—Of course, you would have been signed up to one of these—

Mr Platt—I signed my life away—yes, I did.

Senator ABETZ—confidentiality agreements, so you cannot tell us what happened at COIL. But am I allowed to ask whether you raised these questions that are enumerated in paragraph 1.2 at the time? It would be perfectly understandable to me that those questions may have arisen after discussions, when more thought was put into the process, but I am interested to know whether they had previously been raised with the department or not.

Mr Platt—Certainly AMMA was on the public record, I think during the period when the Fair Work Bill was originally being drafted, in relation to the drop date. That was a serious concern to us, and so that matter was raised publicly with the government well before the COIL meeting on the bill, together with the potential for union turf wars. The COIL process was an extensive one and allowed us to critically examine and question much of the material that was contained in the bill. So, without going to any particular issue—from a technical perspective—we were very satisfied with the COIL process. The outcome we would say was not perfect, but someone might challenge me and say, ‘Well, I’d never agree that anything was perfect,’ but we do not have any complaints in relation to the levels of consultation.

Senator ABETZ—That seems to be the overwhelming evidence of the participants in the COIL process. They thought that they were, as a minimum, listened to. Whether what they were submitting was acted upon, of course, is another issue and we will not go there. The chair, possibly the secretariat and hopefully the department are already aware of AMMA’s submission, but if the department tomorrow could be prepared to answer those questions in paragraph 1.2, I think that would be very helpful—if not to the committee, at least to me.

CHAIR—We have indicated to the department that the committee would appreciate the same form of response that they did on the Fair Work Bill, which was quite a detailed paper which they presented to us at the beginning of the submission. We have encouraged them to do that again, but we will convey that request to them directly.

Senator ABETZ—Thank you, Chair. I must say that, yes, the department was most helpful with the Fair Work Bill. I would agree with you on that. Can I ask a question in relation to union representation orders—this is paragraph 1.10.1. A number of employers have submitted to us along similar lines that employers should be allowed to proactively seek orders. If you only raised it in the COIL process and you got a response that you cannot comment on, that is accepted, but can I ask you: has that been raised separately with the government and have you had a response that you are able to share with us as to what might be the arguments against this proposal?

Mr Platt—AMMA did put a submission on representational orders to the government prior to COIL, and that submission was made public. Essentially, the position that we put is that there ought to be a mechanism to determine a union’s eligibility and therefore a whole range of rights under the act before the rights are acted upon. For example, if there were going to be a debate about a union right of entry, either a union, an employer or both jointly could go before Fair Work Australia, have the issue sorted out once and for all and determine that XYZ union is or is not entitled to exercise a right of entry onto those premises.

The alternate position that we put was that, otherwise, if the union came on site and exercised a right of entry and there was a dispute about it, then essentially the ball stopped bouncing at that time and everybody went back to the umpire to determine whether or not there was a legitimate right of entry. The idea was that, where there was going to be a known dispute, if the parties wanted to sort it out beforehand they could do so and not have an argument about it at the front gates. If you did not do that then you took your chances that there may well be a challenge to your right of entry, and that would then have to go to Fair Work Australia. We put those positions to the government and the same positions in relation to representation orders generally. The response that we have is the transitional bill.

So, in part, some of our proposals have been accepted, but our concern is that there has to be a dispute—although I can say that in the explanatory memorandum there is a slightly different discussion, which indicated to us that there might have been a different view on it. But our concern is there has to be a dispute. We would like a mechanism available so that if people wanted to pre-empt a dispute then that could be done and it could be done in a timely fashion and still allow a union which wanted to exercise an entry to do so, but in the knowledge that they had the right to do so and the employer could understand that that union did have a right and then afford it to it.

Senator ABETZ—What you are saying makes a lot of sense to me, and that is why I was interested as to whether you had received a response from the government as to why they would not or could not meet your request. In your submission, you tell us the Fair Work Bill does not appear to allow orders to be proactively sought and the transitional bill also does not allow for the automatic transfer of current demarcation orders. Was any argument put to you as to why the seeking to pre-empt disputes would be a bad thing from a public policy point of view or were any arguments advanced against the proposition you are putting to us?

Mr Platt—No, no argument has been put against it at this point.

CHAIR—You said you should be able to seek representation orders in a timely manner. In the pre-emption of a dispute, what sort of time frame would you have in mind?

Mr Platt—The timely manner that I was thinking of is essentially if a union wanted to exercise a right of entry, and it was an area where they had not had any involvement before and they expected there would be some resistance, then they could pre-empt a challenge and go off and get an order in the same way as the Office of the Employment Advocate used to do a pre-review of an agreement. If you were not sure whether it passed the test you could send in the agreement. They would do a review and give you a view, and in that way you could proceed with a level of certainty. It is the same sort of approach.

I think it is useful in the real industrial relations world, where people do not have books and books and books of demarcation disputes and union rules to read, that they should know where they stand. I would see benefits from the side of both the employer and the union if you knew in advance of exercising a right that you had that right and that it was not going to be subject to a challenge. And so what we are suggesting is that there ought to be access to a representational order that Fair Work Australia has considered the competing arguments in relation to a right of entry and they have decided that there is or is not a right of entry, so everybody knows where they stand.

CHAIR—The only issue that I am a bit concerned about is how it would work in practice. There are situations where a number of unions may have coverage of the same work, but traditionally different unions in different geographical areas or states or industries cover that area. I would be concerned if representation orders were gained by people who technically had coverage but practically did not. Also, employers may use that to go union shopping, which actually would destabilise the traditional, the norms—the custom and practice.

Mr Platt—I think your concern is a valid one, and it is one of the reasons why we sought it. You can have technical coverage of a particular worker but for some reason the union does not become involved. But the Fair Work Act does not make a distinction between technical coverage and real-world coverage. So there may be a change of heart by the union officials with technical coverage, and they might pursue coverage in that area when they have not done so before. That was why we put in our proposal a whole range of factors that Fair Work Australia should consider before it makes a representational order, including the history of agreement making and representation in the industry, the views of the employees, the views of the employer, the existence of demarcation disputes and the conduct of the parties. That is designed to essentially preserve the status quo. We are not proposing that representational orders result in some huge union turf war or brawl for coverage, on day one of the introduction of this act. What we are proposing is that there ought to be a mechanism for these disputes in relation to the rights of entry and the right to make application for scope

orders and majority support orders and the like, and also demarcation disputes, in a manner that can be done before a dispute blows up rather than afterwards.

Senator ABETZ—On another topic, who currently decides union rules?

Mr Platt—The organisational branch of the Industrial Relations Commission deals with union rules. There are some criteria in the RAO section, schedule 1 of the Workplace Relations Act, which essentially sets out the status of existing unions. If a new union starts—or a new employer organisation—there is a process and a set of criteria to go through to work out whether they can start and whether their rules can be approved. If you want to modify your eligibility rules, there is a process of advertisements and objections, and the commission makes orders in respect of that.

Senator ABETZ—And you are concerned that some of these rules as currently expressed are a bit obtuse or not easily understood?

Mr Platt—They are even more obtuse than the previous act, which was pretty obtuse. They are not written for laypersons, and some would argue that they are not even written for lawyers. So what we are proposing is that, in an ideal world, you would have a plain-English version of the union rules. We recognise that that may change the legal context of the rules, so we have stolen an idea from the insurance companies. Essentially they have a plain-English insurance policy but behind it, no doubt, is a much more complex insurance policy with all the legal jargon. But 95 per cent of the time you can read your insurance policy and know what your rights and obligations are. We are proposing exactly the same process for union rules, and that there be a central database so that people would be able to access the rules and understand what a union or an organisation is entitled to do and where they are entitled to go.

Senator ABETZ—I refer to point 6, under the heading ‘Recommendations’, at the foot of paragraph 1.10.1. We could achieve that result by the minister simply changing her direction and sending a letter to Fair Work Australia. Or do you think that would require an amendment to the transition bill?

Mr Platt—In my view, it is an administrative process. So it would be a direction to Fair Work Australia to prepare summaries of the rules in plain English. Because it is administrative, it would not be legally binding. But, in my view, for 95 per cent of the time it would resolve most of the questions about coverage. Remember that, because of the award modernisation process and the way that we have removed union respondency from awards, there will be a whole range of overlap of union coverage within awards. We have a whole bunch of new employers who are going to be covered by the system as a result of the expansion of the awards, and they will not have a clue who is entitled to go in and who is not.

Senator ABETZ—Thank you for that. It looks as though we might be able to do that by ministerial direction. Can I take you to paragraph 1.10.6 of your submission. In the first line of that paragraph it says that AMMA is concerned at ‘the intended consequences of award modernisation’. Is that correct?

Mr Platt—Sorry, that should say ‘the unintended consequences of award modernisation’.

Senator ABETZ—I thought it might be. So we have an amendment to the submission, Chair.

Mr Platt—A deliberate mistake!

Senator ABETZ—Yes—to see if we had read it! And the good news is: the committee has passed the test—we picked up the deliberate error. But, more seriously, can I ask: are there any real life or realistic examples that you would seek to proffer to us as to where some unintended consequences might arise, where an early review of modern awards would be helpful?

Mr Platt—I do not have any real-world examples that I could give you. The ones that we know about would be lobbying the commission to change now. But I suppose what I am concerned about is this. In the hard rock sector of the mining industry, we have put together about 25 awards into one. That is a positive move. Instead of having 25 different classification structures, we now have one. And we have a translation structure from the old system to the new system that we will be putting to the commission for them to introduce. But it may well be that we have missed something—that there is a person whose classification is not mentioned, or the hours of work provisions may have all been written in a way such that an existing arrangement cannot be operated. It is those sorts of unintended consequences that, in my view, you should not have to wait two years to fix, particularly in an environment now where we are challenged by the global financial crisis and we are going to be challenged by the impact of the ETS. The last thing that we want is an unintended consequence to hang over our heads for two years before it can be resolved. Remember, though,

that there are a myriad of awards, not just the ones in the mining industry, and according to the laws of probability you would expect there to be a mistake somewhere.

Senator ABETZ—Just so that I understand this: Fair Work Australia will be drafting what are called modern awards. They would, under the normal time frame, be reviewed every four years—is that right?

Mr Platt—That is correct. And there is a special review of two in the transitional bill.

Senator ABETZ—And then there is a special provision for a two-year review, but only to occur once, so that after an award is locked in after that four-year period it would then be reviewed every four years—is that right?

Mr Platt—Yes, and we say that is sensible, because it needs to be stable. But what we are concerned about is that these things are not going to be road-tested until 1 January 2010, and that is when you are going to find your problem—after a few months of road-testing. What we are saying is: in relation to that first period, there ought to be a mechanism by which to bring on something for an earlier review if there is an unintended consequence.

Senator ABETZ—To me, that makes eminent sense. I am just wondering why you would not have a clause. Whilst you would want the overwhelming detail of the award to be, if I can use the term, locked in for four years, if there are unintended consequences from the first draft—and it is more likely, I agree, to occur within the first two years, because there may have been a drafting error or an oversight—what about if other things, just changed circumstances or whatever, that might require a review come up in the future? Would you be supportive of a general mechanism for an urgent review in the event that, let us say, a mistake was not picked up in the first two years, or that there is a part of the award which is only now being tested because, until it came into dispute, nobody realised that there was some ambivalence about the potential interpretation of it?

Mr Platt—There is a mechanism for ambiguity.

Senator ABETZ—In fact, I think I used the word 'ambivalence'; I meant 'ambiguity'. Thank you.

Mr Platt—There is a mechanism for resolving ambiguities in the act, so I think that will be okay. There is also a provision in the act which, essentially, allows for a review if it is undermining the principles of having a safety net and the like, which I think would cover the sorts of circumstances you are thinking about in the longer term. Again, I think the system needs to be stable, and the problem is that if you have too many doors open then people from both sides of the fence will be using them, perhaps for a purpose for which they were not designed. I personally think that these initial issues should be resolved, certainly within a two-year time period. All I am saying is that you should not have to wait two years before you can address them.

Senator ABETZ—So in relation to other general issues you are satisfied with the framework of the legislation, you are just concerned that in that initial two-year period drafting things is always fraught with dangers and there are unintended consequences that might need to be addressed on an urgent basis.

Mr Platt—That is correct.

CHAIR—My understanding of the two-year review was a review of the whole award and its operation. I did not read that that necessarily excludes dealing with any unintended consequences that could be done independently. I thought you alluded to some of those examples too. I am not quite sure what you say the problem will be.

Mr Platt—What I say the problem is is that you should not have to wait for two years to fix any unintended consequences.

CHAIR—But do you have to? The two years is a review of the whole of the operation of the award, but there are mechanisms in place that deal with—

Mr Platt—You have got your ambiguity mechanism and you have got a mechanism that is just undermining the entire system. What I am concerned about is that the clause may not be ambiguous at all. It might be crystal clear, it just might be wrong. Alternatively, we have not put a classification in where it should have been in. They are matters that will not be resolved through fixing ambiguities or mistakes.

CHAIR—And you say there is no other mechanism to deal with these issues.

Mr Platt—There is no other mechanism that I am aware of. I do not have a problem with the interim two-year review, but what I am suggesting is that there ought to be a mechanism to come back to Fair Work Australia where there is a provision in a modern award that is detrimental and it is an unintended consequence.

CHAIR—So it is both. I do not think we want to open up a system where people simply do not like what has happened, because there are going to be the swings and roundabouts of that across the board and what you may like someone else may not like.

Mr Platt—That is right.

CHAIR—But if it is clearly unintended or there is clearly an omission, I would have thought there are other normal processes of the commission.

