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Official Committee Hansard

SENATE

EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS
AND EDUCATION LEGISLATION COMMITTEE

**Reference: Workplace Relations Amendment (Transmission of Business) Bill 2001
and Workplace Relations (Registered Organisations) Bill 2001**

FRIDAY, 18 MAY 2001

CANBERRA

BY AUTHORITY OF THE SENATE

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SENATE
EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS
AND EDUCATION LEGISLATION COMMITTEE

Friday, 18 May 2001

Members: Senator Tierney (*Chair*), Senator Carr (*Deputy Chair*), Senators Brandis, Collins, Ferris and Stott Despoja

Substitute members: Senator Murray for Senator Stott Despoja for matters relating to workplace relations and small business

Participating members: Senators Abetz, Allison, Boswell, Brown, Buckland, Calvert, George Campbell, Chapman, Coonan, Cooney, Crane, Crossin, Crowley, Eggleston, Faulkner, Ferguson, Gibbs, Gibson, Harradine, Harriss, Hogg, Hutchins, Knowles, Lightfoot, Ludwig, Lundy, Mackay, Mason, McGauran, O'Brien, Payne, Schacht and Watson

Senators in attendance: Senators Carr, Collins, Murray and Tierney

Terms of reference for the inquiry:

Workplace Relations Amendment (Transmission of Business) Bill 2000 and Workplace Relations (Registered Organisations) Bill 2001

Committee met at 8.42 a.m.

Bohn, Mr David Anthony, Acting Assistant Secretary, Legal Policy Branch, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

Shakespeare, Ms Penny Maureen, Director, Organisations, Freedom of Association and Other Minimum Entitlements Section, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

Smythe, Mr James, Chief Counsel, Workplace Relations Policy and Legal Group, Department of Employment, Workplace Relations and Small Business

CHAIR—I declare open this public hearing of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee. On 5 April 2001 the committee was asked by the Senate to inquire into the provisions of the [Workplace Relations Amendment \(Transmission of Business\) Bill 2001](#) and the [Workplace Relations \(Registered Organisations\) Bill 2001](#). The Workplace Relations Amendment (Transmission of Business) Bill is intended to make the management of workplace relations more efficient by reducing the complexities arising from the existence of multiple or inappropriate certified agreements following the transmission of business.

The Workplace Relations (Registered Organisations) Bill deals with the technicalities of registration and the internal organisation of registered organisations particularly in relation to financial accountability, disclosure and democratic control. Before we commence taking evidence today, I state for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to the evidence provided. Parliamentary privilege refers to the special rights and immunities attached to parliament or its members and

others necessary for the discharge of parliamentary functions without obstruction or fear of prosecution.

Any act by any person that operates to the disadvantage of a witness on account of evidence given before the Senate or any of its committees is treated as a breach of privilege. I welcome all observers to this public hearing. I welcome officers from the Department of Employment, Workplace Relations and Small Business. The committee has before it submission No. 10 from the department. Are there any changes that you wish to make to this submission?

Mr Smythe—Yes, Senator. In the submission relating to the Workplace Relations (Registered Organisations) Bill it is foreshadowed that a further bill dealing with consequential and transitional amendments will be brought before the Parliament. Appendix A to our submission is an outline of the matters that would be contained in that bill. We also indicated that if any drafting changes emerged in the drafting of that consequential and transitional bill we would draw those changes to the attention of the committee. As a consequence we have an amended appendix A to our submission which outlines and sidelines the changes to that consequential and transitional bill. I believe it is the government's intention to introduce the consequential and transitional bill, which is the partner of the registered organisations bill, during the next sitting period of the Parliament.

CHAIR—You may continue with a brief opening statement if you wish.

Mr Smythe—The Senate committee is dealing with two bills today—the [Workplace Relations \(Registered Organisations\) Bill 2001](#) and the [Workplace Relations Amendment \(Transmission of Business\) Bill 2001](#). I will make a few brief comments about the registered organisations bill, if I can use that shorthand form. The bill is intended to achieve two broad policy objectives. The first is to transpose into a separate piece of legislation those provisions of the Workplace Relations Act 1996 that are concerned with the registration and internal administration of registered organisations, that is, registered organisations both of employers and employees. The second objective is to make technical but nonetheless important amendments to these provisions in a manner that modernises them for the first time in years, particularly in relation to financial accountability, disclosure and democratic control.

