



COMMONWEALTH OF AUSTRALIA

# SENATE

## Official Committee Hansard

SUPERANNUATION COMMITTEE

**Reference: Workplace Relations Amendment (Superannuation) Bill 1997**

MONDAY, 27 APRIL 1998

SYDNEY

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**SENATE**

**Monday, 27 April 1998**

**SELECT COMMITTEE ON SUPERANNUATION**

**Members:** Senator Watson (*Chair*), Senator Allison, Senator Conroy, Senator Chris Evans, Senator Ferguson, Senator McGauran and Senator Sherry

**Senators attending the hearing:** Senators Conroy, Sherry and Watson

Matter referred by the Senate for inquiry into and report on:

Workplace Relations Amendment (Superannuation) Bill 1997

**WITNESSES**

<b>BURNLEY, Miss Sue-Anne, Industrial Officer, Shop Distributive and Allied Employees Association, 5th floor, 53 Queen Street, Melbourne, Victoria 3000 . . .</b>	<b>2</b>
<b>de BRUYN, Mr Joseph, National Secretary-Treasurer, Shop Distributive and Allied Employees Association, 5th floor, 53 Queen Street, Melbourne, Victoria 3000 . . .</b>	<b>2</b>
<b>DREVER, Mr Philip Malcolm, Assistant Secretary, Labour Relations Policy Branch, Department of Workplace Relations and Small Business, PO Box 9879, Canberra City, Australian Capital Territory 2601 . . . . .</b>	<b>49</b>
<b>KNIGHT, Ms Naomi, Adviser, Association of Superannuation Funds of Australia, 133 Castlereagh Street, Sydney, New South Wales 2000 . . . . .</b>	<b>26</b>
<b>PATERSON, Mr Mark, Chief Executive, ACCI, Commerce House, 24 Brisbane Avenue, Barton, Australian Capital Territory 2600 . . . . .</b>	<b>34</b>
<b>REHN, Ms Kerry Ann, Assistant Secretary, Legislation Policy and Services Branch, Department of Workplace Relations and Small Business, PO Box 9879, Canberra City, Australian Capital Territory 2601 . . . . .</b>	<b>49</b>
<b>RUBINSTEIN, Ms Linda, Senior Industrial Officer, ACTU, 393 Swanston Street, Melbourne, Victoria 3000 . . . . .</b>	<b>16</b>
<b>SMITH, Ms Philippa Judith, Chief Executive Officer, Association of Superannuation Funds of Australia, Level 19, 133 Castlereagh Street, Sydney, New South Wales 2000 . . . . .</b>	<b>26</b>

**Committee met at 10.37 a.m.**

**CHAIR**—I open this inquiry of the Senate Select Committee on Superannuation. On 25 March, the Senate referred the Workplace Relations Amendment (Superannuation) Bill 1997 to the committee for inquiry and report. The committee is to present its report on the bill on 14 May. The bill removes superannuation from the list of allowable matters set out in the Workplace Relations Act 1996. The effect of the amendment is that the Australian Industrial Relations Commission will not be permitted to deal in disputes about superannuation by arbitration. Further, the commission will not be permitted to prevent or settle disputes by making awards or orders or maintain the settlement of such disputes by varying awards or orders.

The commission will also be precluded from making an ‘exceptional matters’ order about superannuation. The amendments will also have the effect that superannuation provisions will be removed from existing awards. In his second reading speech, the Minister for Workplace Relations and Small Business, the Hon. Peter Reith, explained that the bill would simplify the superannuation arrangements with which businesses must comply. Currently, businesses must comply with award provisions and with the obligations imposed by the superannuation guarantee legislation.

The government considers that the result of amending the legislation will be a single set of superannuation requirements, which will be far simpler for business to administer. In his second reading speech, the minister also reminded the House of Representatives that when the Workplace Relations Bill was originally introduced into parliament, the allowable award matters did not include superannuation. The amendments, subsequently agreed with the Australian Democrats, added superannuation to the allowable matters. The minister noted that it was always intended as part of that agreement that this would be a temporary measure only and that superannuation would be removed from the allowable matters as part of the ‘choice of funds’ legislative package.

The committee received a considerable amount of evidence about the legislation in the context of the choice of fund inquiry. Today, we will be taking evidence from a number of groups which made submissions about the legislation to that inquiry. The trade union movement will be represented by the Shop Distributive and Allied Employees Association and the ACTU. Employers will be represented by the Australian Council of Commerce and Industry which has agreed to give evidence by teleconference this afternoon. ASFA and the Department of Workplace Relations and Small Business will also be giving evidence.

Before we commence taking evidence, let me place on record that all witnesses are protected by parliamentary privilege in respect of submissions made to the committee and evidence which is given to it. Parliamentary privilege means special rights and immunities attach to parliament or its members and others necessary for the discharge of functions of the parliament without obstruction and without fear of prosecution. Any act by any person which operates to the disadvantage of a witness on account of evidence given by him or her before a Senate select committee or any other committee of the Senate is treated as a breach of privilege and, accordingly, you are protected.

[10.37 a.m.]

**BURNLEY, Miss Sue-Anne, Industrial Officer, Shop Distributive and Allied Employees Association, 5th floor, 53 Queen Street, Melbourne, Victoria 3000**

**de BRUYN, Mr Joseph, National Secretary-Treasurer, Shop Distributive and Allied Employees Association, 5th floor, 53 Queen Street, Melbourne, Victoria 3000**

**CHAIR**—I welcome the representatives of the Shop Distributive and Allied Employees Association. Is it your wish that your submission be considered as a submission to the current inquiry?

**Mr de Bruyn**—Yes.

**CHAIR**—Thank you. I invite you to make an opening statement and at the conclusion of your remarks I will invite members of the committee to direct questions.

**Mr de Bruyn**—Thank you for the opportunity to be here. I would like to make a statement, which I have in written form for the benefit of the members of the committee. Once I go through that, I would like to hand over to Sue-Anne to make a few additional comments, and we would then be happy to answer any questions. How many copies of the statement does the committee require?

**CHAIR**—About seven.

**Mr de Bruyn**—The Shop Distributive and Allied Employees Association is an organisation of employees registered under the Workplace Relations Act 1996. It has 230,000 members working primarily in the retail and fast food industries across all states and territories in Australia. It is the largest trade union in the country, and the largest trade union affiliated to the ACTU. This verbal submission to the Senate committee adds to the written submission which has already been made.

The issue before the committee is whether superannuation should be removed as one of the 20 allowable matters permitted under the Workplace Relations Act to be covered in awards made under the act and whether superannuation can be the subject of conciliation and arbitration by the Industrial Relations Commission as part of its ordinary work. The Shop Distributive and Allied Employees Association believes strongly that superannuation should be retained as an allowable matter for a range of reasons. In our written submission we have advanced the following reasons for retaining superannuation as an allowable matter. The first reason is that an award prescription on superannuation permits a wider eligibility among employees for superannuation payments than the eligibility terms which are contained in the superannuation guarantee legislation.

We have given examples of the Victorian retail awards where certain classes of part-time and casual employees enjoyed the benefit of occupational superannuation by virtue only of the award prescription as they are not eligible under the terms of the superannuation guarantee legislation. Accordingly, if the bill to remove superannuation as an allowable

matter is passed by the parliament, these employees would find that, from the operative date of such legislation, their right to occupational superannuation would disappear.

In our written submission we have given a number of examples of such employees who would be affected and we have stressed that this would have a disproportionate impact on female workers, who tend to be represented disproportionately highly amongst such part-time and casual workers. It is unacceptable that certain workers should lose their entitlement to superannuation. It is also unacceptable that the coalition break its 1996 election promise that no worker will be worse off under the coalition's policies.

The second reason we gave in our written submission was that an award prescription for superannuation provides an easy and ready access for any employee to their superannuation entitlements. It is normally a provision of an award that a copy be available in the workplace to the employees who work there so that there is ready access to that superannuation entitlement.

Furthermore, awards are now written in plain English and are therefore easy to read and understand. If superannuation was to be limited to the superannuation guarantee legislation, accessibility by employees to the precise terms of their entitlements would be significantly reduced. An ordinary worker would find greater difficulty in comprehending the terms set out in that legislation compared to the easy to read English which is now used in award provisions.

The third reason we gave in our written submission was that while superannuation remains an allowable matter, the Industrial Relations Commission can readily deal with any disputes over superannuation which are not able to be resolved by negotiation between the employer and the employee. Such disputes could include the matter of whether the employee is eligible for occupational superannuation, the fund into which the superannuation payment should be made, the frequency of such superannuation payments by the employer, and so on.

If the Industrial Relations Commission is rendered unable to hear and determine such disputes whether by conciliation or by arbitration because superannuation is beyond its jurisdiction, the employee would have nowhere else to go, particularly now that the Superannuation Complaints Tribunal is no longer operative for the purpose of determining complaints regarding superannuation by employees. In fact, it is my understanding that the tribunal is really for the purpose of dealing with complaints relating to the member of the superannuation fund and the fund itself and is not there for the purpose of dealing with problems between the employer and the employee. The Industrial Relations Commission is a readily accessible and independent tribunal in which disputes issues on superannuation can be heard and determined. It can proceed by way of conciliation between the parties and, failing resolution of the matter, by arbitration. Its orders are enforceable at law, as are the terms of superannuation clauses in federal awards.

In addition to the above arguments which are set out in our written submission, we now wish to advance a number of additional reasons that superannuation should be retained as an allowable matter. These additional reasons are as follows. Firstly, an award provision on superannuation may include a provision requiring the employer to pay superannuation on, say, a monthly basis to the relevant superannuation fund. The superannuation guarantee

legislation merely requires an employer to make the payment once a year. Accordingly, an award provision requiring monthly or even quarterly payments is in the interests of the worker because the money is paid on a regular basis into the superannuation scheme and therefore commences earning interest for the worker earlier than if the employer made the payment on an annual basis. It therefore ensures a higher retirement income for the worker than would otherwise apply.

An annual payment of superannuation contributions as permitted by the legislation enables an employer to hold the money in the meantime and to earn interest on such money which remains in the credit of the employer. Alternatively, the money might be used by the employer as part of his working capital and thereby assist in the operation of the business. Either way, the employee is losing the benefit of the interest which that money could have earned had it been deposited in his superannuation account on, say, a monthly basis.

It seems extraordinary that, although the entitlement to superannuation contributions paid by the employer accrues on a monthly basis under the terms of the superannuation guarantee legislation—because the eligibility talks about \$450 per month or more in earnings—the payment of that money can be withheld by the employer to the disadvantage of the worker. The only practical way of overcoming this problem at the moment and paying the superannuation contribution to a superannuation account on a monthly basis is through an award provision requiring the employer to make such monthly payments.

If superannuation was removed from awards, some employers might shift to annual payments thereby disadvantaging their employees. Annual payments also result in significant enforcement and compliance problems and it becomes much more difficult for a worker to establish whether the full entitlement has been paid by the employer. To give an example of that, if you take the financial year 1 July 1997 to 30 June 1998, the superannuation guarantee legislation requires the employer to make the payment for that financial year by approximately 28 July 1998.

Most funds will prepare statements for the members for the financial year to 30 June and so, when those statements are prepared and circulated in the second half of 1998, they will not include in the statement the payment made by the employer on or around 28 July. It will only appear, then, in the statement of the following year, so the employee does not really know—presuming statements are done on an annual basis—until the second half of 1999 whether the money for the period ending 30 June 1998 has been paid by the employer. Only then is the employee in a position to check to see whether the correct amount has been paid and, if necessary, to take any action if the employee believes that the amount that was paid is not correct.

If you take the alternative of monthly payments, where a monthly payment is made, it is usually made in the first two weeks of the month following the month for which the payment is intended, and so you find that, in the statements which will go to the members of a fund in the second half of this year, they will generally have the contributions contained in that statement up until the end of May 1998. So there is usually only that last month outstanding. Therefore, statements with monthly payments are far more up to date.

The other impact which also needs to be taken into account with the frequency of payments is the impact that it can have on insurance. If a person starts work with an employer and a period of up to a year goes by without any payment being made to the superannuation fund, the employee might have elected insurance but if no money has been paid, and in the event then of death or permanent disability, the person will find that they are probably not covered for insurance because there has been no payment of money from which the premium would have been deducted.

These are all practical reasons why the issue of frequency of payments is important. The legislation does not protect the worker in those situations and so an award provision which provides, say, for a monthly payment, is the only way in which you can effectively ensure that the greatest amount of interest is earned, that it is easier for the employee to check that the correct payments are being made, that the statements are genuinely up to date, and that you do not have these unfortunate effects with respect to insurance being selected but not applicable because no money has been paid to the fund.

The second additional reason we have for retaining superannuation as an allowable matter is that an award provision on superannuation might include a provision entitling an employee to payroll deduction of employee contributions by the employer and the payment of such moneys on a monthly basis into the employee's superannuation account. This convenient way of contributing to one's own superannuation encourages savings by the worker and contributes to his or her assets at the point of retirement.

In the absence of such an award provision, the employer might refuse to perform such payroll deductions of employee contributions to superannuation and, accordingly, the employee is deprived of a convenient way of making regular contributions to his superannuation account. Alternative ways of paying to a superannuation account are more inconvenient for the worker.

In any event, a worker is more likely to save if he or she never sees the money in a pay packet because it has been deducted at source by the employer. The superannuation guarantee legislation contains no provision whatsoever for employee contributions to be made to superannuation by payroll deduction at the election of the employee and so removing superannuation as an allowable matter acts to the detriment of the worker and the nation.

The third reason is that an award provision on superannuation might include a requirement on the employer to ensure that a new employee is asked to complete a membership application form for the relevant superannuation fund within, say, a week or two of commencing employment, and a provision that such a completed membership application form be sent to the superannuation fund within 14 days of the commencement of the new employee. Such administrative provisions greatly assist in the efficiency of running a superannuation fund as they ensure that any election of death and disability insurance cover made by the employee can go into effect immediately.

The removal of superannuation as an award matter would remove such provisions from the award and, because the superannuation guarantee legislation does not impose such requirements, employers might in future either fail to carry out such administration work

regarding membership application forms or do it over a longer time frame which would be to the disadvantage of the employee. This is particularly relevant in industries where there is a high turnover of employees and, of course, turnover rates in both the retail industry and fast food industry which we cover can frequently be up to 50 per cent per annum. So you have two industries which are large employers of labour but which have very high turnover rates.

Therefore, each time a new employee starts, it is important to get the employee to complete the form. It is also important for that form to be sent off to the superannuation fund so that a new account is opened up by the superannuation fund and so that any election of insurance can go into effect straight away. We have had problems in the past on occasions where an employee has elected insurance but, because the death or disablement occurs between the completion of the membership application form and it reaching the fund, there is then an argument as to whether the person was in fact covered by insurance. So a provision that makes requirements on the employer for these administrative tasks to be done efficiently and promptly is of assistance to employees in making sure that they are covered.

Fourthly, a superannuation clause in an award may nominate the fund or funds into which the superannuation contributions are to be paid by the employer. This will readily identify to all existing and new employers covered by the award the appropriate fund or funds for the purposes of making the superannuation payment. Although choice of fund legislation is to be introduced by the parliament in due course, the specification of one or more funds in an award nevertheless will continue to have relevance into the future by providing to the employer the name of the relevant industry fund which he may continue to offer under the proposed terms of employee choice of superannuation funds.

For all of these reasons, the union strongly believes that superannuation should remain one of the 20 allowable matters under the Workplace Relations Act so that the best interests of working people in respect of their superannuation entitlements will be ensured and preserved. Removal of superannuation as an allowable matter would eliminate certain categories of employees from the entitlement to superannuation and also worsen the entitlement of many existing employees to benefits relating to their superannuation, and the conditions under which the superannuation obligation is observed by employers. I might just hand over to Sue-Anne to make a few additional comments.

**Miss Burnley**—In our written submission we detailed several other issues which have implications arising from the changes made to the Industrial Relations Act to establish the Workplace Relations Act. One of the main changes that occurred was the removal of minimum part-time weekly hours. There can be daily minimums for part-time employees but the weekly minimums no longer exist. One of the arguments for not having minimum weekly hours set for part-time employees was to allow full choice to employees by breaking down the barriers that prevented full participation of people seeking part-time work. This principle was based on assumptions of equity in conditions flowing to these employees. Equity, however, cannot occur in respect of superannuation with the proposed legislation as it currently stands.

A part-time worker is now able to work as little as three hours per week on a daily basis. So they can have one shift of three hours. Under most of the retail awards currently, the superannuation provisions provide superannuation on a base of a time service. So if that

person is employed on a regular basis or for a regular period of time, once they reach, say, six months service, they become entitled to superannuation regardless of how few hours they work. We say that these types of provisions provide equity between the full timers and part-timers but, with this proposed legislation that seeks to remove superannuation from awards, this equity is destroyed. It contradicts the principles espoused by the government on making part-time employment more accessible so that equity could be encouraged. Without the award provision there, with the removal of minimum weekly part-time hours, part-timers who are a new form of part-time employee will no longer be eligible for superannuation.

By introducing this legislation, there is a circumvention of the principles of the Workplace Relations Act. Under the Workplace Relations Act, the Industrial Relations Commission, when making any change to an award, has to examine each matter that comes before it in detail. Especially when there is an increase or decrease in the proposed safety net, the commission must examine the safety net of conditions and address individual issues of an award, the peculiarities of an industry and weigh up the pros and cons of any change. Removing superannuation from awards with this piece of legislation is a move of stealth by the government. It bypasses the commission and its obligations, with the government seeking to reduce an employee benefit without justifiable examination of each industry. This circumvention should not happen.