Mr Platt—I do not think they are in the bill.

CHAIR—So it is clearly about unintended consequences, not people just coming back for a second bite of the cherry in submissions.

Mr Platt—That is correct. It is about unintended consequences, and we try to be clear about that.

Senator ABETZ—Chair, for what it is worth, I have scrawled down a note that I think that is a good question for the department tomorrow. They might be able to show us a clause in the legislation that overcomes Mr Platt's concerns.

Senator JACINTA COLLINS—This is partly my concern too, because my understanding of the ambiguity provision, as we are calling it now, in the act is that it is broader than simply ambiguity. I wonder if Mr Platt has looked at that and is absolutely convinced that it does not pick up the sorts of things such as an oversight in terms of an extra classification. My impression from the previous inquiry is that it would.

Mr Platt—My concern is that something might not be ambiguous at all; it might be crystal clear but has been written in a way that it has not foreseen something and there is an unintended consequence. I am concerned that the provision to address ambiguities may not be sufficient.

Senator JACINTA COLLINS—I understand that aspect of the problem, but my understanding of what we are calling the ambiguity provision is that it covered more than just ambiguity. Have you looked at it to be clear in your own mind that it definitely does not cover the sorts of circumstances that you are referring to?

Mr Platt—I had that provision in mind at the time that we wrote the submission and so my concern went to things that could not be addressed using those provisions.

CHAIR—Senator Abetz, are you close to winding up?

Senator ABETZ—No, I could go on for the same time, so just wind me up when you think I have had my fair share of time.

CHAIR—I am just wondering whether Senator Humphries and Senator Back have questions.

Senator BACK—I have one but I can defer to others.

CHAIR—Go ahead.

Senator BACK—I want to draw attention to paragraph 2.4 in your submission where you give us a very quick overview of the number of projects that are out there. My concern of course—as I am sure everybody else's is—is in relation to jobs and job security into the future. The figures you present are very impressive but written on 9 April they do not include the potential now that has been opened up in the Browse Basin as a result of the decision of Aboriginal elders and others in relation to James Price Point. Can you give us a quick summary of where you think the real point is going to be where companies will either downsize or not or embrace new projects as a result of concerns with the legislation going forward? Is there one area that you believe is likely to be an area you should draw to our attention?

Mr Platt—Our members are very concerned about the increased level of union powers in the Fair Work Act. Obviously, that act is not for debate here. They are very concerned about the impact of the ETS. The information that I have is that the ETS could have as big an impact on jobs as the global financial crisis has. People are calling it potentially the double whammy. In relation to future expansion every mining operation that I know is running the ruler over every cost. Most of the expansions have been delayed. Everyone is looking to see what is happening in the future. I am no more informed than you or the government about what is going to happen in terms of Australia's economic future and when it is going to turn around. We are concerned to try and ensure that the Fair Work Act, these transitional provisions and the regulations that will follow do not hinder our capacity to employ people and to operate in the same productive manner that we have done. At the managerial and executive salary levels there is basically an unofficial freeze on across our industry. They are the things that we are doing, but I cannot give you any definite answer as to when it is going to end.

Senator JACINTA COLLINS—On the issue you covered in relation to take-home pay orders and employer equivalents, so to speak, I went back to page 38 of your submission. You indicate there that AMMA thinks the 12-month time limit is appropriate and thinks the limits on take-home pay orders are appropriate, but you do not canvass limits on the proposed employer's capacity to deal with an increase in costs. I am curious as to whether any thought has been given as to how you might build fences around an employer's proposed capacity to argue before the commission that they have had an increase in their employment costs.

Mr Platt—Insofar as there would be any time limits in relation to employee take-home orders in my view the same time limits would apply to employers in relation to application of increased costs. What we were trying to say in our submission is that it is not as if there has not been a balancing exercise here. If the commission were considering making a take-home pay order, one of the things that it ought to consider is also the impact of additional costs on the employer's business. There are two competing influences in the award modernisation process. The similar influences were in the previous legislation's process and, in our view, the legislation of take-home pay orders only covers half the equation.

Senator JACINTA COLLINS—I understand that, but if anything I am trying to get one level beyond what you were just talking about here and what you have covered in the submission which is the design of issues around take-home pay orders has quite deliberately limited the disadvantage that an employee may suffer to issues around whether it affects their take-home pay. For instance, some of the organisations who have submitted to us have suggested that there is a range of other detriments that employees may suffer that are not captured in that definition of take-home pay.

On the employer side, you have simply suggested increasing costs. You have talked to us today and in your submission about increased costs associated with, for instance, the global financial crisis and other issues. But I take your comments here to mean increases in employment costs.

Mr Platt—As a result of the award modernisation process.

Senator JACINTA COLLINS—Okay, that is one fence. But I am asking whether you have given any thought to any other appropriate fences in much the same light as has obviously been applied in relation to increases in disadvantage that employees may suffer through the award modernisation process. We are obviously not saying any disadvantage is something that an employee—

Mr Platt—I would be happy to come back to the committee with a method of putting into practice the protection in relation to increased costs for employers. If the committee is minded to consider that, I am happy to come back with another couple of pages with a bit more detail on how we would see orders operating in relation to increased costs for employers. I am happy to do that for you.

Senator JACINTA COLLINS—I obviously cannot speak for other senators here. But what I am saying—which I think is fairly obvious when you are suggesting such things here—is that, as were discussing in relation to some of the other provisions a moment ago, the scope is so wide as to be unmanageable by the commission as it is currently framed.

Mr Platt—The modern award system does impose some increased costs. In our sector, the casual loading has gone from 20 per cent to 25 per cent. Access to 12-hour shifts as a right in ordinary time has been removed, which imposes an additional cost on employers. The ability to incorporate annual leave on the roster is still a bit of a moot point, because of the changes in the award modernisation request. That is an area that may well result in increased costs. I still see a mechanism where the employer would go to Fair Work Australia and say, 'The modern award that you have made has the effect of increasing costs in our business, and we seek some relief.'

Senator JACINTA COLLINS—So you are imagining that the commission would 'balance the gains', so to speak, for a particular employer to? You cite, for instance, the casual loading. In some areas there have been enormous gains for employers in adjustments to the casual loading. Are you suggesting that the commission's role would be to balance where there have been gains to their overall employment costs, as opposed to where they have been given more flexibility, and do some balancing exercise?

Mr Platt—I would not oppose such a view. Obviously we are operating without one piece of the jigsaw in the sense that the commission has not yet dealt with the transitional provisions. I think DEEWR has put in a submission on behalf of the government saying that everything should have a five-year transitional period before it is introduced. So, in that sense, we do not know what the transitional provisions are. But certainly in respect of our industry we do not have a problem with treating this as a global exercise—in the same way we

would say that, if the NES is introduced into agreements predating Forward with fairness, that also ought to be a global exercise, not a line-by-line test.

Senator JACINTA COLLINS—The difficulty, though, with the comparison you are making to take-home pay orders are fairly quick assessments that the commission is able to do far more easily than a global assessment of an employer's gains and losses in terms of their employment costs. On the face of it, it looks like, 'Yes, we want a comparable balance,' but once you start exploring how this might even be applied it becomes very different for the reason you have just mentioned—that is, we are looking at a five-year phase-in period. It is easy to look at an individual employee and whether they have had a loss of take-home pay, but it is a far more difficult and complex exercise to look at whether an employer has had a gain in their overall employment costs.

Mr Platt—I do not say that the exercise will be easy. It is certainly something that will not be able to reduced to an Excel spreadsheet, and we have a lot of experienced members in the commission who are used to putting square pegs in round holes. But you need a mechanism. There may well be an employer who has some employees who are saying, 'I have suffered a loss in take-home pay', and they are saying: 'You may have, but I am now paying all my casuals 25 per cent instead of 20 per cent. I cannot average my hours over a year anymore because I am in the agricultural sector. I have got to average them over a week, and that means that I cannot use the quiet times to overcome the peak times'. There are a lot of different circumstances, but I think that there ought to be a mechanism for the employer to be able to argue their case in relation to their half of the commitment that was given in the award modernisation request. At the moment, that does not exist.

Senator JACINTA COLLINS—No, for some of the reasons we have just been discussing. So I would be interested to hear how you could imagine such a mechanism might be applied, because I think this is the closest we have come to any discussion even about how that could occur, and I see some serious problems as to how it could.

CHAIR—We are happy to receive any further information you might wish to provide. But we are reporting on 7 May and will of course start drafting the report tomorrow afternoon, so the sooner the better.

Senator HUMPHRIES—Following up on Senator Abetz's question about plain English union rules, what exactly is the harm that you want to remedy by making those rules easier to understand? I assume they are not things that most people would read unless they had a purpose to do so. Are you suggesting that there is a problem that needs to be fixed?

Mr Platt—Employers will be having to make decisions as to whether or not to allow unions on the site. Their positions in relation to a union application will become covered by an agreement, a majority support order or a scope order. These are all based on a union's eligibility rules. People just do not know. HR people do not know, never mind a security guard on a gate who has a union official there who says they are entitled to enter the site. All you need to do is go and have a look at the union rules—take, for example, the CFMEU rules—and I suggest that will make my case out for me. People do not know that the CFMEU's access to sites in the mining industry is based on the old FEDFA coverage, which covers winder drivers and excavators. They do not know that. So there ought to be a mechanism available to do it. Surely, if we are about making a fair system, part of that is making a system that can be understood by the people who this is written for. It is not me; it is workers and employers, not all of whom have IR professionals and lawyers at their fingertips.

Senator HUMPHRIES—There is a benefit for union members of that particular union as well?

Mr Platt—I think there would be. If someone is being approached by a union, surely they ought to be able to work out whether that union can validly cover them—and it would not be the first time that the unions have gone in and enrolled people that they could never cover. That is a bit like paying money and you are not entitled to anything.

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

Mr Platt—Thank you.

[9.48 am]

HARVEY, Mr Keith, National Industrial Officer, Australian Services Union

WHITE, Ms Linda, Assistant National Secretary, Australian Services Union

CHAIR—We welcome to the committee the Australian Services Union. Thank you for your submission. Do you have any amendments or additions to make to that submission?

Ms White—We do. We want to table a further short submission, which I refer to, if we could. It contains a number of examples and really reiterates a number of matters that we have talked about previously and some things that have happened since we put in our submission that we think it will illuminate.

CHAIR—Thank you. We invite you to make an opening statement to be followed by questions from the committee.

Ms White—Thank you, Senators, for this opportunity to appear on behalf of the Australian Services Union. We welcome this opportunity to make further oral submissions to the committee and to respond to questions that you may have. We hope to be brief in our opening remarks. We have filed written submissions and they deal with four main issues. Firstly, we talk about the impact of award modernisation on our members and the need for better transitional protections to ensure that no employee is worse off as a result of award modernisation. Secondly, we talk about the continuing substandard AWAs, ITEAs and non-union agreements. We also raise, thirdly, special workplace determinations for low-paid employees and, fourthly, the transitional arrangements for non-federal system employees.

I will first talk about the question of award modernisation, which I have been known in other forums to describe as the most soul-destroying process that I have ever been engaged in during my industrial career—and I have dealt with number of significant matters, not the least of which were the collapse of a major airline and the Kennett era. This has been a fairly soul-destroying process in that after the two-year duration and then the five years beyond that for the enterprise awards, the best we can hope for if we are going to be 100 per cent successful is to keep what we have. And we are probably the union with the most experience in this process in that we have filed 60 submissions and have had to consider every single industry that the Australian Industrial Relations Commission has dealt with. When I say that the process has been soul-destroying, I do not necessarily blame the government, but what I do say is that the way in which it has been enacted by the Industrial Relations Commission and the process that has been adopted have been lacking in a number of respects.

As I have drawn to your attention, we have prepared a further document to bring the committee up to date with developments in award modernisation, especially in the way that they affect those employees who will be employed under the terms of the modern clerks award. If I take you to the document, it has a summary in the first 13 paragraphs and then from pages 4 to 29 we go through what has happened to the modern clerks award. On the last two pages we give an example, which I will take you to shortly, about some of the issues that arise from the take-home pay orders issues. The document deals with the question of employees' disadvantage arising from award modernisation. The ASU has already been—and we expressed this last time—concerned with the lowering of standards in modern awards, particularly as a result of cuts to conditions of employment and the imposition of an exemption level in the awards and in particular in the Clerks—Private Sector Award.

You might recall that last time we raised with you the clerks modern award. I take you to paragraphs 13 to 26, starting on page 6, of the supplementary document. That gives you an extensive list of matters that have been taken away from a number of employees—in fact, the majority of employees—who receive over $851 a week. Anyone who earns over $851 a week will no longer have access to matters on that list. The problems do not stop there. They have now been exacerbated by cuts to the conditions for call centre employees employed under the modern clerks award and the modern finance award. They now have lesser terms and conditions than other employees working under the same award. We describe those cuts at page 10, paragraph 25. So what has happened since we last met with you and described those earlier cuts is that the commission has decided to impose on both of these awards, the modern clerks award and a modern finance award, for any person working in an in house call centre, a set of conditions that they have never had imposed on them, anywhere in Australia, before.