It should be said that the bill has been developed over a considerable period. The government has made extensive revisions to the bill in response to submissions made by unions, employer organisations, accounting professionals and other parties. More recently, consultation has occurred through the formal processes of the committee on industrial legislation, a committee of the National Labour Consultative Council. Introduction of the bill was delayed to enable these consultative processes to be fully exhausted and differences of view on policy and drafting minimised. As a result of this consultative process the government has removed from the bill the more contentious policy issues that arose during the process. It should be emphasised that three issues in particular were removed from earlier drafts of the bill. They are: changes to the criteria for the registration of enterprise unions; disclosure of political donations made by industrial organisations; and part funding by organisations of the cost of industrial elections conducted by the AEC. Those costs are currently totally publicly funded.

The government has indicated that, if these matters are to proceed by way of registered amendment, they will occur through separate single-issue pieces of legislation. Some of the amendments proposed by the bill reflect the government's response to the report commissioned in 1998 from Blake Dawson Waldron on financial reporting and government

arrangements in relation to registered organisations. Other changes implement the government's response to the 1990 recommendations of the Joint Standing Committee on Electoral Matters about industrial elections and to the HREOC recommendations about discriminatory rules. The transfer of the bulk of the existing regulatory provisions of parts 9 and 10 of the Workplace Relations Act into a separate registered organisations bill is intended to make the Workplace Relations Act a more usable and relevant document for users of the system. Our amendments to the current arrangements proposed in the bill are made with a view to enhancing the democratic governance of registered organisations and modernising provisions regulating financial disclosure and reporting.

I just make a few brief comments about the [Workplace Relations Amendment \(Transmission of Business\) Bill 2001](#), which I think I will refer to from now on as the transmission of business bill. The amendments proposed by this bill would provide a mechanism for the Australian Industrial Relations Commission to resolve problems that can arise from the inappropriate application of certified agreements following transmission of business. The bill is a simple technical bill that gives the commission the power to order that a certified agreement does not apply, or applies only to a limited extent, following a transmission of business.

Under the legislation as it currently stands a certified agreement will automatically transmit in all cases where there has been a transmission of business. The department's submission outlines some of the difficulties that can arise from the operation of this rule. The bill would give the commission the power to overcome some of these difficulties. We think it is important to emphasise that the bill gives discretion to the commission to deal with difficulties that can arise from the inappropriate transmission of certified agreements. The bill does not automatically operate to prevent the transmission of certified agreements. It should also be noted that the bill requires that before making an order the commission must afford persons bound by the certified agreement an opportunity to be heard. That concludes my opening statement.

Senator CARR—I refer to issues relating to the legislative program. You said that the department expects this additional bill, which we have not seen, to be introduced next week?

Mr Smythe—I could not guarantee that it will be introduced next week. I believe that it will be introduced very soon.

Senator CARR—The parliamentary session concludes on 28 June. Do you anticipate the matter to be introduced by 28 June?

Mr Smythe—I do not know.

Senator CARR—You cannot give us any indication of what the department expects by the end of the session?

Mr Smythe—I imagine that it would be, but I do not know. I have no control over the parliamentary program. The bill has been drafted. It is ready to go.

CHAIR—The question is: do you know what the parliamentary program is?

Mr Smythe—No, I do not. I know that the minister's intention is to introduce this bill as quickly as possible. Obviously, it is needed to make the registered organisations bill work, if passed. The consequential and transition provisions would need to be passed.

CHAIR—But if it is not introduced next week is it your understanding that it would be introduced in a fortnight before we rise for the winter break?

Mr Smythe—Yes.

Senator CARR—Obviously, because it has not been introduced, it cannot be listed on the program. When do you anticipate the package being debated?

Mr Smythe—The whole package of this bill and the consequential and transitional bill?

Senator CARR—Yes, because clearly we cannot really deal with one without the other, can we?

Mr Smythe—No. I believe that the matter will be debated in that final two-week period of parliament.

Senator CARR—Do you expect it to be listed?

Mr Smythe—The government expects it to be listed.

Senator CARR—I understand that it is a government decision but presumably the department gives the government some idea about when these matters will be dealt with. There must be some discussion?

Mr Smythe—Senator, we are working on the assumption that it will be debated in parliament before the parliament rises.

Senator CARR—Before the end of the winter session?

Mr Smythe—Correct.

Senator CARR—Will this take priority over the budget bills?

Mr Smythe—I have no idea what priorities the government will afford it.

Senator CARR—I was just wondering, as you are putting a lot of work into this. Presumably you would know whether or not the government regarded this as more important than its budget?

Mr Smythe—I could not comment on the government's order of priorities, Senator. We are working on the basis that the matter will be debated.

Senator CARR—As I read it there are eight days—excluding next week, the three days of the budget period—in which the Senate will be sitting. I take it that it will be done fairly quickly in the House of Representatives but it might require a bit more time than you have anticipated to have the matter debated before 28 June. Given that there are other issues to be dealt with, I wonder whether or not it is the view of the department that there are other industrial relations bills of higher priority. Where do you see it in the scheme of things? Is it the most important bill that this department wants to see debated in relation to its own legislative program?

