



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND
WORKPLACE RELATIONS

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

THURSDAY, 30 APRIL 2009

CANBERRA

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

Thursday, 30 April 2009

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

Substitute members: (As per most recent Senate Notice Paper)

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, Bilyk, Collins, Fisher and Marshall

Terms of reference for the inquiry:

To inquire into and report on:

Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

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Committee met at 9.03 am**ANDERSON, Mr Peter, Chief Executive, Australian Chamber of Commerce and Industry**

CHAIR (Senator Marshall)—I open this public hearing. On 9 March 2009 the Senate referred to this committee an inquiry into the provisions of the Fair Work (Transitional Provisions 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 employees, employers 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. I thank witnesses for their understanding and accommodation of the changes made today so that Senators were able to attend the funeral of the former deputy clerk yesterday afternoon. I welcome the witness from the Australian Chamber of Commerce and Industry. Is there anything you wish to add about the capacity in which you appear today?

Mr Anderson—I register an apology on behalf of Mr Daniel Mammone, our manager of workplace relations, who was scheduled to attend by teleconference. He is ill with influenza—not the swine flu but pure Australian influenza—and is not able to be here.

Senator ABETZ—We wish him a speedy recovery.

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

Mr Anderson—No, there are no alterations to make.

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

Mr Anderson—As senators would be aware from both our submission on this bill and earlier submissions on the Fair Work Bill, employers, through ACCI, have had a number of significant concerns with the government and the parliament on the policy frameworks and content of the fair work system. Although a few of these concerns were remedied in the legislative and prelegislative processes, many remain in whole or in part. As strongly as many in industry hold those views, it is equally our view that the new system, which is a reality, should be given every chance to operate in as smooth a manner as possible. That would be in the interest of the economy. In itself, that would be no small challenge given the dimensions of the recession impacting our economy and the labour market and given the terms of the new IR system. Communication and information programs by governments and business organisations such as ours and our members' have an important role to play, and the government's recent announcements in this regard are welcome. But for the fair work system to commence with a minimum of fuss, self-evidently rules need to be set as to the status of industrial arrangements in place immediately prior to the operation of the fair work system, and those rules need to be fair and practical. This is where the Senate comes in. This is the focus of the bill, and we believe a transitional bill needs to be enacted.

The bill before us is complex, in some cases necessarily so—for example, because there have been so many system changes in the past, because some past systems were too complex, because we are still trying to integrate state industrial relations systems into a national system and because rules need to be made for many different forms of past industrial instruments that exist in the economy. In other cases, though, the bill is unnecessarily complex. Perhaps the most avoidable complexity is that, under the bill, we face, indeed, two transitional periods: a set of rules for the six months from July to December 2009 and then a different set of rules from January 2010. This is a direct consequence of government deciding to bring large parts of the fair work system into operation six months earlier than the originally intended date of 1 January 2010. We consider that this was a mistake in policy terms. Bringing forward labour market re-regulation in a time of recession is hard to fathom. In operational terms it adds to the complexity I mentioned, and we believe that the Senate ought provide one common operative date that would be easier in terms of implementation: the first full pay period on or after 1 January 2010.

Notwithstanding that issue, the bill has been the subject of some consultation. Some of its provisions are agreed and agreed by us; however, we differ from the government in a number of areas, and the Senate should amend the bill accordingly. None of the amendments we seek through our submission affect in any way the

integrity of the government policy. They would make the transition fairer and smoother. Unless the transition is fair and smooth, the system will get off on the wrong track with many employers, even those amongst our own membership and those who more generally take no interest in the policy debates we have in this place or the political debates that senators have. Our submission provides details on the variety of matters we raise. I will simply refer to three major points for the purposes of this opening statement.

Firstly, we do not agree with the terms of lawful existing agreements being retrospectively varied on wages or conditions by new wage rates in modern awards or the legislated conditions, called the National Employment Standards. We believe that this is unfair as this proposed arbitrary rule would alter the balance of negotiations on wages and conditions that employers, unions and employees settled on for the duration of those agreements. If the Senate does not agree with the primary amendment we suggest to cure this problem, we have proposed a number of lesser amendments. Our attempt is to provide a constructive way through. These matters are addressed in paragraphs 22 to 68 of our submission.

Secondly, we believe it is necessary that both of the ministerial directions—that the new modern awards protect employee disadvantage and that they are not intended to increase employer costs—be legislated. The bill proposes to legislate only the employee guarantee through take-home pay orders, and that has been a focus of this committee's hearings in a number of previous days of hearing. In doing so, we believe the legislation is unbalanced and unfair. This is no small or hypothetical problem. As the committee has been informed by some previous witnesses and as we know from the draft modern awards, some key industry sectors with many small business characteristics will face significant indirect and direct labour cost increases simply as a consequence of what was meant to be a regulatory clean-up. Even many past consent awards between unions and employer bodies are to be set aside through that process. Those businesses expect the honouring of the ministerial commitment and the protection of their parliament as much as employees do. In some cases that will occur, but in many cases it will not. These issues are expanded in paragraphs 71 to 96 of our submission, with paragraph 94 again setting out some alternative positions.

Thirdly, representation orders should be able to be made in advance of a demarcation dispute actually arising. Agreement-making processes and commercial contracts completed or largely completed prior to 1 July should not have to be repeated or renegotiated. These are some practical matters upon which the Senate too should focus. To require renegotiation or the repetition of process would be a waste of time and resources and will create uncertainty where none need exist. The bill generally applies this principle quite well but fails to do so adequately in two areas—the bargaining rules and the rules on the transfer of business. Paragraphs 113 to 119 and 128 to 133 of our submission address this point. In each of those areas of concern the Senate can prevent the transitional rules for the fair work system adding their own extra compliance and start-up costs beyond those that would be imposed as a consequence of the substantive bill. Unless we fix some of these problems, an unnecessary degree of angst is likely to be felt by many employers despite the government's intention to start the system off on the right note and despite the best endeavours of the business organisations to do so. That concludes my opening statement.

Senator JACINTA COLLINS—I want to pick up on one of the points that you have just covered. We discussed this yesterday. There are a few different employer positions, but in your case it is that the take-home pay order should be complemented by some type of arrangement to deal with an increase in employment costs for the employer. I have gone to your submission and the section we are dealing with, take-home pay orders, but what we were asking for yesterday and have yet to receive is something a bit more concrete about how that might occur. In the take-home pay orders case you have a discrete unit—as in one individual—a discrete set of circumstances, which is much more difficult to assess than the case of an employer and a claimed increase in employment costs across their workforce or across their circumstances. I am wondering if ACCI has given any consideration to how Fair Work Australia might apply such a test.

Mr Anderson—Since the development of the submission we have given some more thought to that, and ultimately that type of concrete conclusion or consideration needs to be made as a consequence of any consideration of the submission we make. Before coming to a specific suggestion, I will just clarify one aspect of your question—that is, take-home pay orders can be made in respect of a class as well.

Senator JACINTA COLLINS—I understand, yes.

Mr Anderson—and I suspect in many cases the applications that will come before Fair Work Australia will relate to classes of employees.

Perhaps one of the best suggestions we have assessed is to introduce a further element into the exercise of the discretion by Fair Work Australia. In assessing the terms of a take-home pay order, rather than Fair Work

Australia just considering the matters that relate to employee disadvantage or employee disadvantage within the group they could also consider, in making the terms of that order, the impact on the costs of employers in that group of making that order. In other words, there are some circumstances here where there are going to be some trade-offs. The difficulty the Senate has, and the difficulty we all have, is that giving effect to the proposition that no employee will be disadvantaged comes into conflict with the proposition that no employer's costs will rise, because it is axiomatic that the employee disadvantage being cured almost inevitably involves the raising of the employer cost. It is the employer cost that flows from curing the disadvantage but also from the operation of the modern award in different terms to what previously applied.

So either you create a separate stream where orders can be made curing the employer cost—and that would be our preferred position because that would give clear expression to the ministerial direction; but it will have the flow-on consequence of then asking, in making those orders, what you do with employees who are disadvantaged as a consequence of those orders, which is the flip-side problem of what we are trying to determine here—or you deal with the employer cost issue in the context of deciding what the terms of any take-home pay order will be. Whilst that is not the preferred position because that almost puts employers in a position where they would have to be carrying the onus of arguing that you should moderate the take-home pay order because of our costs, that would at the very least be consistent with the way in which the government has framed this legislation, because it has obviously decided not to go for the former option that I mentioned, our preferred option. But at the moment there is no exercise of discretion which goes to the question of employer costs in the terms of making the take-home pay order, and we think that is, at the very least, where the Senate can try to cure this problem.

Senator JACINTA COLLINS—But there are other elements of the act that do take into account employment costs.

Mr Anderson—There are some broad objects of the act that will go to questions of productivity and economic application, but those objects are all, in their own terms, balanced against other objects which will ensure that modern awards operate as a fair safety net and the like. Where you have a specific jurisdiction created—that is, the making of a take-home pay order—the capacity to try and use a very generic object as the leverage to say you must moderate your take-home pay order because of that object is a very difficult argument to put because it is an argument easily defeated by reference to other objects which will counter that economic or commercial object.

Senator JACINTA COLLINS—Let us just explore for the moment a potential assessment along these lines. I will go back one step first, though. Yes, you are right—to try and ensure that there is no disadvantage, the obvious trade-off now is take-home orders as opposed to guaranteeing someone's complete set of conditions. That is one trade-off on that end. From the employer's point of view I do not think it is fair to say that there has been no accommodation, because there is the allowed five-year phase-in period as well in terms of shifts in modernising award processes. That is obviously an element designed to try and phase-in the impact of shifts in employment costs.

Let us just explore a particular situation. Let us say employer A has an increase in their hourly rate of pay for a particular class of employees but a decrease in their casual loading. How do you apply that balance of their employment costs to a take-home pay order for a particular employee who may not be a casual?

Mr Anderson—This is precisely the sort of thing that has been the product of determination by the AIRC when it has come to determine some of these award provisions in the first place where it has conducted merit hearings on those very issues. The determination of whether or not you may, for example, provide for a higher rate of pay in an award in return for a reduction of a penalty rate—

Senator JACINTA COLLINS—No, no—I understand those situations.

Mr Anderson—involves those trade-offs, and those trade-offs are not unknown to the industrial relations area.

Senator JACINTA COLLINS—Yes, I know. You and I know them well.

Mr Anderson—In fact, in a past life I was involved in some very worthy agreements where we did that. So there are going to be some trade-offs. But where you are—as I suspect we will be—dealing primarily with groups of employers and groups of employees, when we come to the question of take-home pay orders, then inevitably there are going to be winners and losers inside even that category of employees, in respect of the take-home pay orders, because not all employees work the same roster and, at certain points in a working roster, there are higher remuneration entitlements than at others.

Senator JACINTA COLLINS—Yes, and rosters will change.

Mr Anderson—And so there will be some averaging factor that Fair Work Australia will apply in any event when it deals with take-home pay orders, even under the legislative proposal we have before us. What I am saying is that the fact that there is going to be some averaging factor applied in respect of determining the orders, as the government would propose in the legislation, means that it is not a great leap to say that you have to average a range of other considerations in the terms of the order, and those other considerations are the costs that are going to flow through to employers as a consequence of the operation of the modern award.

Senator JACINTA COLLINS—I am sorry—in the example I gave you I probably gave you the wrong example of where the casuals should be. Say that, for a class of full-time employees, there were a change to their penalty for working Saturdays, so their take-home pay would be reduced under the new arrangements, whereas the penalty rate for the casuals in that workplace has risen from 20 per cent to 25 per cent. The employer, across its workforce, would now have additional employment costs. But the full-time staff, who would previously have been paid X amount, now face a drop in their pay unless they receive a take-home pay order. I do not think it is envisaged that Fair Work Australia would say, in relation to their claim for a take-home pay order, ‘Because the casuals are getting more now, we are not going to grant you the amount that preserves your previous rate of pay.’ I do not think that is envisaged at all.

Mr Anderson—No—on that example, I do not think that is envisaged. That identifies one of the unfair aspects of the way in which this proposition would work through, because it would allow a union to, effectively, just narrowly construct a specific class of employees—in your example there, the full-timers who would receive a lower remuneration—as the class in respect of whom the take-home pay order should apply.

In assessing that question, no regard under the current framework would be given to the fact that a member of Fair Work Australia could receive material or be influenced by the fact that the employer is paying higher costs for retail workers or the other workers on a Saturday. The application by definition only narrows in on that one form of employment category in the workplace that is disadvantaged, that is the subject of the take-home pay order, and the issue of the employer costs cannot bear any relationship to the making of that order. It is very much directed at ensuring that those individuals are not worse off, notwithstanding the fact that the employer is worse off in respect of the total employment by that employer.

Senator JACINTA COLLINS—Yes, and I think that is probably where we will have to conclude on a difference of opinion because I think the phasing arrangements in the system are what accommodate those concerns.

Mr Anderson—Phasing is not something that industry opposes, but I think we need to be really clear about this. To a certain degree, phasing allows industry to prepare for the higher cost and it delays the impact of the higher cost, but it does not prevent the higher cost applying. We have to go back to the proposition that if this is not intended to increase employer costs then phasing does not cure the inconsistency between the ministerial direction and what will ultimately be the outcome as a result of the modern award process in some industries. I am not saying in all industries, and I think I should be clear about this too. The real problems that are occurring here are in the industries where there has been a heavy award reliance on the old state award system. Many of these problems arise from trying to remove state differentials. Some of these problems arise from then trying to take those industries and put them into mega-industry descriptors—the restaurants industry is an example of that. But it is not all industries where this is insoluble. Where you fundamentally had industries operating under a national structure the problems are less acute. Where the problems occur—

Senator JACINTA COLLINS—In part, the problems are less acute because they have been dealt with in bargaining over the last five to 10 years.

Mr Anderson—Some of the more heavily unionised industries have been dealt with through bargaining. The industries that come from the state IR system tend to be lower unionised industries, service industries, and, critically for this process, they are the industries which are very labour-intensive and very award reliant.

CHAIR—We have had evidence that there is a lot of advantage to employers too. In fact, the AiG yesterday were happy with some of the outcomes employers have received through the award modernisation process. Are you saying that award modernisation has resulted in across-the-board extra costs or are you saying it is more balanced than that?

Mr Anderson—I will follow on from my last answer to Senator Collins. There are some industries, particularly where they have traditionally operated under a national structure, where they will be able to achieve satisfactory results or results which do not impose acute new costs. But we cannot try and discount the

impacts in those industries where there are some acute new costs by the fact that in other parts of industry they may be able to manage this process. The ministerial direction did not say that we are going to trade one industry sector off against another. More particularly, in the industrial relations area we never have said, 'Because in manufacturing X outcome has been achieved with satisfaction, we will flow that outcome onto the service industries.' We have never done that in the industrial relations system. We have conducted hearings on the merit in the service industries and examined what the appropriate impact of new or changed award provisions will be on employees in those industries.