It does not stop there. It happened without any submission either from the employees or from the employers. It just happened behind closed doors without any warning. As it now stands in relation to the clerks award, up to three-quarters of a million employees are potentially affected by the commission's persistence in

stripping the award conditions from clerks earning no more than $851 per week. At our estimate, about 340,000 may now be affected by the extended ordinary time hours to include Saturday mornings. Our best estimate is that about 280,000 in-house call centre employees will have extended ordinary hours on Saturday mornings and those various conditions I pointed to on page 10, clause 25, which they never had previously. As you will see, that is not just a list about working on Saturday mornings; they are substantial changes to the penalty rates that apply. It is ordinary time, and it has never been ordinary time on Saturdays for clerical and administrative employees. So these are not insubstantial changes. Because the clerks award appears to be considered in every single industry, it is an ongoing process. I cannot say, as I sit here today, that there will not in fact be more changes depending on what the next industry round brings towards us.

The transitions bill's only remedy for these cuts in pay and conditions is the proposed take-home pay guarantee, but we see it as no guarantee at all. I draw to your attention that, despite what the Australian Industry Group may say to you here, the day after this bill was introduced the employers, including the Australian Industry Group, in the airlines industry award modernisation proceedings that we have been involved in quite heavily were urging the commission to relax its approach to award modernisation since the take-home pay orders could fix the problem. They said on the record in the commission on that day exactly the opposite of what they have said to you on page 13 in their written submission. As it stands at the moment in the airline operations award, the commission is considering the position that they put at that time. This is clearly not the case, because the orders apply to existing employees only, not all employees in an industry or occupation. It covers money amounts only and, therefore, cannot compensate for loss of conditions such as having to work on Saturday mornings and other non-financial issues, and it does not apply if an employee changes jobs or is promoted.

On that last point we have taken the opportunity to do one calculation for you—one of what we would expect to be many—and that is at pages 12 and 13 of our supplementary submission. What we have done here is extract what for a person who is a casual clerk at level 2 currently—

Senator ABETZ—Can I just interrupt you so I can get a feel for what sort of job a casual clerk level 2 would be. What is a real life example that will give me some idea of it? Would it be a bank teller? If you cannot think of one, proceed.

Ms White—Off the top of my head, I cannot think of one.

Mr Harvey—Telephone betting clerk.

Ms White—A casual telephone betting clerk would probably be a level 2. I think that is probably right. Currently, if they are at level 2 they would be casual. Say they work 30 hours per week in Victoria. They have enterprise agreements, but that is the sort of work that it would be—on the phone. Say they were under the Victorian clerical administration award at level 2. At 12 months they are on a second level. We have extracted what they would be paid if they were on the award as at today. As of 1 January, because of the change in the award, they would translate to a level 1 year 2. You can see from our supplementary submission that their rate of pay would go down to $16.05 under the take-home. Consequently, if they work 30 hours per week, their money would go down and their yearly pay would go down.

The casual loading, as you see, was 33⅓ per cent for clerks in Victoria. As of 1 January, it goes down to 25 per cent, not 33⅓ per cent. In New South Wales it was 28 per cent and it goes to 25 per cent. You can see that because of the award modernisation there is a gap. That would lead to a take-home pay order of $2,806 based on those figures. We have presumed that casuals are covered. You may not know, but casuals are often regarded as on daily hire. It is unclear to us whether or not take-home pay in the act applies to a casual. We presume it applies to a casual, but it does not actually say. If you said that they were on daily hire, theoretically this might not even apply at all and they may not be entitled to it. But let us say they are.

CHAIR—You indicated that the take-home orders do not apply to new employees. If someone is on a casual hire process, what is to stop the employer from simply saying, 'I'm going to finish you up now, have a day's gap and then start you again'? Is there anything to stop that?

Ms White—We cannot see that there is anything to stop that. I guess it will be how this is interpreted and what an existing employee—

CHAIR—And if it does not apply to new employees you then have that absolute incentive to put that person off.

Ms White—You could. We have presumed that that incentive is not there. We have taken the high moral road and hoped that nobody is going to take that. If you had been a casual for 20 years and you had been

employed for 30 hours a week as a regular casual, we would hope that people would not. I am in the business of hoping, perhaps. Employers frequently disappoint me. But let us say they do not. We take this other thing. There is another way in this act that they can get round it. All they have to do is promote a person from level 1 to level 2. Because they have been promoted, because of the way the transitional bill works, they could promote them on 2 January to level 2 and that employee would not be entitled to a take-home pay order. But the way in which the award has been structured, they would still be on less money than they would have been had it not been for the award modernisation.

CHAIR—In this example you get promoted to lesser pay.

Ms White—Exactly. You could be promoted on 2 January and you would get less pay. There are countless examples of this, but this illustrates it. There will be plenty of take-home pay orders and issues that arise. As we have said, the ASU has never accepted the position that no-disadvantage rules should only apply to existing employees. We oppose any fall in the safety net for any class of employees. We just do not see any justification for it. In addition, we believe that disadvantages not restricted simply to money matters—conditions such as not having to work on Saturday mornings as part of the ordinary hours of work—have to be considered as well. These are equally valuable to many employees. As we say in paragraph 1 at page 4 in our supplementary submission, our estimate is there are 340,000 clerical workers in South Australia, Tasmania, ACT and Queensland who can now be compelled to work on Saturday mornings and there will be no take-home pay order for that loss.

I turn now to the substandard agreements. The union's submissions deal also with continuing substandard agreements, which the bill will allow to exist indefinitely unless terminated. The ASU opposes this and has proposed a means for testing these agreements and setting them aside if they would fail the new BOOT. The ASU supports the submissions of the ACTU in this regard. The ASU also has members who were forced onto substandard AWAs in the dying days of Work Choices, notably those at Qantas Valet Parking, about which we have spoken to the committee before in the Senate hearings on the Fair Work Bill. The bill proposes a certain drop-dead day for instruments applying to non-federal system employees. We think that it is in the public interest that there be one minimum standard for all agreements going forward, not a range of standards for employees unlucky enough to have been forced onto poor standard agreements at some point during the Work Choices era. Our submissions talk about how this can be done.

I turn now to special low-pay determinations. The ASU has many members who are low paid, at least in the sense proposed by the legislation—that is, they are paid substantially on the award. This will be the case particularly in the social and community services sector. This is because the employers of those members have no capacity to bargain because they cannot adjust their income in response to pay higher wages because they are funded by government, for example.

The act makes certain provisions for assistance to such employers in the bargaining process. The ASU did welcome those provisions; however, now the bill limits access to special low-pay determinations to employees who have never been covered by a collective agreement, according to the explanatory memorandum. We submit that this is just plain wrong. Why should employees who otherwise might be entitled to these provisions be denied because they once had coverage under a collective agreement?

That agreement may have only dealt with only one or two matters or may have been a greenfields agreement, which they themselves did not enter into. Agreements that have covered one or two matters, might have had salary sacrificing for superannuation or salary-packaging arrangements or it may have been a short-term arrangement to assist an employer in difficulty. It may have been an agreement which simply reflected award coverage so it applied nationally to otherwise state award based employers and employees. There are a number of reasons why such an agreement may have operated in the past, but the employees now finds themselves paid substantially on the award and otherwise entitled to specific assistance to enable them to get a special determination. The ASU submits that item 22 of schedule 7 should be scrapped.

Finally, I turn to non-federal system employees. Clause 20 of schedule 3 of the bill proposes that transitional instruments based on the C&A power will cease to have effect on 27 March 2011 to the extent that employers covered by them are not federal system employers. This date is not so far away but there is no resolution of outstanding issues for non-federal system employers in sight. The ASU represents many such employers, particularly in local government, social and community services and elsewhere. We have many awards for these employees based on the C&A power.

Ongoing award and agreement coverage for these employers must be resolved urgently. The local government, the social and community and the not-for-profit sectors are major employers. It is not in the

public interest to have the status of these sectors in limbo any longer. The ASU is aware of the constitutional issues involved, but we cannot resolve them ourselves. This is one of the biggest transitional issues facing the new system, but it is not addressed. The ASU notes that certain actions have been taken by some state governments about local government, but not by others. The union's position is that in each state the whole of each sector must be in either the state or national system. There cannot be any uncertainty or half-and-half coverage. This would not be in the public interest. It is time we say for something to be done about it to eliminate the uncertainty.

CHAIR—The original award modernisation request set a fairly tough objective for the commission to go through this process with the aim of not disadvantaging employees or employers. You have given us some very clear and I think good examples to consider where you say there is quite a significant disadvantage to employees. Is it a matter of swings and roundabouts though? Are people compensated in other ways or do you say this has been a very one-sided result against the members you cover? We do have employers saying that there are all these extras and there are no swings and roundabouts. In fact, we have not heard anyone come and tell us that they are happy with the process yet, but we have not finished the inquiry.

Ms White—I would be surprised if the Australian Industry Group does not punch the air over the contract call centres. They have been saying publicly in the papers that it was the greatest thing since sliced bread. Who would not? They never in their wildest dreams thought that would happen. No-one in their wildest dreams would have thought there would be a policy where $100,000 was the threshold and that would find a clerk who earns $851, or less than half of $100,000 a year, exempt from things like dispute-settling procedures, ordinary time hours and shift penalties. Who would have thought that?

So this is not an outcome that anyone would have predicted. We did not predict it. All we can say is we probably have the most experience of any union at the front line in every industry because of the clerks award and we have not seen a net gain. In fact, as it continues on it gets worse. We thought we had reached the high-water mark with the exemption level at $851, but we did not realise that the call centre issue would then be thrown into our estimate of 280,000 people who work in call centres—and that is probably conservative because it does not even say what a call centre employee is. So we did not expect these sorts of results. On a number of occasions we did not even have the opportunity to argue against it, because it was not in the exposure draft and it appears in the final draft, when no-one had submitted it. So this is not a process that we envisaged from the policy position, nor what the minister put to the commission.

Senator ABETZ—If I may, what you have put to us is very interesting, and I suppose in my years as a lawyer I learned that there are always two sides to a story. Whilst the Australian Industry Group might provide some commentary on this, I am wondering about major call centre employers. Would that be Vodafone? Who would be one of the major call centre employers?

Ms White—There is a contract employer. A significant number of employers have in-house call centres.

Senator ABETZ—This is what I am trying to get at: I would be very interested in hearing from a major employer of call centre employees and a major employer of clerks as to what they would say to your submission and if you could nominate potential employers in those two categories. If they are willing to say as well that they did not submit anything along this line and they were as surprised as the ASU then I would be interested in that, but unfortunately we do not have a submission from those specific employers. Perhaps you want to think about it and let committee secretariat know, because what I would be proposing, Chair, is that the committee secretariat then forward that to those employers to see if they would be willing to respond to the submission. I think, in fairness, there are some live issues here, on the face of it. That is all I am saying.

Mr Harvey—It might be helpful if I unpack a little what happened in the call centre industry award. In one sense, we and the employers—which in this case means the Australian Industry Group—were absolutely united in what we asked of the Industrial Relations Commission in the award modernisation process with regard to this particular industry, which I think was information, communications and technology. There were a number of subsectors in that industry, but one of them was the contract call centre industry. A number of unions, including the ASU as a main union in this area, and the Australian Industry Group some years ago negotiated the terms of a specific award to cover the contract call centre industry. There were a couple of matters in that that ended up being arbitrated, as I recall, by the commission, but by and large the parties—the unions, and the employers represented by the Australian Industry Group—came to an agreement that there was a need for a specific award to operate in the contract call centre industry.

So the contract call centre industry is a very specifically defined industry. It applies to those call centres which are not in an industry of their own, if you like. So they are not in the airline industry or the finance

industry but they are organisations which take call centre type work on contract for a third-party employer. The award expressed that to be in that industry and covered by that award you had to have more than one client, so you could not just be in the finance industry or in the airline industry and operating a call centre. So it was the industry of contract call centres. Ironically, it only had five major respondents, and we can certainly give the committee their names if you like—it is a matter of public record. It was also a common rule award in Victoria, but it applied to a very clearly defined sector.

The industry parties—us in this case and AiG—went to the commission and said, ‘We’d like you in this award modernisation process to make a modern contract call centre award.’ I was the advocate at the time and we, the industry, were united on our side of the table about what that should be. The commission in its exposure draft of awards decided not to make a contract call centre award but actually took the flexibilities and the provisions of that award, designed for that one particular industry, and decided to put them en masse into the clerks private sector award and then apply them to every type of call centre employee, although without defining ‘call centre’.

We went back in the second stage of the process and said: ‘We think you’ve got that wrong. We actually want a contract call centre award,’ and AiG said the same thing. At the end of the day the commission in stage 2 awards made a contract call centre award, but they still imported all the special conditions that had been agreed or arbitrated for the particular industry of contract call centres. They still put the flexibilities from that award, particularly as it relates to weekend work, as we have indicated in our supplementary submission, in the clerks private sector award. They then said, ‘These apply to all call centre employees,’ although they do not define what a call centre is, but you can work it out a bit from the classification structure.

The commission have taken what the industry—us and the employers covered by the contract call centre award—were happy about and they have applied it to everybody who might be considered to be working in a call centre, which is radically different to what the industry asked for. Nobody asked for that, which is the point we have made in our submissions. Nobody actually asked for it but that is what we have, for some unknown reason. It is bizarre to us and has wide ramifications for anybody who might be considered to be working in a call centre and covered by the clerks private sector award.

Because the commission did the same thing with regard to the finance industry, if somebody works in a call centre for a bank, an insurance company, a credit union or a health insurance company—which are to be covered by the finance sector modern award—they are now subject to these different terms and conditions of employment, which they did not have before, based on conditions which applied to five employers in the contract call centre industry. That was a very long-winded answer but I think we need to explain what has happened there. We think that no employer group actually said that, and we certainly did not say that is what we wanted as an outcome from the award modernisation process.