Mr Smythe—I will take on notice this question about priorities and come back to the committee.

Senator CARR—I would just like to know what you regard as the most important industrial relations bills that are already listed. Substantial matters are listed already.

Mr Smythe—I do not think what I or the department regard as the most important—

Senator CARR—I would be surprised if any of you regard this as being of great moment, but how does the department regard it?

Mr Smythe—The department is simply working on the basis that this bill and the consequential and transitional bill will be debated prior to the parliament rising at the end of winter. I cannot comment about the priority of other bills.

Senator JACINTA COLLINS—Mr Smythe, can you apprise us as to why the consequential and transitional provisions were not included in the bill?

Mr Bohn—My understanding is that it is OPC drafting practice, when a new bill has been established, to separate the main bill and the transitional and consequential arrangements that go with that bill. That is what happened in 1998 when the Industrial Relations Act was established. There was a separate consequential bill at that point.

Senator JACINTA COLLINS—I do not think that was the case in 1996 or in 1998.

Mr Smythe—In 1996 it was not creating a new act. If this bill were passed it would be a new act. The idea would be to have the consequential and transitional bill separate from that so that it does not become part of the new act. That is simply an operating document. So it is OPC practice. Whatever the main subject of the bill it becomes an act without any confusing issue of having consequential and transitional bills rolled into the act which will continue in force for ever.

Senator JACINTA COLLINS—As a consequence of that policy we have procedural problems which I need to get to the bottom of. For example, how does this committee proceed in relation to this legislation? Why was that bill not tabled during the last session?

Mr Smythe—Because it was not drafted.

Senator JACINTA COLLINS—It was not ready?

Mr Smythe—That is correct.

Senator JACINTA COLLINS—When this committee was given an assurance that it would have the legislation before it before members all trotted back to Canberra for the next session, that commitment really pertained only to some of the legislation and not to all the relevant legislation?

Mr Smythe—I am sorry, Senator, I am not aware of that commitment. In which forum was that commitment given?

Senator JACINTA COLLINS—This committee dealt with this reference on the basis that the legislation would be tabled in the House of Representatives at the end of the last session. We are now left in a quandary as we do not have all the relevant legislation before us. We have a reporting date of 18 June. We are now being told that we may not even have all the relevant legislation before us by 18 June.

Mr Smythe—I am not aware of the undertaking. I am not sure whether or not it was an undertaking given by the department. My understanding is that this is an inquiry into this bill. I appreciate the difficulty of not having the precise details of the consequential and transitional provisions. However, that is as far as I can take it. We have provided an outline of what will be contained in that consequential and transitional bill.

Senator JACINTA COLLINS—This bill refers to the other bill though, does it not?

Mr Smythe—It does. This bill, for its operation, will require the consequential and transitional bill to be passed, which will go to issues of what happens with an existing process that is under way when this bill becomes an act.

Senator JACINTA COLLINS—With respect, it is a bit more serious than that, Mr Smythe. For instance, submissions to this inquiry refer to issues and concerns associated with what may be in the other bill. I do not think this committee should conclude its consideration of this bill until the other bill has been tabled and until it sees the other bill.

Mr Smythe—All I can say is that, as I understand it, this is an inquiry into this bill. I am sure it is open to the committee to draw whatever conclusions it likes about what might be in the consequential and transitional bill. All we can do is give you as much information as we can about what is intended to be in the consequential and transitional bill, what the sentiments are, and the general principles that apply. I believe that we have provided that in appendix A, of which we have given you an update.

Senator JACINTA COLLINS—Is there any reason why you cannot provide us with a draft?

Mr Smythe—We will take that question on notice. As I understand it, there are limited circumstances in which drafts can be provided. But I will take that question on notice and get back to you.

Senator JACINTA COLLINS—I just have in mind other bills that we have gone through quite closely. The department has accepted the need to go back and look at further amendments. I would not like this to occur in this case, given the time frame under which we are operating. Going back to the issue of why there are two separate bills, you say that that is current drafting practice?

Mr Smythe—That is right.

Senator JACINTA COLLINS—For stand-alone legislation?

Mr Smythe—It is because this will become the act and the consequential and transitional provisions only have a limited operation to facilitate the transmission of provisions out of this act into the stand-alone act. You do not need to have the consequential and transitional provisions as part of the act that continues in force as the act.

Senator JACINTA COLLINS—Why do they have only limited operation?