Ultimately that is the right thing to do, because the fact that you may not be imposing extra costs, costing jobs or putting some employers at risk in one industry does not make things any easier in the other industries. I think that we are looking at award structures which are independently operating inside industries, and they have to be examined that way. That is the way the industrial relations system has always done it.

CHAIR—You would have preferred, then, not to have the award modernisation process.

Mr Anderson—No. I think what has occurred is that the award modernisation in some of these industries is biting off more than it can chew at the one time. It is trying to do three things. It is lifting the safety net to what the government says the appropriate award safety net should be, including some matters that were removed from awards in the past and adding some new things. That is relatively straightforward.

The second thing it is trying to do is to remove state differentials, and this is where it gets complicated and where the costs start to flow, because when you start dealing with those service industries that have traditionally had very different state award structures—in retail, hospitality, tourism and leisure industries—the removal of state differentials, by definition, is going to involve some very significant cost issues depending on where you pitch the new award. That will not be the case in those industries that have been operating under national awards, because they have not got state differentials to remove; hence, they will still be able to get through that door reasonably satisfactorily.

The third thing it is trying to do is to create a national award structure for larger groups of industries—in other words, to try and reduce the total number of awards—so restaurants get tied with hotels into a hospitality award. So you have industry sectors that have always been either differently or largely differently analysed for the purposes of their award provisions brought together—more particularly, industries with some very different trading and financial circumstances—and that involves real problems in trying to marry costs as well.

So, in doing all those three things at once, we will have problems in the service industries. We are not opposed to the process of creating modern awards, but the process in those service industries has been too ambitious and too truncated. It fundamentally has not allowed some of the merit-based issues to be dealt with, and that is, I think, part of the angst that we see—not just the draft outcomes but the fact that these industries have not been able to have proper hearings conducted with the evidence that is required, particularly in the stage 1 process, on some of these issues.

Senator ABETZ—I think that is a good starting point. I had a grab bag of questions to ask you, but allow me to start with the modern award process. As I understand it, there will be a review every four years and an interim review after two years. The suggestion has been put to this committee that there may well be, because of the ambitious project that it is, unforeseen errors or consequences and that, as a result, there should be an opportunity to revisit or reopen the modern awards prior to the two-year interim period. I understand that there are sections in the legislation dealing with issues of ambiguity and, of course, you have the problem of potentially opening the floodgates with everybody saying that every issue that they want changed was an unforeseen consequence. Is that something that has exercised ACCI's mind and, if so, what is your solution to getting a sufficiently tight definition of unforeseen or unintended consequences?

Mr Anderson—It has exercised our minds, and there does need to be a mechanism for some variation to deal with either unintended consequences or consequences which are of such a serious nature that there is damage to the interests of the industry or the employees in that sector. The first thing I would say about that, though, is that you really do not cure a problem by saying, 'We're likely to have a problem, but let's make the modern awards and then after the event try to cure the problem.' It is much more difficult to alter an established instrument than it is to get the instrument in the right shape in the first place. We think that in some of the areas it is self-evident that the ministerial direction is not able to be given proper effect to because of the issues that we have already discussed this morning. It would be unwise for those awards to come into operation, for those higher costs to be imposed to cover those additional payments, some of which are windfall gains for employees. It has to be understood that this is not the product of working differently or the like; these costs are imposed simply as the product of changes in the mix and the nature of regulation. It is much harder

and much more difficult to take those issues away or to rectify those issues later in the day, because you then have to ask, 'Do we need transitional provisions or some measures to ensure that people who have been relying on those additional forms of income are not themselves disadvantaged?'

Senator ABETZ—I agree with all that you are saying. I have a hunch that we will not necessarily be able to do anything about that in the sense—

Mr Anderson—I understand that. The business organisations are working in the commission to bring about as best outcome as they can by 1 January 2010. But there is no flexibility in the ministerial direction in its current terms in that regard and we believe there ought to be.

Senator ABETZ—That can be remedied then just by a ministerial direction, not necessarily by an amendment to the legislation?

Mr Anderson—It can be remedied in both ways. The commission is acting on the basis of a ministerial direction. A ministerial direction could indicate that where there are significant costs to industry or a sector that would arise from the operation of a proposed modern award then that proposed modern award not come into operation on 1 January and that an existing award structure operate until such time as Fair Work Australia creates a proposed modern award that meets the terms of the ministerial direction.

Senator ABETZ—Of course, there would have to be a two-way street as well whereby if employees suffered a huge loss that was unforeseen then they could also make application?

Mr Anderson—Absolutely. This is the dilemma. The stage 1 process, particularly, which dealt with some of these very significant awards, did not allow for what we would see as merit based hearings that are necessary to properly analyse the balance of interests. To come back to your question about postoperative provisions, the risk we must avoid is providing such a gate for a review which involves Fair Work Australia dealing with substantive issues about award content rather than simply the so-called unintended consequences. My dilemma, though, is that the phrase 'unintended consequences' is a very narrow term in this context. Some of the consequences we have been talking about this morning are, at the very least, foreseeable. We are foreseeing them right now. So if unintended consequences means things that you could not have foreseen at the time that the awards came in then it is hardly unintended to say that there will be some cost increases. In fact, a number of commission decisions in these critical award areas have clearly said, 'Yes, we understand there will be some costs to employers that flow from the consequences of our decisions.'

Senator ABETZ—Time is limited, so if I can quickly ask about representation orders. As I understand the current legislation, the new power can only be exercised in relation to a dispute. A suggestion has been put to us that that should be expanded. In fact, if you look at the explanatory memorandum on page 129, you will see there is a cameo or an example in a box of Spokey Dokes, which, interestingly, Senator Fisher, the government put in its own explanatory memorandum: 'aware there is a longstanding enmity between two particulate unions'. So the government acknowledges this actually exists in real life, which is interesting. I do digress. It says that in circumstances such as that you should be able to get an order, yet the legislation says 'only in a dispute'. Professor Stewart suggested to us that it might be worth while to include the words 'a threatened, impending or probable dispute' to cover the Spokey Dokes example that exists in the explanatory memorandum. I wonder whether you have any views to offer in relation to that?

Mr Anderson—That would be a proposal that we support. I am aware of that suggestion. We support it because, in looking at this part of the bill, we have to be as pragmatic and as practical as possible. I think the government in a number of areas has tried to be practical in a way in which it has dealt with some of the transitional issues. This is an area where I do not think you can just sit on the proposition and say, 'We will allow the full effect of individual choice to apply, irrespective of what the consequences will be, irrespective of what is just about to hit.' The government has put some public interest considerations into some other aspects of both the substantive bill and what we have before us. This is one of those areas where you need to be aware that there are some broader interests that can flow and be affected by a demarcation dispute of this type or other types. I think the language that has been suggested to the Senate committee is language known to the industrial relations system. The Australian Industrial Relations Commission's past generic jurisdiction over industrial matters related to not just disputes but threatened, pending or probable disputes. That would at least provide a capacity for those issues to be brought before Fair Work Australia. It does not automatically deny the rights that individuals would have to associate themselves as they would wish. Ultimately, the impact of those associations would be a matter that Fair Work Australia would determine. That has been the way in which the former commission has in the past dealt with many demarcation disputes. I do not think it is a particularly controversial proposal, given the history of the industrial relations system in Australia.

Senator ABETZ—The CCIWA, the Chamber of Commerce and Industry, Western Australia have put in a submission. On page 8 they point out one of the difficulties with a no detriment rule:

In the health industry, union and employee collective agreements often contain terms that provide an employee 6 weeks annual leave whereby 2 weeks constitute leave in lieu of public holidays.

Currently, under the proposed no detriment rule, they are asserting that an employee would continue to receive six weeks annual leave because it is more favourable than four weeks annual leave provided by the National Employment Standards. But the public holiday requirements will also be imported, making life very difficult. I wonder whether you had read that, whether you share those concerns and whether you can suggest any remedies. As I understand it, time is limited, we are not getting the Western Australian Chamber of Commerce and Industry to appear before us, and there is no criticism of that.

Mr Anderson—Through the chair, the Western Australian Chamber of Commerce and Industry have been a party to the development of our submission. They are a very substantive business organisation in the country, with strong membership, including in the health sector. We share the concern and the issue they have raised and mirror that issue in broad terms, without using that specific example, in paragraphs 43 onwards of our submission. Paragraph 49 in particular is the core of what we say about that matter. The legislation proposes the no detriment test to be a line by line test, not a global test. If it is applied as a line by line test then precisely that consequence arises, and that is a very unfair consequence.

Again, it is that very sort of thing that, if you had a merit based assessment before the commission or Fair Work Australia, would invariably get factored in by the commission. The commission does not have a history of just wanting to provide windfall gains. Where the commission does provide a variation to awards in these sorts of circumstances, the commission has made it clear why it is doing so. And, where a particular benefit in an award is provided almost as a quid pro quo for another provision, it is extremely unfair to be providing a no-detriment test which is a line-by-line test which will result in the employer effectively providing the benefit but also having to no longer get the benefit of the quid pro quo.

Senator ABETZ—I have one final question before Senator Fisher asks her questions. Can I ask you about the impact, particularly on small business, of award modernisation in relation to an example that I am personally aware of—let us say, the pharmacies in Western Australia. What impact will they encounter?

Mr Anderson—The small business impacts will vary across the economy—for the same reasons that Senators Collins's and Senator Marshall's questions to me indicated—depending how the system would apply broadly. We know that small businesses in Australia are predominantly in the service industries and we know, for the reasons I have explained in my evidence, that the service industries have historically been operating under state industrial relations systems and have exactly the industrial relations history and characteristics that will make them very susceptible and vulnerable to cost increase as a result of the creation of modern awards, at least in the way in which the process of creating modern awards is currently going. So there will be significant cost increases in some small business sectors of the Australian economy, and they tend to be the labour intensive industries.

Senator ABETZ—Such as the pharmacy sector which, faced with those sorts of imposts, may well limit their hours of opening, which of course will reduce a very important community service. But I say that more by way of comment.

Mr Anderson—Can I just respond simply to that one proposition. The award system has never been designed to try and change the way the economy should operate and it should not be designed to do that. The award system should be there to provide a safety net for people who are working in the economy. If the effect of a modern award is that the way a business has to open or close and provide services in the economy is changed, that is a perverse outcome and should be of concern to the Senate.

Senator FISHER—Mr Anderson, regarding award modernisation you have said, 'you don't cure a problem by delaying it'. Can you explain why ACCI is suggesting that? I understand your first proposal is that the bill be amended so that no modern awards increase costs for employers, but then you go on to say that, where they do, employers should be able to obtain an order from Fair Work Australia to delay the effect of the award or certain provisions of the award if delaying does not fix it. Why is that part of your solution?

Mr Anderson—Delaying does not fix, and I said that in response to Senator Collins's question. The reason we have included that there is we want to ensure employers have the best possible capacity to get what we would see as some fairness or outcomes out of this process, without the potential negative outcomes—where

they are going to occur—occurring all in one hit at one time with the major adverse impact on their businesses and the economy in which they operate.

Senator FISHER—So it is pretty much a last—

Mr Anderson—I want to be clear about our position. Our position is not that you can simply address the ministerial request insofar as it relates to no costs on employers by transitional provisions.

Senator FISHER—Yes.

Mr Anderson—That does not address the ministerial request. The ministerial request will not be met as a consequence of transitional provisions. The transitional provisions will delay and in some cases allow for costs to be prepared for, but they will not mitigate against the introduction of those costs.

Senator FISHER—So that part of the ACCI recommendation is a last resort relief to the problem.

Mr Anderson—It is there to say that we ultimately will not oppose transitional provisions but transitional provisions will not address the application of the ministerial request.

Senator FISHER—Earlier on, in your answer to Senator Abetz you were talking about an amendment in respect of the unintended consequences to the ministerial directive and the legislation. If it is arguable that the commission has not complied with the spirit of the ministerial directive thus far, why would an amendment to the ministerial directive suffice?

Mr Anderson—It is because the ministerial directive tells the commission that it must create these modern awards by 1 January 2010 and they must come into operation by 1 January 2010.

Senator FISHER—Thus far it has not forecast modern awards that do not increase costs for employers, so why would you have faith in it being complied with?

Mr Anderson—It is not a question of having faith. We would like to see the legislation clearly indicate that where there are cost increases to employers modern awards should not come into operation, because those are the terms of the ministerial direction. But if the legislation does not do that we have to look at what other ways we can try to achieve that.

Senator FISHER—Have you put to the minister the proposition that the legislation be amended to so provide?

Mr Anderson—We put the proposition to the government and we are putting the proposition to the Senate, yes. That is precisely what we have done.

Senator FISHER—Have you had discussions about that with the minister?

Mr Anderson—The government has framed its legislation. The government's legislation is in the terms that we have before us, and that proposition is not accepted.

Senator FISHER—Has the minister said it is not doable?

Mr Anderson—The government has said publicly and to business organisations that it believes that the commission and soon-to-be Fair Work Australia is able to address these issues. The evidence that has come from the process so far is that in some industry sectors the commission is able to address these issues, but in some of these critical areas it is not able to do so. The commission has made it clear in its decisions that there are cost increases to employers in those sectors. On the face of it, if the commission has clearly said, 'We intend to do this notwithstanding the cost increases,' our only recourse is to seek amendment to legislation. Legislation should be amended or the direction to the commission should make clear that those awards do not come into operation until such time as those cost increases are removed.

Senator FISHER—To the extent that there are provisions in the bill that allow employers to seek some relief from Fair Work Australia if the viability of the business is threatened, what are ACCI's views of those provisions? Is it possible that there could be problems caused for a business that stop well short of threatening the viability of the business itself which are not addressed in the bill? How do you see the viability provisions operating with an employer having to prove that the viability of his or her business is being threatened? Perhaps you could take that partly on notice.

Mr Anderson—We do not consider those provisions for the potential cases on viability before Fair Work Australia go anywhere near curing the problems that employers will experience in those service industries with cost increases. There are two completely different propositions here—one for business viability, one for increases in labour costs. A business can still suffer substantial increases in labour costs but may for other

reasons be viable, and one cannot simply say, 'We'll allow those labour cost increases to flow simply because it could still be viable.' Those were not the terms of the ministerial direction and would not be true to it.

Senator FISHER—Can you—perhaps on notice if you are not able now—provide some comment about how, if an employer is forced to the wall because of these costs, the employer would be placed to prove so before it becomes a prophecy realised in fact?

Mr Anderson—Past experience of employers in respect of the application of those sorts of provisions in the commission has been deeply fraught and deeply flawed, because those employers effectively have to tell the entire market they are about to go under. That is almost a guarantee that they will go under.

Senator FISHER—So it is a recourse without relief.

CHAIR—I have to bring this to an end. Thank you for your submission and your presentation to the committee today.

Mr Anderson—Thank you.

[9.55 am]

NOONAN, Mr David John, National Secretary, Construction and General Division, Construction, Forestry, Mining and Energy Union

ROBERTS, Mr Thomas, Senior National Legal Officer, Construction and General Division, Construction, Forestry, Mining and Energy Union

CHAIR—I welcome to the inquiry witnesses from the CFMEU. We have received your submission. Do you have any additions or alterations to make?