Equality in conditions of employment should mean that full-time and part-time employees can access on an equal basis all benefits of employment—for example, annual leave and sick leave. Retail awards provide this equality to all conditions, including superannuation. This legislation, in seeking to remove superannuation from awards, will place part-timers in an inequitable position. Many who had previously qualified for superannuation or some of the new low hour part-timers will not qualify for superannuation any more.

The SDA's position is to retain superannuation in the awards as it exists. But if the government is committed to removing it, then the provision in the current legislation setting a minimum of \$450 as the monthly qualifying amount to get a superannuation account should be changed. The SDA has a couple of suggestions: one would be to decrease the qualifying amount from \$450—preferably to zero or to some other lower figure such as \$200 or \$250 a month—or a second alternative could be to place another form of qualifying, so that you could maintain the \$450 amount and add a provision such as, 'So long as they have completed six months of service.' So when they have completed six months of service and they are a regular employee, they can access superannuation. Either of these two options would enable part-timers working a low number of hours to access superannuation on an equitable basis.

Having detailed the effects that this issue could have on part-timers, there then arises a gender inequity issue with superannuation being removed from awards. This comes about because a large proportion of part-timers are female. By reducing a part-timer's access to superannuation, the government is directing a measure at women. By denying a section of the work force which is dominated by women, this legislation is implementing a form of gender inequity which will then be discriminatory against women. As I have said previously, the retail industry does not currently have that discrimination because, in most of the awards, the qualifying is met by a service amount and not by a dollar amount. So if someone is

working five hours regularly either as a part-timer or a casual and they have reached the qualifying period, they are then entitled to superannuation.

The last part that we detailed in our written submission was in relation to the equal remuneration section of the Workplace Relations Act. Under the Workplace Relations Act 1996 there are provisions which provide that the commission can examine equal remuneration between male and female employees. The commission can then issue orders to ensure that equal remuneration is given for work of equal value. This occurs under part VIA of division 2 and is contained in sections 107BA to 170BI.

In considering all the equal remuneration claims that come before it, one part of the remuneration that the commission must take into account is workers' entitlement to superannuation. When you look at the equal remuneration part of the act, the commission is restricted in examining the issues to what are allowable matters. So what happens if this legislation goes through and you suddenly take a case to the commission regarding equal remuneration is that you will no longer be able to draw in any comparisons with regard to superannuation.

If an employer had decided, 'Yes, we are going to abide by the rules. We are going to pay everybody the same amount as the award says, but we will give this side of the work force, say, 12 per cent superannuation and we will give everybody else the SGC required superannuation of, say, six per cent,' then there is a six per cent inequity there that could not be examined by the commission if this legislation went through because the commission would no longer be able to view or even look at superannuation because it was not an allowable matter. We say this would make a farce of having equal remuneration provisions within the act.

If this legislation proceeds, then a further change would be needed to the Workplace Relations Act to counterbalance that. That would be with regard to the orders that the commission can issue. An exemption would be required so that, if an order were issued regarding equal remuneration, the commission would be allowed to deal with any questions regarding superannuation. In our written submission on page 16 we put what the amendment would be. That would be under section 89A—scope of industrial disputes. The section involved would be section 89A(1)(b)—preventing or settling an industrial dispute by making an award or order, except orders under part VIA, division 2.

That provision would, therefore, enable the commission to examine superannuation in any case it was dealing with with regard to equal remuneration. So as a total package that the employees were receiving, the commission could examine each and every one of them. Without that provision in there, the commission would not be able to examine that issue and, therefore, inequities regarding equal pay could occur quite easily in the work force and nobody would have the power to address it.

**CHAIR**—If, for example, differences between award super and the superannuation guarantee were to be augmented in gross wages, do you believe that would honour the Prime Minister's undertaking that no employee would be worse off? So what technically might be lost in superannuation is thrown back into the cash payment for wages. Would that restore the equity?

**Mr de Bruyn**—No, it does not. Apart from the practical difficulty of trying to do that, it does not give the worker that money in a superannuation account.

**CHAIR**—No, but it gives them a cash advantage.

**Mr de Bruyn**—Yes, with tax to be taken out at the marginal rate. A person who currently has money going into a superannuation account has the money in a vehicle where it is available only upon retirement at age 55 or above, has the opportunity for death and total and permanent disablement insurance cover as well, and has a low rate of tax applicable. I see that as being a different and better benefit than if the extra money were simply paid as wages if some way could be found of doing that, which I think relates to the practical side. I do not think you could practically do it.

**CHAIR**—Opinion is divided on this issue. In an earlier hearing on a related matter we heard that what the very low income earners—*itinerants* and a lot of married people—really need is maximum cash in hand. These sorts of people are going to fall back on the social security system, anyway.

**Mr de Bruyn**—The amount that this would add to the worker's pay packet is marginal. It has a significance only if it is able to be accumulated over time in a superannuation account. The far better way for such a person to get a higher income is to be given some more hours of work. It seems to me that the entitlement to have money going into a superannuation account is a benefit in its own right and you cannot say that there is a way of substituting some equivalent by giving them a bit more money. I do not believe that is correct. I think there is a benefit to superannuation in its own right because it is money which is being put away for retirement.

**CHAIR**—I raise the make-up in the gross pay because I think Sue-Anne raised the problem where some employers might shift to the superannuation guarantee and effectively pay fewer amounts in superannuation. So the total package that the person would get would, therefore, be less.

**Mr de Bruyn**—I think what we have been talking about is that the eligibility provisions in the awards tend to be somewhat different from those under the superannuation guarantee legislation and, therefore, the award will catch some people who would not have that eligibility under the SGC and make them eligible for super. If superannuation were removed as an allowable matter, then those people would suddenly find from the operative date of that legislation that their entitlement to superannuation has gone.

**Senator SHERRY**—You have specifically designed in your negotiations with various employers under each award a provision you have outlined that is suited to the nature of employment in the retail industry.

**Mr de Bruyn**—We have tried to do that, yes.

**Senator SHERRY**—Following on from that, I am looking at your example in your written submission where you have detailed the case of Sarah who works 7.6 hours on a Thursday and 7.6 hours on a Friday. That is a total of 15.2 hours. Her earnings are \$448 a

month. For this particular person, Sarah, under your provision superannuation is paid for her. If superannuation were removed as an allowable matter, she would not receive any payment in respect of superannuation at all because she would come under the \$450 a month cut-off.

I would like you to comment on this issue. At the moment superannuation contributions are six per cent and are rising to nine per cent. Do you think that, if an employer can get away with not making any superannuation payment at all—currently it is six per cent and it is going to nine per cent—they will manipulate the hours of work so that in the case of Sarah, for example, they would reduce the hours of work of a casual below the effective cut-off point of \$450 a month, therefore avoiding any superannuation obligation at all?

**Mr de Bruyn**—Would they do that? I think some employers would be tempted to do that because, as the superannuation guarantee rises to nine per cent, they would see that as being an opportunity for a significant saving. Because there is already so much part-time and casual employment within the retail and fast food industries, it is not difficult to reduce people's hours to keep them below that \$450 and just employ one or two extra people and get the same work done.

**Senator SHERRY**—It seems to me to be a very obvious way an employer would avoid an obligation that is currently at six per cent and is rising to nine per cent. It probably would not have been such a problem when the SGC was three per cent because, I suspect, a lot of employers just could not be bothered, but a nine per cent wage saving is a considerable saving.

**Mr de Bruyn**—It is a considerable saving, and employing more part-timers and casuals, but on a limited number of hours, would be the way to do it. In the past, we have tried to ensure that at least part-timers will get to that \$450 mark, even in the absence of anything else, by having a minimum number of hours that they must work. But, of course, that has gone.

**Senator SHERRY**—What is the approximate breakup of state and federal jurisdiction of employees covered within the retail industry?

**Mr de Bruyn**—It used to be that the vast majority were covered by state awards and it was in only the ACT and the Northern Territory that federal awards applied across the industry. What has now changed is, firstly, that people in Victoria are largely covered by federal awards because the state industrial relations system has disappeared. There are, I think, three or four federal awards in Victoria which cover large numbers of employers across the whole of the industry. The second thing which has happened in recent years is that we have been able to get the larger employers into enterprise bargaining agreements. Those agreements have generally been certified, originally as federal awards and now they more typically are agreements, with the federal award that was originally made as the first enterprise bargaining agreement being the underpinning award.

In the case of Coles Myer, which has about 150,000 employees across all its different trading divisions, there is a federal award in existence covering just the issue of superannuation. The only part of the Coles Myer business that it does not cover is Red Rooster, which is the fast food part. All the other retail divisions of the company—the Coles supermarkets,

the K-Mart stores, Target stores, Myer stores, Grace Bros stores, Katies, Liquorland—are covered by a federal award which is just devoted to superannuation. It contains most of the points which I mentioned in the submission. It has a wider eligibility than SGC among certain categories in this part-time casual area. It provides for the monthly payment of superannuation to the appropriate fund. It provides for employee contributions by payroll deduction, and so on.

**Senator SHERRY**—I am familiar with the industrial arrangements in Tasmania. There is a state retail trades award. Presumably the agreement you have talked about with Coles would extend to—

**Mr de Bruyn**—They do, yes.

**Senator SHERRY**—We know this legislation is only going to deal with employees under the federal jurisdiction, although the government has expressed an interest in its spreading into the state jurisdictions. In Tasmania, for example, we are going to have workers who are covered by the state retail trades award not covered effectively by the state industrial relations jurisdiction in regard to superannuation, but workers in the federal jurisdiction will not be covered. It seems to me that you would have people working, maybe for Coles Myer, who also work in another shop covered by the state award. There could be some degree of confusion amongst employees in the retail industry who work in part of the industry covered by a federal document and in part of the industry covered by a state document at the same time, or indeed who move from employer to employer.

**Mr de Bruyn**—Yes, there would be that confusion. If a part-timer or a casual worker is not getting enough hours with one employer, they will try to get the number of hours they need to meet their weekly income expectations by having another part-time or casual job with a different employer. So they could be in this position: partly covered by a state award and partly covered by a federal award.

**Senator SHERRY**—When the marketing exercise gets under way for choice, employees, inevitably, will be bombarded with material about exercising choice. In your view, do workers in the retail industry know whether they are covered by a state or federal document?

**Mr de Bruyn**—Typically, the answer is no.

**Senator SHERRY**—So workers in the state jurisdiction will be bombarded with material on choice and not be able to make a choice, and presumably confusion will result from that exercise alone.

**Mr de Bruyn**—I expect there will be a lot of confusion.

**Senator SHERRY**—There is one other issue that has not been touched on and that has only come to my attention. As far as the award position goes for the SG, do you have the full six per cent in all of your awards, do you have the three per cent or is it a mixture?

**Mr de Bruyn**—It varies. We have been trying to get the full six per cent into the awards and that process is under way at the moment. In agreements, you sometimes find three per

cent, you sometimes find six per cent, it goes right up to the nine per cent. So it is a mixed bag at the moment, but we have set out to ensure that every award has the full amount of six per cent rising up to nine per cent. Those applications, I think, are somewhere in the process of being prepared and put into the commission. They are being dealt with at the moment.

**Senator CONROY**—State or federal?

**Mr de Bruyn**—We are talking about the federal.

**Senator SHERRY**—I understand from a practical point of view, and also the commission has a question mark over its powers, it is not progressing quickly.

**Miss Burnley**—Yes, there have been delays in processing some of the applications. Also, the employers are a bit reluctant as they do not know where the future is heading in a lot of areas, so there have been delays.

**Senator SHERRY**—I will finish on this point and it is a totally different issue. I have had some representations in respect of Tasmania, not in respect of the retail industry. Where an award only has three per cent—where it does not have the full current SG—some agents for insurance companies have been attempting to sell insurance type products beyond the traditional life, death and disability. That is insurance in respect of loss of incomes or in respect of sickness and accident; it is much broader than insurance for death and disability. They have been convincing some employers to put the difference between the award provision, which may be three per cent, and the SG, which is six per cent, into a very broad package of insurance products which effectively use the difference between three and six—three per cent. I have had drawn to my attention the activity of some agents flogging products which use the full three per cent. Have you had any evidence from your state organisations about this practice occurring in the retail industry?

**Mr de Bruyn**—No, I have not. I have had no evidence of that.

**Senator SHERRY**—You might just take that on notice because I am interested in pursuing the issue. I think it is a blatant misuse of superannuation moneys, but it has been occurring in some other sectors unfortunately.

**Senator CONROY**—The Institute of Actuaries, after the choice hearings, did some modelling for us on the loss and benefit caused by moving from simply monthly contributions to yearly. It worked out, I think they said, between a three and a four per cent loss of benefits just by simply changing that one area. So that may be an argument that is useful to you amongst your members.

**Mr de Bruyn**—Yes, it can be significant. The other aspect is the reaction of an employee when they are told that the employer is hanging on to the money until the end of the 12-month period. They are wild. They really do resent the employer hanging on to that money and using it for their own purposes, particularly if the money is put into, say, a cash management account and it earns interest which the employee never sees. It does engender great resentment, and I have found that in talking about that issue to employees who are members of the union.

**Senator CONROY**—Yes, I still have scars.

**Senator SHERRY**—On that issue, there are a lot of small employers in the retail industry. If they move to a yearly payment, I can see an agent going out and saying, ‘Choice is in; sign up with me for this particular product.’ One of the ‘advantages’ you will have in convincing the employer is that switch to yearly payments. I do not know what the bankruptcy rate is in the retail industry, but it might be useful if you could perhaps provide us with some figures. It seems to me that where an employer goes bankrupt within the first year, the worker is not going to get any super.

**Mr de Bruyn**—No. That will be the problem. And the worker may very well not chase up the entitlements either. Unless they bring that issue to an organisation such as the union, they may not themselves even be aware that there is this entitlement of superannuation which is available to be chased up provided they go to the right place and the right people who could follow it up for them.

**Senator SHERRY**—What you have just said reminds me of another issue.

**CHAIR**—Before we go on to another issue, isn’t super a preferred item as far a trustee in bankruptcy and a liquidator are concerned?

**Senator SHERRY**—It is the equivalent of wages, isn’t it?

**CHAIR**—Is it identical to wages or not?

**Mr de Bruyn**—I think it would be the same as wages.

**Senator CONROY**—Except if you work at Patricks!

**Senator SHERRY**—If there are any assets to pay out, that is. Even in a situation where there is not bankruptcy, the retail industry, like hospitality where I used to work, has a very high turnover. I am sure that you have significant numbers of employees who are members who do not last a year in employment, for a whole lot of reasons.

If superannuation is paid at the end of the year, do you think it is likely that a worker who had, say, worked for only six months, nine months or 11 months, left the job, had not signed a membership application because the money is paid at the end of the year, will get their superannuation if they have moved on to somewhere else?

**Mr de Bruyn**—That is a question I have often asked myself: whether in fact that entitlement is ever paid to them. It is unlikely that the employee is aware that there is that entitlement, so they are not likely to be checking. I have often wondered myself whether that entitlement is ever paid.

**Senator SHERRY**—But at least if the money is paid monthly or even quarterly you have a substantial cheque. If it is paid yearly—it seems to me that there will be a lot of employers where the casual employment turnover might be 100 per cent in a year.

**Mr de Bruyn**—If the payment is monthly, then right from the outset of the employee's commencement of employment they join a fund. Money is paid some time after the end of the relevant period and the fund is going to send them a statement. The employee is then far more likely to pick up if there is any shortfall in the payment of superannuation arising from the period of employment. But if it is an annual thing, and they come and go within the 12 months, then I think that is entirely different.

**Senator CONROY**—You raised the question of death and disability. The secondary problem of paying only annually is that, technically, people are unfinancial for their death and disability cover. I wonder if you have had many instances of people who fell, unhappily, into the situation where they were either injured or, in a number of cases, deceased, and the arguments that ensue. I have been involved in a number of quite tragic cases myself.

**Mr de Bruyn**—It does happen. One of the most common claims for insurance in the event of death is with young people. They seem to be disproportionately represented. It has happened that a person has commenced with an employer and there has been some delay in getting the person to sign the membership application, or the person may have signed the application but there has been a delay in getting it to the fund. If the person is, for example, involved in a car accident, eventually the membership application comes to light. The person has elected insurance, but the insurance company says, 'At the time the person was involved in the car accident the membership application had not yet reached the fund, therefore we say that the person is not covered for the insurance.'

The other type of problem is that the person, in their membership application, elects to be covered by insurance but the employer has not yet made a payment and therefore there has been no insurance premium paid to the insurer. This again leads to a question about eligibility. There have been a number of people who fitted into that. There was a case recently involving Woolworths which went to the Superannuation Complaints Tribunal where there was an argument as to who, if anybody, was at fault. I cannot recall now, but there either had been a delay in sending the membership application where the person had elected their insurance or a delay in making the payment. But ultimately it was resolved with Woolworths accepting some liability and making a payment.