Ms Shakespeare—The bill will mostly remove provisions from the Workplace Relations Act that are being replaced by the provisions in the new stand-alone bill as well as making changes to other acts that currently refer to Workplace Relations Act provisions. It will replace those references with references to the new stand-alone bill. The transitional provisions will be the ones that have limited operation.

Senator JACINTA COLLINS—What sort of limited operation are you envisaging?

Mr Smythe—Well, for instance, a proceeding is on foot at the time that this act comes into operation. The general sentiment is that it should continue to be dealt with by the commission, or whoever, under the provisions of the old act. Over time that sort of situation will cease to occur, because the proceedings that were on foot at the time the new act came into place will have all been concluded.

Senator JACINTA COLLINS—But, as I understand it, other aspects of this separate bill will deal with issues such as maintaining current exemptions under the act. Now they would not be limited, would they?

Mr Bohn—The transitional bill will provide that exemptions under the existing act will be treated as if they were exemptions under the registered organisations act. So it is just a roll

over. At that point they are then treated as though they are made under the registered organisations act and that provision does not have any further work to do.

Senator JACINTA COLLINS—Yes, but it has ongoing work to do. It needs to continue to prevail. This is an issue that has been raised with us by one of the major employer organisations that is concerned about this. You would not want it included in some ancillary bill that does not prevail. Perhaps this is one of the things that should be in the main bill.

Mr Bohn—It is not a question of prevailing, Senator; it is just a question of the application of existing—

Senator JACINTA COLLINS—You are saying that it has limited application. With respect, one matter was submitted to us by a major employer organisation which said that it did not think it should have limited application.

Mr Smythe—Senator, as one of my colleagues said, it is a fairly common practice. In the 1988 exercise undertaken by the ALP government, the consequential and transitional bill was a separate bill and a separate act. In the Public Service review legislation, the consequential and transitional provisions were a separate act. It is simply the practice of the drafters to do it that way.

Senator JACINTA COLLINS—Mr Smythe, I do not take issue with that element. The problem we have is that it is not before us.

Mr Smythe—I think I have taken our response as far as I can, Senator.

CHAIR—Senator, there is a fair bit of detail in this brief indicating what is in the transitional bill.

Senator JACINTA COLLINS—There may be a fair bit of detail in the brief but until we can actually compare it to the bill itself we are not in a position to make a judgment on the matter.

CHAIR—I am not suggesting that you can make a judgment but I think there are some elements relating to the principles and other aspects of the transitional arrangements.

Senator JACINTA COLLINS—The problem we have this morning is that I have already looked at the first appendix. The department has now given us another appendix to replace that first appendix which has been amended. I need to go through it to determine precisely where and how it has been amended, describing this ancillary bill.

CHAIR—I am not suggesting that you can conclude it today, Senator, but I think we can make a bit of progress on it.

Mr Smythe—Let me can just add to that. In respect of that amended appendix there are three relatively minor changes, each of which is highlighted in the document that you have been given. So it is not as though there is a great deal of additional material that you need to go through to understand what changes have been made.

Senator JACINTA COLLINS—The issue relating to substantive matters was going to be my first question. Could you take us to the changes and explain why they needed to be made?

Mr Bohn—In the revised document there are changes to paragraphs 11, 13 and 21. Two of the changes are just to clarify the operation of the bill. The first one relates to existing demarcation orders. It clarifies the provisions in the new bill that provide for the variation of the applied orders that were made under the Workplace Relations Act as well as orders that might be made after the commencement of the registered organisations act.

Senator JACINTA COLLINS—Thank you, Mr Bohn. For the purposes of the chair, this highlights precisely the problem or the issue. I looked at your first draft and I thought that there were a few things that had not been covered—issues or problems associated with transitional matters. Now you have given us an extra one. Are the two others further issues?

Mr Bohn—There are two further issues.

Senator JACINTA COLLINS—And there may be more. That is my concern.

Mr Bohn—I do not believe so, Senator. But if there are any further ones that we come across, we will certainly let you know.

Senator JACINTA COLLINS—The problem is that we might need to let you know.

Mr Bohn—I suppose that is true.

Senator JACINTA COLLINS—What is the next one?

Mr Bohn—The change in paragraph 21—

Senator JACINTA COLLINS—Did you deal with paragraph 13?

Mr Bohn—Yes, paragraph 13 was the 118A demarcation order. I should go back as I missed paragraph 11. There is a provision in the new bill that provides that, when part of an organisation disamalgamates from an existing organisation, that part of the organisation, once registered, gains access to or becomes bound by agreements made by its former host for a period after the disamalgamation takes effect. This change to the consequential bill ensures that, when disamalgamations occurred prior to the registered organisations act taking effect at the five-year period it is taken to start from the commencement of the consequential bill.