Mr Noonan—There are just a couple of comments we would like to make in addition. I will make a few opening remarks and then allow Mr Roberts to expand on those. First of all, I thank the committee for the opportunity to make these remarks here today. Our submission outlines two major areas of concern that we have over the bill. The third issue we seek to address arises from oral submissions given to the committee by the Master Builders Association at one of the preceding hearings. We would like to address the issue of the continued operation of Australian workplace agreements and ITEAs, where we believe the situation arises that many workers will be locked into what are substandard employment arrangements for years to come—the very arrangements which were rejected by the Australian people at the last election. In some cases this has and will continue to have the effect of resulting in inequality and injustice in one workplace where we see workers engaged under AWAs and/or ITEAs on substantially lesser wages and conditions than their colleagues. It is our submission that this perpetuates an unfair situation for those people in those workplaces. Our submission contains a number of confidential statements from employees who are in precisely that situation.

Senator ABETZ—For the record, they do not seem to have been included in the submission that we were provided by the secretariat. It is not your fault, but as a result as committee members we have not had the opportunity to go through them. Apologies for that, but hopefully they are being brought up.

Mr Noonan—We are at some disadvantage, then. They are not a large volume of material, and I think members of the committee would be able to familiarise themselves with those documents relatively quickly. It is unfortunate that that has occurred. The second issue that we would like to raise is concern over the provisions concerning representation orders. In addressing that we say that we believe that, subject to the union concerned having eligibility to enrol a classification or class of workers in question, those workers should have the right to be represented by the union of their choice, and this is fundamentally a matter for the workers concerned, not one of union shopping by employers, which is something that we are concerned about.

The other matter, which I just raise briefly in speaking to the third issue that I raised, is the oral evidence given by the Master Builders Association in a previous hearing. Essentially, MBA addressed the committee about concerns they had in respect of the redundancy provisions that exist in the building and construction industry. The comments either misunderstand or misrepresent this issue. The committee should really put little or no weight on that part of MBA submissions. If any member of the committee would like to have further discussion we are happy to expand on that but, in essence, the Master Builders Association appear to believe that a particular award provision existing in the building and construction industry and relating to severance and redundancy was extinguished by the operation of Work Choices.

In fact, the provision remained in the construction awards throughout the period of time that Work Choices existed. As we best understand it, the Master Builders' position is that the provision became not allowable as a result of the operation of Work Choices. That is a matter of dispute, and it is a matter that I think, as MBA said, is in contention in the courts at the moment. There is a lower court decision which is on appeal to the full court of the Federal Court in relation to that. We just make this observation: if the Master Builders had the view that particular provision did not operate then they had the ability to make application to the commission during the period of the operation of Work Choices to have it removed from the award and therefore end all doubt about the issue. But they elected not to do so, rather seeking to argue a question of allowability after the event. We do not concede that argument. We simply make the point that at no stage did the Master Builders ever make application to have the award varied to reflect their particular view of the applicability or otherwise of that provision. I will hand over to Mr Roberts for any further comments.

Mr Roberts—I will pick up on the point that Mr Noonan last made and add to that. It seems to us that the MBA expressed concern about the interaction of the recent full bench decision in relation to award modernisation in the construction industry and the decision that the bench came to in respect of redundancy in

the new modern award. The effect of the Work Choices amendments and some litigation in relation to those amendments are currently a matter reserved before a full bench of the Federal Court.

As we apprehend the MBA submission, their concern was that if the unions or the employees succeeded in their argument before the Federal Court the entitlement concerned could be properly characterised as an incentive based payment or a bonus, as opposed to a redundancy payment. If that argument succeeded then some double counting would be possible, because that payment might arise as an incentive based payment or bonus and as a redundancy payment under the new safety net arrangements.

If that is the MBA's position, we say that the argument is misconceived because the Federal Court is considering exclusively the effect of the Work Choices amendments on the redundancy and severance provisions as they existed in the national construction award during the period of the Work Choices legislation. Once the present act is repealed and is replaced by the new safety net—which will be the NES and the new modern award—the question of the effect of the workplace amendments on the redundancy provisions in the award as it was simply will not arise. So, to the extent that the MBA expressed that concern about a possible double counting, we say it is simply a non-issue.

Can I also briefly raise a second issue alluded to by Mr Noonan and supplement our written submission, again, on the redundancy issue and prompted in part by the submissions that the Master Builders made on this point. I refer the committee to item 5 of schedule 4 of the bill, which deals with the question of whether previous service counts for NES entitlements. As it is currently framed, the bill provides that the general rule is that previous service with an employer does count for NES purposes provided there is no double counting involved in claiming NES type entitlements. However, there is a special rule in relation to redundancy entitlements, which is set out at clause 5(4), and that provision says that, in the case of redundancy entitlements, if the instrument which covers the employment of a person did not provide for a redundancy entitlement as at the Fair Work safety net provision's commencement day—that is, 1 January next year—then previous service with that employer does not count for the purposes of determining redundancy entitlements.

This is an issue that is dealt with in the ACTU's submission but on a slightly different point. The ACTU submission, however, notes that the rationale for that particular treatment of service for redundancy pay purposes appears to be that if an instrument, in particular an AWA or ITEA, has covered the issue of redundancy by cashing up other benefits and removing a specific redundancy benefit then of course their national employment redundancy standard should not apply in that situation. However, if the Master Builders Association are found to be correct in the Federal Court about the effect of the Work Choices amendments on the severance and redundancy provisions in the National Building and Construction Industry Award then the effect of this part of the bill will be that lengthy periods of service both pre Work Choices and during the currency of the Work Choices provisions will not count at all for redundancy purposes in the construction industry. That will have the effect of potentially denying someone with lengthy periods of service—say, 10 years of service—who, come 1 January next year, will be entitled to the redundancy provisions as they have stood since 1989 from receiving a redundancy benefit based on any of that pre Forward with Fairness period of service.

In our view, there is a serious deficiency in the bill involved in that blanket exclusion set out at clause 5(4) and we would ask that the committee give some serious consideration to rectifying that potential problem so that people are not disadvantaged, particularly given that the full bench of the Australian Industrial Relations Commission have now determined the shape of redundancy provisions in the new safety net in the new modern construction industry award. Thank you.

CHAIR—The committee now have the worker statements, though we probably have not had much time to read them.

Senator JACINTA COLLINS—The document we have is stamped 'confidential'—is that the situation?

Mr Noonan—Yes, it has been provided on that basis.

Senator JACINTA COLLINS—That is why it has not been circulated in the book.

Mr Noonan—Okay.

Senator ABETZ—Are these worker statements the ones that Sharan Burrow referred to in an interview?

Mr Noonan—They may be.

Senator ABETZ—Or has there been discussion between you guys and the ACTU? What I am referring to is this. I have received a letter suggesting that, on Sunday, 26 April, in an article entitled 'Workers unable to

escape AWAs' published in the *Sunday Age*, ACTU President Ms Sharan Burrow was reported as saying that she may give evidence in relation to two employees of Austral Bricks. I understand that these two employees were actually named in the article. I do not think their names actually appear on the statements that we have been provided with. But they are from the same employer—namely, Austral Bricks.

Mr Noonan—Yes, I think that is probably correct. I have not discussed the issue with Ms Burrow, but I understand that our branch secretary may have and I think Mr Roberts may have had discussions with the ACTU.

Senator ABETZ—We just have to be careful that, if there is an issue of confidentiality, we do not provide too much identification, other than to say, just for the record, that this letter that I received says that the two employees mentioned are paid a higher hourly rate under the AWA than they would have been paid under the collective agreement and would not have earned more for the hours they have worked had they been engaged under the EBA, despite any claims to the contrary. As with so many of these things, there seem to be two sides to the argument. But thank you for that.

Mr Noonan—If it is of assistance, considerable work has been done by our branch on the very question of that relative disadvantage, and we would be able to provide further information on that if necessary.

Senator ABETZ—The difficulty is that we are dealing with assertions made in confidence. It is somewhat strange that we are given these assertions in confidence but Ms Burrow seems to have been able to talk about two examples publicly in the *Sunday Age*, which means that one side of the argument can be aired quite easily but those of us who might want to hear both sides of the argument are somewhat constrained. But, at the end of the day, I think the issue is that we, as a Senate, need to be careful to ensure that people are not disadvantaged in the way that is being asserted, and then whether that is a real disadvantage or not is a matter that can remain on the sideline.

Mr Roberts—To respond to that, I think that the material that was sent with the submission that you have now received was sent in confidence in the sense that the employees concerned did not want to be identified. I do not think there is any confidentiality attached to the assertions that they make about whether they are or are not disadvantaged. And, if that is the case, as Mr Noonan said we are happy to provide the committee with a more comprehensive and detailed analysis to deal with the issue of whether there is disadvantage in substance.

Senator ABETZ—The first statement I have got is from a person who asserts, for example, that, 'The terms of my AWA are inferior to the benefits provided to other workers on a particular site'—and I will not even name the site because that may identify him. Unless we are able to actually get to see the AWA—and of course there are confidentiality requirements—and able to name that person and put the allegations to Austral Bricks then we cannot get the full story. That is one of the difficulties that we as a committee face. That is the only point I suppose I am making.

Mr Noonan—It is also the case that, based on the article—and I have not discussed this with Ms Burrow or with our branch secretary—there are other individuals who have identified themselves who are not subject to confidentiality; hence the *Sunday Age* article.

Senator ABETZ—But the two in the *Sunday Age*—who have been named, unless I am mistaken—have not supplied a statement to the committee. And the only evidence that we can really deal with as a committee is that which is placed before us. For the people who were mentioned in the article—and I will not name them—we could pick up the phone to Austral Bricks and say, 'What is your side of the story?' But these people want to remain confidential—and we respect that—so we cannot pick up the phone to Austral Bricks and say, 'This is what they are asserting; what is your answer?' If they cannot explain it then I think you guys have an argument; if they can explain it then the argument may not be as strong. So that is all I am saying: that we are unable to really dig deeper to verify the assertions contained in those statements because of their understandable request for confidentiality and the fact that AWAs have confidentiality attached to them.

I would like to quickly ask you about representation orders. Do you agree with the proposition that there is a culture of enmity between some unions?

Mr Noonan—No, I do not agree with that proposition. People may characterise it that way. But I have heard characterisations of enmity between members of various political parties—in caucus and so on—and I do not know if there is enmity between those people.

Senator ABETZ—It is just that it is raised as a genuine issue in Ms Gillard's explanatory memorandum to the parliament in relation to the issue of representation orders.

Mr Noonan—This was in relation to—

Senator ABETZ—Spokey Dokes.

Mr Noonan—I cannot claim any particular knowledge about Spokey Dokes.

Senator ABETZ—Ms Gillard, with her excellent union credentials, having provided us with this explanatory memorandum, I would have thought would have been full bottle on this when she said that, aware that there is a longstanding enmity between two particular unions, an employer might seek an order. So I doubt that Ms Gillard would have just pulled something out of thin air as a non-live real possible example. But you are telling us that that is possibly what she has done. Do you agree with the proposition that an employer should be entitled to go to Fair Work Australia and say, ‘There is potential for a dispute and we would like it resolved before it blows up’?

Mr Noonan—We think there may well be a role for Fair Work Australia in assisting with the resolution of any such disputes that might arise from time to time.

Senator ABETZ—By way of actual orders?

Mr Noonan—If I could just finish—I also think there is a very real role for the peak body of the trade union movement to play in assisting the resolution of those disputes. Our particular concern—

Senator ABETZ—And they will be allowed to make submissions?

Mr Noonan—Yes. Our particular concern would go to a situation where employers, for instance, were able to, if you like, union shop and pre-emptively try and make decisions which would then be imposed on employees who are eligible to be members and are members and wish to be represented by a union other than the one the employer chooses. It seems to us that the primary question of union representation ought to be one for the employees, subject to the eligibility rules of the organisation.

In relation to your question about the desirability of Fair Work Australia making orders, I might just defer to my colleague Mr Roberts and ask him to address a couple of those issues.

Mr Roberts—The act already provides for the commission to have the capacity to make orders in circumstances where those types of issues arise. The act has provided for that capacity for many years.

Senator ABETZ—Can I interrupt you there. The suggestion has been put to us that, for many years, the capacity in the legislation has said not only ‘where there is a dispute’ but also ‘where there is a threatened, pending or probable dispute’ and that that should be imported into this legislation is well. That was a proposition put to us by, I think, Professor Stewart. So I am just trying to sound out the CFMEU in relation to their approach to this.

Mr Roberts—What you have said is correct. The act does currently provide the capacity for the commission to make orders in circumstances where there is an impending damage to the operations of the employer.

Senator ABETZ—And you are happy for that to continue, or you would be agreeable to that continuing?

Mr Roberts—As I understand, that is not part of the debate that we are having about this bill. The existing provisions in the act, which are currently in schedule 1, will remain, but the proposition is that there will be this additional capacity for representation orders to be made in accordance with 137Aa of the bill.

Senator ABETZ—What has been put to us is that as the bill stands the new power can only be exercised in relation to a dispute, and the suggestion is that that should be broadened out to include that phrase ‘threatened, in pending or probable dispute’.

Mr Noonan—And I think our understanding is that the new power in respect of representation orders would be in addition to, not in replacement of, the existing provision, nor would it be used to read it down, as I would understand it. Perhaps that addresses your concern.

Senator ABETZ—All right. In your submission you tell us in the middle of the third page that it is fundamentally contrary to the freedom of association principles. Just so I can get an understanding of the CFMEU’s understanding of freedom of association principles, does that mean that the CFMEU itself acknowledges the absolute right of somebody to decide to join and indeed not join a particular union?

Mr Noonan—The CFMEU strongly supports the International Labour Organisation’s definition of freedom of association, which deals with the rights of employees in respect of union membership and representation.

Senator ABETZ—What does that mean? Does it mean that an employee has the absolute right to decide not to join a union?

Mr Noonan—The ILO provisions talk about, in my understanding, and Mr Roberts is more of an expert in this than me, the right to join and be represented by a union. They are the fundamental provisions of the ILO convention, which has been ratified by this nation and we say should be observed.

Senator ABETZ—That is right. And part of that history is where regimes have disallowed trade unions, and it is appropriate that in this modern world we say people ought be entitled and have a right to join a union. What I am exploring with you, in a country where people do have a right to join a union such as in Australia, should they also have a right not to join a union?

Mr Noonan—Could I just comment that we welcome the fact that you endorse that, because the ILO has in fact found that the legislation enacted by the previous government contravenes that provision and has found so on six occasions. If there is now a recognition that we need to come into conformity with that ILO convention, we would be very happy about that. As a matter of law in this country, people cannot be forced to join a union. We accept the law of this country in relation to that.

Senator ABETZ—Do you accept that that is a good law?