**Senator CONROY**—I have unfortunately been caught in the next worst set of circumstances where the employer, having not forwarded any moneys, then turned around and said, 'The person never signed the form, so I didn't ever get to send the forms, so it is not my fault,' therefore legally arguing that they had no liability. There is another area which I think you raised—administration. In this situation people are forced into the routine of saying, 'Here's a new person. We'll send the form off.' I have been involved in a number of legal actions against employers who have basically denied that they ever received the form back from the employee, and they therefore sought to avoid the death and disability liability.

**Mr de Bruyn**—Yes. Making sure that the form is completed and sent in quickly and that there is frequent payment of the superannuation moneys to the fund are issues which are extremely important from the point of view of making sure that the person is in the fund and, if they have elected insurance, that they are covered by the insurance so that the process is there and proceeding. Nothing but problems arise from delays. Of course, if you say, 'Well, surely the fund itself has an arrangement whereby it wants to see regular payments

being made, and so on, and wants to see the membership application form coming in,' the problem is that the fund itself has no way of requiring an employer to do these things in an enforceable way. The only thing the fund can do is to say to the employer, 'Look, if you don't do that you can't be a participating member.' Then of course the employer might say, 'Well, I'll just go and join another scheme where these requirements are not put on me,' whereas, if these things are in an award and provided for there, they are enforceable and, if the employer is not complying, you take the employer to the Industrial Relations Commission or to the Industrial Relations Court for a breach.

**CHAIR**—We have exceeded our time. Thank you very much, Mr de Bruyn and Miss Burnley, for coming and presenting evidence.

[11.33 a.m.]

**RUBINSTEIN, Ms Linda, Senior Industrial Officer, ACTU, 393 Swanston Street, Melbourne, Victoria 3000**

**CHAIR**—Welcome. Would you mind speaking to your submission or would you like to go straight to questions?

**Ms Rubinstein**—No, we welcome the opportunity to address the committee specifically on this issue of award superannuation as an allowable matter. This was addressed in the written submission which we gave to the inquiry into the choice legislation. Although we understood that the issue of the amendment to the Workplace Relations Act was not specifically before the committee at that time, with your indulgence I think we did speak about that issue because it is, of course, inextricably linked to the question of choice. I certainly do not wish to be simply repetitive, but it is important to stress again some of the key issues from those submissions.

We would say that the argument that award superannuation provisions should not be changed at this time gains additional force from the deferral of the choice legislation and the lack of certainty as to how the Senate will amend that legislation—that is, the industry and the parties involved simply do not know what the final form, if any, the choice legislation will take.

The first point that I would like to raise is that it is absolutely critical, if there is to be an amendment to the Workplace Relations Amendment (Superannuation) Bill, that it not take effect from the same time that other non-allowable matters are removed from the act. There are a number of award provisions which are not contained in the list of allowable award matters in the Workplace Relations Act. Those provisions will become unenforceable on 1 July this year. If this bill were to go through prior to that, it could be that superannuation would be treated the same way as those other non-allowable matters and simply would become of no legal effect from that date.

That would have two immediate results, one of which would be that employers would have the absolute right to determine the fund to which employees' contributions would be paid in the absence of any other legislation. While that is very wrong in principle, it also opens up the whole question of employer liability, in terms of selection of a fund, which is not there when they are paying into a fund in accordance with the processes set out in an award.

The second problem is one that has been referred to by the ACTU previously and that the SDA has also talked about: the immediate removal of a number of entitlements from employees which have nothing whatsoever to do with choice of fund—that is, the contributions payable to employees earning less than the \$450 per month SGC threshold. It needs to be remembered that that was a productivity trade-off. It was a trade-off for a wage increase in around 1987. To remove it now would have the same effect as removing some other national wage increase from an award. It is simply unfair.

As the SDA has pointed out, this impacts on part-time workers, a disproportionate number of whom are women who are working part-time in many cases so that they can combine paid employment with family responsibilities. To be able to carry out this dual role, they accept that they will have lower pay than would be the case if they worked full-time. To also discriminate against them in respect of their retirement earnings seems particularly unfair and onerous. In fact, discrimination against part-time workers runs against the government's stated commitment to promote regular part-time work which offers all full-time conditions on a pro rata basis.

Other entitlements that would be lost would be things like payment of superannuation during a period of absence on workers compensation make-up pay, which is a pay supplement to workers compensation payments. The questions of monthly payment of contributions and some other administrative matters such as giving a form to the employee, sending in the form 14 days later and so on have been explored in some depth with the SDA this morning. But, clearly, it will have an effect on earnings and it will have an effect on insurance.

I would say that, from my experience with one of the superannuation funds, which also has a very high membership of casual workers and young people who will often work for a relatively short period of time, the problems of insurance are already there. There have been a number of cases where insurance has been claimed on behalf of members and it has been found that, because the employer did not pay in the contributions, that person is not insured.

The industry funds at least make substantial efforts to ensure that there is compliance. The fund that I am involved in sends out three letters and it also informs the employee at that point that the contributions have not been received and explains to everybody what the implications are for insurance and for their legal liabilities. If there were no way of finding out for what may be as much as 18 months after the contribution was due, the problems of that become really obvious. The employee would have no other option than to sue the employer for the insurance and, after that period of time, whether the employer could be found or would be solvent is a matter of some doubt.

It might be argued that 1 July this year is a reasonable time for superannuation to drop out of awards because other non-allowable matters will be dropping out at that time, but the following two points need to be taken into consideration. Firstly, in respect of those other matters, the employers, employees and unions have had an 18-month transitional period to plan how they are going to deal with that, to negotiate over those issues, and to decide whether or not to include them in enterprise agreements.

In the case of superannuation, which I would suggest is a more complex matter than any of the other non-allowable matters that will be removed from awards, there will be no time. The earliest, presumably, that people will know whether or not it is happening would be some time towards the end of May or early June. There will simply be no time for alternative arrangements to be made. I would also point out that, by and large, the other non-allowable matters do not involve substantive monetary financial entitlements as this does.

The ACTU's position is that award superannuation should remain but that, at the very least, it would be grossly irresponsible to remove those provisions in the current situation of uncertainty. We say that superannuation provisions should remain in awards, even when

choice is implemented. Firstly, we say that it is appropriate that award specified funds be the default funds under the choice system. We have previously suggested that the mechanism for designating awards for the purposes of applying the no-disadvantage test to agreements could be used to determine the default fund for all employees, whether or not covered by an award.

Certainly, before there is any contemplation of removing award superannuation provisions, there is a need to monitor and evaluate the experience of choice, including whether or not employees have been sufficiently educated to properly understand and take advantage of the legislation before awards are tampered with. It is also important that the commission maintains its dispute resolution powers in relation to superannuation. If that is not the case, there will be no body with the jurisdiction and the expertise to resolve the inevitable industrial disputes concerning choice of fund and other superannuation related matters. It should be noted that these are disputes between employees and employers, not disputes between members and the funds or the insurance companies—although there is no reasonable way of dealing with that at the moment after the Federal Court decision in respect of the Superannuation Complaints Tribunal.

A number of other points need to be noted in respect of this issue. Firstly, the government intends to preserve the lower earning base for employer calculation of contributions where these are provided for through awards—that is, where an employer has been using a lower earning base pursuant to an award than would otherwise apply under the legislation.

The ability to do that will be preserved, and yet there is no similar preservation of the benefits to employees where they are provided through awards, so it is not swings and roundabouts. It is very much that the employers will have the swings and the employees will not. It is so incredibly unfair that it is difficult to see that that is the government's real intention. Nevertheless, we must stress that if award provisions provide benefits for employers and benefits for employees, then they should all be preserved.

Secondly, the exclusion of superannuation from being the subject of an exceptional matters order is really quite extraordinary, as this would be the only specific exclusion in the act. There is none currently. Thirdly, we need to point out that awards frequently provide for choice of fund. It is not true that awards invariably have a process for one industry fund. As we have pointed out before, award provisions often specify a choice between a corporate fund and one or more industry funds, or a process by which any fund could be utilised.

That is particularly significant given the implications of the Financial Clinic case for non-union members. The hospitality award, which was included as an appendix to the ACTU's written submission on choice, shows how that is dealt with, that in the case of non-union members who wish to be in another fund, the onus is actually on the union to show particular circumstances as to why that should be the case.

There is already a proper workable process which can be used by employees and employers, but with recourse to the commission and with a role for the union if, and only if, there are employees who are members of the union. That is highly significant and I suggest that the committee look at that as a really good example of how the commission has dealt with the very complex issues which surround superannuation.

Removing superannuation from awards is really another step as part of the government's long-term strategy to restrict awards generally to a bare minimum of very basic conditions or even to abolish them altogether. It has absolutely nothing to do with choice because awards are not a barrier to choice.

Kelvin Thomson, the opposition spokesperson on superannuation, has proposed a simple means of providing genuine choice for those employees who really want it, that is, a provision which is similar to that applying in other states that would allow individual employees, with the consent of their employer, to become a member of any fund irrespective of the award which would otherwise apply.

A provision like that is really saying that any employee who wants to be in another fund—and it should only be a matter for the employee—will not be prevented by the award from doing that, subject to the agreement of the employer for administrative reasons and whatever. That is choice without any need to displace existing provisions or existing mechanisms, or to have very complex legislation with a whole lot of other intended and unintended consequences.

The opposition proposal puts the government on the spot because it does provide for a simple and genuine employee choice rather than a complicated system designed for employer choice, really, and for the benefit of the banks and the other large financial institutions. The committee should carefully examine this proposal as an alternative to wholesale removal of comprehensive award superannuation provisions.

This proposal, in relation to awards, as I have said, is inextricably linked to the flawed choice proposal, the future of which is unknown and the effect of removing award provisions would be to open up award-covered employees to the kinds of tactics used to sell funds in the UK and Chile, about which the committee has heard a considerable amount and expressed some concern.

A careful reading of the committee's report on choice will show that the commission has expressed concerns about a range of issues including the need for education, the time frame of the legislation, the risk of employees making poor choices, too much power in the hands of employers, the issue of default funds and other employee safeguards, disclosure and key feature statements in the time frame within which those can be developed, issues related to insurance, and the issue of employer liability. All of those issues would need to be resolved before we can have the choice legislation and the ACTU could be forgiven for really wanting to see what is there and how it works before we are in a position where we start looking at awards. Awards are not the barrier to choice.

There should be no question of tampering with award superannuation until the legislation is in place and it is seen to work. We have a system about which there are very few concerns, particularly for an employee. There is no evidence of any significant dissatisfaction with particular funds or particular processes specified in awards. Given that, how can it be justified to break up the system in favour of a choice concept about which very serious concerns have been raised from all parties: the unions, the employers, the consumer organisations, the industry and, I would have to say, the committee itself.

**CHAIR**—Would some of your opposition be overcome if the committee recommended the scope of a reconstituted Superannuation Complaints Tribunal to cover disputes between employers and the employee? That does seem to be a problem at the moment.

**Ms Rubinstein**—Anyone who has ever been a student of constitutional law in this country will know quite a lot about the powers of the Industrial Relations Commission. As the main administrative arbitral tribunal in Australia, its constitutional basis has been attacked many, many times from all sides.

**CHAIR**—And if we can overcome that?

**Ms Rubinstein**—It has taken 90-odd years and there are still constitutional challenges now and then to its work, so I could not be optimistic that we could overcome it. The problem with the SCT is that you can set it up but you do not actually know, until the High Court tells you, whether or not it is constitutionally valid. Then you only know that it cannot do a particular thing.

**CHAIR**—If these powers came within a constitutionally valid, reconstituted Superannuation Complaints Tribunal, or whatever its name would be—so it is properly constituted to overcome the constitutional impairments it has had to date—would that overcome some of your opposition?

**Ms Rubinstein**—First of all, I think the question is hypothetical because the constitutional issues are so hard. Even granting that, there are really two other reasons I would say no. One is that, over the last 90 years or so, the commission has got a very deep corporate, if you like, expertise in handling workplace issues and resolving disputes. Certainly, the experience I have had is that other tribunals dealing with workplace matters—equal opportunity tribunals, for example—have found it much harder than the commission. The commission works as a cheap, accessible avenue where, not to put too fine a point on it, it is skilled in, where possible, knocking heads together and saying, ‘You sort this out.’ It has a very good record of achieving negotiated settlements and quick arbitrations where that is necessary. I do not know of any other tribunal in this country that is capable of doing that with specifically workplace issues.

The second reason I do not think it would work is that disputes about superannuation are often related to other industrial disputes, so a union will have a number of matters over which it is in dispute with the employer, one of which would be superannuation. So to have that one off, again, would be costly and difficult for the employer and would also mitigate against a settlement of a package, which is often the way in which industrial disputes are resolved so a whole series of things are settled. For those reasons, I just think it is completely impractical.

**CHAIR**—What if the differences between award superannuation guarantees were pushed into an actual increase in the gross payment?

**Ms Rubinstein**—First of all, that has not been suggested.

**CHAIR**—No, but if the committee came up with this approach.

**Ms Rubinstein**—I would make the point that it has not been suggested. I suspect it would be strongly opposed, including by employers.

**CHAIR**—Would you oppose that?

**Ms Rubinstein**—Yes, we would also oppose that and I think for the same reasons Mr de Bruyn gave. The entitlement to retirement income is a very important entitlement and the achievement of gaining universal superannuation is really something I think we should all be very proud of. The government has proposed—although it has not as yet introduced legislation—enabling opting out of employees earning less than \$900 a month. We are also opposing that for the same reason.

It is not true to say that employees who are earning very small amounts are always going to earn small amounts. They are not. They go in and out of full-time work. In some cases, they might go in and out of working and also benefit from the spouse contribution. So all of that needs to be linked. If you think of the work life cycle, particularly of women, it could be a period where they are working full time and getting superannuation, then not working in the paid work force but receiving a spouse contribution, then working part time and receiving superannuation, and then going back into full-time work later. All of those contributions, even if they are quite small, as you know, can play a big part in terms of determining their final retirement income.

**Senator SHERRY**—The issue that I touched on with the shop assistants union about the manipulation of hours below the \$450 threshold which is currently contained in the act: do you believe that would become a more significant problem than it is at the moment—reducing a casual's hours so that, effectively, there is no SG payable, which is currently six per cent, going to nine per cent?

**Ms Rubinstein**—It will depend on the employer. Some employers take the view that, if they have skilled, good employees, it is not worth fiddling around simply to save three or six per cent, or whatever it might be. But, where there is not a strong relationship with a particular individual and there is a saving by doing that, some employers, particularly in labour intensive industries where margins are very tight, will look to do that. There is no doubt about it.

**Senator SHERRY**—What about a move away from monthly or quarterly payments, as most awards provide two yearly payments? It seems to me that, if you were an agent trying to convert an employer to a particular fund or product that you were selling, you would make a virtue of the fact that you could pay the money yearly.

**Ms Rubinstein**—That is exactly right. Some funds, through their trust deed, have the ability to require monthly payments, for example. But, if there was no award provision, the employer could pick and choose between funds who would allow, for example, for an annual payment and, in fact, who would not follow up with unpleasant letters to employees and all these other things which employers do not like.

**Senator SHERRY**—From your experience in the hospitality industry, let us assume that a lot of employers moved to annual payments—at the moment, it is monthly or quarterly in

hospitality. In the hospitality industry, you have an average turnover of about 100 per cent per annum, which is a massive turnover of labour. What do you think is likely to happen to superannuation payments in that sort of scenario?

**Ms Rubinstein**—I think they simply will not happen. It is not just the employees who disappear. The employers disappear as well. There is a very big turnover of small employers, and 85 per cent or 90 per cent of the employers who participate in Host-Plus, in the hospitality fund, are very small employers. So that is an obvious consideration.

But the employees will never follow it up. They will have gone. How it will be followed up through the tax office and the charge mechanisms, I do not know, because I think that the scale of the task would become so big and they would be going back for so many long periods that a lot of employers would simply take the risk because they probably would not have to pay the charge.

**Senator CONROY**—It would be an administrative nightmare for a fund, I presume, if in the quarterly, six monthly or annual statements you were to identify the source of the dollars. So, if you worked for four different companies, I presume that a capacity on your statement to break it down would not be feasible in terms of administration.

**Ms Rubinstein**—There is all of that, but also you would have the problem, which I think Joe de Bruyn talked about, when somebody works for three months or six months, from July to March, and it is an annual statement—I would have to say that the statements in the industry funds are generally twice a year—because you would not actually find out for quite a long period afterwards. Even with six monthly statements, you would not find out what had happened maybe for eight or nine months. That is a real problem.

Maybe the employee will come screaming; maybe they will not because they have moved address. Maybe they are uncontactable. Maybe the tax office gets onto it but, by this stage, the employee has lost interest anyway. It is a nightmare. In many cases, the funds will get blamed, I suspect, because they will see the statement with no money shown on it and they will think they are being robbed by the fund.

**Senator CONROY**—You mentioned earlier what you believed the agenda of the government was. The whole push towards trying to casualise, put people on short-term contracts and those sorts of things seems to me to possibly be part of that attack on job security. Would you like to expand on that a bit?

**Ms Rubinstein**—In the sense that what it is about—as is the proposal for opting out under \$900 a month—is to say that there is this class of workers. In spite of all the rhetoric about regular part-time with pro rata conditions, it is to create a class of people who have less attachment to the employer and to the work force and who do not have something like superannuation which involves paperwork and attachment and which can be seen as much more coming in and out. I think that is right, there is no doubt that there is less predictability and less certainty. There is growth in what they call precarious employment.