The final change, Senator, is in paragraph 21, which relates to the election provisions. There is a new provision in the bill that allows the Electoral Commissioner to seek an inquiry into an industrial election. The change referred to in paragraph 21 provides that the Electoral Commissioner can make an application when any step in the election has occurred after the organisations act comes into force. They are not limited to elections that are wholly conducted under the registered organisations act.

Senator JACINTA COLLINS—Picking up on one of the issues raised by, I think, the AIG, if you have an exemption to the requirements of the returning officer regarding the conduct of elections where, under the principles that you have given me, does that exemption survive?

Mr Bohn—Look at paragraph 2 of the document, Senator: orders, injunctions, et cetera, that were operating before commencement will continue in force. So an exemption that has been granted by the Industrial Registrar in relation to the conduct of elections would survive under that provision.

Senator JACINTA COLLINS—Under the general approach provision?

Mr Bohn—Under the general approach provision.

Senator JACINTA COLLINS—But we are yet to see exactly how that has been drafted. You may have gathered from the chair's comments earlier that it appears likely that we will want the department back. I do not find it satisfactory, actually, to be dealing with questions at this stage of a bill's inquiry. We should be dealing with those matters after we have spoken to other witnesses. But I do not anticipate that that will occur until we have seen this additional piece of legislation. We may, however, try to deal with some issues to fast track the process, on notice, following the evidence we hear later today. But again I think the committee has a

report back date of 18 June. We obviously cannot meet that deadline until we see other legislation in the House of Representatives. Going back to Senator Carr's questions, you are not in a position to explain the urgency of this legislation. Why are we here when we do not have the consequential amendments, or why have they not yet been tabled in the House of Representatives?

Mr Bohn—The reason they have not been tabled in the House of Representatives is that at the time the House rose the drafting had not been completed.

Senator JACINTA COLLINS—My point is that a Senate inquiry usually has a bills inquiry after the legislation has been tabled in the House of Representatives. I think I will have to check with the Clerk in relation to this issue. Procedural problems are probably involved if we deal with a bill before that occurs. Only one of the bills has been tabled. Even in the second reading speech there are references to the other legislation which is yet to be tabled. My question is: what is the urgency? Why are we here before it has been tabled?

Mr Bohn—I cannot take that question any further than Mr Smythe has taken it, Senator.

Senator JACINTA COLLINS—That is my point. Mr Smythe was not able to answer that question.

Mr Smythe—I point out, Senator, that the government, in its 1998 policy document, indicated that it would be introducing legislation to modernise accounting and financial practices within registered organisations. Following that policy statement it is now almost the end of the parliamentary session. It has been the intention of the government to introduce such a bill for a long time. There have been over 12 months of consultations. The government simply sees the need to deliver on its promise to do what it said it would do after a lengthy period of consultation with all parties.

Senator JACINTA COLLINS—But the problem is, Mr Smythe, that regardless of the government's intentions it has not delivered in relation to process. The bill in its totality has not been tabled in the House of Representatives.

Mr Smythe—With respect, Senator, a bill has been tabled in the House of Representatives and an inquiry into that bill has been announced. Such an inquiry can take place. I appreciate that there are interactions between this bill and another bill.

Senator JACINTA COLLINS—The point is: why are we conducting an inquiry in such a half-cocked manner? What is the urgency of this piece of legislation? Why do we need to go through this procedural silliness?

Mr Smythe—All I can do is answer questions in respect of the inquiry which you have, and in relation to which I have been invited to give evidence. I cannot really answer questions about process.

Senator JACINTA COLLINS—There is no substantive urgency. There is no issue of urgency other than the fact that the government has been announcing its intention for some time, but procedurally it is not matching its intention. You indicated that the government has exhausted consultative arrangements. The problem we have with this inquiry is that it is, in part, a consultative arrangement as well. We have submissions from both employers and from unions raising concerns about matters that may be in this other bill. So consultative arrangements have not yet been exhausted because we still have this bill.

Mr Smythe—Again, with respect, Senator, in respect of this bill, consultative arrangements have been exhausted.

Senator JACINTA COLLINS—Yes, but that bill cannot operate without the other bill. You said that yourself.

Mr Smythe—Correct.

Senator JACINTA COLLINS—It is one thing to say that we have consulted on this bill, but it cannot be brought into operation without the other bill.

Mr Smythe—An examination of the provisions of this bill can be undertaken without the other bill being tabled. The consequential and transitional provisions are not so integral to the operation of this bill that consideration of the provisions of this bill cannot proceed.

Senator JACINTA COLLINS—No, but I would prefer to not then have to go through the process of consideration of a consequential bill separate from the main bill.