Mr Noonan—Whether I accept it is a good law or not, I do not accept that the laws as they are currently framed in respect of the Work Choices regime and the building industry legislation are good laws at all. I think it is notable that the committees on freedom of association and the committee of experts at the International Labour Organisation, who are charged with interpreting and advising governments on the implementation of ILO conventions, have said on I think now six occasions that the Work Choices provisions and the Building and Construction Industry Improvement Act ARE flagrantly in breach of ILO conventions. This points to the fact that domestic law as it stands is deficient and is contrary to Australia's international obligations. We are forced to accept that the domestic law applies and applies to us as it applies to everyone in society. As to the desirability of that law, we think it is very clear that on six occasions now the domestic laws of Australia have been found by the relevant body to be in conflict with the ILO convention. If you are saying, as I think I heard you say, that it is now accepted by your party that we should be complying with ILO conventions, then we welcome it.

Senator ABETZ—I note that you said 'forced to accept' the law, which would indicate a degree of reluctance. Those that might have more than enough time to read *Hansard* will note that that long explanation and referral back to Work Choices et cetera was all started by a fairly fundamental proposition as to whether or not the CFMEU accepted the right of workers not to join a union. Methinks that the answer indicates what the real stance is and that might explain certain activities on worksites by the CFMEU.

Mr Noonan—Perhaps it will be of assistance if I can clear the matter up. We accept that the law cannot require us to have an individual join the union. We accept that is the law. We accept that we are subject to that law. What I went on to say at some length, as you indicated, in my reply is that that law in itself has been found to be fundamentally contrary to international law and to the International Labour Organisation conventions which Australia has freely ratified.

Senator ABETZ—And which Ms Gillard herself has accepted, has she not, that Australian workers should be free not to join a union should they so choose.

Mr Noonan—I think that is absolutely correct in terms of Ms Gillard's position.

Senator ABETZ—Ms Gillard and the Labor Party.

Mr Noonan—Yes.

Senator ABETZ—I notice with great interest on page 2 the CFMEU's concern that these provisions will generate disagreement and litigation rather than reduce or resolve it. Can I welcome this newfound concern by elements in the CFMEU to try to lessen disagreements and litigation and matters of that nature. I would encourage you, Mr Noonan, to use whatever powers you have to undertake that at the Westgate Bridge. That would be very helpful, I think, for a lot of people.

Mr Noonan—Can I say to you, Senator, that the Westgate Bridge dispute, which I also read was the subject of some discussion the other day, was characterised by the Master Builders Association as a demarcation dispute. Firstly, it is very clear that it is not a demarcation dispute. That has been stated not only by my union but also by the secretary of the Australian Workers Union, which is supposedly the other part of a demarcation dispute. That is a very difficult and intractable dispute with senior officers of my union are trying very hard to

resolve today. It results from the dismissal of over 30 workers for refusing to accept the unilateral imposition of conditions by their employer. That is the subject there and that has led to that dispute, and the intractability and difficulty of that dispute is notable because it has occurred under the existing laws. And I think that the Master Builders—

Senator ABETZ—And you know nothing about the community protest in relation to the picket nor anything about the brick that went through the window of the home of the VicRoads supervisor.

Mr Noonan—I know this: I know that I have read of that reported in the newspaper and I absolutely condemn that sort of behaviour, whoever has undertaken that behaviour. I understand that the Victoria Police are investigating that incident and I would encourage them to do so and I would hope that they bring to justice whoever committed that act, whoever it may be.

Senator ABETZ—What about urinating around the work offices of John Holland at the worksite? You know nothing about that by union officials?

Mr Noonan—No, I tend to use the facilities that are available, Senator.

Senator ABETZ—I am not talking about you personally but officials that carry—you are not aware of that? It was reported in the media.

Mr Noonan—It was reported in the media that someone urinated—

Senator ABETZ—That is where I got to hear about it. Do not pretend that you do not know about it, please.

Mr Noonan—Of course I read it.

CHAIR—The role this committee is not to be examining a dispute that I understand is before the commission. It was raised by the Master Builders and I think you have put an alternate point of view, and I think Senator Abetz has made the point earlier that often matters of this are disputed when one party puts things together. It is not our role to examine this dispute, so I think we should leave that matter alone.

Senator ABETZ—Their desire to limit disagreement, litigation and unhappiness at the workplace, as indicated in the submission, is a welcome invitation; I just wish it could find expression at work sites around Australia.

CHAIR—Inevitably, it takes two, at least, to have a dispute.

Senator ABETZ—Well, the CFMEU always seems to be at the forefront. That is my only observation.

Senator FISHER—We could have three if I opened my mouth.

CHAIR—Thank you for that invitation, Senator Fisher, which I will not take up.

Senator JACINTA COLLINS—I just want to revisit this Austral Bricks case and take up your offer to provide us with further information. On the face of it, in the press reports that I have seen, it appears to me that there must be some fairly straightforward, verifiable way of demonstrating the case. Is there an individual who is prepared to furnish details that do not need to remain confidential and that will demonstrate the AWA, as opposed to the pertinent instrument, as opposed to what their roster is, so that you can do a straightforward calculation? If you could provide us with that type of information I think it would be helpful in resolving what is being aired as claim and counterclaim, because at this point we do not have the material to satisfy us.

Mr Roberts—We will take that on notice. I think it is likely that there will be an individual or individuals who would be prepared to provide the details of their AWA and the details of their working arrangements. We can supplement that with an analysis and we can take the matter from there.

Senator ABETZ—That would be of interest to me as well—if you could provide somebody that might be willing to identify themselves and who we could potentially talk to, and then we could get Austral Bricks's view as well. The allegation is that they have inferior terms. The claim is, 'I don't receive overtime penalty rates.' The assertion of Austral Bricks is, 'Yes, that's right, because they get paid a substantially higher hourly rate for all work undertaken.' From the information that is before us, from both the workers and Austral Bricks, we cannot tell how that pans out at the end of the day in the take-home amount. So it would be very helpful if you could provide that information.

Mr Noonan—We are optimistic that we can provide that on notice.

CHAIR—I am just wondering why workers would seek to have these agreements terminated if in fact they were better than the overall instrument. One would naturally assume that, if you are seeking to be covered by

the instrument that applies at the workplace, you would only want to do so if it was in fact better not if it was worse. But that is just an observation.

Mr Noonan—My understanding is that the position of the company was that they had the power to hold the workers to those contracts regardless of the workers' wishes—

CHAIR—And that is the whole purpose of raising this in your submission.

Mr Noonan—and that they propose to do exactly that.

CHAIR—Indeed.

Senator FISHER—The ministerial directive talks about the award modernisation process not disadvantaging employees, and the bill contains the take-home pay provisions. Are there any ways an employee could be disadvantaged in your industry by the award modernisation process that will not be addressed by the take-home pay provisions if they become law?

Mr Noonan—It is a very difficult question. I might ask Mr Roberts.

Mr Roberts—I cannot think of any circumstances off the top of my head. I can take that on notice as well and come back to you on that.

Senator FISHER—Thank you. So, if your answer comes back essentially as 'no', as you have said, then the subsidiary question is: does that mean that, if the take-home pay provisions become law, in your industry no employee will be disadvantaged by the award modernisation process?

Mr Noonan—We would certainly hope that that is the case. We will do some further work and try and get a proper analysis of the question you ask. Mr Roberts will take it on notice and respond.

Senator FISHER—Thank you.

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

Proceedings suspended from 10.35 am to 10.54 am

BOWTELL, Ms Cath, Industrial Officer, Australian Council of Trade Unions

FETTER, Mr Joel, Legal Officer, Australian Council of Trade Unions

CHAIR—I welcome to this inquiry the next witnesses from the Australian Council of Trade Unions. We have received your submission. Do you have any additions or alterations to make?

Ms Bowtell—No, there are no additions or alterations.

CHAIR—We invite you to make some opening remarks to the committee and we will follow with questions.

Ms Bowtell—The ACTU supports this bill as the next step in giving effect to the Fair Work Act. We support large parts of the bill as being a responsible and sensible way to transition from the very complicated regime of the current industrial relations legislation, which builds system upon system upon system with notional instruments and instruments that exist only by virtue of tracking back through decisions and legislation, and trying to deal with those issues and bring them forward to operate within the new system.

Having said that, there are a couple of policy areas where we think that the bill has not quite got it right. The ACTU has a longstanding view, which the government clearly does not share in the drafting of this bill, that, having set in place a new safety net, that safety net should apply in the new system and that any predecessor instruments, legacy instruments, from the old system that do not meet that safety net should not continue in the new system. There are a variety of ways in which you could get rid of those instruments. We think the most effective way for that to happen would be to empower Fair Work Australia to make orders to transition workers off agreements that do not meet the safety net once the Fair Work Act is in operation.

I want to remind senators that this is not just for AWAs and ITEAs, which lapse, effectively, when the employee changes job or whatever. It also applies to collective instruments. New hires can continue to be employed under those instruments into the future for a period of up to, potentially, another five years. So you could have new hires in a workplace being hired on an instrument which provides only for the Australian fair pay and conditions standards under the current act—and the new minimum wage system and the protected award matters. Those instruments would continue to apply, and the new modern award safety net would have no relevance. It is true that the National Employment Standard has relevance, but the key areas where these instruments have cut conditions are not contained in the NES. They are contained in overtime rates, penalty rates allowances and so forth, which are found in awards.

The second issue in relation to transitional instruments is we are most concerned that the Commonwealth has decided that any instruments that rely on its power to regulate noncorporations using the conciliation and arbitration power will lapse. The effect of that decision is that groups of employers and employees who, for whatever reason, have historically been covered by the federal industrial relations system will find themselves with no regulation of the terms and conditions of employment. While the state systems would pick them up, in some circumstances there is no relevant state award to pick them up, so they fall out of the federal system, by virtue of the fact that they are not a corporation, without there being any effective means to transition them back into the state systems. That is partly a responsibility of the states, but by simply having a drop-dead date for the regulation under the federal laws you leave these workers vulnerable to having inadequate regulation in the state system. We say that it is the responsibility of the Commonwealth, in deciding to retreat from the area, to ensure that people are not disadvantaged, and it can do that either by negotiation with the states or, we would say, more effectively by continuing to regulate this area using the C&A power.

The third area where we have some concerns is in the making of the modern awards. We recognise the work that take-home pay orders have to do. However, in giving effect to the intention, which seems to be a legislative grandfathering of people's take-home pay, the Commonwealth has not quite got it right. The fact that the legislative grandfathering only preserves the status quo of the day before the modern award is switched on yet the transitional period for modern awards could be up to five years means that there may well be employees whose circumstances change after the modern award is switched on and who will find themselves disadvantaged a day, a week, a month, a year later because the point in time at which you measure whether there has been a reduction in take-home pay is the point in time before the modern award was switched on rather than at any time during that transitional period.

This is not good for employers either. If you think about, perhaps, a decision to transfer someone at the same level and working the same hours but to a different job then you see that they would no longer be doing the same work pre and post award modernisation. They would no longer qualify to make an application in

relation to take-home pay orders, yet they could well be disadvantaged by the making of the modern award. So, as well, it would potentially limit the flexibility that employers have to restructure their workforces.

We have concerns about the enterprise award criteria whereby we think—and, again, it is the same point—that, having set a safety net, it is important that that safety net be respected. To continue to entrench agreements or awards that are below the safety net through enterprise award modernisation would be contrary to the general scheme of the Fair Work Act.

We have noted our concern about representation orders. We have read the submissions of the employer community in relation to this area and it seems to us that their concerns go more to employers maybe not knowing which union is entitled to represent people. So we would not oppose Fair Work Australia being able to make orders that were declaratory in nature but we do oppose Fair Work Australia being able to make pre-emptive orders to carve down or scale back a union's representation rights in the absence of any live dispute or concern at the workplace. If it were merely to ensure that there was certainty as to who did and did not have the eligibility to enrol and represent members then that would be something that of course people should have certainty around, and there should be capacity to deal with that.

Finally, in relation to the involvement of state-registered unions in the system, we think that the architecture the bill contains is right in that it seeks to minimise, over the long term, two organisations purporting to represent the same groups of workers, which is not a sensible way forward, and it does seek to preserve the rights of state unions that have actively represented people to participate in the federal system but to minimise overlap where there is no history of active representation. However, we are concerned that the drafting does not give proper reflection to that architecture. So we do not oppose the architecture but we think there is some work to be done in the drafting.

With those concerns noted, we are happy to take questions.

Senator ABETZ—Thank you for your submission. In section 1.1 you say:

We submit that the appropriate response is to allow FWA to terminate transitional instruments, in the public interest, in cases where they disadvantage employees compared to the modern award.

Would you see that as being a two-way street in that if employers were to be significantly disadvantaged then Fair Work Australia would be similarly empowered?

Ms Bowtell—The context for that comment is that there is an AWA, an ITEA or potentially a collective agreement in place in which, taken as a whole, overall the employees receive terms and conditions of employment that are inferior to the new modern award. If your proposition were to be right, that would empower Fair Work Australia to terminate just about every collective agreement in the country which is superior to the new modern award—if I understand your proposition—which would presumably undermine the whole basis of collective bargaining in the country.

Senator ABETZ—So it is only a one-way street.

Ms Bowtell—It is a one-way street because, the safety net having been set, what you are remedying here is the ongoing operation of individual or collective agreements that fall below the safety net. Our argument is that if you set a safety net it should be a safety net without holes in it and this is leaving a significant hole in the safety net.

Senator ABETZ—I can understand the ACTU perspective because you are charged in general terms with looking after the interests of workers, but it would not be surprising to me if an employer organisation were to suggest, 'If that's the case and our economic viability is at stake, why can't we revert down to the safety net?' If others can revert up to it, why shouldn't they be able to revert down to it?

Ms Bowtell—If a modern award is adjusted upwards and it imposes additional costs on employers, and you are saying they are disadvantaged by that, our whole problem is that that does not actually apply to people covered by these transitional instruments. The adjustment in the modern award to an employer covered by one of these transitional instruments makes no difference. If you have made an enterprise agreement, an ITEA or an AWA, what happens in the modern award is irrelevant to you until you get to bargain again, so you do not have a cost imposed upon you. The only people who have changes in their conditions of employment under the making of the modern awards are people who do not have a formal instrument, who do not have an AWA or an ITEA. Employers who have instruments, have made agreements and have entered into contracts with their employees do not face any lift in their employment costs by the making of modern awards until such time as they go to rebargain. That is the essence of our problem: that the making of the modern award does not flow through to those workplaces.

CHAIR—How many people do you think are just simply award reliant?

Ms Bowtell—The estimates vary between 1.2 million and 1.6 million people, depending on whether you are talking about federal or federal and state awards. So 1.2 million are probably award reliant for their wages. But conditions of employment will go much broader than that. The most recent ABS data about methods of pay setting, which only looks at pay and not conditions, suggests that about 40 per cent of non-managerial wage and salary earners earn some overaward pay but the award would actually set their conditions of employment because adjusting those is outside formal bargaining. Some of those will be well above and it will not matter what happens in the award but there will be another group that are not wholly award reliant for their pay but will be very close to the award safety net and an adjustment in the award allowance rate or when penalty rates are paid or whatever would directly affect them. We do not know what proportion in that 40 per cent are close to the award as opposed to those who are paid reasonably well above the award in order to compensate them.