**Senator CONROY**—To follow on Senator Sherry's point: if you are creating a 10 per cent differential for somebody to be able to manipulate their work force, it is going to add a

great deal of pressure on reputable employers to try to be competitive. If you are a store that employs six people who are all over the \$450 a month and suddenly you realise you can employ 10 people and keep everybody down below \$450 and therefore reduce your on-costs by 10 per cent, then a smart accountant is going to start working this out over time—

**Ms Rubinstein**—In some businesses that would be very worth while.

**Senator CONROY**—And this will just put competitive pressure on other companies to match and follow suit.

**Ms Rubinstein**—It will do that. It will also increase the already huge advantage that large companies have in terms of labour management—shaving the margins and keeping all the economies down.

**Senator SHERRY**—But it would be creating employment though, would it not, job-sharing?

**Ms Rubinstein**—It would create employment.

**Senator SHERRY**—Everyone would be working for less than 15 hours a week, according to those calculations.

**Ms Rubinstein**—It is a type of employment, yes.

**Senator CONROY**—You are creating a pool of workers that are almost second class and can just be pushed around.

**Senator SHERRY**—Do you have any statistics—I am sure there would be some available—on the numbers of people and the number of hours they work; say 0 to five, five to 10 and 10 to 15?

**Ms Rubinstein**—Yes, there are statistics on that.

**Senator SHERRY**—Could you provide the committee with those?

**Ms Rubinstein**—Yes, certainly, I can do that.

**Senator SHERRY**—Is it a fair generalisation to say that casual and/or part-time work is growing in importance in the economy?

**Ms Rubinstein**—Yes, casual and part-time work is growing absolutely and as a proportion. As well as the breakup of hours, what is interesting is the desire of employees to work more hours. And not surprisingly, the lower the number of hours that people work—I can send you ABS statistics on this—the higher the proportion of those people who say that they would like to work more hours. So the ones working less than 10 hours are not necessarily happy little campers doing that; they want more hours.

**Senator SHERRY**—We have had a quite remarkable lack of interest from employer organisations in these issues relating to choice of superannuation, although we have Mr Paterson from the ACCI this afternoon and I think he appeared at the previous hearings which went over two days. Have you had any contact with employer organisations?

**Ms Rubinstein**—My view is basically this: from what I can see and from attendance at a number of conferences where a large number of employers and employer representatives have attended, there is no support for the whole choice legislation. It is not something that employers want. They do not believe that it represents a focus on what the main problems are that Australian business needs to confront.

When the budget announcements last year were made about the shape of the choice regime that was coming in, a number of employer organisations quite vigorously opposed it. But what I think has happened—without knowing because we are not privy to these things—is that, as part of the negotiations, the government put a provision into the bill that purports to ensure that employers cannot be held liable for the role that they play in the choice of fund. It was an issue of great concern to employers which I think became the rallying issue, although I am not sure it was the real issue in terms of their concerns about administration and general hassle. It is often easier to say, ‘Don’t hassle me with all this detail,’ so you focus around this one issue which was employer liability.

When that provision went in, I think that the employer organisations—ACCI at least—felt that it had to then say publicly that its concerns had been addressed, which it more or less did in rather muted tones. But I do not believe that that represents what is happening with actual employers and even employer organisations in specific industries who really do not support this legislation and who just need it like a hole in the head.

It is one more worry and they have enough worries. They do not want it. They do not know of any concerns amongst their employees. If their employees did have concerns about award superannuation provisions or choice, they could go and do an enterprise agreement or AWAs with them and do anything that people wanted. That is all available now. So it just does not make any sense. That would be my guess as to why employers could be seen to be running a bit dead on it. They do not have the rallying cry for public opposition any more and I guess they might feel a bit disloyal making too much noise, so they are leaving it be. But you will have to ask them, which you should do.

**Senator SHERRY**—But that is the trouble. We only have one to ask.

**Ms Rubinstein**—Well, ask him when he comes.

**Senator SHERRY**—They run dead; they do not turn up. Maybe we should remove the exemption from employer liability—

**Senator CONROY**—Flush them out.

**Senator SHERRY**—And maybe we should insist that anyone earning less than \$450 should be paid in lieu. That would certainly flush them out.

**Ms Rubinstein**—We would say they are liable anyway.

**Senator CONROY**—Have you had any further legal advice on that issue?

**Ms Rubinstein**—No, not specifically. But I have talked to a lot of people since that time, including lawyers, and there seems to be a general view that there will still be liability. But I think it is being assumed the legislation will not pass in the precise form, so we need to see how that works out.

**Senator SHERRY**—I have had a couple of examples of agents trying to flog products in Victoria prior to the 1 July start-up date—of course, it is not a 1 July start-up date yet and it will not be now. We do not know what the new date will be, because it has yet to be announced. At the appropriate time in the Senate, I will be detailing what I regard as the misrepresentations that have been made about the legislation that we have in front of us—let alone what we may end up with once it passes the Senate in whatever amended form. Do you have any feedback about activity that has been going on at workplaces by representatives, agents and the like with the proposed choice model?

**Ms Rubinstein**—I have heard of a couple of cases. I do not know that it is huge. In Victoria, which may be the same ones, I have heard of an employer bringing the agent in and saying, 'We are going to make some different arrangements.' I have also heard that in Western Australia there has been quite a concerted campaign by agents working with employers to tell people that there is change and that they should be doing this. Of course, in Western Australia there is also state legislation for choice of fund that affects that.

**Senator SHERRY**—Perhaps you could attempt to obtain some specific evidence and pass it on to the committee. It would be useful.

**Ms Rubinstein**—I do not know whether it has been happening on a vast scale or whether people are gearing up and waiting for it to be actually there.

**Senator SHERRY**—I have had two specific examples in the case of Victoria and one in the case of Tasmania.

**CHAIR**—There being no further questions, thank you very much.

[12.10 p.m.]

**KNIGHT, Ms Naomi, Adviser, Association of Superannuation Funds of Australia, 133 Castlereagh Street, Sydney, New South Wales 2000**

**SMITH, Ms Philippa Judith, Chief Executive Officer, Association of Superannuation Funds of Australia, Level 19, 133 Castlereagh Street, Sydney, New South Wales 2000**

**CHAIR**—Thank you very much for both appearing before the committee. I think, Ms Knight, this is your first occasion. I now invite you to speak to your submission.

**Ms Smith**—I have got a written copy here, which I will provide to the committee at a later point. It is not very long. I will touch on a few points that have been made. We assess the bill from a vantage point of looking at whether people would be worse off in terms of the proposed changes and the need to ensure a cost-effective way of handling disputes that might arise on these topics.

The two key issues we see arising in the event of superannuation being removed from awards are eligibility and equity. ‘Eligibility’ in that it is likely that employees who currently receive superannuation through their award and earn less than \$450 per month will not be eligible for superannuation under the superannuation guarantee system. There was discussion about that. I think that is a significant thing because it really goes to the heart of the equity issues involved in terms of the lowest paid members of the work force currently receiving superannuation who will be losing out because of that. That section of the work force traditionally consists of women and migrant employees with a low skills base and minimal education who are in casual, part-time or intermittent work.

So that is of considerable concern to us. It is also of concern that not only will they lose their superannuation coverage but it is also likely that they will lose their insurance coverage. That becomes another significant issue. As you have already heard, the frequency of the payments becomes another significant issue with payments being moved from, say, monthly to annual as well as losing the additional payments that may have been there. So there are the issues of coverage and the accrual of interest that would have otherwise occurred.

There is also an issue in terms of those award entitlements where superannuation is sometimes paid or agreed to be paid during a period of accident or during the workers compensation period. That is another coverage issue that may be lost during that period of time. I guess we are, in essence, echoing some of the same concerns outlined by other speakers. These are issues about coverage and particularly about coverage plus the linkage of insurance and the timing issues, which also go to coverage and the ability of people to obtain those payments.

In terms of timing, as for the minister’s announcement that he would delay the implementation of choice—date yet to be specified—certainly we saw it as essential that we need to know the rules of the legislation, the rules of the regulations and have sufficient time after the regulations are in concrete form for a full implementation program, particularly in so far as it goes to public education programs, and to ensure that there are appropriate systems

around that legislation so that there will be informed choice and adequate complaint mechanisms in the case of disputation. Removing superannuation from awards now, as currently proposed in this bill, would have the effect of immediately introducing fund choice for that part of the work force covered by awards. We see this as being a rather anomalous effect of that timing issue.

So we see the issue of timing certainly as being one question. Probably more significant than that is ensuring that there is a proper mechanism in place to ensure both informed and effective choice for the education program and that there is an adequate dispute resolution mechanism. Here we have to say that our bottom line is that the Industrial Relations Court probably provides the best mechanism even in an ongoing fashion than any other possible solution that we have been able to identify.

We believe the Industrial Relations Court has played a very significant role in resolving superannuation disputes where such disputation arises between employers and employees. This is for a number of reasons. In part, it is because of the nature of the superannuation guarantee itself. As a result of the way in which the guarantee is administered, disputes between the employer and the employee are quite different from disputes between the employer and the Commonwealth for failure to meet a taxation obligation, for example. It is important to comprehend that the guarantee is not an entitlement and the ATO imposes a penalty in the event of the employer failing to meet their obligations.

When you start to look at the mechanisms for resolving disputes in superannuation, this becomes significant. There are three mechanisms, as you are aware: the Industrial Relations Commission, which is basically dealing with employer-employee issues and matters at the workplace level; the Superannuation Complaints Tribunal—or what is left of it—which deals with disputes related to the trustee and members' relationship with the trustee; and the Australian Taxation Office, which operates more as a whistleblower style hotline for employers or members of superannuation funds to bring to the ATO's attention possible breaches of employer taxation responsibilities. So those disputes deal with three fundamentally different relationships in the superannuation arena: employers, trustees and taxation liabilities. It is difficult to envisage how one dispute body might be expanded to encompass those various relationships.

Indeed, we have been, as you know, considering the options relating to shoring up the SCT or an alternative industry scheme. Our research and our discussion with lawyers indicate the difficulties—'difficulties' is probably a mild word—of bringing employer actions under the scope of either a revamped SCT or an industry alternative, particularly in ensuring that they are a compulsory member of such a scheme or that the decisions are enforceable. I will spell that out.

If you are looking at an industry alternative, you would be looking at legislative underpinning requiring the funds to be a member of an approved scheme and then a contractual underwriting of that with those members agreeing to live by the decisions of that approved scheme. So you are getting a determinative arrangement. Bringing the vast range of employers into that type of scheme where you are getting 100 per cent coverage and you are getting effectively determinative decisions is near nigh impossible.

We do not consider the ATO to be a suitable mechanism to deal with employer and employee complaints. I am talking here about what happens if you remove these types of complaints from the Industry Commission. At the moment, the only option that seems to be forwarded, when we have asked that question, has been the ATO.

As I have indicated, because of the particular nature of the superannuation guarantee—it is a tax obligation penalty issue not an employer-employee relationship that you are dealing with, so it does not have the scope, the focus or the certifiable mechanisms by which those complaints can come forward—functions such as conciliation, investigation and review mechanisms would have to be developed in order to provide a complaints mechanism that meets the needs of both employers and employees. Our bottom line is that we believe that the role of the AIRC should be retained as the most effective dispute mechanism that is there at the moment to deal with employer/employee complaints. Certainly, we remain to be convinced that an alternative body can be found to resolve or deal with those types of disputes.

**CHAIR**—If an alternative body can be found under a reconstituted superannuation complaints tribunal that met constitutional requirements, would you be happy if it went to that body or are there special circumstances so that you think the status quo should remain?

**Ms Smith**—I think it is an extraordinarily big ‘if’. That is the problem. As I said, we have been looking at a range of options and getting a range of legal advice, so we certainly are not convinced that it would be possible to join the employers in as a party or that it would have the stability into the future of being able to withstand challenges of the future. From where we sit, the Industrial Commission has proven itself to be a relatively quick and effective mechanism for dealing with these sorts of complaints, so we are hesitant about throwing it out when there does not seem to be another option available.

**CHAIR**—Would you like to answer the question about whether we could constitutionally validate it in some way.

**Ms Smith**—The problem is that it is something of a hypothetical question, so I—

**Senator CONROY**—It is something probably for tomorrow.

**Ms Smith**—Yes. If all those guarantees could be there and if there could be a structure that dealt with it, it may be something to be considered, but from what we have been able to see to date, we have had difficulty in identifying that other mechanism that would be the—

**Senator SHERRY**—Even if you were able to do that successfully—and I accept your evidence that it is very difficult, to put it mildly—you would still have workers under state awards in state jurisdictions under the jurisdiction of the state industrial commissions, so there seems to be a logic in having a common industrial jurisdiction dealing with industrial issues, whether they be state or federal.

**Ms Smith**—In so far as I think there is probably a general confusion amongst people about what award—Commonwealth or state—they are dealing with and there is a level of understanding amongst people about the nature of complaints that go to the Industrial

Commission and the fact that those complaints may be related to other aspects of the dispute that is taken there, I think streaming of complaints makes sense. The question of who you can bind into the decision is an important one. Coming back to your earlier question, at this point in time the SCT does not try to cover employer-employee type issues.

**CHAIR**—That would require a legislative amendment.

**Senator SHERRY**—Have you had any dealings with employers on this issue?

**Ms Smith**—Not in a great level of detail. I have had some generalised discussion.

**Senator SHERRY**—We might pursue this matter with Mr Paterson this afternoon.

**Ms Smith**—We have had requests from the New South Wales Employers' Federation about how we go about choice issues.

**Senator SHERRY**—I understand that, but on this issue of the SCT and its lack of power, have employers put any view about how the issue of disputes between employers and employee unions are dealt with in this context of superannuation?

**Ms Smith**—No, we have not received any comment.

**Senator SHERRY**—The discussion we have had has revolved around the issue of dispute mechanisms. You were saying the role should be retained. I take it that is also because of the other issues that we have had some discussion about, and you have also commented on them—equity issues, frequency of payment, insurance—that the current arrangements that are in awards in the federal jurisdiction are best dealt with by the ISC rather than have them scrapped.

**Ms Smith**—What we are looking at is the potential reduction in protections and coverage that may result from this particular bill.

**Senator SHERRY**—But there is no way of guaranteeing those protections other than maintaining the position that superannuation remains an industrial matter, is there?

**Ms Smith**—Yes, that is right. We do not see any other mechanism that is there at this point in time.

**CHAIR**—If the government proceeds with the legislation, do you think an amendment is required to move to at least quarterly or monthly payments from the employer? Would you recommend that?

**Ms Smith**—Yes. The frequency of payments is—

**CHAIR**—What is ASFA's preferred position, monthly or quarterly?

**Ms Smith**—I am not sure whether we have a fixed position, but certainly, looking at the arrangements, one needs to ensure that coverage of insurance is linked and the assurance of people getting those contributions, the more regular the better.

**Senator SHERRY**—That does not deal with the problem of minimum payment, where it is below \$450?

**Ms Smith**—No, it does not.

**Senator SHERRY**—Do you see any way of resolving that?

**Ms Smith**—No.

**CHAIR**—Could there not be a requirement, if there is a difference between award superannuation and the SGC, that it be added back into gross wage, similar to what they are doing between \$450 and \$900?

**Ms Smith**—In theory, yes. That assumes, though, that that negotiation is occurring as a top-up in terms of the wages for the casual and intermittent workers.

**CHAIR**—Could you make it mandatory, to make sure that it cannot be manipulated?

**Ms Smith**—Our starting point is, rather than allowing an opting out of superannuation and superannuation contributions, that it is desirable that contributions are made because, even though they might be small contributions, as you know, over time they can build up to be important component parts of someone's retirement income.

**CHAIR**—It was pointed out to us about two years ago that the very low paid and itinerants really need money in their pockets now and if you had a provision that any shortfall is made up—

**Ms Smith**—You have to go back to basics, as to the purpose of superannuation. In reality, it is a very small percentage of savings and, as we know, the value of superannuation is the cumulative effect.

**CHAIR**—Are you in favour of augmentation?

**Ms Smith**—We are really against any further opting out of superannuation contributions and we see the greater value in the continuance of superannuation contributions and savings being maintained.

**Senator SHERRY**—It was part of the budget announcement, but there is no provision in any of the legislation.

**CHAIR**—There is no provision, but we can come up with recommendations.

**Ms Smith**—We would be opposed to that.

**Senator SHERRY**—Going back to the issue Senator Watson raised, where the award provides for a payment that is a minimum cut-off payment, less than \$450—you would have heard the examples in the retail industry that we discussed—if you assume that superannuation goes as an industrial matter, where it exists—and it does exist in a lot of other industries besides retail—how could you transfer that over to the legislation?

**Ms Smith**—Sorry?

**Senator SHERRY**—There is a different provision in retail, there is a different minimum in retail, although there is the \$450 cut-off point. There is a different provision in hospitality. In fact, there are different provisions in different areas of the hospitality industry that I am aware of. There are different provisions in a lot of industries. How could you successfully transfer that lower minimum over to the legislation to protect those employees?

**Ms Smith**—I am not sure I have got an answer on that.

**Senator SHERRY**—I have not got an answer either. I think it would be incredibly difficult to do. The only other way would be to insist that employers pay when someone effectively earns less than \$450 a month and that every employee receives payment in lieu.