Mr Smythe—I appreciate that concern, Senator. The government, as is always the case, intends to conduct consultation through the whole process on the transitional and consequential bill. The government believes that the general sentiments that will be conveyed on the consequential and transitional bill are relatively simple and that the consultative and examination process need not be as extensive as the large number of issues that have been raised by this bill.

Senator JACINTA COLLINS—Let us hope not. Let us go into some of the substantive matters. Can you tell the committee the rationale for the removal in the 1996 legislation of provisions relating to the commission's powers with respect to certified agreements addressed during its term?

Mr Smythe—Sorry, I do not follow the question.

Senator JACINTA COLLINS—The AEC submission was quite useful. It highlighted that, prior to 1996, the commission had the power to address certified agreements during its term.

Mr Smythe—Sorry, Senator, is this a question which goes to the transitional provisions bill?

Senator JACINTA COLLINS—Sorry, you are right. I have skipped a bill and I told you that I was not going to do that.

Mr Smythe—I am happy to answer the question. I was trying to see how it related to the other bill.

Senator JACINTA COLLINS—I do not want to do that. I wrote down that note on the wrong page. Apart from the argument that you include in your submission about simplicity and making the Workplace Relations Act an easier piece of legislation to work with, is there another rationale why the registered organisation provisions are to be separated?

Mr Smythe—It also gives people whose job it is to deal with the administration of registered organisations, both employers and employees, a stand-alone piece of legislation—a manual for them to work with. So it has two effects. One is to make the Workplace Relations Act a simple document for people who may have nothing to do with the administration of employer organisations and unions—people simply want to bring an unfair dismissal claim or who want to enter into a document which is not encumbered by provisions about the administration of registered organisations. Separately, it is a document for those people who are concerned with the financial affairs of unions or employer organisations or elections relating to unions or employer organisations. It is their separate piece of legislation. It is a method of making it more user friendly for both groups of people.

Senator JACINTA COLLINS—Is there any further rationale?

Mr Smythe—None that immediately spring to mind, Senator.

Senator JACINTA COLLINS—I turn to part 2. How many applications for registration of an enterprise union have been made since 1996?

Mr Bohn—I will take that question on notice, Senator. From recollection, it is three.

Senator JACINTA COLLINS—And what has been the average length of time for the AIG to finalise the application?

Mr Bohn—There were two applications. One was withdrawn, so that probably does not count. I should point out though that that provision is not limited in its operation to enterprise unions. That provision encouraging the commission to act as quickly as possible operates in respect of all applications for registration of an organisation. But as to the exact time for enterprise unions, I would have to take that question on notice.

Senator JACINTA COLLINS—Taking into account the commission's current behaviour is there any basis to indicate that there is a need to insert this sort of provision?

Mr Bohn—It is an indication that applications for registration should, in the scheme of matters that are before the commission, be given particular priority.

Senator JACINTA COLLINS—Is there any basis for the concern that priority is not currently being given?

Mr Bohn—The registration process does take quite a long time. It is just an indication to the commission, to the extent that it is possible, which is all that the provision says, that they be dealt with as quickly as they can.

Senator JACINTA COLLINS—Whilst on the face of it, it might look like a fairly simple provision, I am concerned—as I think other senators have indicated in the past—about inserting provisions like this into an act when the commission's principal problem in relation to timeliness is actually its level of funding and resourcing. On what basis is there considered to be a need to extend the grounds for deregistration of a registered organisation? For instance, why should a breach of section 298U justify deregulation or deregistration?

Mr Smythe—The government believes that freedom of association issues are a concordant part of the act as it has existed since 1996. It is not unreasonable that serious breaches of integral parts of the act could potentially lead to the deregistration or the cancellation of the registration of an organisation. It should be pointed out, Senator, that the provisions in this bill do not alter the process for cancellation of registration. They simply add a few new grounds. So the process still requires an application to a court. It does not mean that by the addition of these new grounds unions will be deregistered automatically. There is still a court process with discretion not to cancel registration even if the further ground has been laid out.

Senator JACINTA COLLINS—Has there been any practical problem in this area that indicates a need for this provision?

Mr Bohn—There have not been any applications for deregistration since 1996 that I am aware of. All this is doing is bringing the grounds for deregistration into line with the current framework.

Senator JACINTA COLLINS—Yes, but I am asking you whether there have been any practical examples of conduct of registered organisations that leads to a need to introduce provisions in relation to freedom of association.

Mr Bohn—The introduction of that as a ground of deregistration is not based on any examples of particular conduct. It is just to bring it into line with, as James said, the key foundations of the Workplace Relations Act.

Ms Shakespeare—And to ensure that Federal Court orders are observed. The provisions would not allow for deregistration because of a breach of freedom of association provisions. It is really aimed at ensuring that Federal Court orders are observed.