Senator ABETZ—With modern awards, one proposition that has been put to us by the Chamber of Commerce and Industry Western Australia is that health employees, for example, have traded away extra pay on public holidays in exchange for two extra weeks of annual leave so they get six weeks annual leave. Hospitals have to run 24/7. Everybody gets paid a particular rate and they are given these two extra weeks. If that is then to be examined line by line, as I understand will occur, and these benefits are transported to the modern award, these employers would then get the benefit, potentially, of six weeks annual leave but also the benefit of penalty rates on public holidays et cetera. That is where there can and will be a substantial and very debilitating impost on certain employers.

Ms Bowtell—I do not know the detail of that but the way that example would work in my understanding is that the trade that was done by trading an award entitlement—public holiday penalty rates—for additional annual leave would have had to have been done through a registered collective instrument. So changes in the modern award are unlikely to affect that provided the total package leaves the employees better off overall under the new system. That trade would continue. The only time that a line by line comparison becomes relevant is if it is in the National Employment Standards, where you cannot trade one for the other. But the payment of penalty rates on public holidays is not contained in the National Employment Standards; it is an award matter, as is additional annual leave.

So that type of arrangement, whereby people have said that they would value more leave as opposed to penalty rates on public holidays, would be able to continue on an ongoing basis provided people are happy to renew that agreement. When they come up for bargaining, if the employers and the employees in their total basket of arrangements have come up with an adequate trade—on this basis it sounds as if they have: you get 11 public holidays and two weeks annual leave so it is probably one day short, actually—then that arrangement would continue. If they have not then they would revert to the award arrangements of four weeks annual leave and payment on public holidays.

Senator ABETZ—I will not argue that further other than to draw your attention to pages 8 and 9 of the Western Australian Chamber of Commerce and Industry submission, which says:

Under the proposed no-detriment rule, an employee (other than an employee employed in a non-client related position) would continue to receive 6 weeks annual leave because it is more favourable than the 4 weeks annual leave provided by NES.

So I do think that there is a live issue. But in relation to the modern awards the suggestion has been put that chances are that, with the flurry of activity, with the best will in the world there are going to be errors made in the modern awards and therefore the two-year interim review may potentially be too long from both an employee point of view and an employer point of view. Therefore, something like an unintended consequence should be allowed for to reopen the award to deal with such circumstances. In general terms I was wondering what your view is.

Ms Bowtell—The ACTU would support that. There is not doubt that the commission is working very hard, as are all the parties. There are some decisions that we find difficult to reconcile. That is not a criticism of the Industrial Relations Commission generally—they are doing a very difficult job and working as hard as they can to bring it to finality—but it is a very complicated issue and there will be errors. The capacity to remedy them quickly would be a useful thing but it should not be used to reopen matters that were decisions of the commission, deliberately made.

Senator ABETZ—I think you would find heated agreement from the employer organisations in relation to that, as well. It should be genuinely only for those situations where a paragraph was accidentally left out, or something of that nature, which was not picked up.

I move on to the position of registered organisations. I would have thought that the administration of a regime of registered organisations is important, and the way that the regime is expressed is more important than where that regime might physically exist. Can you explain to me why the ACTU considers it to be so important to have what you describe as a nexus between the registered organisations regime and general workplace law?

Ms Bowtell—Well there is an issue—it is more than a symbolic issue—about the role of representative organisations, trade union and employer organisations in the system, and the legitimacy of their participation in the system. Over the last period of time there has been quite significant attacks, particularly on the role of unions in the system. So having the registration and regulation of trade union entities as integral to our regulation of fair work is something that we see as more than symbolic.

There is also a practical issue, in that it makes the constitutional nexus clearer if the legislation is contained in the same legislation, so that the creation of trade unions and employer organisations is connected with the regulation of corporations through this legislation rather than having a separate bill.

Senator ABETZ—Do you have any legal authority to say that the nexus would be clearer? I would have thought that if the High Court had to make a determination on the matter they would not be interested, quite frankly, as to whether it was a separate act on its own relying on certain constitutional powers or incorporated in another act of parliament relying on certain constitutional powers.

Ms Bowtell—I do not know whether that question has ever been before the High Court. The question in the past has always been whether the creation of trade unions was incidental to the conciliation and arbitration power. Intuitively, you would think that having it in the same legislation certainly bolsters the argument that it is incidental to the regulation, rather than stand alone.

Senator ABETZ—So could that then be your concern? If I might say, I think you ran a symbolic argument first—I accept that—and then the practical argument, which was the legal nexus and its constitutional justification. Could that practicality not be overcome by the act indicating the constitutional power that it draws upon and, as a result, provide exactly the same protection as if it were incorporated in—can I use the term—'mainstream' workplace relations legislation, as opposed to a separate stand alone piece of legislation?

Ms Bowtell—I am sure there is a number of things you could do to bolster the constitutional authority of the regulation of trade unions. Whether it were done that way or other ways—I am not a constitutional lawyer—but I would say that the integration argument is not just a symbolic argument. The way—

Senator ABETZ—You gave me a practical argument, which you said was the nexus, which I think we could—

Ms Bowtell—Yes. I said I had a practical one.

Senator ABETZ—Is there another practical argument that you would put to us?

Ms Bowtell—I would be scraping the bottom of the barrel to go to practical arguments about having to carry around two pieces of legislation rather than one I think, so I probably will not rely on that!

Senator ABETZ—All right.

Ms Bowtell—Our objection is largely the one which you describe as symbolic and which we say is actually operational and goes beyond symbolism but does make sure that registered organisations are at the heart of our industrial relations system, and not seen as peripheral to them.

Senator ABETZ—Thank you for explaining that for me. Can I take you to 6.3 of your submission, dealing with representation orders? You assert in the second paragraph:

First of all, the provisions are entirely unnecessary, since there is unlikely to be a significant increase in demarcation disputes under the new legislation.

Given the important caveat that you say there is unlikely to be a significant increase, can we agree that you do see there will be an increase in demarcation disputes but you are just not willing to say that it will be a significant increase? That is how I read your statement. We can argue what significant means, but I think most people would be agreed that there is the potential for increase in demarcation disputes, and some unions themselves have put that to us as a committee. I just want to get an understanding whether the ACTU accepts

that there is a likelihood of an increase in demarcation disputes. How much that increase might be is potentially very much a theoretical argument.

Ms Bowtell—We can bring two things to bear on this question. There is our experience over the period since the availability of bargaining. Until 1996, you could only reach an agreement where you had an interstate industrial dispute, so collective bargaining was limited not only to a workplace where you had constitutional coverage but also where an interstate industrial dispute had been found to exist. It was then the agreements were made in settlement of that dispute. From 1996 onwards we had the two forms of collective agreement available to unions, one of which was in settlement of an interstate industrial dispute and the other was directly with a constitutional corporation with whom they had employees employed within their constitutional coverage.

The opening up of bargaining to any union that had a member within their constitutional coverage did not lead to an outbreak of demarcation disputes. In fact, I would be surprised if we could find, if we went back through our history, any examples of unions opportunistically using that change in the law—that is, your entitlement now rests on your constitutional coverage rather than the fact that you are party to an award or party to an interstate industrial dispute to try to recruit, organise and bargain in a workplace where they had not previously been recruiting, organising and bargaining.

Our experience is that changing the threshold to start bargaining did not lead to any change in union behaviour, so our prediction is that that will continue to be the case. I think that is probably what that sentence is based on—that prediction that that will continue to be the case. Since that time, I think you would say that there is a greater sense of unanimity amongst the trade union movement that demarcation disputes are not in our interests and that there is an even greater commitment to try not to have demarcation disputes but to go and organise in workplaces where there are not other people's members rather than trying to organise in workplaces where there are union members.

Senator ABETZ—I understand that, but just to clarify: instead of 'there is unlikely to be a significant increase in demarcation disputes'; am I to read that that you accept that there is likely to be an increase in demarcation disputes?

Ms Bowtell—No, that would not be an accurate reflection. From our experience, we would say that there is no likelihood of increased demarcation dispute. Nonetheless, there is a change in the legislative framework and there is a change that there will be, by virtue of the bringing together of the state and federal systems, some areas where there will be more overlapping coverage than there has been. So we do not predict any increase, but we could not say with certainty that it will not happen, because next time when we are back here and something has happened, you will say, 'We told you it would not happen.' So I am not going to give you an absolute guarantee—

Senator ABETZ—Very wise!

Ms Bowtell—but all of our experience suggests that we would not predict an increase at all in demarcation disputes.

Senator ABETZ—Can I then finally ask you, as time is getting on: do you accept that, much as the trade union movement love each other immensely—I am sure they do—there are some unions that are known to have a degree of enmity between them? Would you agree with that proposition?

Ms Bowtell—No, I would not agree with that—

Senator ABETZ—Would you use the term 'creative tensions' or something else?

Ms Bowtell—There are unions that have traditionally operated with overlapping coverage, and that has not necessarily created enmity but has created competition. To move from competition to enmity is a big leap, I think.

Senator ABETZ—It is a huge leap. So would you say that the trade union movement, in the past 10 or 20 years, has had a history of some, at least, enmity or would you describe it more as competition or creative tension or a somewhat more neutral term?

Ms Bowtell—I think that where there are disagreements between trade unions they will vary. The location of those disagreements will vary depending on the issue. It will not necessarily divide on one union always opposing another union and their having that enmity that you talk about. There are alliances that move and change—as there are in all political organisations. In all political organisations there are alliances that move and change, but I do not think that there are fixed oppositional pieces and enmities.

Senator ABETZ—That is fine. To correct the record, it was not me that was using the term ‘enmity’. I was repeating a term used by Ms Gillard in her explanatory memorandum at page 129. That is just for the record.

Senator JACINTA COLLINS—We did understand that, Senator.

Senator ABETZ—Yes, but just for the record. I know you do not like being reminded of it.

Senator JACINTA COLLINS—I am bemused by the fact that you seem to have some naivety that there was this aspect of the trade union movement. I thought it was well known.

Senator ABETZ—What—that there was enmity?

Senator JACINTA COLLINS—There are elements of enmity as there are elements in any form of human behaviour.

Senator ABETZ—Thank you for that evidence. I hope Hansard caught that.

CHAIR—Senator Collins, do you have a question?

Senator JACINTA COLLINS—Yes, I want to go to the enterprise instrument modernisation section of your submission please, just to get you to elaborate on the last sentence in that, which is:

For these reasons we submit that enterprise awards should be restricted to closely linked employers.

Can you describe what you mean there by ‘closely linked’?

Mr Fetter—The concern is that at the moment enterprise awards can be made to cover an enterprise which may consist of multiple employers. In the case of the fast food industry, which we have highlighted in the submission, for instance, many of the head franchisors run an enterprise that consists of dozens if not hundreds of franchisees. It is arguable that they do run a single enterprise, but often the concern is that the franchisees have other businesses that they operate in tandem with the franchise arrangement. You might have, for instance, a McDonald’s franchisee of which the legal operator, the employer that operates the McDonald’s store, operates another store, whether that is another fast food business or a newsagent in the same street in a country town. The concern is that, if read literally, this provision that is proposed in the bill will allow the McDonald’s enterprise award, or the modern award, to apply to that franchisee in all of its operations even if it is outside the franchise anticipated by the award. The concern that is being raised by at least one of our affiliates is that the enterprise instrument modernisation process should: focus on the entities that are applying to have the instrument cover them, make sure that they really are either a single employer or very closely linked employers and be restricted to the type of business that is contemplated by the making of the modern award.

Senator JACINTA COLLINS—Another element that has been canvassed on this point is that it should also be all-encompassing—for instance, if an enterprise award is going to cover, let’s say, McDonald’s franchises, that it should cover all entities operating such businesses. Is that envisaged in your comment about closely linked employers as well?

Mr Fetter—That is right.

Senator JACINTA COLLINS—The gist of your argument is a bit like the earlier view that was expressed, which is that there should be a level playing field—that we should not be allowing for one level in the sector and then another for others that do not have the benefit of an enterprise award.

Mr Fetter—That is right, and it goes back to what Ms Bowtell said before about the intention being to create a modern award safety net that represents minimum standards for an industry. We have pointed out that it is unfair, first of all, to employers to allow unfair competition between them on the basis of labour costs. That is particularly the case where some employers are allowed to pay rates that are below what has been declared by the delegate of the parliament, Fair Work Australia, to be the minimum rates payable in that industry. The idea that particular businesses, especially very large businesses and franchises, can take advantage of these provisions seems to us to be very troublesome.

Senator JACINTA COLLINS—Thank you.

Senator FISHER—The minister’s directive to the Industrial Relations Commission in terms of award modernisation talks about not disadvantaging employees. If your concerns about the take-home pay provisions as set out in your submission were rectified by amending the legislation, would that mean that no employee would be disadvantaged as a result of the award modernisation process?

Ms Bowtell—It would depend on the rectification.

Senator FISHER—If it were rectified to address your five concerns.

Ms Bowtell—It is a bit hard to tell without seeing the transitional arrangements that the commission is going to put in place. That is the first thing I would say: we are still working with an incomplete canvas in this area. That may well ensure that no employee individually would be disadvantaged. It would not address some of the concerns that we have about award modernisation resulting in a lowering of the safety net in certain sectors, industries and occupations.

I think you had the ASU in here yesterday giving you some examples out of the private sector clerks award. You may well find that take-home pay orders, if remedied in the way that we have suggested, would satisfy the concerns about individuals who are employed at the moment, but it would not satisfy our concerns that the safety net for private sector clerks has been eroded by this process.

Senator FISHER—Thank you. Your submission talks about the failure of take-home pay orders to address non-financial disadvantage to employees, and you talk about changes to working hours and rosters. Are there any other non-financial ways in which an employee could be disadvantaged, as a result of the award modernisation process, that are not addressed by the bill?

Ms Bowtell—There are certainly—and, again, I think the ASU raised this in their material yesterday—non-financial elements of the award safety net, such as access to a dispute-settling procedure and access to consultation about significant change, which are not addressed through simply looking at the pay for the employee at the end of the week before award modernisation and the week after, and some of those things are probably beyond the scope of the bill but go more towards the way the AIRC has handled some of the particular industries and occupations by exempting employees from the application of certain award terms because of the quantum of earnings that they have.

Senator FISHER—So, by your answer and submission, there would be quite some changes necessary to ensure that an employee is not disadvantaged as a result of the award modernisation process?

Ms Bowtell—The primary place to ensure that people are not disadvantaged through award modernisation is in award modernisation. That is the primary place in which to make sure that the safety net is secure and relevant. It is a difficult process that the commission is going through. It has to preserve the status quo for employees and employers but modernise at the same time. That is a very difficult ask, but that is the primary place to do it. And the transitional arrangements will be very important to ensure that that happens. If that is done properly there will be little work for take-home pay orders to do. And we certainly believe that it is incumbent upon the government to send a very strong message to the commission that its intention to legislate for take-home pay orders is not an excuse to take its eye off the ball in making sure it sets a safety net which does not disadvantage employees.