**Ms Smith**—It just highlights the difficulties, I think, of the award structure and trying to translate it over.

**CHAIR**—The government's view is that there is a need to simplify the administrative burden on employers, particularly small employers. Removing super from the allowable matters is one step in that process. Doesn't the existence of both a complicated award system and the superannuation guarantee increase burdens on small employers and decrease the incentives to employ?

**Ms Smith**—I think the answer is that superficially it might look to be simpler, but in the day-to-day operations of employers—and you will need to ask them—I am not sure that it is simpler. Simplification really always has to be weighed against the practical implications of coverage, equity and having practical systems there. So we started with looking at the question of the practical implications for members, particularly lower income members, and the practical and effective mechanisms for dispute mechanisms. I do not think—

**Senator CONROY**—Are you aware of a single employer or employer group calling for this piece of legislation on the basis that it is simpler?

**Ms Smith**—No, I am not. But at the same time I have not tried to consult with employer groups either. But I—

**Senator SHERRY**—Taking the bill we are dealing with today, which is part of the package of choice, in your expert opinion, given your knowledge, can you draw this committee's attention to one area where the level of regulation, paperwork and bureaucracy is decreased for an employer as a consequence of this package of legislation? Where is it easier, simpler or less costly? Is there less paperwork?

**Ms Smith**—I do not know. Certainly concerns have been expressed to me by a number of employers—small and other—about not understanding what their responsibilities and liabilities are. But, again, I think you really have to ask employer organisations as to the added administrative overheads.

**Senator SHERRY**—I am not asking that; I am asking whether in your expert opinion—given your knowledge and practical experience, which is extensive—the overall paperwork burden is reduced for business, particularly small business, because of this package of legislation? How?

**Ms Smith**—I do not think it is reduced.

**CHAIR**—Along a similar line, you argue that the superannuation legislation is difficult to understand, yet the concepts behind the superannuation guarantee are relatively simple. I think under the previous administration we had amending legislation because of the difficulties between award superannuation and the superannuation guarantee. Could you please elaborate on why you see it as being so complex? If it is complex, wouldn't this be a move to simplify it?

**Ms Smith**—The basic point is that it goes back to the nature of the superannuation guarantee, in that under the guarantee employers, except for a few exceptions, are required to provide the prescribed minimum level of superannuation support. If they do not do that they are levied with a tax on the superannuation guarantee charge. So, in essence, we are dealing with two different things here and that is part of the problem—that the award goes so far but it also provides some supplementary aspects to it.

**Senator CONROY**—Would the requirement to supply forms actually streamline an administrative arrangement rather than having the open situation which you will have? You might have heard us talking to the previous witnesses about arguments that have developed because forms have not been forwarded.

**Ms Smith**—Yes.

**Senator CONROY**—There is some argument that just because you have got to fill the extra piece of paper out and make sure it gets off, that is actually simplifying your position in the long run rather than having arguments backwards and forwards about, 'Did the form get signed?' and 'Did it get forwarded? Have I forwarded my payments on time?'

**Ms Smith**—Yes, that is probably true.

**CHAIR**—Mr Reith said that including superannuation in an allowable matters list was only ever intended to be a temporary measure to cease when choice of fund was introduced. Do you have a view on that?

**Ms Smith**—It raises the contradiction that I raised before. I am not sure why you would want to do it prior to choice of fund being introduced because of the contradiction we raised before. In essence, we are saying that if you are going to do it, do it now. 'Prior to choice of

fund' has the rather anomalous effect of introducing choice prior to some of the other matters.

**Senator CONROY**—Effectively, it introduces choice for everyone including current employees from 1 July, which is a different approach than even the government has suggested, which is to have current employees dealt with 18 months after.

**Ms Smith**—I am just struggling with his question of the timing aspect of it. But also, because of its nature and the way it is tied up with employment issues, the position is really what we are saying here: that it should remain an allowable matter before the Industrial Commission. I am not convinced of the logic of making it an exemption.

**Senator SHERRY**—But that is Mr Reith's expert opinion, isn't it?

**Senator CONROY**—He has probably had legal advice on that.

**Senator SHERRY**—Yes.

**CHAIR**—Miss Knight, do you have anything you wish to add?

**Ms Knight**—No, thank you.

**Ms Smith**—She has been scribbling me notes very diligently.

**CHAIR**—Thank you very much.

**Proceedings suspended from 12.38 p.m. to 2.05 p.m.**

**PATERSON, Mr Mark, Chief Executive, ACCI, Commerce House, 24 Brisbane Avenue, Barton, Australian Capital Territory 2600**

**CHAIR**—Welcome. Thank you very much for agreeing to this teleconference. The parliamentary rules on the protection of witnesses are still afforded to you in a teleconference, so there is no problem there. I invite you to make an opening statement or to speak to your submission.

**Mr Paterson**—Our submission is relatively brief. We support the removal of superannuation from awards as an allowable matter as a natural consequence of the government's announced intention to introduce choice of fund. We believe that there would be a strong potential for inconsistency and uncertainty in the proper application of superannuation entitlements for employees if overlapping sets of obligations were to continue, both in respect of awards and in terms of the announced intentions with respect to choice of fund.

Our position in relation to award coverage of superannuation is not something that has arisen directly as a result of the government's intentions with respect to choice of fund, but we have indicated for a long period of time that there are overlapping and, in some cases, inconsistent sets of obligations under the superannuation guarantee charge provisions and award provisions, and we have argued for a long time that there ought to be a consistent and single set of obligations in this area, preferring that superannuation be removed from awards. Given the announced intentions with respect to choice of fund, we believe that now the time is right for the removal of superannuation provisions from awards.

We want to ensure that employers have a clear understanding of the nature of their obligations and how they can comply with those obligations where they employ under a federal award, and we believe that the proposal will assist in clarifying what the nature of those obligations are, will remove some element of complexity which exists at the present time and which would exist under a choice of fund environment, and will ensure that there is a clear and coherent set of obligations on how they deal with superannuation as an employment matter. I am happy to respond to questions.

**CHAIR**—This morning, we heard from ASFA—the Association of Superannuation Funds of Australia. They have some concerns about the removal of superannuation from the list of allowable matters before the Industrial Relations Commission. They point out that there will be a loss of certain equity issues for employees who earn less than \$450 per month. They are concerned about the insurance issues and matters of frequency of payment. They feel that employers may be encouraged, for example, to pay only once a year whereas, under a lot of awards, they now have to pay on a monthly basis. Would you like to comment on those three aspects, speaking from the employers' side?

**Mr Paterson**—I will take up the last of those issues first: the frequency of payment. It is often asserted that many award provisions specify the frequency of payment but, as often as that is asserted, I think there are examples where that is not the case. By and large, payments made to superannuation funds are guided or governed by the employer deed that is signed by

the employer as a relationship between the employer and the superannuation fund. That specifies the frequency of payment. You will find in many cases that employees are employed under an award which envisages either weekly or fortnightly payment of other entitlements but monthly payment of superannuation contributions is made. That does not normally align with a strict weekly or fortnightly payment regime. In most cases, the contributions are made on the pay periods falling within a month, and that is often governed by the deed that the employer signs. There is no reason on the face of it why that situation would necessarily change.

Even under many awards at the present time, if individuals choose to pay superannuation guarantee obligations on a biannual or annual basis, that continues to occur at the present time and obviously it would be possible for that to continue under the proposed regime. If there was a view held by an individual or individuals within a workplace on the frequency of payment, there is no reason why that could not be dealt with by a collective or individual workplace agreement, and both of those would be covered by the proposed legislation.

**CHAIR**—Do you think some employers may attempt to move to make annual payments, that is, available under the superannuation guarantee arrangements?

**Mr Paterson**—That is possible, and those annual payments are an option certainly for that component of the superannuation guarantee which is in excess of an award, if the award actually specifies a payment period. I do not think we have seen any significant take-up of that change in frequency, notwithstanding the fact that it is available to employers now and has been available to employers for a significant period of time. So whilst no-one can assert to you that no-one will take it up, I do not think that there is any evidence to suggest that there would be any substantial change.

**CHAIR**—Would you be in favour of a more frequent period of payment?

**Mr Paterson**—It depends largely on the nature of the pay arrangements and the administrative obligations that that then imposes on employers. There are some overlapping issues, given the complexity of superannuation, which can have an impact on the frequency of payments. Very small contributions being made, the provisions in relation to an average of \$450 in a monthly period and components of the opt-out between \$450 and \$900 are issues that would have to be taken into account when thinking about the frequency of payments. We could come back to the other two issues that were raised. It is probably best that we deal with the frequency of payment issues first.

**Senator SHERRY**—Yes. I was going to take that issue up and then come back to the other two matters. On the frequency, it nevertheless is true that there are many awards that do require monthly or quarterly payment. Certainly, I have knowledge of a number of them. Whether it is half, one-third or two-thirds, we would have to look at the evidence but there are many awards that do require it, are there not?

**Mr Paterson**—There may well be. I could not specify the number of awards that require it. Some do, but often it is asserted that they do, when a proper examination of the provisions in a number of awards will find that it is not actually mentioned.

**Senator SHERRY**—I accept that it is certainly not the case in all. I do not know what the proportion is, but certainly some do. You are correct; in many cases the deed that the employer signs does require usually monthly or quarterly payments. I do not think there are too many that are annual. Under the so-called choice regime, why wouldn't an agent, whether it is an agent of a life company or an agent of a bank, attempt to sell a product on the basis that an employer should pay it annually?

**Mr Paterson**—If it is about increasing the level of contributions that are going to individual funds, then it would be in the interests of the individual funds to have it more frequently paid than annually.

**Senator SHERRY**—Yes, but the funds do not make the decision, do they?

**Mr Paterson**—But you are asking: why would not agents or funds promote a particular outcome? I am suggesting to you that the beneficial interests of those promoting it would be to have more frequent—

**Senator SHERRY**—Because the beneficial interest of the person promoting the fund would be to get them to change product. Certainly, if I were an agent and I were out there selling a product and attempting to convince an employer, I would say to them, 'Come into our particular product and make a yearly payment.' Why wouldn't that appeal to some employers?

**Mr Paterson**—It may appeal to employers, but employers are required to put details and key feature statements before their employees. If there were a comparative series of funds being put forward, I would expect that the key feature statements would declare frequency of payment, certainly if that was a material issue associated with the fund, and then individuals would be in a position to make a choice.

**Senator SHERRY**—On that issue of frequency of payment and key feature statements, have you had any consultation with the government about whether that issue will be addressed in the KFS?

**Mr Paterson**—I cannot, from the top of my head, recall whether, organisationally, we have had detailed discussions on that limit of it or not. I got out my superannuation choice of fund file and I have to say it is about six inches thick at the present time. I cannot precisely recall whether that issue has been specifically addressed in the key features statement.

**Senator SHERRY**—But you would advocate that it should be in there?

**Mr Paterson**—There is always a challenge between the length of key feature statements to make them relevant and the material that you might otherwise include within them. If it is regarded as being a material consideration and certainly if people were arguing that it is an issue of such substance that you would want to make a decision about whether superannuation remained within awards or not, I would, on balance in those circumstances, say yes to it being in the key features statement, if it was a provision in relation to the fund.

**Senator SHERRY**—Do you accept that most employers would prefer to pay yearly rather than monthly or quarterly?

**Mr Paterson**—I do not accept that that is necessarily the case.

**Senator SHERRY**—Why?

**Mr Paterson**—Because the vast majority of employers have had that opportunity to make payments in accordance with the superannuation guarantee act for five or six years, or however long that act has been in place. The majority have had that opportunity to pay annually under that legislation for that period and the majority have not elected to do so.

**Senator SHERRY**—Yes, but most employers were in fact bound either by the award or the trust deed prior to the superannuation guarantee being introduced. They continued on with the obligations that they signed prior to the superannuation guarantee being introduced, didn't they?

**Mr Paterson**—That may be the case. I would think that a commitment entered into prior to a piece of legislation being introduced would not necessarily bind the people to the same commitment with respect to the superannuation guarantee charge other than their contribution. I do not think that the majority of people necessarily jump to changing their payment arrangements.

**Senator CONROY**—The SGC, when it was first introduced, had a provision to move after a year or two to quarterly payments, which is currently not being enforced or has been amended because of wanting to avoid too much paperwork and for people to be able to get used to it. It would be fair to say that when people set up their superannuation arrangements administratively they were envisaging at a minimum of having to pay quarterly anyway. Now that we are currently only required to pay annually, would people move towards an annual payment? The Institute of Actuaries produced some information for us a few months ago which showed that by simply moving from monthly payments to annual payments the end benefit for the individual member, not the fund, was between three per cent and four per cent less just by the stroke of a pen. Do you have any comment about that?

**Mr Paterson**—I cannot comment on something that I have not seen. It may be asserted that the actuaries say that there is a fall-off in that way. The legislation which was introduced by the former government and has been in place for a significant time continues to provide for annual payments. The proposition I would put to you is that that has been there, notwithstanding any actuarial assertion to the contrary, and that there has not been any substantial move by employers to annual payment, which is the focus of the questions that are being put.

**Senator CONROY**—Do you receive monthly payments of your own superannuation?

**Mr Paterson**—I think that the circumstances in relation to me are entirely irrelevant.

**Senator CONROY**—Would you prefer to be paid annually in arrears?

**Mr Paterson**—I said that I think that the situation in terms of my personal circumstances are irrelevant. I am appearing as a representative of an organisation, not as an individual.

**Senator SHERRY**—How is an employee advantaged by an annual payment rather than by a monthly or quarterly payment?

**Mr Paterson**—I am not asserting that they are. I am saying that that is the statutory provision. We have not seen any significant move by employers to change their payment frequency, notwithstanding that statutory provision.

**Senator SHERRY**—What we are concerned about is a significant change in legislation and a possible change in behaviour. Do you accept that an employee cannot be better off if payments are made annually rather than monthly or quarterly?

**CHAIR**—It depends on the package.

**Mr Paterson**—I do not want to be cute, but it would depend on whether those payments are made in advance or in arrears.

**Senator SHERRY**—What about where they are made in arrears?

**Mr Paterson**—We are not advocating any change in the position. We have not seen any change of the position in the past and believe that, if there were examples of change, there is no reason why that could not be dealt with by individual or collective workplace agreements. Our concern is to remove the potential for overlapping and confusing the obligations both with respect to choice of fund and then specified provisions within awards.

**Senator SHERRY**—But in relation to these inconsistent obligations you refer to, what about the problem that will continue to exist about superannuation being determined by state industrial jurisdictions?

**Mr Paterson**—Clearly that is an area where the legislation does not have coverage. Therefore, the choice of fund provisions do not apply where persons are engaged under a state award. The choice of fund provisions indicate that if a person is employed under a state award then that is deemed to have met the obligations with regard to offering choice of fund. With employers under federal awards, that is not the case. They would be obligated to comply with the provisions in relation to choice of fund and, if superannuation were to remain in awards, obligated to comply with that component as well.

**Senator SHERRY**—I understand that. That is an outline of what the new factual situation would be should the legislation be passed. We are going to have a situation where state awards and employees covered by state awards will still be in the industrial jurisdiction. Workers under federal awards would not be covered by the industrial relations system. That is clearly a confusing situation.

**Mr Paterson**—It is. You do not address that confusing situation by making it more confusing at a federal level. You seek to minimise the level of confusion where there is a constitutional opportunity to do so. If you are asking us if we would prefer there to be less

confusion between state and federal industrial arrangements and a harmonised system around the country, then our answer would be yes, but that is not on offer at the present time.

**Senator SHERRY**—What about a workplace where employees—and this is quite common, as you would be aware—are covered by federal awards and state awards?

**Mr Paterson**—Different groups of employees within the same business?

**Senator SHERRY**—Yes.

**Mr Paterson**—Yes. That is clearly an area where there is the potential for different sets of entitlements and obligations. I would have thought that, in those circumstances, the opportunity for a collective workplace agreement or individual agreements would obviously have some attraction if there was a desire for consistency. The collective workplace agreement under the federal provisions could cater for superannuation. There is no reason why it could not.

**Senator SHERRY**—By itself?

**Mr Paterson**—Yes.

**CHAIR**—Does the removal of superannuation from the industrial relations arena take it completely out? Is there not still a power, even if this legislation went through, for certain conciliation matters to be dealt with by the industrial relations law?

**Mr Paterson**—I do not pretend to be a technical expert on all of the issues but, as I understand the proposed provisions, it is to take it away as an allowable matter. It would be removed as an allowable matter which would mean that it is neither enforceable in terms of an award nor is it then subject to the no disadvantage test when consideration is given for Australian workplace agreements or others in terms of the no disadvantage test. Whilst I cannot say whether there is or is not a conciliation power, it is not an allowable matter and therefore not an enforceable matter under an award at the federal level, and that is given effect to on 1 July.

**CHAIR**—We will certainly raise this issue with the departmental representatives when they appear before the committee later this afternoon.

**Senator SHERRY**—There have been disputes between employers and employees, whether represented by their union or not, in the past involving superannuation. Who is to resolve a dispute should there be one?

**Mr Paterson**—To the extent that there have been disputes in relation to superannuation, I would assert that they are rare and infrequent disputes. The choice of fund provisions entitle individuals to select a particular fund from those on offer. There is nothing to constrain an individual and an employer from agreeing to a contribution to any complying fund, irrespective of the offer of funds made by a particular employer if that employer and the employee agree.