Senator ABETZ—It may have been a long explanation but I for one am better informed as to the circumstances and I thank you for that. I now want ask you possibly a more provocative question. This is what the Labor Party said they would do at the last election: award modernisation, with the AIRC the umpire. Don’t you have to cop it sweet when the umpire comes down with a decision that is not necessarily to your liking? Or are you saying that there was something else in the Labor Party’s promises at the last election which would have militated against such an outcome as you are now concerned about?

Ms White—The ASU does not think that the way in which the policy has been implemented by the Australian Industrial Relations Commission was envisaged in the references. There were not even one or two lines of explanation as to why such massive things occurred, which is what happened with the exemption level decision, in anything that I read. We could not possibly anticipate it happening and we certainly do not believe it was the intention. We think there is a communication problem with the commissioning, in that they do not appear to understand the impact on the ground that this is going to have.

Senator ABETZ—So the outcome, about which you have expressed concern, would not allow the government to say that no worker would be worse off under the new policies. Workers clearly are worse off, as you have set out.

Ms White—This has still got seven months to go, and I am in the business of hope. As far as we are concerned, award modernisation will not cease for the Australian Services Union and our members and the people covered by the awards until midnight on 31 December 2009, so it ain’t over till it’s over—because our experience has certainly shown that the clerks award is a live issue.

Senator ABETZ—All right. Can I say that, as things stand as at 10.20 am on 29 April 2009, under this regime workers will be worse off than they were before?

Ms White—If at 10.20 am it applied to anybody, yes they would be, but at the moment it does not apply to anyone and it will not apply until—

Senator ABETZ—And you do live in hope.

Ms White—I live in hope. I am an optimist.

Senator ABETZ—Thank you for that. In your supplementary submission you talk about 1.1 million clerical/admin workers in the private sector. In general terms, what is the percentage of your coverage of the admin/clerical work force in the private sector?

Ms White—Not 1.1 million.

Senator ABETZ—Is it roughly 20 per cent? Less? More?

Ms White—We would have to look at the sectors. Our density is different in different sectors, and the 1.1 million private sector employees also include other people who have coverage, so it includes the Finance Sector Union. I do not know what the density is.

Senator ABETZ—If you do not have the figure to proffer, that is fine.

Ms White—I do not have the figure.

Senator ABETZ—I have been reading through the submissions, and, unless I have missed something, nobody has submitted in relation to the conscientious objection clauses that currently stand in the workplace relations legislation. As I understand it, they will be transported into the new legislation without amendment. Have there been any difficulties from your organisation with those conscientious objection clauses as they operate?

Mr Harvey—Not in our experience. They are relatively little used. You are referring, Senator, to the ones that enabled an employer to gain a conscientious objection certificate?

Senator ABETZ—Yes, and also employees, as I understand it.

Ms White—I have never seen it.

Mr Harvey—I have been doing this job for a long time but I can recall only one or two employers that our organisers would have visited who sought to use that exemption provision, and that would have been a very long time ago. I cannot recall anything like that in the last 20 years.

Senator ABETZ—So basically it is operating without any concern, at least to your union.

Mr Harvey—I do not think we could point to a practical example. On the other hand, we thought the previous provisions were unfair and unwarranted and could be used, but I cannot point you to an example of where they were being used to deny right of entry for unions. But it was certainly—

Senator ABETZ—Sorry, I am not talking about conscientious objection to right of entry. I am talking about the conscientious objection clauses in relation to being a member of an employer or employee organisation.

Mr Harvey—It is so rare.

Senator ABETZ—It is of no consequence to you?

Ms White—It does not fall within my experience.

Senator ABETZ—It has not been on your radar.

Ms White—No.

Senator ABETZ—Thank you very much for that.

CHAIR—We are running out of time but we still have a couple of minutes.

Senator HUMPHRIES—I have a couple of clarification questions. On the lost conditions you refer to on page 6 of your supplementary submission, are you saying that these conditions in that second column have been adversely affected, as in reduced in effect or something, or are you saying they have been lost altogether?

Ms White—What the new clerks award says is that if you earn over $851 a week those things do not apply to you.

Senator HUMPHRIES—So you do not get a meal allowance, a vehicle allowance, a first aid allowance, a living away from home allowance—all those things just disappear?

Mr Harvey—Nor access to the dispute-settling clause in the award. Yes, they are gone completely. The way the award has been phrased by the commission, it simply says at clause 17.1, 'except as to the provisions of' redundancy, superannuation, annual leave, personal carer's leave and compassionate leave, public holidays and community service leave, the award 'will not apply to employees employed by the week who are in receipt of a weekly wage rate in excess of 15 per cent above' the level 5 wage rate, which is $740. Fifteen per cent above that is $851. So the award does not apply. You are taken out of the award coverage except with regard to those five matters, which are basically matters which are in the National Employment Standards or superannuation, which is a legislated entitlement in the main. So, yes, the award is gone completely; dead.

Senator HUMPHRIES—My understanding of award modernisation was that it meant you would take a range of different employment conditions, salaries and so on in a particular industry or field and you would try to get a standard, so not the highest or lowest common denominator but a midpoint was chosen to embrace all the particular occupations within the particular industry or sector. If that was the principle that was being applied here, there must be somebody else somewhere else who is benefiting from the reductions in conditions which are being imposed on these particular workers. Is that the case, to your knowledge?

Mr Harvey—No. In this particular case what the commission has done is take an exemption level provision from the New South Wales NAPSA, the New South Wales state clerks award, and applied it to everybody who will be employed under the terms of this modern award in the future. So if the situation has not changed for employees in New South Wales who were previously exempted from the award, it has changed adversely for everybody else in those circumstances in every other state in the country.

Senator HUMPHRIES—So NAPSA in New South Wales was at the bottom of the rung of comparable conditions around the country?

Ms White—It was. In Victoria, for example, there was not an exemption on anything. There was a range, but this is the lowest common denominator. We will also argue that whether or not the NAPSA delivered exactly what is here is another matter, too.

CHAIR—It is a bit puzzling for me. Are you actually saying that at $851 a week you are still bound by the award but you get no protections from it and no conditions from it? You are not actually award free, as the $100,000 threshold is.

Senator JACINTA COLLINS—What was the basis of that exemption in the New South Wales NAPSA?

Ms White—It was lost in the mists of time.

Senator JACINTA COLLINS—So this is different to the $100,000 exemption, but for some reason the commission has applied this in the same fashion that was envisaged for the $100,000.

Mr Harvey—No, and it is a very important question. It is not applied in the same fashion. With regard to so-called high-income employees, there is the notion in the act of a proper bargain—that is, the employee must be offered a guarantee of certain earnings over a 12-month period and if the employee accepts that offer then they are deemed to be not covered by the award because they have got that guarantee. With regard to the exemption rate, it is completely different. There is no guarantee and there is no bargain. The employee gets no choice as to whether to accept or not. It is just if you hit $851 week, or $44,000 a year, you are out of the award except for those five conditions. End of story.

CHAIR—But that is an absolutely clear contradiction of government policy.

Mr Harvey—We would say so.

Ms White—We would say so, yes, and we have raised this at every opportunity. We have tried to re-litigate it with the commission because it just seems completely against government policy. As Mr Harvey has explained, there are get-out clauses even for people who are over $100,000. This is targeted at low-paid, female, clerical and administrative workers in a way that is not seen in any other award. That is why this is soul destroying. We are not alone in this in that something similar has happened to our friends in the finance sector.

CHAIR—That will give us something to ask the department.

Senator BILYK—Do we have an explanation for this? I know how they did it; I want to know why they did it.

Ms White—There are one or two lines in a decision.

Mr Harvey—This was introduced by the commission in its 19 December decision, which was the final decision about the clerks private sector award. It is fair to say that one or two employer groups, particularly one in New South Wales, said they wanted the exemption rate that was currently in the New South Wales award maintained but other employers either did not address the issue or they supported, for example, annualised salary courses, which have been a feature of AiG submissions. They were happy with an annualised salary clause within, for example, the contract call centre award and the telecommunications services industry award but did not really advocate—and AiG can correct us if we are wrong on this—exemption rates as such. It suddenly appeared.

The commission's 19 December decision last year said, 'We've included an exemption rate with regard to overtime in the clerks award, and we will mention that again later in the decision', but when you go to the clause in the award, which I just read out, which has been maintained, it is not an overtime exemption rate, it is an 'everything other than those five conditions' I mentioned. But there is actually no explanation as to why. As Ms White indicated, we re-argued that case—I got quite passionate about it back in February—

CHAIR—So, it is not a mistake? You have actually had an opportunity to put it to the commission?

Mr Harvey—I thought it may have been a mistake when they said 'here is an overtime exemption rate' and then did something different. I genuinely thought it may have been a mistake. But we did argue the thing quite passionately and in the 3 April decision they refer to the fact that we were a bit concerned about it. So they certainly know what we think about it. But in the 3 April decision they said, 'We have heard from the ACTU on that'—the ACTU made submissions on behalf of the Financial Sector Union and us—'and from the Australian Services Union but we do not have enough evidence on the matter before us now to completely remove the exemption rate. We will have to deal with that at some point in the future.' So there is a possibility. This is the hope that we are talking about—that we will address that point at some time in the future. We are not exactly sure what the mechanism for that is at the moment but it is not a mistake. It is just based on importing what we would say is an antiquated provision from one state award, in effect, and imposing it on everybody under that award in terms of the clerks private sector award and then, in the case of the finance sector award, extending it to everybody in the finance industry—400,000-odd employees are covered by that award. In that case I think there was an exemption rate in a credit union's award which applied to one or two per cent of the people in that industry. We certainly do not think it is a mistake but you cannot find detailed explanations from the commission. That is not the nature of these award modernisation decisions. They just say, 'This is what we have done.'

Senator HUMPHRIES—You said this process will continue until the end of the year; are there further determinations to be made by the commission in respect of your members in that process?

Mr Harvey—There are. The stage 3 award matters have got to be dealt with—the clerks award. In every private sector industry the clerks are dealt with. In stage 4 there are issues—they may determine to roll-in other industries, for instance the legal industry has not been dealt with. Whether our submission about the legal industry is successful or whether they decide to roll it into the private sector clerks award, I do not know at this stage. It is a live issue.

Senator HUMPHRIES—But will not mitigate the sort of evidence you have put in front of us about the wholesale loss of conditions?

Ms White—Well, it could make it worse! Based on what has happened at every stage, we are not going upwards; we are going down. So yes, it is potentially going to get worse. I am an optimist so I have hope, but it could get worse.

Senator ABETZ—Just to make it clear, Mr Harvey, exemption rates have been part of the clerks award for some time. Is that right?

Ms White—No, Senator. They have been part of the New South Wales clerical NAPSA, if you like. That is where the provision comes from. One state award had an exemption provision in it like that; the clerks ACT award had a partial exemption clause in it. The coverage of that is about 15,000 employees; that is our estimate. In all of the other states and territories there was either absolutely no limitation on the award coverage, other than by reference to the classification structure, or there might have been an annualised salary clause, which we would submit is a creature of a completely different complexion, really. It is not an exemption clause; it is more of the nature of the bargain that I was talking about before where, under certain circumstances, you could agree to sort of roll-up certain terms and conditions and do them on an annualised

basis. We say that the commission has taken the provision from one award and applied it nationally, basically, which we think is inappropriate.

CHAIR—Thank you for your very interesting submission, and thank you for your supplementary submission and your presentation to the committee today.

Proceedings suspended from 10.37 am to 10.54 am

[10.54 am]

SMITH, Mr Stephen, Director, National Workplace Relations, Australian Industry Group

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

CHAIR—I welcome representatives from the Australian Industry Group. We have received your submission. Do you have any alterations or additions?

Mr Smith—No, Senator.

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

Senator ABETZ—Could I suggest that, in the opening statement or as an addendum to it, you could give, at least from my point of view, a response to what the Australian Services Union said.

CHAIR—Rest assured it was going to be a question anyway.

Senator ABETZ—Yes, but it might be handy just to start off with that; incorporate it however you like.

CHAIR—And whether you were punching the air.

Senator ABETZ—Yes.

Mr Smith—No, we will not be punching the air, but we do have a completely different perspective and view on all of those issues that were raised, as you might expect, which we are happy to talk about.

Senator JACINTA COLLINS—Yes, we would expect that.

Mr Smith—We welcome the opportunity to express our views on this bill. In general we support the bill, but we have proposed a number of amendments which are set out in our written submission. I would like to refer to a few in our opening. One is the transfer of business provisions and in this respect we would like to make a few comments about the fair work act and then put that in the context of the bill. We regard the transfer of business provisions of the fair work act as particularly problematic. Every day, companies are expressing great concern to Ai Group about those provisions; they believe that they will have a major impact on their business. It is open to parliament to give business some relief in this area through the transitional and consequential legislation, because of course for the short-term every instrument that will be transferred will be a transitional instrument because there will not be any modern awards or new enterprise agreements until after 1 July.

CHAIR—So that is your segue into having another bite of the cherry, is it, Mr Smith?

Mr Smith—We argued vigorously against these provisions—

Senator ABETZ—You would not blame them if they tried.

Mr Smith—and we were hopeful of achieving an outcome that was different from the one that we all did achieve, if you like. But we now wish to focus, within the parameters of what is there, on what we can do to give relief to our companies in sectors like call centres, ICT and labour hire, which are very concerned about these provisions.