Senator FISHER—My question is in respect of your final concern about take-home pay and the difficulty of proving a causative link between the results of award modernisation and a loss of take-home pay. You note that, indeed, a loss of take-home pay could be attributable to multiple causes, and your submission goes on to suggest an amendment in that respect. It is just before the heading 3.2 in your submission; I do not have the page number. You go on to recommend that the bill should clarify that an employer may still be liable to a take-home pay order if there are multiple reasons having resulted in a loss of take-home pay, so long as award modernisation was one of, you say, the ‘actuating reasons’ for their actions. In respect of the viability provisions—if I can call them that—in the bill, in terms of the prospect of some so-called relief to an employer facing the consequence of the award modernisation provisions: firstly, would you see the same causative problem, in terms of proof? And, secondly, what would the ACTU say of an amendment to those provisions, in respect of employers, that says an employer may, similarly, achieve relief, provided that award modernisation is one of the, in your words, ‘actuating reasons’ for threat to viability of the business?

Ms Bowtell—So you are talking about an incapacity-to-pay principle—how that might operate?

Senator FISHER—I am talking about the provisions of the bill, at this stage, and your contention, which is entirely conceivable, that a causative link would be difficult to prove in terms of take-home pay for an employee. Would there not be the same difficulty in proving a causative link, from an employer’s perspective, in respect of viability of the business? And, if so, would it not be consistent with your recommendation in respect of employees to also accept that there should be a consistent amendment in respect of employers to say that, if award modernisation is but one of the actuating reasons that results in threat to viability, that should be sufficient to provide an employer with relief?

Mr Fetter—Just while we flick through the legislation to make sure we are right about what provisions are in the bill, I wanted to make the point that I think many of the cries that are made by some employer groups about the disadvantage that award modernisation will occasion are at the very least overblown. The Restaurant and Catering Association in particular is very vocal in the press, claiming, we think misleadingly, up to 25 per cent increases in rates for people working in the hospitality industry, with particular reference to businesses that operate on the weekend and on Sundays. But we have done our own analysis, for instance, of the figures and I can provide this information in written form to the committee at a later point—

Senator FISHER—Thank you, Mr Fetter. Noting the limiting time—

Mr Fetter—If I could just finish my answer—

CHAIR—We are actually out of time and past it, so what I might do is ask you if you wish to respond in writing to the committee to answer those questions that Senator Fisher asked.

Ms Bowtell—I am not sure of the provision you are talking about in terms of the incapacity to pay provisions. I just need to check it. But I am very happy to get an answer to you by close of business today on that.

Senator FISHER—Thank you.

CHAIR—And if you want to provide the further analysis to the committee, we would appreciate that too. Thank you for your submission and your presentation to the committee today.

Ms Bowtell—Thank you.

[11.38 am]

JAMES, Ms Natalie, Chief Counsel, Workplace Relations Legal, Department of Education, Employment and Workplace Relations

KOVACIC, Mr John Anton, Deputy Secretary, Workplace Relations, Department of Education, Employment and Workplace Relations

PARKER, Ms Sandra, Group Manager, Workplace Relations Policy, Department of Education, Employment and Workplace Relations

RODDAM, Mr Mark, Branch Manager, Department of Education, Employment and Workplace Relations

CHAIR—I welcome the officers of the department. How do you want to proceed? Do you have a document for us?

Mr Kovacic—We do have an opening statement, and we have copies which we can make available to members if that could assess.

CHAIR—Thank you.

Senator ABETZ—Roughly how many pages is that opening statement?

Mr Kovacic—It is 13, Senator.

CHAIR—Did you want to read it all?

Senator ABETZ—Can I suggest that it be incorporated? Time is short. If we could be provided with copies so that as we scan it if something jumps out at us. And if we ask questions and it is covered in that opening statement, feel free to interrupt us and let us know and we will take that at face value that it is covered.

CHAIR—We will do that.

The statement read as follows—

SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

30 APRIL 2009

Opening Statement by DEEWR on its written submission to the Inquiry into the Provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

The Department of Education, Employment and Workplace Relations welcomes this opportunity to present an overview of its submission to this Senate Committee's inquiry into the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (Transitional & Consequential Bill).

When enacted, the proposed legislation now before this committee—the Transitional & Consequential Bill—will operate with the Fair Work Act 2009 (Fair Work Act) to ensure a smooth transition to Australia's new workplace relations system on 1 July 2009.

The Transitional & Consequential Bill repeals the current Workplace Relations Act 1996 (Workplace Relations Act) with the exception of Schedule 1 (which deals with registered organisations) and Schedule 10 (which deals with transitionally registered associations).

The Transitional & Consequential Bill also includes arrangements for movement into the new system, and covers issues including:

- the continued operation of existing Workplace Relations Act industrial instruments and setting out how these interact with the new system;
- arrangements to allow bargaining under the new system to commence in an orderly way;
- arrangements for the transfer of assets, functions and proceedings from the institutions operating under the Workplace Relations Act to Fair Work Australia and the Office of the Fair Work Ombudsman; and
- consequential amendments to other Commonwealth legislation considered essential to the operation of the Fair Work Act (e.g. the creation of the Fair Work Divisions of the Federal Court of Australia and the Federal Magistrates' Court of Australia).

A second transitional and consequential Bill, to be introduced into the Parliament in May 2009, will make consequential amendments to all other Commonwealth legislation —this is likely to involve amendments to over 70 Commonwealth Acts.

This Bill will also deal with amendments that arise from any state referrals of power that have been completed by that time.

As with the Fair Work Act, the Government undertook extensive and significant consultation in developing the Transitional & Consequential Bill.

The Department has outlined the key elements of the Transitional & Consequential Bill in its submission. These key elements include:

- universal application of the safety net;
- transitional instruments and enterprise awards;
- bargaining, agreement making and industrial action;
- transfer of business;
- registered organisations and representation rights; and
- institutions.

I will now provide the Committee with a brief overview of some of these key elements.

Universal application of the safety net

There will be a bridging period between 1 July 2009 and 1 January 2010. During this bridging period entitlements under the Australian Fair Pay and Conditions Standard and other minimum statutory entitlements (e.g. notice of termination) will be retained.

This arrangement will ensure that employees retain existing minimum entitlements during the transition to the operation of the new, fairer safety net through modern awards and the National Employment Standards (NES).

The Transitional & Consequential Bill provides that following commencement of the NES and modern awards on 1 January 2010 the NES and minimum wages (that is, the wages in modern awards and the national minimum wage order) will apply to all national system employees, including employees who are covered by a transitional instrument (in effect an instrument made before 1 July 2009 or Individual Transitional Employment Agreements (ITEAs) made before 31 December 2009). This will ensure that the Government's new safety net will benefit employees who would otherwise have conditions that are inferior to the conditions included in the NES.

Because there may be instances where the application of minimum wages to agreement-based transitional instruments means that it would be appropriate to phase in the effect of resulting pay increases, Fair Work Australia will have scope to make orders to phase in minimum wages in modern awards, on application by an employer, where it is satisfied that such measures are necessary to ensure the ongoing viability of a business.

The Bill also provides for leave and service accrued by an employee prior to 1 January 2010 to be recognised for the purposes of the NES.

However, where an employee does not have an entitlement to redundancy pay on commencement of the NES, only their service from 1 January 2010 will count as service for this entitlement.

Take-home pay orders.

The Transitional & Consequential Bill makes it clear that the award modernisation process is not intended to result in a reduction in the take-home pay of employees and provides a mechanism for obtaining remedial orders—known as take-home pay orders—in limited circumstances when there is such a reduction.

A number of stakeholders both employer and employee representatives have addressed these provisions in their submissions to the Committee.

Some stakeholders have raised concerns that the take-home pay order provisions treat employees more favourably than employers. This is not correct.

The creation of new modern awards necessarily involves the alignment of current terms and conditions applying across the states to a new standard.

The scope to phase in modern award provisions over five years ensures that employers have access to an appropriate adjustment period. The Commission will include provisions within modern awards that provide for transition to the new industry standards. Any changes to conditions penalty rates, loadings, wage levels can be phased down, or phased up, to the new national standard, and be phased in over a full live year period.

But take-home pay orders will protect current employees from having their actual take-home pay reduced. In most cases an employee is likely to have a contractual entitlement to their current rate of pay in any event, but the provision of take-home pay orders makes the change to the new award system workable and simple and ensures no employee can have his or her pay reduced.

On 3 April 2009, the Australian Industrial Relations Commission announced a timetable for dealing with the transitional arrangements for the Priority and Stage 2 awards. Initial submissions to the Australian Industrial Relations

Commission are due by 29 May 2009. The Government would encourage all interested parties to participate in that process.

As to take-home pay orders, the scope for such orders is tightly constrained. An employee will only be considered to have suffered a reduction in take-home pay in certain strictly defined circumstances. For instance, there must be an actual reduction in take-home pay and award modernisation must be the immediate reason for the reduction (and not, for example, an unrelated event such as a change to the employee's shift-work roster).

Importantly, Fair Work Australia will not be able to make a take-home pay order if the reduction in take-home pay is minor or insignificant, or Fair Work Australia is satisfied the employee has been adequately compensated in other ways for the reduction.

Take-home pay orders will also operate separately to modern awards and any increases awarded as a result of an annual minimum wage review will not flow into the order.

Transitional instruments and enterprise awards

New bargaining framework commencing on 1 July 2009 will continue to operate unless terminated or replaced by a new enterprise agreement.

Under the Transitional & Consequential Bill, instruments made under the Workplace Relations Act will generally become 'transitional instruments', and will continue to apply as if the Workplace Relations Act had not been repealed and will be able to be terminated in accordance with the rules that currently apply.

This means:

AWAs and ITEAs will continue to operate under the new system, although both parties can agree to terminate such an agreement, including prior to its nominal expiry date.

Once an AWA or ITEA reaches its nominal expiry date, it may be unilaterally terminated by either party giving 90 days' notice.

Collective agreements may be terminated in accordance with the rules currently apply to the particular type of instrument, depending on the time it was made under the Workplace Relations Act.

Some parties have suggested that AWAs should be able to be terminated in certain circumstances before their nominal expiry date. The Bill ensures an orderly transition to the new system by providing that such agreements are phased out over time as they expire, but continue to apply for the period that the parties agreed they would apply. However, employees on substandard AWAs will receive the protections of the NITS from 1 January 2010.

The relevant content and interaction rules that applied to these instruments under the Workplace Relations Act will generally continue.

Entry into the new, simpler workplace relations system is encouraged by:

- limiting the ability of Fair Work Australia to vary transitional instruments to clearly defined circumstances;
- providing for the sun setting of instruments that apply to non-national system employers and notional agreements preserving state awards (NAPSAs);
- providing additional rules for the termination of transitional agreements; and
- allowing for the conditional termination of individual agreement-based transitional instruments AWAs and ITEAs—so that employees may become fully involved in collective bargaining, including voting and participating in any industrial action. The general protections part of the Fair Work Act commencing from 1 July 2009 will protect employees seeking to make a conditional termination from adverse action.

The Transitional & Consequential Bill provides for the integration of Enterprise awards and NAPSAs derived from state enterprise awards and certain preserved state collective agreements derived from an enterprise award (defined as an enterprise instrument) into the new workplace relations system. The process provided by the Transitional & Consequential 13i11 is called the enterprise instrument modernisation process.

I am aware that the National Secretary of the Shop Distributive and Allied Employees' Association, Mr Joe de Bruyn, has raised concerns with the Committee, both in his written submission and orally, concerning the enterprise instrument modernisation process. In particular, Mr de Bruyn raised concerns regarding franchisees and enterprise awards, chiefly in the fast food industry.

As I understand it, Mr de Bruyn is concerned that the enterprise instrument modernisation process will allow Fair Work Australia to make modern enterprise awards in the fast food industry which undercut the modern award safety net which would otherwise apply that is the Fast Food Industry Award 2010.

The Fair Work Act requires that all modern awards including modern enterprise awards must provide a fair and relevant safety net. In deciding to make a modern enterprise award, Fair Work Australia will be required to consider and balance a range of criteria, including, in summary:

- the circumstances that led to the making of the instrument;

whether there is a modern award that would otherwise apply and its content;
the extent to which the enterprise instrument provides enterprise specific terms and conditions;
the competitive position of the enterprise covered by the enterprise instrument and of the enterprises covered by the modern award that would otherwise apply to the enterprise, and
the views of the persons covered by the enterprise instrument.

In addition, FWA must consider the modern awards objective—that is, it must consider all of the general factors that FWA is required to consider when making modern awards.

It is not the intention for modern enterprise awards to undercut the safety net for employees in an industry or to impact on the competitive environment in which businesses, in this case fast food operations, are carried out.

The Transitional & Consequential Bill provides for the continuation of the Australian Fair Pay and Conditions Standard during the bridging period and for the preservation of redundancy provisions in certain agreement-based transitional instruments where the instrument is terminated at the initiative of the employer.

Bargaining, industrial action and agreement making

Bargaining processes initiated prior to the commencement of the Fair Work Act on 1 July 2009 will not carry over when the new system commences.

Representatives involved in bargaining for a collective agreement under the Workplace Relations Act will either need to conclude their bargain prior to 1 July 2009 or commence a new bargaining process for an enterprise agreement under the Fair Work Act.

Protected industrial action authorised under the Workplace Relations Act will not be protected once the Fair Work Act commences. The Transitional & Consequential Bill provides for the treatment of strike pay relating to industrial action taken before the Workplace Relations Act repeal day.

While some stakeholders have raised concerns with this approach, it provides for a simple, clean transition to the new system that facilitates immediate access to the new bargaining and agreement provisions of the Fair Work Act, including good faith bargaining.

However, the Transitional & Consequential Bill includes provisions that allow Fair Work Australia to take into account the past conduct engaged in by bargaining representatives under the Workplace Relations Act when exercising discretion under the bargaining and industrial action provisions of the Fair Work Act.

Transfer of business

Schedule 1 1 of the Transitional & Consequential Bill provides for the continued application of the Workplace Relations Act where transmission of business occurs before the Workplace Relations Act repeal day and provides for the application of the transfer of provisions in the Fair Work Act to transfers of business that apply on or after the Workplace Relations Act repeal day.

Schedule 1 1 also provides for the transfer of entitlements under the Australian Fair Pay and Conditions Standard and arrangements for preserved redundancy provisions and transmitting transitional instruments during the bridging period.

Registered organisations and representation rights

Schedule 22 of the Transitional & Consequential Bill amends Schedules 1 and 10 of the Workplace Relations Act to create a stand-alone Act, the Fair Work (Registered Organisations) Act 2009, which will contain the provisions dealing with registered organisations and State-registered associations. This Act will be closely linked with the Fair Work Act which provides certain rights for these bodies.

The Transitional & Consequential Bill includes new provisions that make it simpler and easier for State and federal unions to operate across multiple jurisdictions. This includes extending the transitional registration provisions for five years, and providing for the reciprocal recognition of State and federal unions in certain circumstances.

The Transitional & Consequential Bill also amends Schedule 1 to the Workplace Relations Act to enable Fair Work Australia to make a new and additional form of representation order where disagreement exists regarding an organisation's entitlement to represent employees within a workplace group.