**Senator SHERRY**—What if they do not agree?

**Mr Paterson**—Then the provision in relation to the choice of fund would prevail.

**Senator SHERRY**—What if there is an industrial dispute over it?

**Mr Paterson**—I do not anticipate industrial disputes in this area. As I said, industrial disputation with respect to superannuation is infrequent.

**Senator SHERRY**—But certainly in the days when funds were being established, there were considerable disputes about where moneys were to go to. I was personally involved in two or three of them. There was a considerable number of disputes at that time.

**Mr Paterson**—There may well have been back in history a considerable number of disputes in this area, but I think we are working in a different environment. There is a focus on resolving these issues at an enterprise level and focusing on terms and conditions which suit the needs of both the employer and the employees at the enterprise level. I would hope that the provisions that are being proposed would be capable of dealing with that. I do not believe that the retention of superannuation as an allowable matter within awards could be justified on the basis that there is the potential occasional dispute in relation to it.

**Senator SHERRY**—I can certainly recall that, when superannuation was introduced into awards in the early to mid-1980s, there were a considerable number of disputes. We are now moving to a choice of fund environment where there will be new arrangements. I just do not see who is going to resolve the dispute.

**Mr Paterson**—As I said, I do not proceed on the basis that there will necessarily be a dispute. There are disputes and potential disputes about all manner of things that we could speculate about, not all of which are governed by awards.

**Senator SHERRY**—My recollection is that, in the early to mid-1980s, it was the employers on many occasions who made use of the ability of the commissions, both state and federal, to resolve those disputes.

**Mr Paterson**—That may well have been the case in that history. What I am suggesting to you is we now have a regime which is focused on the employer and the employee—not sectorally dictated outcomes but arrangements that ought to meet the needs of the employer and their employees at the workplace level. The guiding objectives of the Workplace Relations Act give primary emphasis to the resolution of those issues at the enterprise.

**Senator SHERRY**—But they do not rule out disputes, do they?

**Mr Paterson**—No.

**Senator SHERRY**—They provide an effective mechanism for disputes in respect of the other 19 allowable matters?

**Mr Paterson**—Yes.

**Senator SHERRY**—So why not in respect of superannuation?

**Mr Paterson**—I indicated at the outset that, given that the proposed choice of fund regime was to not allow there to be overlapping sets of obligations with respect to superannuation, we believe that the removal of superannuation from awards is a natural consequence of that.

**CHAIR**—Do you think there is a role for a reconstituted Superannuation Complaints Tribunal to be able to hear matters which are in dispute between an employer and an employee?

**Mr Paterson**—I would see no role for that.

**CHAIR**—No role?

**Mr Paterson**—No role.

**Senator SHERRY**—Why?

**CHAIR**—But there must be somebody who is going to arbitrate somewhere?

**Mr Paterson**—We do not believe that we have to establish entities to deal with every potential form of difference that might exist within the community. I do not believe that there is justification, given the regime that is being proposed and the opportunities for individual or collective agreements to also deal with this issue, and that we then need to give power to yet another body to try to resolve issues. As I understand it, there has been some constitutional challenge to the nature of the Superannuation Complaints Tribunal's role.

**CHAIR**—Yes, but if we overcame those constitutional problems—

**Mr Paterson**—Why would we create yet another body?

**CHAIR**—We are just saying maybe extend its powers to handle disputes—

**Mr Paterson**—The majority of issues that have traditionally been given to the SCT, as I understand it and I will stand corrected, are about the relationship between members and funds, not the relationship between employers and their employees. It would be a very significant change of role, I would have thought, for the SCT, where its dominant focus has been the relationship between funds and their members, to try to then have some relationship between employers and employees with respect to differences that may exist between funds.

**CHAIR**—But, using your past connections, you are saying that is an environment of the past and we now have a new environment—

**Mr Paterson**—We have not got a new environment and we do not have anything before us that talks about an amended role of the SCT.

**CHAIR**—But the issue has been raised by a number of witnesses—

**Mr Paterson**—It may have been but it has not been raised with us. If you wish a formal response from us, I am happy to take it on notice, but it is not something that we have contemplated. You are talking about extending the role. I would have thought that a dispute resolution role of that nature is inconsistent with the traditional or any envisaged role of the SCT.

**CHAIR**—Would you like to address the equity issues that ASFA raised, the three points that I mentioned initially?

**Mr Paterson**—As I understand the issue that the chairman outlined, ASFA was concerned that, to some degree, individuals who may be entitled to amounts below \$450 may, by the removal of superannuation from awards, miss out on that entitlement; is that the suggestion that is being put forward?

**CHAIR**—Yes.

**Mr Paterson**—We and others have been very concerned about small payments and the impact of small payments being made in relation to superannuation funds. There are many who would assert that the \$450 amount is too low a level. I am not aware of the extent to which payments below \$450 are specifically provided for in awards.

**CHAIR**—There are some cases—

**Mr Paterson**—Once again, if there are some cases that are individual and isolated circumstances—they certainly would not apply to all of the people covered by awards; they could only ever apply to a limited number of people who might be governed by those awards—then specific arrangements, if necessary, could be dealt with on an individual or collective basis. It would never apply to everybody who is governed by an award. So it would be special and isolated circumstances. I do not know whether the proposition has been put forward merely by assertion or by a demonstration that the cases really exist.

**Senator SHERRY**—We have some detailed cases in the retail industry with names, hours, days they work, amounts of superannuation accrued, et cetera.

**Mr Paterson**—If you have evidence in relation to those, there is no reason why that could not necessarily be addressed by alternative means—if it is isolated to the retail industry and it is isolated to particular circumstances. I do not know which awards are being put forward for those circumstances because my understanding is that the vast majority of the retail industry is governed by state awards. The Commonwealth awards in the retail industry consist of the ACT shops award, individual company awards and some individual company agreements. In fact, the largest company within the retail industry, as I recall, is covered by an individual consent award—

**Senator SHERRY**—Yes, that was raised with us this morning. Do you believe that any of the workers who are in this situation should be disadvantaged?

**Mr Paterson**—I believe we are dealing with a very minor set of circumstances in this area and, in those circumstances, we are also dealing with very minor contributions being made in relation to superannuation.

**CHAIR**—Could you put some flesh on the bones of how these people could be compensated, even though there might be a very small number, to make sure that they are not worse off as a result of this change in order to honour the Prime Minister's undertaking?

**Mr Paterson**—What particular undertaking is that?

**CHAIR**—That people would not be worse off as a result of the change.

**Senator CONROY**—A non-core one.

**CHAIR**—Would you like to take that question on notice as to what mechanisms could be used?

**Mr Paterson**—I would want some greater indication as to the nature of the problem that we were seeking to address and the extent to which that problem existed.

**CHAIR**—Fair enough.

**Mr Paterson**—As I have said, individuals or groups of individuals—if there are groups who are affected by this—clearly have the opportunity of individual or collective agreements seeking to deal with it.

**Senator CONROY**—I think the examples that we were given this morning revolved around individual shop assistants who may only work six or seven hours a week for one shop but on a regular basis, and you would be comfortable with saying an individual in those circumstances could negotiate with Coles-Myer—

**Mr Paterson**—We should be careful on the examples. Coles-Myer has an individual federally registered agreement. One would expect that the people who may have appeared before you this morning giving you those examples would be in negotiation with that company on superannuation arrangements. The vast majority of the employees covered in the retail industry—and we are talking about the vast majority of hundreds of thousands of people—are covered by state awards and therefore are not affected by the matter that is before you.

**Senator CONROY**—Victoria is now covered by federal awards.

**Mr Paterson**—Certainly.

**Senator CONROY**—There are a few hundred thousand there.

**Senator SHERRY**—You would be hoping that this spreads to state jurisdictions, too, wouldn't you?

**Mr Paterson**—I do not believe that there is a constitutional provision which would enable the legislation to extend in that way. We would like some clarity.

**Senator SHERRY**—That is correct, but you would not want a situation continuing to exist which was confusing, where you had state jurisdictions covering superannuation as an allowable matter and not so in the federal jurisdiction, would you?

**Mr Paterson**—Clearly we would want clarity in relation to all employment entitlements, but we have had a perpetuation of inconsistencies between state and federal. We have been on the record for a long period of time arguing for a harmonised system and a consistent set of entitlements.

**Senator SHERRY**—Do you believe that with a cut-off level of \$450 and SGs currently six per cent going to nine per cent there is an incentive for a person who is employed as a casual to have their hours of work manipulated so there is no SG payable?

**Mr Paterson**—I do not believe that there is any evidence that is available to anybody. I am sure that the resources that would be required by an employer to come up with a roster that resulted in that style of outcome would probably cost them more than the contribution would be worth. I do not envisage that people would manipulate shifts to avoid it.

**Senator SHERRY**—Your organisation would not condone that?

**Mr Paterson**—Certainly it is an issue. We believe there needs to be equitable treatment in relation to employees. It is a matter for employers and their employees to determine the appropriate rostering arrangements that would apply, but I do not believe there is any evidence of that assertion.

**Senator SHERRY**—Should we have any limit—\$450? Why not have everyone getting six per cent going to nine per cent superannuation contributed on their behalf?

**Mr Paterson**—Clearly there are economies of scale with respect to contributions that are being made to superannuation funds. There was already even with the \$450 limit a perceived need by those in government at the time to introduce protection of small contributions. So even with a \$450 limit they needed to move to introduce protection for those contributions because the cost of maintaining the funds or the member accounts in some cases exceeded the level of contributions that were being made. If you remove that limit, you exacerbate the problem, and with member protection all you do is pass the cost of maintaining those accounts on to the other members of the fund thereby diminishing the return to all members of the fund.

**Senator SHERRY**—It sounds to me a good argument for a minimum contribution level.

**Mr Paterson**—Or a good argument for a higher level of minimum contribution.

**Senator SHERRY**—Do you advocate that?

**Mr Paterson**—We certainly advocate that \$450 ought to be raised.

**CHAIR**—Any further questions?

**Mr Paterson**—The third question that was raised with me was the issue of insurance. As I understand insurance, in the vast majority of circumstances it is not specified as an award provision or entitlement. It is a feature that is offered by some funds, not all. The entitlements with respect to insurance differ from fund to fund at the present time, and the nature of the offering can vary over time. In many cases funds have moved to enhance the nature of those entitlements over time but they are not specified as part of either the award entitlement or the superannuation guarantee charge.

**Senator SHERRY**—That is correct. By the very nature of superannuation and the contributions that are paid, not just industry funds but certainly many in-house employer funds provide for a compulsory insurance element.

**Mr Paterson**—I raise a doubt, and I cannot assert the position with a degree of confidence, as to whether they are a compulsory insurance entitlement or an option that is available. My recollection of the majority of funds—I will stand corrected on this—is that insurance is optional.

**Senator SHERRY**—I would have to correct you. I would believe that in respect of at least one or two million workers from the funds of which I have knowledge insurance is a compulsory element of superannuation. Let us assume one million workers are covered by compulsory insurance. Do you see any particular problems with the provisions of the legislation in respect of the application of insurance?

**Mr Paterson**—Of the removal of superannuation from awards?

**Senator SHERRY**—Yes.

**Mr Paterson**—I don't. If it is regarded by that group of people as a material issue, if for whatever reason the offering that is being provided to them does not include insurance, then there is once again no reason why that cannot be dealt with by individual or collective agreements. It does not justify those issues on the periphery determining whether there should be overlapping bits of legal obligations with respect to superannuation.

**Senator SHERRY**—I think section 32V excludes or at least attempts to exclude the employer from legal liability in the event of choice being exercised. Are you confident that is true?

**Mr Paterson**—I am confident that it has application in some circumstances. I am not confident that that provision absolves employers from all potential claims with respect to liability.

**Senator SHERRY**—Why should there be any employer exemption from liability?

**Mr Paterson**—The matter of offering choice is a matter of public policy being advanced by the government of the day. We do not believe by that change that employers should be placed at risk of liability in that process.

**Senator SHERRY**—If the employer determines, why shouldn't they?

**Mr Paterson**—The employer is obligated by a statute to offer choice of fund in a given set of circumstances. We do not believe that an employer obligated to provide that suite of choices should then be held liable with respect to the choices exercised by the individual. Employers are not financial advisers. I think one of the quotes that I recall from the evidence that was put before the committee that reported on choice of fund in March this year related to the owner of a patisserie. As I recall it, he reminded the committee that he runs a cake shop; he is not a financial adviser. I think we need to recognise that the vast majority of employers who will be captured by this legislation do not have expertise in the field of superannuation.

**Senator SHERRY**—So why require them to make choice?

**Mr Paterson**—There is a range of opportunities that are being proposed with respect to choice of fund. The choice is to be exercised by the individual from a suite of choices being offered by the employer.

**Senator SHERRY**—By the employer. That is right.

**Mr Paterson**—Correct.

**Senator SHERRY**—If the employer adopts a particular option, why shouldn't they be liable?

**Mr Paterson**—We do not believe that they should. They are giving effect to a statutory obligation. To the extent that they comply with that statutory obligation we do not believe there should be any claim.

**Senator SHERRY**—Who should protect the employee in the event of something going wrong?

**Mr Paterson**—By way of example?

**Senator SHERRY**—What if an employee ends up in a fund that the employer has urged and there is some sort of binding agreement to that effect and the employees it can be shown have been disadvantaged financially?

**Mr Paterson**—In terms of an employer urging, we would strongly counsel employers not to urge a particular selection of funds. They may well place themselves in breach of some other pieces of Commonwealth legislation with respect to providing financial advice. Therefore, we would be urging employers not to urge employees into a particular direction at all.

**Senator SHERRY**—Nevertheless, they have that option under the act.

**Mr Paterson**—They do not have an option of urging. In fact, all of the draft material I have seen suggests that employers should not provide any financial advice. In the drafts of

the material we have prepared we would encourage employers to avoid providing any advice. If employees seek it, they should be referred to appropriately qualified financial advisers. In selecting a fund you cannot take account of the particular circumstances of each potential individual who may be a member of that fund. That is a matter for the individual to determine.

**Senator SHERRY**—Why shouldn't the individual determine absolutely what choice they want their money paid into?

**Mr Paterson**—There is a possibility that that will be one of the suite of options that may be offered to individuals.

**Senator SHERRY**—Why shouldn't that be the only choice effectively? Why should an employer preclude an employee from having the money paid into a particular fund the employee wants?

**Mr Paterson**—There are options within the suite that is available for an employee to approach an employer and seek to have their superannuation contributions paid into any particular fund.

**Senator SHERRY**—What if they do not?

**Mr Paterson**—It is a matter for negotiations between the two.

**Senator SHERRY**—What if they do not agree and the employee insists on the money going into their particular fund? That is choice, isn't it?

**Mr Paterson**—It is one of the choice options that may be elected to be offered in particular circumstances and individuals can seek to pursue alternative negotiations. I do not believe unlimited choice from an administrative point of view would necessarily be in the best interests of those that I represent.

**Senator SHERRY**—Why not? Choice is choice. Don't individuals have the freedom and the right to exercise choice?

**Mr Paterson**—As I understand the reference that is currently before the committee, choice of fund has already been before the committee. What the committee is now determining is the issue associated with the removal of superannuation—

**Senator CONROY**—You indicated earlier that there could still be some circumstances where there is potential employer liability. Are you able to give us a couple of examples where your legal advice is indicating there may be problems?

**Mr Paterson**—I indicated that I understood the protection of legal liability was where an employer acted in accordance with the offer of choice specified in the statute. It might not necessarily provide the same degree of protection if there was an inadvertent breach, for example. So if a person offered three rather than four, as envisaged by the legislation, I am

not satisfied at this time that that protection would necessarily extend to that employer where there was an inadvertent breach of the offer of choice, but an offer of choice nonetheless.

**Senator SHERRY**—You represent obviously a range of employers. Taking this legislation as a whole, as a package, can you give us an example where an employer has reduced paperwork requirements or reduced general requirements for observing the superannuation payments? Where is an employer better off?

**Mr Paterson**—The question that is before us at the present time, as I understand it—and I am happy to try to respond to your question—is dealing with the removal of superannuation from awards. I am saying that there will be a reduced potential compliance burden and complexity for employers if superannuation is removed from the award in the environment of a choice of fund that is being proposed.

**Senator SHERRY**—How will the complexity be reduced?

**Mr Paterson**—They will not have an overlapping sense of obligations with an employer trying to resolve which set of obligations it is required to meet.

**Senator SHERRY**—But they are very clear at the moment. They are in the award.

**Mr Paterson**—There is a choice of fund regime that is proposed. As I said, our view in relation to the removal of superannuation from awards, particularly in the current context, is support for its removal as a natural consequence of the choice of fund proposals. I also indicated that we have long supported the removal of superannuation from awards with the introduction of the superannuation guarantee because, once again, there are overlapping obligations which cause confusion for employers.

**Senator SHERRY**—Do you think the package as a whole simplifies the world of superannuation for employers?

**Mr Paterson**—I have not seen any move by government over recent years at any point in time that has simplified the provisions with respect to superannuation.

**Senator SHERRY**—On that, I will agree with you.

**Mr Paterson**—But you cannot seek any comfort in just looking at what has happened in the last two years.

**CHAIR**—I think we have just about covered the range of issues. Mr Paterson, thank you very much for the very frank way you have responded to our very penetrative questions.

**Mr Paterson**—I was happy to do so, but I am sorry I could not be there with you.

[2.50 p.m.]