In our written submission we give the example of a company that employs a temp from a labour hire firm and then a few months down the track they wish to employ that temp. The way that we read the fair work act, because there is a transfer of employment from the labour hire agency to the client firm and because of all of the tests about a connection between the two firms—in particular there is an arrangement where the assets that the temp was using for the first employer are continuing to be used for the second employer; it might simply be a desk and a computer—the client becomes bound by the enterprise agreement of the labour hire firm. If that client has not got an enterprise agreement itself, new employees that they employ can become bound by that enterprise agreement, which we think is ridiculous and unworkable. As we have said in our submission, we think these provisions are not workable and that amendments will undoubtedly need to be made, but in the meantime we have proposed some amendments through the transitional and consequential bill which would give employers some relief. One important area would be that there is an opportunity to define some of the terms that are used in the fair work act and in the transitional and consequential bill—for example, what ‘outsource’ means, what ‘arrangement’ means and what the ‘beneficial use of some or all of the assets’ means. We put the position strongly that this is needed. Moving on to another area, one element of the—

CHAIR—You have finished on transfer of business, though.

Mr Smith—Yes, in our opening statement.

CHAIR—The committee majority report also recommended to government some changes to those provisions which were not picked up by the government, so I might have a second crack at it as well. You are moving on to another subject.

Mr Smith—Well, Senator, we all have our views on them. But, as I say, every day we have companies contacting us, and they are well aware that we are here today representing their interests to seek some relief on their behalf.

Senator BACK—A consequence of your example may be that the person in fact is terminated as a temp and does not have the opportunity then to come into that company as an employee. That may be the decision of the employer in that circumstance.

Mr Smith—Yes, and that is the view that we strongly express. We believe these provisions are anti employment, because there is a massive incentive for the new employer to not employ the employees, because then nothing transfers—

Senator BACK—Which is counterproductive for everybody.

Mr Smith—Yes, and, as we have said in our submission, it is completely—

CHAIR—Let us move on. Really, this is a debate that has been done, so we should move on to the next subject.

Mr Smith—The next issue I wanted to mention briefly was the enterprise award modernisation process. This is one element of the bill that we are pleased about. We think it is a very balanced structure that had been set out in the bill. Some enterprise awards are very generous compared to industry awards, perhaps most; others give the relevant employer an important competitive advantage, and they base their cost structure and flexible arrangements on those provisions. So we believe it is completely impossible to have a one-sided set of criteria for enterprise awards. The criteria need to be balanced, and Fair Work Australia needs to look at the situation when an application is made and decide: should there be a modern enterprise award and, if so, what should the terms and conditions be? We believe that the provisions of the bill are balanced and largely just leave the issues to Fair Work Australia to deal with.

The four-year time frame is workable, but we do think one important amendment needs to be made, and that is, in exceptional circumstances, to allow applications to be made before 1 January next year, to give companies the ability to use a modern enterprise award in lieu of an industry award in circumstances where, say, they need to change the definition of the enterprise. During the inquiry, the SDA expressed some strong views about the enterprise award provisions; we submit that those views do not stand up to scrutiny and we totally oppose the views that were put.

With one notable exception, we believe the award modernisation provisions of the bill are balanced and fair. That exception is the provision in the industry award schedule and the enterprise award schedule dealing with reduction in take-home pay orders. The award modernisation request, as I am sure many other parties have pointed to, gives equal weight to the objectives of not disadvantaging employees and not increasing costs, and we believe that the provisions of the bill are lopsided and should be either removed or amended to enable the commission to increase orders about no increased costs. As you would be aware—

Senator JACINTA COLLINS—Mr Smith, do you have a detailed submission on that?

Mr Smith—We have quite a lot of detail in our submission about that point, yes.

Senator JACINTA COLLINS—No, about how such an assessment might be conducted by the commission.

Mr Smith—No, Senator—

Senator JACINTA COLLINS—No. Okay.

Mr Smith—but we do believe—I did listen to the exchange with Mr Platt—that this is an issue that the commission has looked at many, many times over the years in balancing the interests of different parties and looking at the no disadvantage test and the issues of public interest. We believe that, if that power is there, they will make sensible decisions about take-home pay orders as they will make sensible decisions about the issue of no reduction in pay. But we think the best thing is to not have either of those mechanisms in there, because the award modernisation process, we believe, is a process which is resulting in an outcome where employers are not getting everything they want and employees and unions are not getting everything they want. It is a balanced and fair outcome, and of course you would not expect anything different from the AIRC.

CHAIR—I wish to be clear about that, because I made some comments earlier about that. We have got a lot of submissions from people who are generally a bit unhappy with the process, but you believe that the award modernisation process so far is meeting those objectives and it is balanced and fair.

Mr Smith—Ai Group has devoted massive resources to this exercise. You would only need to look at the commission's website to see that we have put far more resources into this exercise than any other organisation of employers or employees—thousands of pages of submissions and draft award proposals in a large number of different industries. Even yesterday we filed another 50- or 60-page submission dealing with some supplementary matters. But we think that the commission are doing an amazing job with a time frame that, as you would recall, we expressed great concern about and we sought to extend. The job that they have done given the constraints that they have placed on them is a very admirable job and we think they have been prepared to listen to the views of unions and employers. Along the way they have put out exposure drafts. There has been a lot of consultation and we have been very heavily involved.

As for the issues that Linda White and Keith Harvey informed you about, we have a totally different perspective on those issues. Take the contract call centre issue and the broader call centre issue. I led the negotiations, over the three years from 2000 to 2003, on the creation of the Contract Call Centre Industry Award. It was negotiated with the ACTU and various unions and that was an outcome that was largely achieved after all of that by consent. As Keith Harvey pointed out, we went to the commission seeking a contract call centre award and the commission originally did not support a contract call centre award but ultimately we convinced them to do that. So the contract call centre companies like Teletech, Stellar and Salmat and so on have got an award that reflects what they are currently applying. What the commission did though, for good and fair reasons, was it decided this: why should contract call centre companies have flexibilities and cost structures that are different from companies that have call centres in house? So it put the same flexibilities and penalties in the clerical award so that in-house call centres and contract call centres were on a level playing field. It also recognised that some of the biggest call centres in Australia are in the finance industry so it put those same conditions in the banking and finance award. It listened to very extensive arguments and evidence from Ai Group, the ASU, the FSU and other parties and made that decision, so there is no lack of detail about it. There are thousands of pages of submissions and witness statements and days of hearings that we were heavily involved in that led to that outcome.

CHAIR—The logic you put as to why they made the decision is one element. Another element that I thought was put to us was that neither you nor the union asked for this to happen and therefore that was not subject to submissions and it came as a surprise. Is that correct?

Mr Smith—Not exactly. It went this way. We asked for the contract call centre award and we did not get it at the exposure draft stage. In the exposure draft the commission put these flexibilities in the general clerical award and said that award should apply to contract call centres and in-house call centres. In response to that, we got witness statements from the contract call centre companies and so on and argued vigorously for a contract call centre award. We did not oppose the commission's structure of having a level playing field, so we did not go in there and argue vigorously to keep that but we argued vigorously to get what we had originally put. We do not oppose the idea of there being a level playing field. We did go into the proceedings relating to finance and banking and argue very vigorously that, if the commission were not to make a contract call centre award, to impose the banking and finance award on companies like Teletech and Stellar and so on would potentially destroy their businesses because the cost increases would be massive. In response to our arguments, the commission put those flexibilities into the banking and finance award as well. I do not think it is accurate to say we did not want any of this. We have no problem with the outcome, and we did go out after the outcome saying that we were pleased that our views about the call centre industry had been listened to.

Senator ABETZ—Which was interpreted as punching the air.

Mr Smith—Well—

Senator ABETZ—You do not need to comment on that.

CHAIR—Mr Smith says he is happy and I think we can take that for granted.

Senator JACINTA COLLINS—Mr Smith, I want to clarify one issue . AiG did not specifically seek the extension of the exemption to a new common level award. Is that correct?

Mr Smith—We did not seek it or expect it at the exposure draft stage but we supported it ultimately, once it was in it—

Senator JACINTA COLLINS—That was once the commission had offered it to you and you thought, great, we will accept that.

Mr Smith—Well, it was actually the commission's response to our submission—

Senator JACINTA COLLINS—I understand.

Mr Smith—because they dealt with it in a different way to what we had asked for.

Senator JACINTA COLLINS—The other aspect of that was this. When you submitted to the commission about the additional costs associated with the proposal—and if I am correct you were talking about the finance sector arrangements—did you specifically address the additional costs associated with this exemption not being available?

Mr Smith—We did, yes. The banking and finance award is an award that has very generous terms and conditions in it so we even got evidence from a number of call centre companies saying that if they had to pay those penalties there would be huge cost increases that their business would not be able to bear. So in response to that evidence and those submissions the banking and finance award was varied. But the main thing we were seeking to achieve we did achieve, which was the agreed position that we had with the ACTU and many unions on a contract call centre industry award. That was achieved.

CHAIR—I know you have not finished your presentation but we have started dealing with the issues as you have come to them. Senator Bilyk also has a question. It is a clarification question.

Senator BILYK—Mr Smith, do you think it is fair and reasonable that people working in call centres under the new award and earning $44,000 a year will not have access to dispute resolution procedures for disputes arising under the award or to the NES?

Mr Smith—This is where the ASU's evidence might have been a bit confusing because they were talking about the call centre issue, which is really an issue different from the exemption rate issue. It was all mixed up because it is all related to—

Senator BILYK—Do you think it is right that anybody earning $44,000 a year will not have access to dispute resolution procedures?

Mr Smith—If I can deal with that exemption—

Senator BILYK—Yes or no?

Mr Smith—We do not think that is the outcome.

Senator BILYK—Do you think it is fair?

Mr Smith—No.

Senator BILYK—Right; thank you.

Mr Smith—We think people should have dispute settling procedures available. But that is not an outcome of the clerical award. We disagree with the ASU's evidence in that respect. If I could just make the point, I would like to deal at some stage with that exemption rate issue because it is an issue that was canvassed—

CHAIR—I think you should proceed with your formal comments to the committee. We will go back to the normal structure and then we will come back to questions. But you are happy to deal with that issue as part of your remarks to us?

Mr Smith—Yes, Chair. I have finished basically what I was going to put and now I am picking up on Senator Abetz's point about responding to those issues.

CHAIR—Okay, so let us do that now.

Mr Smith—Thank you, Chair. The other significant issue that was raised was about the exemption rate. The most important thing here is that it is not a blanket exemption. It is an exemption rate that relates to certain provisions, mainly penalties and allowances and the prescriptive provisions that are there. In concept, it is not different to the exemption rates in many other awards, state and federal. The Business Equipment (Technical Services) Award is an ASU and Ai Group award that applies to IT technicians. It has an exemption rate. All the overtime penalties and allowances and so on do not apply; the award applies but there is flexibility with remuneration. The contract call centre award is exactly the same—for the top classifications all the penalties and so on do not apply—and there is the Telecommunications Services Industry Award too.

The picture was put that this is some dramatically different outcome; that is nonsense, in our view. The commission has decided that people at higher pay levels and at higher classifications should be able to have

more flexible conditions. It was a provision that came out of the New South Wales NAPSA and it was totally inaccurate. Mr Harvey said that we could clarify our position that no-one sought it. We argued strongly in support of it. When we achieved that outcome, which we believe was a fair outcome, the ASU and the ACTU were very unhappy about it. They went back, in stage 2, into the commission in February—even though this was a stage 1 outcome—and argued vigorously against it. We argued vigorously to keep it, and the commission has kept that exemption rate, which we believe is appropriate and fair.

CHAIR—I thought the argument was twofold—one was the exemption rate—but the genesis of those exemption rates meant that there had to be a replacement bargain to deal with those issues. An exemption rate does not now provide for that; it simply provides for an exemption. The parties may bargain and get a replacement bargain, which may have all sorts of annualised salaries, flexible rates and that sort of stuff. But that was a requirement, as I understood the argument being put to us, and that requirement is not there anymore. Is that right?

Mr Smith—No, that is not right. I think Mr Harvey was saying that, if you look at the Fair Work Act, you will see it has that provision in it that allows people who are currently award covered, say, a highly paid professional engineer, to opt out of award coverage through entering into one of those guarantees of annual earnings. That is what Mr Harvey was saying: this is an element of the new system, which this does not reflect. We do not see that there is any need to link the two provisions. There are annualised salary provisions in many awards—for example, the metal industry award. The commission has decided that the new, modern manufacturing award should have an annualised salary arrangement in it for supervisors. But the awards that I mentioned—the clerical award, the call centre award, the telecommunications services award and the business equipment award—are all major industry awards and all have an exemption rate which is structured, which says, 'If you earn more than that' or 'You're in these classifications, all of the prescriptive remuneration arrangements don't apply.'

CHAIR—What does apply, though?

Mr Smith—Things that apply are the general protections that are there. I have not looked specifically at this dispute settlement issue, but certainly the dispute settlement clause would apply in the business equipment award, the TSI award and the call centre award. I am sure there would be access to dispute settlement arrangements in the clerical award. I could take that matter on notice. But all of the things that do not go to remuneration—anything in clauses about sick leave, notice periods and so on.

CHAIR—Those things, such as flexibility about remuneration, can be done by having a certified agreement. The thing that concerns me is that the commission here seems to have said, effectively, that there does not have to be an agreement about those matters; just that at this particular rate you simply lose all those protections. We would hope that they are replaced by either an annualised salary or a different method of recompensing people. But at that level if you simply lose your right to penalty rates, loadings or allowances in the hope that there might be some agreement, I think, seems to be a bit of a problem.

Mr Smith—It needs to be recognised also that we will have a very comprehensive set of National Employment Standards that will provide entitlements to all people, whether award covered or award free, so that is one significant element.

CHAIR—Yes, but that is at the level of $100,000 plus, not at $44,000.