Prior to making such an order, Fair Work Australia will need to consider a range of factors designed to ensure that organisations with a longstanding and active history of representing a workplace group are still able to continue to represent those employees.

Existing right of entry permits and other right of entry instruments issued under the Workplace Relations Act will in effect be deemed to be instruments issued under the Fair Work Act.

Conclusion

In conclusion, the Transitional & Consequential Bill sets out essential transitional and consequential changes which will ensure an orderly and fair transition to the new modern workplace relations system, while providing certainty in employment arrangements.

Mr Kovacic—In terms of the key areas that the statement covers off, I will deal with those very briefly. There are a couple of issues I would like to bring the committee's attention to. The submission covers key elements of the transition and consequential bill. They include universal application of the safety net; transitional instruments and enterprise awards; bargaining; agreement making and industrial action; transfer of business; registered organisations and representation rights; and institutions.

In terms of some of the issues that have been canvassed in terms of submissions to the committee, there are probably a couple that I would like to focus on in particular. The first of them relates to the issue of take-home pay orders. If I can direct members to page 4 of our submission, at the bottom there are a number of points. The bill makes it clear that the award modernisation process is not intended to result in a reduction in take-home pay of employees and provides a mechanism for obtaining remedial orders, known as take-home pay orders, in limited circumstances where there is such reduction.

A number of stakeholders, both employer and employee representatives, have addressed these provisions in their submissions to the committee. Some stakeholders have raised concerns that the take-home pay order provisions treat employees more favourably than employers. This is not correct. The creation of new modern awards necessarily involves the alignment of current terms and conditions applying across the states to a new standard. The scope to phase in modern award provisions over five years ensures that employers have access to an appropriate adjustment period. The commission will include provisions within modern awards that provide for transition to new industry awards. Any changes to conditions, penalty rates, loadings and wage levels can be phased down or phased up to the new national standard and be phased in over a full five-year period. But take-home pay orders will protect current employees from having their actual take-home pay reduced. In most cases an employee is likely to have a contractual entitlement to their current rate of pay in any event, but the provision of take-home pay orders makes the change to the new award system workable and simple and ensures no employee can have his or her pay reduced.

On 3 April 2009 the Australian Industrial Relations Commission announced a timetable for dealing with the transitional arrangements for priority and stage 2 awards. The initial submissions to the commission are due by 29 May. The government would encourage all interested parties to participate in that process. As to take-home pay orders, the scope for such orders is tightly constrained. An employee will only be considered to have suffered a reduction in take-home pay in certain strictly defined circumstances. For instance, there must be an actual reduction in take-home pay and award modernisation must be the immediate reason for the reduction, and not, for example, an unrelated events such as a change to the employee's shift work roster. Importantly, Fair Work Australia would not be able to make a take-home pay order if the reduction in take-home pay is minor or insignificant or Fair Work Australia is satisfied that the employee has been adequately compensated in other ways. Take-home pay orders will also operate separately to modern awards and any increases awarded as a result of annual minimum wage reviews will not flow into the order.

There are also some other elements I would like to draw to the committee's attention—

Senator ABETZ—Just quickly on that, if I may, at the top of page 5 you say that the legislation provides a mechanism for obtaining remedial orders. What clauses of the bill? Are you able to tell us that? Both employer and employee groups had concerns, so if they had a specific clause to which their attention could be drawn that might be helpful.

Mr Kovacic—It is part 3 of schedule 5, which is at page 58 of the bill.

Senator ABETZ—That is fine. Just quickly, on page 6, the middle paragraph that finished off 'work roster', would that also include the possibility of somebody being promoted but paid less? That was submitted to us as well, I understand, by somebody. So you are saying an unrelated event such as a change to the employee's shift work roster. That might be one, but what about if somebody were to be artificially promoted? That is basically the idea that was put to us. And what clause are we looking at?

Ms James—Perhaps it might help if I were to take the committee to explanatory memorandum.

Senator ABETZ—Yes, what page are you referring to at this stage?

Ms James—I am referring to page 33 of the explanatory memorandum. This deals with avoiding reductions in take-home pay and it makes it very clear that award modernisation must be the operative or immediate reason for the reduction in take-home pay. So if other events are responsible then the remedy is not available. It is designed to be a very targeted remedy.

Mr Kovacic—I would like to also take the committee to page 9. There are some issues that have been raised by stakeholders around the issue of enterprise awards and their modernisation in the system. At the

bottom of page 8 it says that the transitional consequential bill provides for the integration of enterprise awards and NAPSAs—notional agreements preserving state awards derived from state enterprise awards—and certain preserved state collective agreements derived from an enterprise award defined as an enterprise instrument into the new workplace relations system. The process provided by the bill is called the enterprise instrument modernisation process.

I am aware that the national secretary of the Shop, Distributive and Allied Employees Association, Mr Joe de Bruyn, has raised concerns with the committee, both in his written submission and orally, concerning the enterprise instrument modernisation process. In particular, Mr de Bruyn raised concerns regarding franchisees and enterprise awards, chiefly in the fast food industry. As I understand it, Mr de Bruyn is concerned that the enterprise instrument modernisation process will allow Fair Work Australia to make modern enterprise awards in the fast food industry which undercut the modern award safety net which would otherwise apply—that is, the fast food industry award 2010.

The Fair Work Act requires that all modern awards, including modern enterprise awards, must provide a fair and relevant safety net. In deciding to make a modern enterprise award Fair Work Australia will be required to consider and balance a range of criteria, including, in summary: the circumstances that led to the making of the instrument, whether there is a modern award that would either otherwise apply and its content, the extent to which the enterprise instrument provides enterprise specific terms and conditions, the competitive position of the enterprise covered by the enterprise instrument and of the enterprises covered by the modern award that would otherwise apply to the enterprise, and the views of the persons covered by the enterprise instrument.

Senator ABETZ—Where is that set out—what clauses or pages of the bill?

Mr Kovacic—It is part 2, division 1 on page 63 of the bill. The criteria themselves are on page 65.

Senator ABETZ—Thank you.

Mr Kovacic—In addition Fair Work Australia must consider the modern award's objective—that is, it must consider all of the general factors that Fair Work Australia is required to consider when making modern awards. It is not the intention for modern enterprise awards to undercut the safety net for employees in an industry or to impact on the competitive environment in which businesses—in this case fast food operations—are carried out.

I think the last point that I would like to refer to, and again this has been the subject of a number of submissions to the committee, is in relation to representation orders. There is a brief section in our opening statement which commences at the last program at the bottom of page 12. The bill also amends schedule 1 to the Workplace Relations Act to enable Fair Work Australia to make a new and additional form of representation order where disagreement exists regarding an organisation's entitlement to represent employees within a workplace group. Prior to making such an order Fair Work Australia will need to consider a range of factors designed to ensure that organisations with a longstanding and active history of representing a workplace group are still able to represent those employees.

Senator ABETZ—I would like to ask you about terminology—and I do not want to be too picky but that is what legislation is all about—is the term used in the legislation 'dispute' or is it 'disagreement'. Is there a material difference in the way that we should understand those two words? First of all, let us clarify what the legislation says. It says 'dispute', doesn't it?

Ms James—The legislation says 'dispute' at page 238 of the bill. It talks about orders in relation to a dispute about the entitlement of an organisation of employees to represent the industrial interests of employees. The term 'dispute' here is being used in its ordinary sense not in its traditional conciliation and arbitration of disputes constitutional sense. In the explanatory memorandum—

Senator ABETZ—How do we know that though?

Ms James—I think that for absent definitions dictionaries and ordinary meaning is what we turn to. The explanatory memorandum does refer to disagreements. I think yesterday Professor Stewart put forward a definition that he said came from a High Court case that was along the lines of a dispute is a difference of opinion arising between identified parties—which is not a bad definition. According to my *Oxford Concise* it is: an instance of disputing or arguing against something or someone, an argument or controversy, heated contention, a disagreement, the act of disputing or arguing against something or someone, controversy or debate.

Senator ABETZ—So you are saying that 'disagreement' and 'dispute' are interchangeable?

Ms James—I think that is the sense in which we are using the language here, yes.

Senator ABETZ—Thank you, I just wanted that clarified.

Mr Kovacic—Those are really the key issues that I wanted to focus on.

Senator ABETZ—I have a stack of questions—undoubtedly I will put some on notice. First of all I will start with the registered organisations act. You would have heard the ACTU's submission in relation to that.

Ms James—Yes.

Senator ABETZ—I can understand symbolic arguments and I want to set them aside. What I want to know is: is there any legal reason that would either enhance or decrease this framework by it being a stand-alone act or incorporated in other legislation?

Ms James—When you are talking about enhancing or decreasing the framework it would certainly increase the framework because it would add 300 pages to the Fair Work Act if it were to be put into the Fair Work Act.

Senator ABETZ—Would it increase the robustness? I am not talking about the number of pages—I should have clarified that.

Ms James—In addition I would say that the Fair Work Act has been drafted to be an accessible piece of legislation. The first substantive provisions that you encounter in the Fair Work Act are the National Employment Standards, which apply to everybody in the framework and are highly relevant to all employers and employees. I would say that the registered organisations provisions, while being very important, are of a narrower interest. Of course the references to registered organisations are in the Fair Work Act—and when we talk about right of entry and bargaining the references are there. It is clearly part of an integrated framework. The registered organisation schedule provides very detailed regulation for employer and employee organisations in the framework that are most relevant to officials in those organisations, and occasionally to members and perhaps delegates. I did hear some discussion about constitutionality from up the back before. I do not consider that the placement of the provisions has any bearing on the constitutionality of the provisions.

Senator ABETZ—Could I, in going through, invite you to have a look at the Australian Mines and Metals Association submission at paragraph 1.2. They set out about six questions which they say remain unanswered. I would be interested if on notice you could deal with that.

Mr Kovacic—We could actually deal with those now. In terms of the first of those questions—will existing agreements drop dead on an arbitrarily specified date—the answer to that is no. Agreements made under the Workplace Relations Act will continue—

Senator ABETZ—Could I interrupt you there because time is short. Do you have written answers to these six questions?

Mr Kovacic—I do. We probably have a clean copy which we could provide.

Senator ABETZ—If you have answers, I am happy to accept them. If you and the committee are agreeable then we could just incorporate them into the *Hansard*.

CHAIR—Yes, we should incorporate them into the *Hansard*.

Senator ABETZ—That will save you reading them. If you have answers then I am happy to read them and accept them.

Mr Kovacic—We can provide those to the committee.

Senator ABETZ—If the answers are not good enough, be prepared for the committee stages in the Senate. But I am sure they will be very good answers.

Responses to AMMA:

WM existing agreements 'drop dead' on an arbitrarily specified date?

- Agreements made under the Workplace Relations Act will continue to operate until terminated or replaced. This provides certainty for employees and employers, ensuring that existing arrangements can continue until a new agreement is made. The continuation of these instruments confirms the rights and entitlements for employees, employers and organisations in the transition to the new system.
- The T&C Bill provides sunseting rules for certain types of instruments currently in operation.
- Certain instruments that apply to non-national system employers (i.e. old IR agreements and pre-reform certified agreements made under the conciliation and arbitration power and some section 170MX awards) will terminate on 27 March 2011 unless the employer becomes a national system employer before then.

- The Bill provides that Notional Agreements Preserving State Awards (NAPSAs) will sunset on 31 December 2013, or a later date if prescribed by the regulations.

Will an employee be able to unilaterally terminate an agreement before its nominal expiry date?

- No. Parties may only seek to terminate transitional agreements unilaterally once they have passed their nominal expiry date. This ensures that agreements lawfully made are honoured, while also providing a fair and efficient process for parties to move into the new system.
- Under the Bill, transitional agreements can be terminated at any time by agreement of the parties. Any termination by agreement needs to be approved by Fair Work Australia before coming into operation.

Will existing agreements be able to be varied?

- Yes, existing agreements will be able to be varied, but only to remove ambiguity, to resolve instrument interaction difficulties, to remove terms that are inconsistent with the general protections framework, or to remove some discriminatory terms.
- By limiting the circumstances in which transitional instruments can be varied, the Bill encourages parties to look towards making an enterprise agreement under the new bargaining framework.
- Parties to pre-reform certified agreements and preserved collective State agreements will be able to vary the terms or extend the nominal expiry date of those instruments until 31 December 2009.

Will ITEAs continue to be available until 31 December 2009?

- Yes. Individual Transitional Employment Agreements can be made until 31 December 2009 consistent with the Government's undertaking in Forward with Fairness.

Will existing agreements have to comply with the National Employment Standards?

- Yes, the T&C Bill ensures that the National Employment Standards and minimum wages apply to all national system employees from 1 January 2010, including employees covered by instruments made before the commencement of the new system.
- Fair Work Australia will be able to make orders to 'phase in' minimum wages in exceptional circumstances, for example where it is satisfied that measures are necessary to ensure the ongoing viability of a business.

How will union turf wars be avoided?

- The Bill includes provisions allowing FWA to make a new form of representation order. These orders will clarify existing representative rights where there is a dispute in a workplace over which union should have that right.
- Unlike existing representation orders, there will be no requirement that the dispute must be causing or threatening to cause harm to an employer's business before an order can be obtained.
- FWA will need to consider a range of factors before making the order. These factors ensure that where one union has a long history of actively representing particular employees, it will be able to continue to do so.
- The new orders strike a balance between limiting the possibility of demarcation disputes between unions and the right of employees to be represented by the union of their choice.

Senator ABETZ—Thank you for that. Paragraph 1.10.1 of the AMMA submission makes the assertion that the Fair Work Bill does not:

... appear to allow orders to be proactively sought by employers prior to a dispute arising.

Do you agree with that assertion? It refers to union representation orders.

Ms James—I am aware that this was the subject of some discussion yesterday when Chris Platt and Professor Andrew Stewart were giving evidence before the committee. I think that, between the provisions in the bill and the explanatory memorandum, the intention is fairly clear that potential disputes be covered. I am aware that there is some concern about whether that is as clear as it could be. Of course, we would always like to make the legislation as clear as possible, so we will take on board all of the suggestions put before the committee about that.

Senator ABETZ—If I might say so, that pre-empts another question, but my question was as to their assertion that the Fair Work Bill does not 'appear to allow orders to be proactively sought by employers'. Does the bill allow employers to proactively seek orders prior to a dispute arising?

Ms James—I think the answer is yes, based on the provisions in the bill and the examples in the explanatory memorandum. That is what I meant about it.

Senator ABETZ—All right, but it can be clarified. Sorry, I think now that I was misunderstanding your answer. Thank you for that.

Mr Kovacic—If you have a look at the explanatory memorandum, you will see a case study or cameo there, the ‘Spokey Dokes’ case, which I think was referred to.

Senator ABETZ—We have given that some airing.

Mr Kovacic—Yes. It is certainly consistent with the notion of that capacity.