**DREVER, Mr Philip Malcolm, Assistant Secretary, Labour Relations Policy Branch, Department of Workplace Relations and Small Business, PO Box 9879, Canberra City, Australian Capital Territory 2601**

**REHN, Ms Kerry Ann, Assistant Secretary, Legislation Policy and Services Branch, Department of Workplace Relations and Small Business, PO Box 9879, Canberra City, Australian Capital Territory 2601**

**CHAIR**—Welcome, Mr Drever and Ms Rehn. I understand that you have not got a submission.

**Mr Drever**—No, we do not have a submission today.

**CHAIR**—Would you like to make some comments?

**Mr Drever**—I could make a couple of opening comments which might touch on some of the issues which were discussed earlier today. The government has held the position of superannuation being a non-allowable matter within the Workplace Relations Act. That was in the initial bill and then, subsequently, as part of its agreement with the Australian Democrats, the government indicated that position. The objective behind that is that there should be a single set of obligations and entitlements, at least for workers in the federal jurisdiction initially, with the object of removing red tape and complication in the area of superannuation. In that regard, award simplification is directed towards awards playing the role of a minimum safety net of terms and conditions, and it is the government's view that the superannuation guarantee is the appropriate mechanism in respect of superannuation.

While the superannuation guarantee applies one set of rules to all members, the award system actually has a variable standard, so it is not necessarily the case that we are looking at a dual system. I think various witnesses today have indicated that and the questioning itself has gone to some of those variations which currently exist. So when you look at awards, they can provide for different levels of contributions. The superannuation guarantee is generally the standard; they will either provide for three per cent or they will defer to the superannuation guarantee quantum.

The awards provide for choice of fund. The choice of fund may be a single fund, a number of funds or an agreement on any particular fund. They can provide for different thresholds to the superannuation guarantee. Those thresholds in a very few awards start at the first dollar that is paid in earnings but, more commonly, they are associated with the \$200 mark—some are a bit higher—or they are related to the number of hours a person actually works. Those thresholds are at variance to the superannuation guarantee.

The awards can specify membership requirements and applications to join funds. Some awards provide the details there and what happens as a fall-back if the employee does not make the required application. Others are silent in that area. Some awards have qualifying periods for the entitlement. For example, they may require that award superannuation not be

payable until an employee has been with the employer for a particular period of time. Some of them are of the order of six months.

Some awards have requirements for payment of award superannuation. That is generally 28 days or one month, but in some cases that period can differ between different types of employees. It can, for example, require that permanent full-time and part-time employees have their superannuation paid monthly and casual employees have theirs paid quarterly. Some awards establish an entitlement or a threshold for casual employees based on their annual income rather than any monthly income. So there is a variation there in that one alternative set of superannuation obligations which is established through federal awards.

The other issue which I will touch on is that the government has indicated its intention to retain the existing earnings basis. The problem of the earnings basis was recognised with the implementation of the superannuation guarantee in 1992 to the extent that that legislation recognised the award earnings base rather than applying the default mechanism of the SG.

In relation to the retention of earnings basis, there are two considerations. One is that it is a continuation of the existing obligation on employers. Equally it should be recognised that it is of some significance to a range of low paid workers because the earnings base protected will include a flat dollar earnings base. A number of awards establish a flat dollar amount that must be paid. That is across the board for all employees employed under the award. At the bottom end of the earnings range within that award the actual percentage of earnings being paid to those people would exceed the SG and that is balanced at the top end of the scale. So the earnings base issue is about maintaining the status quo for those people who are currently in receipt of superannuation.

**Senator CONROY**—By the time they reach nine per cent it would be unlikely that even those lower paid workers that you are claiming this protects—

**Mr Drever**—I do not believe that is so because the flat dollar amount is adjusted. As the SG goes up from six per cent to seven per cent, the flat dollar amount goes up as well.

**Senator SHERRY**—Even in all cases automatically?

**Mr Drever**—My understanding of how the earnings base is calculated from the SG is, where the superannuation guarantee recognises a flat dollar amount, that flat dollar amount has to be adjusted for each of the SG contributions so that, when the legislation to recognise flat dollar amounts was brought in, I believe that it was on the basis that those amounts would be adjusted from time to time to reflect the varying levels of the SG.

**Senator CONROY**—I think Senator Sherry might have been in the same boat. I used to be employed by an industry fund that applied a flat dollar rate. The Transport Workers Union super fund had an award that was a flat dollar rate per week. I am interested in your general answer on this. Our legal advice once the SG started moving up from three per cent to four per cent et cetera was that, firstly, our dollar amount did not automatically escalate.

Secondly, we started off on about 4½ per cent. So as the three per cent went to four per cent and to five per cent our legal advice was that we were going to be in breach of the

SGC and the fund could not issue the tick necessary to comply with the ATO's requirements. I am surprised you seem to be indicating that, just because a fund is willing to issue the note to the tax office that an employer has met his superannuation obligations, that covers him for his SG obligation; is that right?

**Mr Drever**—I am not aware of the particular circumstances you are talking about, neither am I an expert on the super guarantee. I am merely going to my own reading on this area. As I understand it, the super guarantee was amended post-1992 to reflect flat earnings amounts. The material that I have read about that suggested to me that the flat dollar amounts were to be automatically indexed to meet the SG and, if they were not indexed, they would fail to meet the SG in that regard.

**Senator SHERRY**—If they were not indexed, then presumably the union would apply to the commission to have the flat money amount increased.

**Mr Drever**—I do not see that it is any different from the three per cent, for example. There have been limited applications to increase the three per cent. Employers presumably are paying six per cent to meet their super guarantee. On the basis that an employer can draw on the earnings base from the award and the earnings base provides for a flat dollar amount, the employer presumably would then, on my understanding of how it operates, have to pay pro rata the flat dollar amount to the SG level to meet the superannuation guarantee obligation.

**Senator CONROY**—So even though the award says three per cent and the SG had gone up to six per cent an employer could not continue to pay the three per cent? Even though the minimum under the award was three per cent, they would still be required to pay the six per cent?

**Mr Drever**—That is to meet their super guarantee obligation, yes.

**Senator CONROY**—Do you think there are many employers who are confused by that?

**Mr Drever**—As I indicated, there are a number of areas where awards currently provide three per cent. I think that is probably the majority of them, although some of them have been adjusted to reflect the superannuation test case decision of 1994 which provided that the super guarantee was the test case standard. The difficulty arises, for example, with regard to all employees with earnings in excess of the minimum superannuation guarantee of \$450 a month; an employer's obligation is six per cent. Their obligation in respect of that six per cent might vary. They might be required by the award to pay only three per cent into a particular fund; the other three per cent could be to any complying fund. That would meet the superannuation guarantee and their award obligations.

**Senator CONROY**—But there would be no confusion out there from an employer that, even though their award said three per cent, they could get away with paying three per cent. They would know the SG is the minimum requirement and that six per cent must be being paid to somewhere.

**Mr Drever**—The evidence would suggest that. The Department of Industrial Relations' submission to this committee in 1991 provided considerable evidence of non-compliance with awards. It appears now that the compliance levels are significantly higher. If you draw those two together, one of the implications is that the SG is impacting on that.

**Senator SHERRY**—I just want to be clear on this earnings base retention. If there is any dispute about the earnings base and its adjustments, will that still be an allowable matter for the purposes of the commission determining those disputes?

**Mr Drever**—The earnings base issue would be a matter for the taxation office in determining whether an employer has met their obligation under the superannuation guarantee.

**Senator SHERRY**—So even though the earnings base set by the award is being kept, there is no scope for redressing any argument other than the tax office giving a ruling?

**Mr Drever**—That is correct.

**CHAIR**—The tax office has got the authority to determine whether an employer is meeting his superannuation guarantee obligations. Obviously, one of the questions would be: were any of your staff subject to award superannuation in the past?

**Mr Drever**—To put it another way: the superannuation guarantee currently is six per cent. Six per cent of what? The 'what' is what is spelt out in the award if the person employed is an award employee or it is the default provision determined by the tax commissioner.

**CHAIR**—The previous witness indicated he did not feel there was a need for any umpire in the event of dispute between an employer and employee. Would you like to comment on that? Can you see under a choice regime the possibility of disputes? If so, how will they be resolved?

**Ms Rehn**—There are a couple of different issues there. First of all it should be recognised that the commission can retain some jurisdiction in relation to superannuation matters. The removal of superannuation from the allowable award matters means that superannuation cannot be the subject of an industrial dispute for the purposes of exercising arbitral powers or settling disputes by an award or order. The commission could still exercise conciliation powers in relation to a matter concerning superannuation and in the exercise of those powers could convene compulsory conferences. So parties could be compelled to attend conferences before the commission. Penalties apply for failure to attend such conferences.

**CHAIR**—So the court could still look at issues where there is a dispute in relation to choice between the employer and an employee?

**Ms Rehn**—Where there is a dispute about the choice regime that is a separate issue. Are you talking about the role of the Superannuation Complaints Tribunal?

**CHAIR**—No, I am talking about the commission.

**Senator SHERRY**—Let us say a group of workers through their union or without their union say, ‘We are not going to have a bar of the fund the employer said we should belong to.’

**Senator CONROY**—They say, ‘Stuff the choice; we want a different choice.’

**Senator SHERRY**—The employee says, ‘I want the money paid into my fund,’ the employer says, ‘No,’ and then there is a dispute. Who resolves it?

**Ms Rehn**—There is capacity for the commission to exercise conciliation powers. Some care would need to be taken there to ensure that it is in fact within the definition of ‘industrial dispute’.

**Senator CONROY**—What about the McGrath situation?

**Ms Rehn**—The High Court’s ruling in the Financial Clinic case comes into play there. It does not mean that absolutely everything pertaining to superannuation will be found to be within the scope of the industrial dispute—it must be matters pertaining to the employer-employee relationship. The High Court found that the jurisdiction is fairly broad, but there may be some circumstances in which particular matters relating to superannuation for non-members of unions fall outside the meaning of ‘industrial dispute’.

**Senator CONROY**—What if we are in the middle of an EBA negotiation? The new EBA document presented by the boss to the workers changes their options, takes them away from, say, the TWU super fund and gives them four choices which do not include the TWU super fund. The guys are outside on the grass, they have got the barbecue going, they have got the caravan set up nicely. Is that an industrial dispute that will go before the commission in any way?

**Ms Rehn**—In the context of bargaining negotiations there are other limits on the commission’s powers to arbitrate. If it is a matter at issue in a bargaining period for an agreement it could be arbitrated. That would be the case with any matter whether it is within the scope of the allowable matters or not.

**CHAIR**—Would the parties be bound?

**Ms Rehn**—By?

**CHAIR**—The decision. That is the problem, isn’t it?

**Ms Rehn**—The commission would be confined to the exercise of conciliation powers by making recommendations.

**Senator SHERRY**—Otherwise the dispute, whether in a workplace or in a number of workplaces, is just slugged out? They fight it out industrially?

**Ms Rehn**—Certainly the effect of this legislation is to remove the scope of the commission to arbitrate, so ultimately the matter would have to be resolved—

**Senator SHERRY**—What if there were a situation where workers on the same site are under a federal award and a state award—and it is quite common; a good example would be clerical workers, because a lot of clerical workers are covered by Commonwealth and state clerks awards—and another group of workers are covered by a federal award? In other words, within the same work force you have got superannuation as an industrial issue in the state jurisdiction with disputes being resolved, but not in respect of the federal jurisdiction. Do you see that as a potential problem? The state commission can issue orders, instructions or whatever—conciliate and arbitrate—in respect of the workers covered by the state award but not in respect of workers at the same work place covered by the federal award.

**Ms Rehn**—That is, I guess, the same sort of issue that arises generally by having two sets of industrial tribunals.

**Senator SHERRY**—But at the moment superannuation is an industrial matter in the federal award system and the state award system. You can have joint sittings. If there is a dispute over superannuation that involves the whole work force—some are employed under a state award, some are employed under a federal award—you can have a joint sitting and the matter can be arbitrated in respect of all the workers, state or federal. If you remove super as a federal award matter for the workers covered by the federal award, you cannot have any binding arbitration in respect of the workers covered by the federal award but you can in respect of the state award for the same work force.

**Ms Rehn**—That is right, yes.

**Senator SHERRY**—Do you think that will add to confusion? Do you think it simplifies things?

**Mr Drever**—The government has been having discussions with the states over harmonisation of the industrial relations system in toto. One aspect of those discussions is superannuation. It is almost an impossibility to suggest that you would be able to move every worker in Australia at one point in time to the one regime.

In the discussions that have gone on with the states, it would appear to me that the states have listened and are interested in seeing the outcome through the federal parliament so that they know what the ground rules are or what they are being asked to align themselves to.

**Senator SHERRY**—That is what they said about the super tax and we have not seen too much action on that one yet.

**Mr Drever**—With respect, if you went the other way and you got all the states to line up to something, there could then still be no guarantee that the federal parliament would pass legislation in line with it.

**Senator SHERRY**—Of course, but factually, aren't we going to have a situation—and let us assume that this legislation is passed and applies from whatever date the government sets—where there is going to be an indeterminate period, depending on the state jurisdiction, when there is not uniformity?

**Mr Drever**—That is correct between the federal and state jurisdiction though, equally, one could say that you have not got it now. If you have multiple workers in your workplace, state and federal, a state award can provide for something different for your federal workers and, equally, an employer can be a respondent to a multiple number of federal awards which can all have different arrangements in any case, so you might have a work force with a number of different provisions. At the margin, they probably all have to receive six per cent, but then the fine print that goes around that six per cent can vary for varying parts of your work force.

**Senator SHERRY**—It is pretty fine print. Here we have a situation where if there is a dispute with workers covered by state awards, except Victoria because there is no state jurisdiction, the state commissions can resolve it if they wish. In the federal jurisdiction, the federal commission will not be able to resolve it by arbitration.

**Mr Drever**—Yes.

**Senator SHERRY**—On these negotiations, I heard you mention ‘constructive discussions’. Is there any indication of a time frame from any of the states yet about when they are going to harmonise?

**Mr Drever**—In respect of superannuation, they clearly want to see the outcome of the legislation which is currently before the parliament. More broadly, I am not in a position to answer.

**Senator SHERRY**—Do you know if discussions have taken place?

**Mr Drever**—One meeting has taken place.

**Senator SHERRY**—In what forum has this meeting taken place?

**Mr Drever**—It was a working party of the department’s labour advisory committee on wages.

**Senator SHERRY**—When did that take place?

**Mr Drever**—In January.

**Senator SHERRY**—Is there another meeting scheduled?

**Mr Drever**—That working party meets regularly. At this point in time, I think the matter sits before the federal parliament.

**Senator SHERRY**—Which area of the department is this working group from?

**Mr Drever**—The wages policy branch of the policy group chairs that working party. My particular branch has responsibility for superannuation, so we have coordinated in that regard.

**Senator SHERRY**—Were you involved in that January meeting?

**Mr Drever**—Unfortunately, I was on leave.

**Senator SHERRY**—Why do you say ‘unfortunately’?

**Mr Drever**—I would have liked to have been involved in the meeting.

**Senator SHERRY**—So if you had not been on leave you would have been at the meeting?

**Mr Drever**—Yes.

**Senator SHERRY**—Good, that gives me an idea about who to make sure we have at the estimates hearings.

**CHAIR**—Do you have any observations on any of the comments made by other witnesses? Were there any inaccuracies in terms of their understanding of the legislation?

**Mr Drever**—I should just go through some. If we talk about the thresholds, as I say, they vary. We did a survey of something like 150 awards. Not all awards actually include superannuation in them, but then there is a separate set of awards which deals solely with superannuation. We took out another 30-odd awards there just to get a handle on how awards are dealing with superannuation. That left us with 85 awards with superannuation in them. Only seven of those awards had lower thresholds than the superannuation guarantee. That said, a couple of those are fairly significant awards, so there is a bit of a balance there.

**Senator CONROY**—Which ones?

**Mr Drever**—Well, the hospitality award has a threshold of \$350. The interesting part with the hospitality award is that it used to be \$250. I believe it was sometime in 1996 that there was a consent application by the employer and union to raise the threshold to \$350. In relation to your questioning, Senator Watson, there was no compensation from the \$250 to the \$350 in that consent application.

It is very hard to get a handle on actual numbers of people involved there, because the data just is not available as to numbers of people involved. The other way is to look at who in essence would have award coverage now and would not have it under the superannuation guarantee. If you first of all take those sorts of thresholds and then relate the \$450 a month to the minimum adult federal award wage, which is \$359.40 or \$9.45 an hour, then to cut across \$450 you would need to work about 12 hours a week on average.

At the bottom end—for example in hospitality—the \$350 is 9¼ hours. So the only people who would be impacted are those working on average between 9¼ and 12 hours per week in hospitality. In some areas, it is \$200. That is somewhat lower. I have not actually done the maths but it can be worked out. So there is that group of people. Those people may only have a three per cent entitlement. I am not sure what the hospitality award says in

respect of those but, in other areas where the threshold exists, it might only be to the extent of three per cent.