Senator BILYK—That is an exemption—

Mr Smith—But it is not exempt; the NES provisions will apply.

Senator BILYK—The right of access to a copy of the award and the NES is an exemption—so if people do not know about it—

CHAIR—Senator Bilyk, if you could just let the witness answer and then you can ask a question.

Senator BILYK—Sorry, Chair.

Mr Smith—The NES will apply. You cannot exempt out of the NES. So that will apply. The exemption rate is dealing with the remuneration elements within the award, such as overtime, penalties and so on. That is a significant issue. The ASU are putting a view that the outcome of award modernisation is unfair. That view is totally unsustainable. The ASU went into the award modernisation proceedings seeking a massive levelling up exercise. A lot of their draft awards cherry picked every condition in every award and took the highest level. Obviously, that was totally untenable and the commission had to look at what was fair. It took, say, salaries out of the Victorian award. In fact, in the case of the clerical award it took salaries out of the South Australian

award. It took the exemption rate out of the New South Wales award. It listened to months of arguments and made what it believed was a fair outcome. The ASU are not happy with that. There are many issues and we would have preferred a different outcome for many industries. But we are putting the view very publicly that, so far, we think the commission has done an amazing job with award modernisation. There are still many issues that need to be dealt with—the transitional provisions and so on. But it is not the case that the commission has been taking one side or the other. Of course, it has not been doing that. It has a long history of being very fair with these things.

Senator BILYK—You made reference to the metal industry award. I would be very surprised if there were anyone in the modernised metal industry award on $44,000 who is treated as though they are earning $100,000, as in conditions lost through the exemption. One of those conditions is the right of access to a copy of the award and the NES. Once again, do you think that is fair? Do you think that people earning $44,000 will lose the right to access a copy of their award and, if so, why?

Mr Smith—It is not saying they cannot access the award or the NES. The specific clause that the commission has put in there says that the employer must provide a copy of the award and the NES to employees. I would have to check.

Senator BILYK—What is the benefit to the employer to not supply that? Why is there a benefit? Why not just leave it? Employees should be able to have access to it. Is it just to make life difficult for employees to access the award?

Mr Smith—There was nothing in the proceedings about that clause not applying that I am aware of. The commission has kept the New South Wales exemption provision for good reasons.

Senator BILYK—So do you think it right that these employees should not have access to the award then?

Mr Smith—We do not believe it follows that—

Senator BILYK—Yes or no?

Mr Smith—just because there is not a clause in the award that they will not have access to the award or the NES.

Senator BILYK—It is atrocious.

Mr Smith—We do not think that follows.

Senator BILYK—It is one of the exemptions that will be lost on 1 January.

Senator ABETZ—This exemption, which is now in the modern award, was transported from the New South Wales award.

Mr Smith—That is right.

Senator ABETZ—The ASU in New South Wales did not complain about this provision?

Mr Smith—Not to the best of our knowledge, but most awards do not have a provision in them, saying, for example, 'You must provide access to the NES.' Obviously, this is a new provision that the commission has decided should go in modern awards. There are many awards which state you have to give copies of an award to employees and there are many that do not. If an employee wanted a copy of their award, any reasonable employer, which is 99 per cent of them—

CHAIR—Can you name that one per cent for us?

Mr Smith—They would not be our members.

Senator ABETZ—The Labor Party, the ACTU!

CHAIR—Senator Bilyk, do you have any questions?

Senator BILYK—It is actually more a comment. I am a senator representing Tasmania and my concern is for all those Tasmanians who are employed under this award, and I would have thought, Senator Abetz, you might be a bit concerned for them, too.

Senator ABETZ—Do you know what? I am a representative of the Australian parliament and I am concerned—

Senator BILYK—You are representing Tasmania.

Senator ABETZ—about all workers all around Australia, and I am interested to learn how the multiplicity of workers under the New South Wales award, which had been in place for quite some time, were able to

survive under these exemption clauses which were determined, as I understand it, by an industrial body and had been applied without any great consternation over many years.

Senator BILYK—We do not know for sure that there has been no consternation. We would have to check that.

Senator ABETZ—Anyway—

CHAIR—Order! The purpose of the committee is not for senators to be debating each other but to elicit answers to questions.

Senator ABETZ—I was a provoked chair!

CHAIR—I agree.

Senator BILYK—How do you think that the new award compares—for example, to the metals award—in general? It seems to me that the majority of people employed in call centres are young females. There seems to be a bit of a gender disparity going on here. As I said, in the metals award you would not get anyone earning $44,000 a year being treated as though they were earning $100,000 a year with regard to their rights and conditions. What are your comments in regard to that?

Mr Smith—They are very different awards, of course.

Senator BILYK—Yes, I understand that.

Mr Smith—The modern manufacturing award will replace about 100 other awards. There is a metal industry award, a rubber and plastics award and numerous others. Those awards have not contained exemptions generally. The modern manufacturing award does have an annualised salary provision in it but it does not have an exemption rate, whereas it is not uncommon for clerical awards and commercial travellers awards to have these exemption rates.

Senator BILYK—At what level does the annual salary award kick in under the metal workers award?

Mr Smith—It applies to certain classifications, particularly to supervisors.

Senator BILYK—And what salary level are we looking at there?

Mr Smith—It is based around the actual classification more than the salary level. I just cannot recall off the top of my head.

Senator BILYK—I do not reckon it would be $44,000.

Mr Smith—It may not actually be much more than that.

Senator BILYK—Maybe you could find out and get back to me on that.

Mr Smith—I will. The award rate for a supervisor is actually in the award. I just have not got it in front of me.

Senator JACINTA COLLINS—I will move on to another matter that you, Mr Smith, raised in your opening comments but did not elaborate on. I am intrigued by your suggestion that the SDA's concerns regarding enterprise awards do not stand up to scrutiny without any elaboration on how, when, where or why you believe that to be the case. It is not in your submission, and I understand that was submitted before our hearings in Sydney. That bald assertion to an inquiry such as this astounds me.

Mr Smith—I am happy to expand on that, Senator. As I understand the comments that the SDA made publicly and no doubt made to the inquiry as well—

Senator JACINTA COLLINS—Where they made them—

Mr Smith—I did see some public statements that Mr de Bruyn made as well.

Senator JACINTA COLLINS—I think they were reported from our hearings in Sydney.

Mr Smith—Okay—sorry, Senator. The point that the SDA seem to be making is that some of the fast food companies—

Senator JACINTA COLLINS—Have you seen their submission?

Mr Smith—I have not read it in detail.

Senator JACINTA COLLINS—Let's not continue then, if that is the case. If all you are commenting on is the public reporting of our submission in Sydney and you are not addressing what the SDA's actual submission is, I think this dialogue really does not have—

Mr Smith—Senator, I really do know what the SDA have said. AI Group has studied that submission and—

Senator JACINTA COLLINS—Sorry, I thought you just said you had not.

Mr Smith—I have not read every word in that submission personally but I can give AI Group's response to it and I am well aware of what is in the submission. The point is that the SDA were putting the point of view that some of the fast food companies have enterprise awards that, in their view, are below the level of industry awards. Those enterprise awards, as I understand it, in many cases were consent documents between the SDA and those fast food companies.

I thought I did actually address the issue in a different way. The point that I made was that the criteria need to be balanced. If it is the case in, for example, an industry like fast food, or any other industry, that there are awards that someone wants to argue below the industry level of conditions, then that should be open to a party to argue. But if there are other industries where there are awards that are clearly far more generous than the industry awards—and we can all think of numerous examples where that is the case—then it should be open to those parties to argue that those awards should be abolished and people should come back to the level of the industry awards. So we think the criteria are very balanced. They give the SDA the ability to run its argument, they give employers in those industries where the enterprise awards are way above the level of industry conditions to run their arguments, and Fair Work Australia will need to make a decision. That is why we say that the SDA's comments are totally without merit, we believe, because they are trying to put—

Senator JACINTA COLLINS—Which element of their comments? One aspect of their submission was, for the criteria to be balanced, a suggested amendment for what the criteria should be. Have you seen those criteria?

Mr Smith—Yes, and we think the existing criteria are balanced.

Senator JACINTA COLLINS—But you cannot specifically address if what the SDA was proposing would add more balance to that equation, or can you?

Mr Smith—A very large number of submissions have been made to this inquiry. I cannot remember every word in all of them.

Senator JACINTA COLLINS—My impatience with this issue is that at the outset you said that the SDA's comments or submissions in relation to enterprise awards do not stand up to scrutiny. That was your evidence to us this morning.

Mr Smith—Yes, and I stand by that absolutely.

Senator JACINTA COLLINS—Now I am asking you to comment upon some of the specifics of that evidence and you are not able to deal with one specific element of it.

Mr Smith—If you were able to put to me the specific—

Senator JACINTA COLLINS—I just said the SDA had put to this committee that we look at an amendment in relation to making the criteria more balanced. I do not have it immediately in front of me but I have not come before this committee and said that the SDA's position does not stand up to scrutiny, and I am asking you now to comment on that and you are unable to.

CHAIR—Because of the time and other senators who wish to ask questions, I invite you, Mr Smith, to make some further remarks to the committee in writing if you wish.

Mr Smith—We will respond in writing over the next day or so to the criteria changes that the SDA has put.

CHAIR—I would appreciate that.

Senator ABETZ—I would have thought some of the workers in the clerical and other areas might not be all that upset if, after a certain threshold of salary, they are not entitled to get a copy of the NES or the award. Chances are they sufficiently internet savvy to get those things for themselves and that is why they command such a salary. But one thing that they might be concerned about is their actual take-home pay. The submission of the ASU was that some workers would actually be worse off—that their take-home pay would actually decrease. Is that your reading and assessment of some of the consequences of the private sector clerical award?

Mr Smith—Anyone can pick a classification and do certain calculations, but whether or not the take-home pay of an individual employee changes is entirely a matter of what the employer and the employee might experience or agree to in that workplace. Most clerical employees are paid well above the award. It was interesting that the ASU picked the classification of level 2, a very low classification that does not apply to most clerical employees, even those that are doing quite basic things, like word processing and that sort of

thing. We could have picked another classification and done different calculations. The commission, as I said, took a classification structure that we did not support, which was the South Australian classification structure—rather than, say, the New South Wales one—and applied its wage rates.

Regarding the issues that the ASU raised about these take-home pay orders, we think in some areas a very sensible approach has been taken in the legislation, if we are going to have access to these orders. What it is saying is that like needs to be compared with like. The explanatory memorandum makes it clear that, if someone has a change in their work pattern or in hours or times of work, you have to compare like and like. Linda White or Keith Harvey made the comment that all you have to do is promote someone and then they would be disadvantaged, but of course a provision is there for that. You cannot say that someone has a reduction in take-home pay based on not comparing like to like. You have to consider: 'That was the job they were doing; are they still doing the same job and are they still working the same hours?' Otherwise it would open up a totally unworkable situation.

We think that, if you have to have take-home pay orders, then those important aspects like comparing like to like are important, as is the issue that new employees should not be subject to these orders, because a new employee is not suffering any reduction in take-home pay. The benefit of the take-home pay orders is that, as people's pay increases, the order falls away, which is also important.

Senator ABETZ—Thank you for that. In relation to the New South Wales exemptions that you have told us have been imported into this new modern award, can you advise us who made the orders or who presided over the New South Wales award that had that exemption contained in it? Was that the AIRC equivalent in New South Wales?

Mr Smith—Yes, the Industrial Relations Commission of New South Wales made that award, and that award was completely reviewed in fairly recent years.

Senator JACINTA COLLINS—Are we talking about the NAPSA or are we talking about the original award?

Mr Smith—The original award has been deemed to be a NAPSA. I thought we were talking about the original award.

Senator JACINTA COLLINS—Do you know how old this provision was—when it was first introduced or how?

Mr Smith—It has been in there for decades, but that award was the subject of a major review within the last five years, and that provision has been retained.

Senator JACINTA COLLINS—The point I am trying to clarify is that—

Senator ABETZ—They were going to be my questions.

Senator JACINTA COLLINS—it may not be the result of a determination; it might have been an agreed element historically.

Mr Smith—It is possible because it goes back so far, but, as I have said, there was a major review of this clerical award that retained it.

Senator ABETZ—I thank Senator Collins for asking those questions because I wanted to get some of that background as well. Mr Smith, would it be possible for you to find out—or perhaps the secretary could find out through the Parliamentary Library—when those exemptions first came into play in New South Wales and whether they survived the review process, as you described it, in recent years to modernise? If that is the case, then it would seem that it was part of the industrial landscape in New South Wales for some period of time and without too much opposition. If it was deemed fair in New South Wales one would assume it might be deemed potentially fair to have that then translated into the modern award under the federal legislation. I would just be interested in the history of that, if you could find that for us.

Given time constraints, I have one quick last question. In the current workplace relations bill, there are certain conscientious objection clauses in relation to membership of organisations. Does the AiG have any difficulty with those clauses being translated into this new legislation?

Mr Smith—No. We agree with the ASU's comments there. Over the years they have been the subject of very little focus, but we have no objection.

Senator ABETZ—Thank you very much.

CHAIR—I think you may have offered on a number of occasions to provide some further information. We are reporting on 7 May, so the sooner the committee receives that information the better.

Mr Smith—We will certainly respond to the fast food issue and the exemption rate issue very quickly—within a few days.

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

Mr Smith—Thank you.

[11.39 am]

STEWART, Professor Andrew John, Private capacity

CHAIR—I welcome to this inquiry Professor Andrew Stewart. Do you have anything to say about the capacity in which you appear before the committee today?