Senator JACINTA COLLINS—I refer to part 3. Whilst you have been pretty thorough in the rest of the submission in relation to referencing the sources of various perspectives, in paragraph 3.2 you talk about ‘by the mid-1990s it was suggested that some amalgamations were top heavy and unresponsive.’ Whose suggestions are you referring to there?

Mr Bohn—I think that draws back on quotes and so forth that were outlined in the introductory chapter. I would have to dig through the submission to find it. There were quotes in the introductory chapter on that point.

Mr Smythe—We could take that question on notice, Senator.

Senator JACINTA COLLINS—Sure. Whilst we are dealing with issues on notice, I appreciated the informal briefing that we had on this bill, courtesy of the minister. But a number of issues were raised in that briefing about which I have yet to receive information. One that immediately came to mind last night related to the discrimination provisions. Has that information been forthcoming?

Mr Smythe—We have provided a document to Mr Bevis.

Senator JACINTA COLLINS—When was that provided?

Mr Bohn—Last week or the week before.

Mr Smythe—Within the last couple of weeks.

Senator JACINTA COLLINS—I will track that down. We might simply have had a problem of staff not being in the right location to receive such things last week. How many disamalgamation ballots have been lodged and/or completed?

Mr Bohn—There have been two applications that I am aware of, Senator. One led to a ballot and the other application was refused.

Senator JACINTA COLLINS—Why is there a need to extend the time limit for disamalgamation?

Mr Bohn—The government considers that the decision to initiate a disamalgamation ballot is quite a long and complex decision and that it is appropriate to extend it by a further year to allow people to consider that. You might recall that the disamalgamation provisions were actually ineffective for the first year because of a technical drafting problem, which was fixed up.

Senator JACINTA COLLINS—It was then five years. If we knock one year off that, it is four years.

Mr Bohn—Yes, but the provisions actually ceased to have effect as at the end of last year, I think it was.

Ms Shakespeare—In January 2000.

Senator JACINTA COLLINS—So it has been three years. Would you submit that there was a window of opportunity for three years?

Mr Bohn—Well, two, allowing for the drafting problem.

Senator JACINTA COLLINS—We started with five. We then took off one and that left four. We then took off another.

Mr Bohn—The provisions commenced either from 31 December 1996 or 1 January 1997. They operated for a period of three years from then.

Senator JACINTA COLLINS—So it was three years. On what basis should the ability to extend the time for disamalgamation be regulated? You are saying to me it is an additional 12 months but there is a provision in here that allows, through regulation, for that to be extended again.

Mr Bohn—Yes, there is, Senator.

Senator JACINTA COLLINS—Why should we be supporting that?

Mr Bohn—Well, that allows scope if the circumstances are appropriate, obviously, for a further extension. Obviously, the regulations are disallowable. So if the Senate does not consider that the circumstances warrant the extension, the regulation could be disallowed.

Senator JACINTA COLLINS—What was the intention of the original time limit to disamalgamate?

Mr Bohn—The original intention, as I understand it, although I was not directly involved at the time, was to ensure that the period between the amalgamation and the disamalgamation was sufficiently close that it was still possible for a disamalgamation to occur in a meaningful sense—that there were still identifiable bits of former organisations that could disamalgamate.

Senator JACINTA COLLINS—So these provisions are actually working against that original intention?

Mr Bohn—And where the circumstances are still such that there are separate, identifiable constituent parts of former organisations within existing organisations, which is the criteria to be able to seek a disamalgamation, then the government considers that the 12-month extension would allow those parts to seek disamalgamation if that is what they wished to do.

Senator JACINTA COLLINS—So where is the demonstrated need for these provisions? Where are these organisations that are seeking to extend this period?

Mr Bohn—I am not aware of any representations.

Ms Shakespeare—I am not sure that we can point to specific examples of organisations or parts of organisations that have been unable to disamalgamate because the provision ceased operating last year. But I suppose the policy behind the amendments is to provide increased flexibility and choice to members of organisations when they would prefer to withdraw from the amalgamation.

Senator JACINTA COLLINS—How else do the applications for disamalgamation provisions differ from the act to this bill in particular? Who can apply and why have they changed?

Mr Bohn—The act as it currently stands requires a certain percentage of constituent members of the part that is seeking to disamalgamate or the committee of management of that constituent part to make the application. Essentially, the changes in this bill would allow representatives of each of those groups of people to make the application on behalf of those groups. So you do not need, for example, some hundreds of individuals to make an

application to the Federal Court. A representative of that group, if properly authorised, could make the application on behalf of that group.