The second group who currently would have an award entitlement and who would not have an entitlement under the SG are young people under the age of 18 who are working less than 30 hours a week. There is no superannuation obligation on employers but there may be an award obligation in that regard. If you wish to say, 'Well, who would those young people be?'—

**Senator CONROY**—Kids at McDonald's.

**Mr Drever**—It may be the kids at McDonald's. I am not sure of their particular arrangements. But if you look at the \$450 and you take what might be a wage for young people—say, \$7 an hour—and put that into the equation, that suggests something of the order of 16 hours a week. The vast majority of young people aged 17 working part-time are doing that in conjunction with study, school or university, and are probably not working the 16 hours in any case. There would be some people, but it is not all juniors under 18 who are working is the point I wanted to make there. The third group is those who are aged over 70 years of age and who are still employed as award workers.

**Senator CONROY**—They are not at McDonald's.

**Mr Drever**—They are not at McDonald's, no.

**Senator SHERRY**—I saw one at David Jones yesterday.

**Mr Drever**—That would be a very small group. There would be no obligation on employers to pay superannuation guarantee for those workers.

**Senator CONROY**—So a 16-year-old who had left school and was not doing any form of study but was working full-time at McDonald's, Red Rooster or Kentucky Fried or whatever, how many hours—

**Mr Drever**—If they worked full-time there is a superannuation guarantee obligation. If they work more than 30 hours a week, that establishes the superannuation guarantee. I was just doing some extrapolations that suggest it is probably around 16 hours a week on average.

**Senator CONROY**—So it is possible that if they are working between the 16 and 30 hours they are going to be covered, but if they are working less than 16 hours they are definitely not covered?

**Mr Drever**—That is correct.

**Senator CONROY**—Depending on their age. I mean, if they are 14, have left school and got a job at McDonald's—

**Senator SHERRY**—How do we ensure that no-one is disadvantaged?

**Mr Drever**—That would be fairly difficult. There would be two ways: one way would be to attempt to compensate them for the value of their lost entitlement in terms of direct earnings, and that would be extremely difficult to do—

**Senator SHERRY**—But could you not simply, for anyone who earns less than \$450 a month, require them to be paid in lieu?

**Mr Drever**—That would probably create an entitlement for many more people than those who were losing the entitlement. It is a balance.

**Ms Rehn**—And there would also be difficulties with how you actually achieve that, given the Commonwealth's limited ability to legislate directly—

**Senator SHERRY**—No, but this is only in federal awards. You would remunerate them, presumably, through an adjustment of their wage.

**Ms Rehn**—The commission could do that—

**Senator SHERRY**—Yes, you could require the commission to take it into account—

**Ms Rehn**—Yes, but the difficulty would be how you actually got to the point of getting the commission to do that.

**Senator SHERRY**—But if it is a wage—

**Ms Rehn**—We could not specify what the commission must do. You could say that this is a factor that the commission should take into account in setting wages, but you could not compel the commission to adjust wages by a certain amount.

**Senator SHERRY**—But could you not write into the legislation that, where a person is not entitled to an SG payment and earns less than \$450 a month, they should be paid the equivalent percentage of wage in lieu? Could you not give the commission the power to do that as a wage power not a superannuation power?

**Ms Rehn**—Perhaps if we take that on notice and give you a more considered response. But I think there are difficulties given that you cannot prescribe precisely what the commission wage outcomes ought to be or the specific factors which will determine its wage outcomes.

**Senator SHERRY**—You can prescribe anything if you can pass it into law, provided it is constitutional.

**Ms Rehn**—But under the industrial head of power you could not legislate directly.

**Mr Drever**—There might also be some administrative arrangements around the threshold where if you earned marginally under the \$450 in one month and you got the cash and the next month you were marginally over and you got the super, then your actual take-home pay may go down for having worked the extra time, which creates a number of difficulties—

**Senator SHERRY**—That is an administrative problem at the moment though in respect of the payment of superannuation for people who earn less than \$450 one month and earn more—

**Mr Drever**—Yes, there is.

**Senator SHERRY**—There is an administrative problem there anyway.

**Mr Drever**—On a similar note, if I can follow up on the questioning that Senator Conroy was putting earlier today about whether employers would align—

**Senator CONROY**—I was just about to ask that question: have you had any concern that people—McDonald's or anybody—could start manipulating their work force to ensure that everyone stayed below \$450, such as make sure everyone was rostered on for 15 hours a week?

**Mr Drever**—I cannot answer how employers would or would not alter their roster. I would merely make the point that if it is an issue at \$450 and the award has \$350 in it, then it is an issue at \$350 now—

**Senator SHERRY**—Yes, but \$350 is 25 per cent less than \$450, approximately a quarter. In the particular retail example we had this morning, the cut-off point was effectively about 15 or 16 hours—

**Senator CONROY**—That is at six per cent now.

**CHAIR**—In your experience do employers manipulate hours of work for these sorts of things?

**Mr Drever**—I am unable to comment on that. I am merely making the point that, wherever you have a threshold, you have issues around thresholds about how people will or will not organise their staffing arrangements.

**Senator CONROY**—I think even Mr Paterson acknowledged that, under the current situation, it would probably cost more to set up that system of rostering than it would be of benefit. The question is whether, with six per cent going up to seven, going up to nine, you have an increased financial inducement to completely legally find your way around the \$450.

**Mr Drever**—There is a raft of economists who have made a living out of the rationale as to how you staff people—the rationale of employing people on overtime rather than having extra staff, the rostering arrangements, the overheads, the fixed costs versus the variable costs and the like. There is a wealth of ways whereby employers may or may not roster their staff.

**Senator CONROY**—It is worrying that, if 20 hours were the break-even point in that sense, you could then start moving from a permanent to two casuals who are working 19 hours a week each. That would avoid your SG obligation. That one would not be too hard. If it were six or seven hours per employee, no-one is going to start chopping and changing and

going from 10 employees to 25 employees to take advantage of eight hours. But if it is almost half of a working week, then some smart accountant at some time is going to start figuring out that this is a bit of a go.

**Mr Drever**—I am not sure what the sums are.

**Senator SHERRY**—But nine per cent is a fair inducement, isn't it? It was at three per cent—and I would accept that, at three, who could be bothered—but it is now six going to nine; that is a significant inducement.

**Mr Drever**—Again, as I said, it may well be how an employer does adjust to that. The debate in earlier times about junior rates of pay was that young people were put off work when they were 18. Whether that happens or does not happen is a factual situation; it is a similar debate.

**Senator SHERRY**—How is red tape cut down?

**Mr Drever**—Primarily we go back to what I said at the start about one set of obligations applying to your entire work force as opposed to a variety. For some employers, it may be looking at the award and looking at the SG and meeting the highest common denominator in regard to each of those. That creates problems. That is not to say that it is not an issue. For other employers with multi awards and what have you, it may be a whole raft further.

**Senator SHERRY**—And for those employers covered by dual state and federal jurisdictions, it becomes more complex, not less.

**Mr Drever**—It goes from three sets of obligations down to two.

**Senator SHERRY**—Have you done any surveys of employers in relation to superannuation and the way in which superannuation applies?

**Mr Drever**—In what sense?

**Senator SHERRY**—Has the department gone out and asked them what are the red tape paperwork requirements? Where is it a problem?

**Mr Drever**—In relation to surveys, I think the answer is no.

**Senator SHERRY**—None at all?

**Mr Drever**—As far as representations go, I am aware of representations from employers to the government.

**Senator SHERRY**—On this issue?

**Mr Drever**—Dating back to 1993-94, if you look at the employers' submissions to the superannuation test case—I cannot recall if it was every single employer, but it was certainly the main employers—I think that, initially, their position was that award superannuation

should defer to the superannuation guarantee. Their position before the commission at that stage was that the award should merely contain a reference that employers should meet their superannuation guarantee obligation.

**Senator SHERRY**—And did those same submissions call for choice? Do you recall any of them asking for choice?

**Mr Drever**—On the contrary, they sought that the choice, which was being provided for through awards—as the only avenue for choice—not be provided for in awards, and that you met your superannuation guarantee obligation. The superannuation guarantee, at that point and now, would be any complying fund.

**CHAIR**—Any other matters raised by witnesses?

**Mr Drever**—No, I think I have covered those.

**CHAIR**—Further questions?

**Senator SHERRY**—The arrangements being entered into in a variety of awards—they were entered into freely by the employer and union organisations who were parties to the awards, weren't they? Do you recall any arbitrated case of the particular provisions that are at variance with the SG minimum?

**Mr Drever**—Certainly, in the introduction of award super, there was the national wage case which introduced it in 1986 and which, in early 1987, provided for superannuation to be introduced either as three per cent or in tranches of 1.5 per cent in arbitrated decisions.

**Senator SHERRY**—I understand that was arbitrated but in the negotiations that flowed over a period of time after that, there were varying arrangements; you have talked about some of them that were entered into between the parties to those awards—you mentioned the hospitality industry.

**Mr Drever**—Yes, that is true.

**Senator SHERRY**—And they recognised the particular circumstances, in that case, of the hospitality industry. So why go to a national uniform standard that cuts across the recognised differences in particular industries?

**Mr Drever**—I think if you look back at the history of superannuation prior to 1986, when there was fairly limited coverage—maybe 40 per cent of the work force and a significant proportion of those were in the public sector—and to the 1986 and 1987 period when award super was implemented, that certainly was on a case-by-case arrangement. The superannuation guarantee legislation introduced in 1992 seemed to draw a number of those issues together, and certainly provided coverage for the non-award area of the work force and the like. So I suspect in this whole area of superannuation, with the value of hindsight, there might have been a more streamlined arrangement put in place from day one.

**Senator SHERRY**—But I certainly recall, in those early days, disputes about, for example, the funds that moneys were going to.

**Mr Drever**—Yes.

**Senator SHERRY**—Quite a number of disputes.

**Mr Drever**—The period beginning in 1987 was a period of considerable disputation about superannuation and primarily those issues were over the choice of fund arrangements.

**Senator SHERRY**—And I think the irony is that the unions more often than not claimed choice of fund at that time. But, to put that issue aside, the commission had the ability to conciliate and arbitrate in those disputes, didn't it?

**Mr Drever**—Yes, it did.

**Senator SHERRY**—And this is a step back from arbitration. If we have arguments about choice of fund, for example, in the future, there will be no power for the federal commission to arbitrate?

**Mr Drever**—There will be no power for arbitration in that regard, but if you look at the period 1987-88, when there was disputation over choice of fund, that was an era when the parties were moving into new ground. There is quite a deal of track record and experience now.

**Senator SHERRY**—You are not saying choice of superannuation is not new ground?

**Mr Drever**—I am saying that was new ground. A number of people were coming into superannuation who had little experience or knowledge or understanding. It is 10 years down the track now and the vast majority of the work force has had superannuation.

**Senator SHERRY**—That is true, but do you think they understand it?

**Mr Drever**—I think it would be a brave person who suggested that anyone understands superannuation to a significant degree.

**Senator SHERRY**—I would have to say that people on this side do not claim they understand it.

**Mr Drever**—More widely in the community, though, I would suggest.

**Senator SHERRY**—More widely in the community. But, if you hold that view, how on earth do people make an effective and educated choice?

**Mr Drever**—The choice of fund issue is getting beyond my bounds, but—

**CHAIR**—I think it is beyond our terms of reference today.

**Senator SHERRY**—This is part of the package of legislation—to implement it, isn't it?

**Mr Drever**—It is.

**CHAIR**—But we are focusing on the workplace relations—

**Senator SHERRY**—Yes, but the thrust of this legislation is to pass back to the employer and the employee arrangements that are to be entered into in respect of superannuation—removing the role of the commission in an arbitrated way. Do you have confidence that the individual employees will understand?

**CHAIR**—I do not think you can ask the witness that question.

**Senator SHERRY**—Yes, I can. It is part of this. We are removing the commission. The industrial system is delegating back to the individual at the workplace level, together with the employer. I think it is quite within the terms of reference.

**CHAIR**—This is bound by government policy, though. I think you have got to be fair to him.

**Mr Drever**—Perhaps I could answer in this way: I understand there is an information campaign to be developed—not in my area. The success or otherwise of that will prove it.

**Senator SHERRY**—Have you had discussions within your department about the implementation of choice?

**Mr Drever**—Certainly.

**Senator SHERRY**—What is the nature of those discussions?

**CHAIR**—I do not know if he can answer that question about discussions within his department.

**Senator SHERRY**—We will see if he can answer it. If he has knowledge of it, he can.

**CHAIR**—No, I think the witness has got to be protected.

**Mr Drever**—I think I should agree with the Chair on this one. The fact is that when policies such as choice of fund or what have you are being implemented by the government there are cabinet submissions, coordination comments and the like. Certainly the department has been involved at that level.

**Senator SHERRY**—Is your department involved in coordinating what is occurring in other departments on this issue?

**Mr Drever**—I have been involved in meetings, yes.

**Senator SHERRY**—I will not pursue it today; I will pursue it at estimates. I have already warned Finance about that anyway. The arrangements that are entered into at workplace level, the changes that occur as a result of removing super as an industrial matter and whatever evolves: will you be doing any monitoring of that?

**Mr Drever**—We have two databases established within my area. One deals with conditions of employment under workplace agreements, the other deals with award simplification as such.

**Senator SHERRY**—So you will be tracking what occurs, registering what occurs, in respect of superannuation matters?

**Mr Drever**—We will be registering what occurs within the award system in terms of what awards do have it, what awards do not have it, and the like. We will also be—

**Senator SHERRY**—What is going from awards under this legislation.

**Mr Drever**—Yes, we will be recording when it is gone.

**Senator SHERRY**—That is not much help to us, but we are interested in what develops.

**Mr Drever**—What is entered into in federal industrial agreements—we will certainly have a handle on that.

**Senator SHERRY**—What if there are no registered agreements? Who will be tracking that? The tax office?

**Mr Drever**—To the extent that it is the super guarantee, the responsibility lies with the tax office.

**Senator SHERRY**—Who will know what is occurring at a particular workplace? When there is not an industrial agreement of some sort, who will know?

**Mr Drever**—Know what, Senator?

**Senator SHERRY**—What the arrangement is, what the fund is, where the money is going, what one of the four choices is that the employer has to choose from.

**Mr Drever**—Again, you are getting into the area of the choice of fund, but my understanding is that the employer would offer a choice of four funds or unlimited. That would be known as the funds that operate in that workplace.

**Senator SHERRY**—So you will not have any role at all with registered agreements other than knowing what will occur?

**Mr Drever**—No.

**Senator SHERRY**—Where you have registered agreements—I have heard there are quite a number being negotiated at the moment—will you publish an overview of those agreements?

**Mr Drever**—I had not thought about the particular matter, but the Workplace Relations Act does require the minister to table an enterprise bargaining report, admittedly with a focus on women and other minority groups in the work force, but to the extent that that covers enterprise bargaining and superannuation issues, then I would anticipate that it would be in there.

**Senator SHERRY**—There is no requirement at the moment, is there?

**Mr Drever**—Not for superannuation specifically, no.

**Senator SHERRY**—You have touched on the issue of the development of award superannuation in the superannuation guarantee. Do you believe that the inclusion of superannuation as an award matter has aided the enforcement of the collection of superannuation moneys?

**Mr Drever**—I think it may well be the opposite. If the evidence that was put to this committee in 1991 in terms of compliance is the base line and the event that has occurred since then is the superannuation guarantee, and the evidence now is of a much higher level of compliance, if you take the ABS statistics even, then it may well be the opposite.

**Senator SHERRY**—So by removing super as an industrial matter, compliance will be improved?

**CHAIR**—That does not necessarily follow.

**Mr Drever**—I cannot answer that.

**Senator SHERRY**—Do you think it will go backwards?

**Mr Drever**—What the situation will be is that employers not meeting their superannuation guarantee obligation will incur the charge. That has significant cost effects on them. It is not clear to me that the six per cent that is being paid now—given that only a small proportion of awards require the six per cent—is necessarily a reflection of an award obligation; it is more a reflection, to my mind, of the superannuation guarantee charge.

**Senator SHERRY**—So you are confident that the percentage of workers receiving superannuation will not be affected by the removal of superannuation as an industrial issue.

**Mr Drever**—I do not know that I can be authoritative in that regard, but it would seem to me that the logic would be, leaving aside the thresholds, and what have you, that the bulk of wage and salary earners are currently getting six per cent and that six per cent is a requirement of the super guarantee to a much greater degree than to awards. I am not aware of what data or evidence is around to suggest that workers are missing out on the six per cent.

**Senator CONROY**—Do you believe that every single worker who is currently getting \$1 plus superannuation will continue to get it after this change? Can you guarantee us that everybody who currently gets—

**Mr Drever**—I cannot guarantee you anything, Senator.

**Senator SHERRY**—But you can give us your opinion.

**Senator CONROY**—You can give us an informed opinion.

**Mr Drever**—As I have said, it appears to me that the super guarantee charge is what is setting the quantum at the moment.

**Senator SHERRY**—So based on that, we would not expect the proportion of workers who receive superannuation to go backwards, would we?

**Mr Drever**—I would not expect so.

**Senator CONROY**—Not the full six per cent; any degree.

**Mr Drever**—Can you explain the difference?

**Senator CONROY**—If you are earning less than \$450 at the moment and it is taken out of your award.

**Mr Drever**—No, I set that aside in my earlier answer to Senator Sherry.

**CHAIR**—Of course, the six per cent moves to seven per cent as from July, does it not?

**Mr Drever**—That is correct, yes.

**CHAIR**—That will also change the equation somewhat.

**Mr Drever**—Again, the differential will be four per cent.

**CHAIR**—Thank you very much.

**Committee adjourned at 3.45 p.m.**