Prof. Stewart—I am from the University of Adelaide and am appearing in a personal capacity.

CHAIR—Thank you. We have received your submission. Do you have any alterations or additions to make?

Prof. Stewart—What I would like to do if I may is to very briefly expand on a couple of aspects of the submission and then deal with one further matter.

CHAIR—Verbally?

Prof. Stewart—Yes, please.

CHAIR—Okay, that is fine. I invite you to make some opening remarks to the committee on whatever you like, and then we will ask questions.

Prof. Stewart—Thank you. As I have indicated in the submission, my general opinion of the transitional and consequential provisions bill is that it is soundly designed and sensibly drafted. I have noted on pages 2 to 3 a number of particular aspects of the legislation that I would strongly support. There are, however, a number of areas where I believe the bill could be improved. I will take you through those very briefly—as I said, perhaps expanding in a couple of areas.

Firstly, on pages 3 to 4 of the submission I deal with what I call the problem of old instruments. This is the plethora of old agreements which, in some cases, go back to the early 1990s—possibly even the late 1980s—and which are still in place under the existing Workplace Relations Act. The transitional provisions bill proposes to allow these old agreements to live on indefinitely. What I have proposed in the submission is that, given that one of the aims of the fair work legislation is to simplify our regulatory system and to introduce a new, far simpler and more transparent set of rules, at some point there needs to come a time when old agreements wither and die. The transitional provisions bill proposes such a mechanism for enterprise awards; it proposes that by the end of 2013, if enterprise awards have not been modernised, they will cease to have effect. In essence, what I am proposing is that the same approach be taken for old agreements and that we reach a point where, unless a party has taken a positive step to have an old agreement converted into a fair work instrument, that agreement will cease to operate.

The particular problem that I am identifying with these old agreements is that you cannot pick up some of these agreements and work out what effect they have. In some cases that is literally true. Some of the old agreements which are preserved here do not physically exist. They cannot be consulted. The example would be a preserved state agreement—that is, an agreement originally registered before Work Choices under a state industrial law. As things stand, it is not the old agreement that survives; it is a mixture of the old agreement, with a few bits and pieces taken out, plus some old award provisions that used to operate alongside it, plus some old statutory provisions that used to operate alongside it. There is no formal record of that instrument. No-one can look this instrument up and tell you exactly what is in it.

Even where you have an old agreement that can be physically consulted—say, a pre-reform certified agreement registered under the federal legislation before Work Choices—from the beginning of next year that agreement will be overridden by the National Employment Standards but the text of the old agreement will not change. What is more, that agreement will become subject or will remain subject to certain old rules—old content rules or old interaction rules—from previous laws. I am not opposed to that as a general principle for a transitional period—it seems to me that that is quite a sensible approach to take—but what I am arguing is that, at some point, if these old agreements are to survive then they need to be, in effect, modernised. In other words, there should be a similar process to what will happen to enterprise awards—that is, their text should be brought into line with the National Employment Standards and they should be published in a form that can be consulted. So the proposal is that the option would be there for parties to old agreements to go to Fair Work Australia and ask for them to be converted to a workplace determination, which is a fair work instrument. Fair Work Australia would do that unless it were contrary to the public interest. At the same time, Fair Work Australia would take the necessary steps to ensure that the agreement is fully set out and fully NES compliant. So that is the proposal with old instruments.

I have also proposed that, to assist parties who have transitional instruments, the Fair Work Ombudsman be required to provide information about the content and interaction rules that will apply to those old instruments. I was about to say it is easy enough for someone like me to find those rules—actually, it is not easy at all. You have to go to a lot of time and trouble, in some cases, to identify these rules. For a small business, for an employee or for a community organisation it would be very, very hard to identify these rules. I am simply proposing that the Fair Work Ombudsman be required, either in the legislation or executively asked, to provide some fact sheets which will set out those rules.

On page 5 of the submission there is a very brief point, but an important one, about what I think is an omission in the bill. Unless I am mistaken, there is nothing that explains what effect transitional instruments will have on state and territory laws, and I am simply inviting the committee to ask the department to draft an appropriate amendment to fill what I think is a significant gap. Consistently with some previous submissions to the committee, I have recommended that, when a new enterprise agreement is put in place under the new Fair Work Act, it automatically replace any expired individual agreements rather than there being this very messy and bureaucratic process of having conditional terminations.

The final issue dealt with in the written submission is representation orders, and I want to briefly add to what I have said about that. In the submission, I have identified what I consider to be a very significant grey area in the current bill. The Workplace Relations Act currently has a set of provisions which will continue under the new legislation that allow for representation orders to be made to adjust the rights of a trade union to represent a group of workers. What the transitional bill is proposing is to supplement the existing provisions by adding a new provision, which would be section 137A in the Fair Work (Registered Organisations) Act. That new provision would be focused on making an order for a workplace group and it would be able to be made, unlike the existing provisions, even though there is no evidence of some existing disruption or harm to an employer’s business.

As I have indicated in the submission, it seems to me that is fine. I can certainly see the point in adding a provision that enables that kind of representation order to be made, focused on a particular workplace relations group, given the significant changes that have been made, particularly in the area of right of entry. The difficulty I see is working out what it is that actually triggers the capacity to make that order. The bill as it stands says that there has to be a dispute. The term ‘dispute’ has previously been interpreted by the High Court to mean ‘a difference of opinion that must have arisen between identified parties’. So you must have reached a point where somebody is disagreeing with somebody else about the issue of representation of a particular group. The question is: how much evidence needs to be shown that the dispute actually exists? The explanatory memorandum for the bill confuses the issue because, firstly, it alternates between talking about actual disputes and potential disputes—and there is clearly a difference there—and it gives an example, the Spokey Dokes example, which to me is an example of where there is no actual dispute but merely a perception that a dispute is about to arise.

I have also looked at the submission that the department have put to the committee for its present inquiry and I must say that, with the greatest of respect to the department, I do not think I am enlightened by the submission. They go from talking about potential demarcation disputes to disagreement existing, and I am still none the wiser as to what it is that triggers the availability of this representation order. In my original submission, I simply propose that this ought to be clarified. Either this is a mechanism that applies where there is an actual dispute or it is a mechanism that applies where there is merely a potential for a dispute.

I do want to correct something that was said by Mr Harnisch of the Master Builders Association in the committee’s Sydney proceedings. It was said there that I had called for the bill to be amended to make it clear that there is a power to issue a representation order where there is the potential for a demarcation dispute to arise. In fact, I was not calling for that to happen. I was calling for the bill to be clarified; I was not advocating a particular position. However, having now given the matter more thought, the position I put is this: it seems to me that it would be inappropriate to have a mechanism which could be triggered merely on the basis of an application to Fair Work Australia—that is, to remove any requirement of a dispute would seem to me to create a situation where there becomes an incentive for both employers and unions to start looking around for possible applications. It seems to me it could be, if anything, encouraging disputes to arise, because potentially you would have employers deciding: ‘Well, we want to lock a particular union out or we want to lock a particular union in. Let’s go down to Fair Work Australia and get something that will say that.’ Indeed, at the other extreme, you might have a couple of unions deciding that they are going to sort out some longstanding differences by making a suite of applications to Fair Work Australia to try to work out who has coverage in what site. Arguably, therefore, there still needs to be some kind of a trigger in terms of there being a real

problem before Fair Work Australia intervenes. At the same time, however, I would argue that it is not appropriate to express that trigger in terms of a dispute that has already arisen, because that, to me, has the problem that you have to wait for bad things to happen, wait for disruption to occur, before Fair Work Australia can intervene. It seems to me that it is precisely to avoid that or get around that problem that the government is proposing this additional mechanism.

The best I can suggest to the committee, and it is a phrase which I think I have used in the submission, is to hark back to some old language from pre-Work Choices days. The Workplace Relations Act and the Industrial Relations Act and the Conciliation and Arbitration Act before that used to talk about a 'threatened, impending or probable dispute'. It seems to me that is not a bad trigger to use in this instance—that is, a party would be able to go to Fair Work Australia where either a dispute had already arisen over representation rights at a workplace, or that there was a 'threatened, impending or probable dispute'. That would at least require the applicant to put some evidence or material before Fair Work Australia to show that there was a real problem, that there was a real likelihood of something happening that warranted the application. What I am trying to avoid here, and what I am suggesting should be avoided, is open slather for applications to be made in order to sort out problems that may never in fact arise in the real world.

So that is all I wanted to say about representation orders. Perhaps I can conclude by adding one other issue: I strongly suspect that there might be some questions about award modernisation. Clearly that is a matter that has come up a lot before the committee. I remind the committee that on previous occasions I have suggested that award modernisation is a process which cannot be undertaken without, in the end, someone being worse off somewhere. You cannot go from a situation of having thousands of awards, of having award conditions set at different rates at different levels across the country, moved to a genuinely national and simplified award system—you cannot do all that without at some point leaving some employees worse off than they would otherwise have been and leaving some employers worse off than they otherwise would have been. What the award modernisation request does is to instruct the commission to try to minimise that disadvantage. I have previously suggested that it could have been worded a little more closely to that concept of trying to minimise disadvantage rather than avoiding it, because it seems to me, in the end, as I have said, disadvantage is unavoidable.

However, in terms of what is now being proposed in the transitional bill, while I would not oppose the provisions for take-home pay orders, it seems to me that in the end what is far more important here is the step in the award modernisation process that has not happened yet—that is, the creation of transitional provisions for the new modern awards. I would strongly argue that rather than trying to address this issue through legislation, it makes more sense to leave it to the commission to sort it out. Leave it to the commission to work out who is going to be disadvantaged in what circumstances, and to have sensible transitional provisions that phase in the new modern awards over a period of up to five years so as to try to mitigate some of the disadvantage that will inevitably be caused. As I said, that is a process that the commission has not undertaken yet. It has indicated just recently, and very sensibly in my view, that it is going to bring forward its previous time line, it is going to deal with transitional provisions during the middle part of this year, and there should be ample opportunity for parties to make submissions to the commission about how those transitional provisions will work. That, in the end, seems to me to be the best process for dealing with the issues of disadvantage, both to employees and to employers.

Senator JACINTA COLLINS—I would like to go back to this 'drop-dead date' issue. The proposal that you have put here is that we look at all transitional instruments ceasing to have effect after 31 December 2013 or the nominal expiry date. There is one area I remain concerned about, which is that some of these old Work Choices agreements continue for up to five years. Some of them will reach their nominal expiry date prior to 2013, and you will have still, perhaps for two or three years, people caught under an agreement where they have no capacity to consult the other employees bound by an order to have the commission deal with what should occur beyond the nominal expiry date. Are you are aware of the types of agreements that I am referring to?

Prof. Stewart—I am, Senator. This should not occur past the end of 2014 though, because ITEAs cannot have nominal expiry dates beyond the end of this year. The last agreements this will apply to will be agreements such as employee collective agreements made up until 1 July this year. They cannot have a nominal expiry date beyond, therefore, 1 July 2014. My proposal simply says that it takes the end of 2013 as a cut-off date, being the same date as applies to enterprise awards—it is probably a longer period than what I would have set ideally, but because it is there in the bill, that is the one I have chosen—and then simply

allowed for the fact that if you do have, it will really be a very small number of agreements made during the first half of this year that might then extend that on until halfway through 2014.

Senator JACINTA COLLINS—I understand that part of it, but the part of it that I am seeking, in a sense, to clarify is this: say you have an agreement of this type and its nominal expiry date is 2012. It can continue until the end of your proposal, which is the end of 2013, if the employees do not take action about the agreement post its nominal expiry date. It has been put to us that there are examples of these types of agreements where it is impossible for the employees to take action because they do not know each other and that there has been some questionable organising arrangements for some of these agreements under the old Work Choices provisions that employees are bound up in and would not be able to extract themselves from, even after the normal expiry date, because of the nature of the procedures that would be required. If, say, the nominal expiry date is at the end of 2012 they will still be caught for another 12 months under your proposal unless we take further action to remedy, if it is accurate, the claim that there are employees caught in agreements that they cannot extract themselves from even after their nominal expiry date because they cannot organise the class of employees that are bound by them.

Prof. Stewart—The mechanism that the bill proposes for all transitional collective agreements is that a party can approach Fair Work Australia unilaterally after the nominal expiry date and ask—

Senator JACINTA COLLINS—An individual employee?

Prof. Stewart—I do not have the transitional bill in front of me. I would be happy to have a look at that and see whether it provides for an individual employee to make an application. I have certainly previously submitted to the committee that it ought to be possible for individual employees to make that application rather than there needing to be a majority of employees, for example. I will check that.

CHAIR—We would appreciate your advice on the matter.

Senator JACINTA COLLINS—Yes, that would be very helpful.

Prof. Stewart—I would be happy to get an answer back on that in the next 24 hours.

Senator JACINTA COLLINS—Thank you very much.

Senator BACK—Could you perhaps give us some sort of guidance in the event of you coming back and saying, 'Yes, an individual employee could make such an application'? Where might that end up for the overall workplace? Might we then find a situation in which we have employees doing the same task in a plethora of different arrangements?

Prof. Stewart—My understanding is that the agreement could not be terminated in relation to an individual employee. What I am proposing to check in the bill, to see what it says, is whether an individual employee can apply to Fair Work Australia to have the agreement terminated. Under that process it is still up to Fair Work Australia to determine whether it terminates the agreement for everyone or for no-one. Fair Work Australia would be required to consider—and indeed this is similar to an existing process with the Industrial Relations Commission—the views of the majority of employees. If a single employee did put an application in—assuming that is possible, and I am advocating that it ought to be possible—it would still be open to Fair Work Australia to say: 'We think there is nothing wrong with this agreement. We see no reason why it shouldn't continue.'