Senator ABETZ—Has the department seen the cameos, for want of a better description, provided by the Australian Services Union? That was in a supplemental submission that was handed out at the hearing. I would invite you to, if you can, take them away and see if, in the department’s assessment, they are realistic or if there is a gaping hole in their argument or consideration—if something else has not been taken into account. Could you do that for us.

Mr Kovacic—We can do that.

Senator ABETZ—I will then go to Professor Stewart’s submission. I think we may well have already dealt with those matters. Yes, I think we have. Possibly you may not wish to comment on this, but I will give it a go anyway. Professor Stewart was of the view that, under the award modernisation process, some people are going to be worse off. You cannot have a system that makes everybody better off. Is that an assessment that you would agree with?

Mr Kovacic—Clearly the process of award modernisation is a balancing act. The main thing that has become apparent as the commissioners progress through the process is that there are fairly significant differences across instruments derived from different jurisdictions. The commission has approached the process of award modernisation with regard to the award modernisation request that the minister has provided to it. I will use the precise words if you will bear with me:

The creation of modern awards is not intended to ... disadvantage employees—

or—

increase costs for employers.

There is a mechanism in the award modernisation request that enables the commission to include transitional arrangements in modern awards; that is something which the commission is going to consider towards the end of May. It has not done so at this stage, but clearly it is a balancing act in trying to address those sorts of differences.

Senator ABETZ—If it is a balancing act, it stands to reason that, whilst there are good intentions—and we know about good intentions; they are all well and good—it is not a guarantee for workers that no worker will be worse off under this process.

Mr Kovacic—Clearly—in terms of the award modernisation request and the scope for transitional arrangements to be included in modern awards, and also in terms of the provisions in the bill around take-home pay orders and mechanisms to deal with those circumstances where the commission has not been able to achieve that sort of balance.

Senator ABETZ—Will the bill mean that no worker will be worse off?

Mr Kovacic—The bill provides a mechanism in circumstances where employees may feel as though their take-home pay has been reduced for Fair Work Australia to make an order. But, as I mentioned in the statement, there are some criteria that apply to that. Similarly there is an opportunity for the commission, as part of the award modernisation process, to put in place transitional arrangements to assist employers in dealing with issues associated with changes to award provisions which might have a cost impact.

Senator ABETZ—Can I ask in the most friendly manner possible, am I going to get an answer to my question as to whether the bill, through its mechanisms, would absolutely guarantee that no worker will be worse off? At the moment, we have a professor telling us that that is not the case, we have a union telling us that that is not the case and I think we also have some employers acknowledging that that may not be the case. So, given this strange coalition of agreement between employers, unions and academics, without going into the politics of this bill, there is nothing in this bill that says every worker will be as well off or better off.

Mr Kovacic—What I can again reiterate is that there is a mechanism within the bill in terms of the capacity for take-home pay orders to ensure that, in circumstances where employees take-home pay may be affected by award modernisation, Fair Work Australia can make an order to address that. Similarly, in terms of the award modernisation request, there is capacity, through the transitional provisions, for the commission to deal with the equivalent sort of impact from an employer perspective.

Senator ABETZ—So my friendliest of dispositions still did not get the answer! What about non-financial considerations? Take-home pay—that might be through a potential mechanism and, as I said before, employers, unions and academics have indicated questions surrounding that. But what about the non-take-home-pay aspects?

Mr Kovacic—Elements of our opening statement referred to issues such as changes to shift work and rosters. You asked a question about things such as promotions, which Ms James dealt with. Do you have a specific non-financial issue which might come into effect?

Senator FISHER—The ACTU submission talks about hours of work and shifts, and Ms Bowtell has told the committee that they will consider whether there are further non-financial forms of disadvantage to employees. But the question is about whether the bill addresses those non-financial forms of disadvantage to ensure that no employee will be disadvantaged as a result of a non-financial disadvantage—if I can use that word twice.

Mr Kovacic—Clearly the take-home pay orders are targeted at take-home pay. I would argue that changes to shiftwork rosters are not matters that flow from award modernisation. They are decisions that are made at the workplace level.

Senator FISHER—Ms James, earlier you referred to the operative reason in terms of award modernisation and take-home pay. Page 33 of the explanatory memorandum requires that award modernisation be the operative reason for a reduction in take-home pay. So, Mr Kovacic, how would the word ‘operative’ apply, or not, in respect of non-financial forms of disadvantage to an employee?

Mr Kovacic—I have just made the point that take-home pay orders are directed at financial impacts in terms of take-home pay.

Senator FISHER—Yes. You also essentially inferred that non-financial forms of disadvantage to an employee, in your view, are more likely to flow from things other than the award modernisation process. So how would the ‘operative reason’ provision apply, or not, in terms of non-financial disadvantage—and if it does not apply, why not?

Ms James—The reference to operative reason was from the explanatory memorandum. I do not think the provisions use that precise terminology. The point I was making was that the take-home pay order remedy is available in cases where there is a real connection, that the operative reason for the change is the award modernisation process and not something else. You are now asking, I think, about changes that are not about take-home pay; they therefore take us outside this provision—

Senator FISHER—Yes, they do.

Ms James—and outside the framework and possibly outside the bill.

Senator FISHER—for which there is no release.

Ms James—What I would say is that, if changes are made at the workplace and they are made because the employer makes the changes—and usually they are changes made by employers about shift patterns or something like that for a reason such as someone’s entitlement under a particular award or agreement—then the general protections may apply, as the freedom of association provisions currently might apply to that kind of scenario. But, again, we are talking about conduct that is outside of award modernisation.

Senator FISHER—In your view.

Ms James—I think that is a statement of fact. We are talking about conduct that is occurring in a workplace between parties; we are not talking about the application of an instrument at the workplace and the results that flow directly from that.

Mr Kovacic—Senator, it is very difficult to envisage what sorts of non-financial changes may be made as a result of the award modernisation process.

Senator JACINTA COLLINS—Being required to work a Saturday is one such example that has been presented to us by the ASU.

Senator FISHER—That is a good example, Senator Collins.

CHAIR—I am interested in this area too but I am very conscious of the time.

Mr Kovacic—The provision in terms of the act—the clause is:

- (c) the amount of the employee's take-home pay for working 23 particular hours or for a particular quantity of work after the 24 modern award comes into operation is less than what would 25 have been the employee's take-home pay for those hours or 26 that quantity of work immediately before the award came 27 into operation;

That is clearly a factor.

Senator ABETZ—What clause or page was that on?

Mr Kovacic—That is on page 58. It is in subclause (3). That clause states that, 'An employee suffers a *modernisation-related reduction in take-home pay* if, and only if ...' and it sets out four subclauses there.

Ms James—So, if I am required to work a Saturday and I was working Saturdays before, and as a result of the award modernisation process my pay has been reduced, then that framework applies. If I am asked to work Saturdays and I was not being asked to work Saturdays before, there might be a whole range of reasons that might be happening.

CHAIR—We might move on from this particular topic and if there are further questions we can put them on notice.

Senator ABETZ—The CCI of Western Australia on pages 8 and 9 of its submission talks about annual leave and public holidays and the health industry and they are talking about what is in an award now—I think it is six weeks annual leave in exchange for public holidays and no loadings for public holidays et cetera. They are now saying that may well mean that there will be six weeks annual leave provided in the modern award plus certain other entitlements. On notice, I am interested in your commentary in relation to that. Also, in the ACCI submission, in paragraph 94, on page 21, there are five suggested amendments. On the face of it, your responses to AMAA look very good—thank you for that. If you could do something similar in relation to the ACCI suggestions in paragraph 94, that would be very helpful. The ABI told us that the Fair Work Australia will not be taking into account employment and inflation as part of its considerations. Is that right? I may have misunderstood their submission. Does Fair Work Australia take into account employment and inflation factors?

Mr Kovacic—Is this narrowly restricted to award modernisation or is it broader?

Senator ABETZ—You are right; it is under 'Modern awards under Fair Work Australia'. It is the indented paragraph on page 2. If I may just draw that to your attention for response. Can I also ask you about the COIL process—undoubtedly, this matter has been canvassed at estimates hearings—that participants had confidentiality agreements to sign. Are we able to be provided with a copy, without of course anybody's name on it? I assume—and can you confirm this—that all of the confidentiality agreements were the same, that we did not sign up one party to stricter confidentiality agreements than others?

Mr Kovacic—Certainly, we can provide copies of the confidentiality agreements.

Senator ABETZ—They were all the same in content?

CHAIR—We do not want copies of the agreements; we just want the proforma—

Mr Kovacic—Just the proforma; that is what I was suggesting.

Senator ABETZ—Just the proforma. You are confirming that they were all the same other than the gaps that will be appearing?

Ms James—They were all the same for the various categories of participants. So the traditional COIL comprised employer and employee organisations. I think there were some slight differences for state officials, bearing in mind the different nature of their roles.

Senator ABETZ—Just out of interest, I thought we had the state officials one as well. I dare say nothing much will ride on it.

Mr Kovacic—By way of background, because I know this has also been the subject of some discussion before the committee, those confidentiality provisions are a reflection of section 5(2)(c) of the National Workplace Relations Consultative Council Act 2002, which states:

- (c) subject to the rights of persons participating in meetings of the Council to report to the persons, bodies and organisations by which they are nominated and to the right of the Council to make announcements that those persons agree are in the public interest—

and this is the bit I would stress—

the views expressed at those meetings will be kept confidential.

I would stress that the committee on industrial legislation is a subcommittee of the National Workplace Relations Consultative Council, which is why confidentiality has been an issue.

Senator ABETZ—In relation to the recipient representing the following association or body, employer and employee got exactly the same document? Is that correct?

Mr Kovacic—Yes.

Senator ABETZ—Have we been given a reason as to why there was no RIS—regulation impact statement—or no small business input in relation to this bill? Has that been provided at all?

Mr Kovacic—It was certainly covered by the regulatory analysis that was included in the explanatory memorandum as part of the Fair Work Bill.

Senator ABETZ—But it was not the normal regulation impact statement. Is that right?

Mr Kovacic—That is correct.

Senator ABETZ—Why?

Mr Roddam—The regulatory analysis done for the Fair Work Bill was agreed to on the basis of an exemption granted by the Prime Minister to doing a regulation impact statement, and that analysis was prepared instead. That exemption granted by the Prime Minister extended to a regulation impact statement for the transitional and consequential legislation. That was the view of the Office of Best Practice Regulation and that exemption extended to the transitional and consequential bill.

Senator ABETZ—It was a prime ministerial decision?

Mr Roddam—An exemption granted by the Prime Minister.

Mr Kovacic—The point I would stress is that the application of that exemption was in respect of the Fair Work Bill. The Office of Best Practice Regulation considered that exemption to also extend to the transitional and consequential bill, so it was not as though there were two decisions made by the Prime Minister.

Senator ABETZ—It was one decision for the whole lot. You did not bother going to ask whether that was what was meant?

Mr Kovacic—We actually sought the advice of the Office of Best Practice Regulation—

Senator ABETZ—Rather than the advice of the Prime Minister?

Mr Kovacic—in terms of whether a RIS was required for this bill, and their advice was that it was not, based on that earlier exemption.

CHAIR—We are getting close to the time when we have to wind up.

Senator ABETZ—Chair, Senator Fisher has some questions. Without any discourtesy, if the departmental officials could please excuse me and, thank you, Chair, for allowing me to go first. I am required at another committee hearing.

CHAIR—Are you able to put your questions on notice, Senator Fisher? This is the scheduled time for finishing.

Senator FISHER—I will confine it to one question; I am happy to put it on notice. Will the bill mean that no employer will face increased costs as a result of award modernisation?

Mr Kovacic—All I can do is reiterate what I said previously in response to Senator Abetz. It is—

Senator FISHER—Perhaps on notice—a yes/no answer would suffice.

Mr Kovacic—What I have put on the record here today—on notice, if you wish—is that the award modernisation request provides the capacity for the Industrial Relations Commission to put in place transitional arrangements to address any sort of cost impact on employers. The commission is scheduled to convene hearings in late May to consider transitional provisions in respect of priority awards and stage 2 modern awards, so at this stage it is yet to be decided what the commission does. All I can do is, as I have said, reiterate what I have indicated already on the record.

Senator FISHER—Thank you, Mr Kovacic. I refer to your opening statement and page 5 of the submission. The department says:

Some stakeholders have raised concerns—

that—

the take-home pay order provisions ... treat employees favourably than employers.

The department then makes the statement:

This is not correct.

You go on to talk about the scope to phase in the impact of modern award provisions for employers over five years. Why does the bill not contain similar provisions in respect of employees? Rather than providing for take-home pay orders—to support your contention earlier that ‘this is not correct’—would not the correlative provision for employees be a phase-in of a reduction of take-home pay, perhaps over five years? Would that not be the equivalent provision necessary to justify the department’s carte blanche statement: ‘This is not correct’?

Mr Kovacic—I do not think so, for a couple of reasons. The primary reason is that a take-home pay order, if one is made—and, as I indicated in the opening statement, it is in very prescribed circumstances that an order is available—is not adjusted to take into account any minimum wage adjustments that are made, so in essence it is frozen in time. Over time, the relevance of that order, I would argue, would start to diminish as minimum wage orders adjust the base level, if I can put it that way.

CHAIR—We will have to leave it there.

Senator FISHER—Thank you, Chair.

CHAIR—You can put things on notice. Senator Collins.

Senator JACINTA COLLINS—There is one thing I would also like you to address on notice. Professor Stewart responded to us overnight on an issue that has been concerning me in relation to terminating expired agreements and the capacity of an individual who has no contact with the other people covered by that agreement. If you would not mind, could you look at his response to us and address, further to that, the professor’s assumption that it would then be up to Fair Work Australia in that situation to satisfy itself of the full scope? Could you look at the provisions in the act and see whether the department is satisfied also that Fair Work Australia would, without any further direction, accept that it is its responsibility to do that, so that the capacity for an individual to respond is not constrained by how the act is presently formulated?

Mr Kovacic—We can do that.

CHAIR—And the secretary has a copy of that further submission for you.

Mr Kovacic—Chair, can I just clarify? Can you provide some guidance about the time frame for responding to the issues that have been put on notice?

CHAIR—Tomorrow.

Mr Kovacic—Apart from ‘the sooner the better’.

Senator FISHER—Tomorrow—that is good guidance.

CHAIR—Yes, tomorrow.

Senator JACINTA COLLINS—Any further questions would have to go in today.

CHAIR—Yes.

Senator FISHER—Yes.

CHAIR—You will have to do your best. Really, all I can say to you is that we will be starting to work on our draft as soon as I adjourn this meeting, and it is really a matter of process. In these situations, I can only ask you to do your best. Some of the questions will be more difficult for you, and I understand that you may not get answers to us before it is really just too late, but—

Mr Kovacic—We will certainly endeavour to do our best and get as much as we can to the committee tomorrow.

CHAIR—Thank you.

Senator JACINTA COLLINS—Thank you.

CHAIR—Thank you very much for the way you presented that in writing. It is what we asked you to do, and you have done it again. I think it is a very useful way for us to use our time with the department. Again, thank you for being so responsive.

Committee adjourned at 12.20 pm