Senator BACK—So to pick up Senator Collins's question about employees who might not know each other, what would the process be then for Fair Work Australia to establish who the employees are and therefore get some sort of majority view from them?

Prof. Stewart—The persons who are covered by the agreement ought to be revealed in the agreement itself, but if there is any doubt I would assume that Fair Work Australia would approach the employer and ask the employer to provide information about that. The point, as I understand it, is that there may be agreements at the moment where it is not possible for individual employees to get together and organise an application. But if the application can come from an individual, which I am suggesting it ought to, and perhaps that is already the case in the transitional bill—as I have said, I will have to check—then it does not matter if they cannot contact one another. It would be enough that somebody could raise the issue and it would then be up to Fair Work Australia to look into the matter and work out what to do about it.

CHAIR—With respect to the representation orders, coming back to the issue of dispute and using the example of what a dispute is as decided by the High Court, if that is the test that is used, isn't that then

enough? Why do we need extra? It is a disagreement rather than a dispute that has an impact upon anyone—it is simply a disagreement between two identifiable parties. Isn't that enough to trigger it without expanding it?

Senator ABETZ—I would be interested in your comment as well on the Spokey Dokes example in the explanatory memorandum.

Prof. Stewart—The High Court has certainly made it clear that you can have a dispute without any existing disruption or industrial action or strife within the workplace. So it is true there has to be disagreement, but there has to be disagreement between identified parties. The Spokey Dokes example—and I do not have the full example in front of me—involves a case where we are told the business owner is aware that there is longstanding enmity between two particular unions, that the business owner is dealing with one union and that the other union has indicated that it now wishes to take a more active role at the workplace. If there is a dispute there, who is the dispute between? The difficulty, it seems to me, that will be faced there if an application is made to Fair Work Australia is that Fair Work Australia could take the view: 'Well, there's a dispute between the union that wants to move in and the union that does not want it to move in, but there may be no evidence that in fact anything has passed between them—this may be all inference or suspicion at this point.'

I am not sure how a member of Fair Work Australia would interpret a requirement for a dispute that requires some evidence of an existing disagreement. It may be that a member of Fair Work Australia would look at the explanatory memorandum and the references to a potential dispute and say, Well, it's enough that there is a potential for a disagreement to emerge.' I am simply saying: if that is the intent, well, why not spell it out in the legislation?

CHAIR—Thank you. I was not thinking of that particular example.

Senator MARK BISHOP—I have two issues to raise. The first arises out of your discussion on old instruments. You identify provisions in the bill for expiry provisions and then you refer in your third paragraph to old instruments living on indefinitely. Can you tell me why you assert that there are no copies of the old instruments so that people, if they are so interested, cannot identify exactly what benefits or otherwise apply to them? I would have thought there would have been a registry file or a consent order or whatever the document would be that originally created the instrument that would be extant in some forum, and I would be much surprised if it was not. Secondly, can you give the committee some idea of the scale of the problem in terms of old instruments living on that you assert exists? Thirdly, in that context, if benefits derive to either employers or employees from extant old instruments, apart from the express provisions that already exist that take those benefits away, what is the justification for further removing the benefits? Also in that particular context, how are either employers or employees who are currently in receipt of benefits under old instruments to protect their future interest in those benefits?

I will just remind you of that recent discussion in the press in that context, where the relevant Defence Force instrument governing conditions of employment for SAS soldiers was modernised and old benefits were abolished with full knowledge, and some SAS people were identified in the press as receiving no benefits into the future. That is the problem that can emerge. So could you respond to those issues, please.

Prof. Stewart—Yes, certainly. Firstly, in relation to what I was saying about there being no copy of an agreement available, I am not referring here to all transitional instruments but to some. I will just go back to an example I gave earlier to explain, and that is a preserved state agreement. So let us say that in late 2005 an agreement was made between a union and an employer in New South Wales under the terms of the New South Wales Industrial Relations Act. That employer is now a federal system employer. On 27 March 2006, that agreement was turned into a preserved state agreement. But the provisions that turn the agreement into a preserved state agreement are not confined to the original terms of the original agreement. You can certainly look up the original agreement. But the preserved state agreement is deemed to include not only the original agreement but also any award provisions that were operating in parallel with the agreement, and it is also deemed to include certain statutory provisions that might have been operating in parallel with the agreement.

There is no official copy of any preserved state agreement. To work out what is in a preserved state agreement, you have to go back and know exactly what the position was on 26 March 2006, you have to be aware of which awards were in force at the time and which provisions in those awards were or were not overridden by the relevant agreement and you potentially have to hunt up some statutory provisions. Now, in New South Wales that would not be too many, but in Queensland and Western Australia in particular there might be some important statutory provisions preserved in that way. So that is a notional instrument that cannot be looked up and potentially—

Senator MARK BISHOP—You say ‘cannot be looked up’, but the relevant parts that you refer to, either actual or deemed, can all be, with simple research, examined and collated to come to a—

Prof. Stewart—Can I disagree, Senator, with the assertion of ‘simple research’. An expert would have relatively little trouble. An expert who knows how to use the research databases which are now available could go back and dig out the terms of the relevant legislation that were in force at the time. There are databases, at least at the moment, of awards that were in existence as at that date, so you could go back and look at that. Then you would do a comparison exercise, go through the agreement line by line, work out which clauses in the award—but I hope you can see where I am going with this.

Senator MARK BISHOP—I can. I understand your point now. The only point I would make to you in response is that, once upon a time, that is what research officers did.

Prof. Stewart—Absolutely—and, if you are an experienced operator in a trade union or an employer association, you can do this. If you are a small business, you have little hope of being able to do this.

Senator MARK BISHOP—I take that point.

Prof. Stewart—If you are an unrepresented employee, even a suburban solicitor, you are going to be struggling.

The second question related to the scope of the problem. Clearly, over time there will be fewer and fewer old agreements. We certainly expect that in the course of the next four years most existing collective agreements will be replaced. But there is undoubtedly the potential for what may be a minority of agreements to live on. My argument would be: even if it is only a minority of instruments, why are we allowing the remnants of this old and more complex system to live on? Why can’t we get to a point—just as we have done with the modernisation of the award system, or will have done—where, if you are bound by an agreement, you can actually look it up and find the text of the agreement as it stands today?

The question of loss of benefits I would answer in two ways. I am not proposing that benefits of old agreements be lost; I am proposing that there simply be a process whereby those old agreements, if they are to live on, have to at least be vetted and modernised. It is already open, after the expiry date of an old agreement, for either party to terminate it. If it is an individual agreement they can unilaterally terminate it. If it is a collective agreement they can go to Fair Work Australia, as we have been discussing, and ask Fair Work Australia to terminate it in the public interest. So it is already the case under the transitional bill that these old agreements can be brought to an end. I am simply proposing that there will come a point 4½ years from now where, if that has not happened, they die a natural death.

Senator MARK BISHOP—On page 4 of your submission you have two dot-point recommendations as solutions to the problem you have identified. Would you also favour an own-motion conversion power in FWA to address the problem?

Prof. Stewart—Yes. I see no reason why that could not be done.

Senator ABETZ—On that point, can you think of any arguments or have any arguments been offered to you against your recommendations on page 4 that Senator Bishop has just referred to?

Prof. Stewart—The only thing I am aware of—and I have not read it—is the submission of the Australian Mines and Metals Association. I have seen reports of it. I gather I arrived this morning just in time to miss Mr Platt taking aim at my submission. As I understand it, AMMA’s view is that there are old agreements around in the mining industry which provide a valuable set of benefits and safeguards and they do not want them disturbed. Exactly the same argument was used by AMMA in relation to enterprise awards and those arguments were sufficient to persuade the government to maintain enterprise awards—but with the crucial rider that they have to be modernised by the end of 2013. I emphasise that I am not advocating getting rid of old agreements as such; I am advocating getting to a point where if an old agreement is still in place and if there is still a good reason to have it in place it will, at least, be in a form that is consistent with the National Employment Standards and in a form that can be consulted by those parties who are affected by it. I believe that the difficulties with this proposal are being exaggerated, if I can put it that way.

Senator ABETZ—I must say I was delighted that you used the Spokey Dokes example, because in the government’s explanatory memorandum we at least have an admission that there may be circumstances where there is a longstanding enmity between two particular unions. I place that on record as acknowledgement by the government of that situation. In relation to section 137A, you are saying that there is a lack of clarity at the moment as the legislation is drafted. That is your concern?

Prof. Stewart—That is correct.

Senator ABETZ—And you believe that there should be the possibility, where there is a probable dispute, that that would be an appropriate mechanism to trigger—I think you used that term—an application?

Prof. Stewart—That is correct. I believe that that is the government's intent. The reference to potential disputes that appears both in the explanatory memorandum and in the department's submission to this inquiry seems to me to suggest that what the government has in mind is that there must be a dispute, but that can include a potential dispute. I am simply proposing that if that be the case it should be spelt out.

Senator ABETZ—Because the example that is provided in the explanatory memorandum could well be a situation where the union that is currently in the workplace is not aware of the design of the other union to enter that workplace, because that other union has gone to the employer for discussions in relation to the issue, but the probable dispute is likely to occur if that does arise. But that would provide, I suppose, sufficient evidence that there is the probability—to use the language of the old legislation—of a dispute arising, in your view?

Prof. Stewart—That is correct. It seems to me that the Spokey Dokes example, as it is presented, is more accurately described as involving a potential dispute than an actual dispute. I do concede that you can give the term 'dispute' a sufficiently broad meaning that it might apply in that situation, but if it is intended that it definitely should apply in that situation then why leave that to the vagaries of the interpretation of the word 'dispute'.

Senator ABETZ—Yes. Thank you for that; I think it is a well-made point. In relation to award modernisation, I note your comments that, when you undertake an exercise such as this, someone is going to be worse off. I think that stands to reason and I will not be tempted to make the political comments in relation to the promises made by the Deputy Prime Minister. But can I ask you: in relation to the phase-in changes, or your suggestion that the changes potentially be phased in, could that simply be by way of amending the ministerial direction to the AIRC without the need for us to amend the transition bill?

Prof. Stewart—I think there is no need to amend either the transitional bill or the award modernisation request. The provisions under which the commission is currently operating are the provisions in part 10A of the Workplace Relations Act. Those provisions will continue in effect until award modernisation is completed. Those provisions already allow for ample discretion to the commission to phase in arrangements. In particular—and I cannot quote you the exact section number—there is a provision which makes it clear that, for up to five years after the commencement of a modern award, it will be possible to retain differences between states and territories. That will be absolutely crucial, for example, in industries such as retail, hospitality—

Senator ABETZ—And the restaurant and catering industry.

Prof. Stewart—Absolutely. The only point I am making is that the commission already has the power to do this. It would be better to just let it get on and propose something. It is planning to propose a set of transitional provisions for the phase 1 and phase 2 awards. Those will be put out for public comment, parties will respond, and the commission will gradually finalise its decisions by the end of the year. This is a sufficiently complex process and the arguments are sufficiently different from award to award, from industry to industry, that they are better dealt with award by award rather than by trying to have blanket provisions in a bill such as this one.

Senator ABETZ—I take your point, and thank you for that. Can I also ask you about your reading of the bill in relation to the opportunity to make changes to modern awards. As I understand it, a modern award will be up for review every four years as a matter of course. There will be an interim review after two years. There is also provision, as I understand it, if there is ambiguity, for parties to go to Fair Work Australia. But what about in circumstances where there is an unintended consequence in the drafting? I go direct to the Australian Industry Group submission in that regard. They are saying that they have not been able to identify a particular clause in the legislation that would allow any party to go back to Fair Work Australia and say: 'Look, something's been overlooked here. We need to amend it, and it's in everybody's interest that we not have to wait till the two-year general interim review time-frame work.'

Prof. Stewart—There are certainly provisions in relation to one class of situation where that might occur, and that is where there turns out to be some sort of a mismatch or problem arising between the provisions of a modern award and the new National Employment Standards. The transitional provisions bill quite explicitly gives a power to Fair Work Australia to amend a modern award in order to resolve that kind of problem. But I take the point that there could be a situation where something has been overlooked in the course of award

modernisation—that would not be surprising. I echo what Mr Smith said earlier about the job that the commission is doing. It is doing a tremendous job in a very limited time frame. I think it would be useful to have some sort of capacity to deal with an entirely unintended consequence. The problem that I see, though, in drafting that kind of provision is in avoiding that turning into a general appeal mechanism. What we do not want is to seek Fair Work Australia spending all of 2010 in effect hearing appeals against decisions that those same members gave while they had their AIRC hats on during 2009. Given that I have already undertaken to come back to the committee on one other matter, I would be happy to look at the existing provisions and identify whether I feel there is a provision there that could be used for that purpose and, if there is not, what kind of provision might usefully be inserted to pick up that kind of unintended consequence.

Senator ABETZ—If you could I would be indebted to you for that. I note your comment about the potential danger of opening the floodgates if you were to have a clause for unintended consequences. I think that was nearly the thrust of the Australian Services Union submission to us—that there were certain things that they were absolutely surprised by in the modern award, such that the scenario you suggested may well be played out. So, if there were to be such a clause, it would need to be a significantly refined and heavily defined and articulated clause which ensured that there were great restrictions placed on the definition of 'unintended'. Thank you very much.

CHAIR—Thank you, Professor, for your submission, your undertakings to provide us with some more information and your presentation to the committee today.

Prof. Stewart—Thank you.

Committee adjourned at 12.27 pm