Ms Shakespeare—There were not any examples of applications for disamalgamation where objecting already registered unions raised the point that the provisions may require every member who is supporting a disamalgamation application to actually sign the documents that need to be lodged. That was dealt with by the commission. But this is to avoid any question on that point.

Senator JACINTA COLLINS—But if it has already been dealt with by the commission, is it necessary?

Ms Shakespeare—I suppose that it is for the avoidance of doubt.

Senator JACINTA COLLINS—Why is there a need to specifically allow an amendment of the application? I thought that that matter had pretty much been dealt with by the commission as well.

Mr Bohn—It has, Senator, in the particular case that arose. But it is to avoid the scope for procedural arguments becoming an issue.

Senator JACINTA COLLINS—Will this be requiring the same form or will it be authorised in the same manner as an application?

Mr Bohn—The applicant would be authorised to make the variation.

Senator JACINTA COLLINS—Yes, but in this case, for instance, the earlier provision, you have extended who can be an applicant?

Mr Bohn—Yes, that is right. Once you have the applicant, that is the person who actually makes the application. If it is a representative person, that person is then the person who has carriage of the proceedings. That person would be authorised to make the variation.

Senator JACINTA COLLINS—Without going back necessarily to those that they are representing?

Ms Shakespeare—That would have to be people who had been empowered by the people making the application.

Mr Bohn—It would depend upon the scope of the registered organisation.

Ms Shakespeare—They would need to be authorised to make the application on behalf of those members.

Senator JACINTA COLLINS—So they need to be authorised to make the amended application?

Ms Shakespeare—Not specifically, but they would need, in their authorisation, to at least have the scope to continue to have the application dealt with by the commission or by the court. This provision also parallels an existing provision in the Workplace Relations Act—section 253, subsection (2)—which allows specifically for amalgamation ballots to be amended.

Senator JACINTA COLLINS—I am conscious that Senator Murray has some questions to ask you. I might leave him to deal with a few questions. I will then ask further questions in the time that we have left.

Senator MURRAY—Mr Smythe, I am interested in your reasons for having a separate bill. It seems to me that one of the great weaknesses of our civic society is that a large number of employers and employees are not organised collectively. Over 75 per cent of employees are

not members of unions. I suspect that over 70 per cent of employers are not members of employer organisations. Unions in some countries have been supplemented by collective organisations like works councils or staff associations as a means of finding ways for employees to be represented collectively. I am not familiar with what has been done on the employer side.

But, speaking as a parliamentarian, you are always better informed when you are dealing with people who are organised collectively and who can then express an opinion on whatever it is—tax, social policy, workplace relations and so on. My question really is: do you think that setting up a separate focused bill like this could provide an incentive, or the opportunity for an incentive, to encourage greater collective action, if you like, or greater collective energy on behalf of employers and employees? Will this bill make it easier for collective representation to occur?

Mr Smythe—One of the objects of this bill is, ‘to facilitate the registration of a diverse range of organisations of employers and of employees that are representative of their members unable to operate effectively in the workplace relations system.’ So to that extent there is an element in this bill which will ensure a more open, fair and transparent process. In the circumstances in which organisations become registered and operate there is the potential to encourage a greater degree of collective representation in that way.

Senator MURRAY—How do you do it, though? How do you motivate employees who do not like the idea of belonging to unions, or who do not see the relevance of staff associations or works councils? How do you motivate employers who do not see the relevance of being part of, for example, the National Farmers Federation, or something of that sort? How do we increase participation in our civil society through this bill?

Mr Smythe—I do not think we could claim that this bill would facilitate mechanisms outside the registered organisations system for collective representation for those who, for one reason or another, do not like to belong to formal, registered bodies. What it does do, however, is ensure that organisations that are registered operate in a transparent and democratic manner. In that respect it would assist people to make more informed choices about whether or not to belong to such organisations. They would be less likely to be discouraged from belonging to organisations because they had concerns about the integrity of its operations. If they simply have an objection to belonging to a collective organisation I do not think there is anything in this bill that will provide them with another mechanism.

Senator MURRAY—I am concerned that this bill reflects a lack of depth in government policy and thinking. My assumption is that this government, as with previous governments, believes that registered organisations are a good thing because of the access and relationships and the understanding that you get as a government when dealing with people who are organised. Try consulting with 1.6 million small businesses. Unless there is a small business organisation to whom you can talk it is very difficult. So it is with employees. I hope that this bill will provide the beginning for such incentives. But I am concerned that you are unable to express a view that ministers or the government have outlined—the process of getting more people collectively organised as employers or employees and ways to encourage that through budgetary or legislative activity.

Mr Smythe—I do not think that there is any lack of will on the part of the government to address the sorts of issues that you raise. The point is that this bill is really predominantly about ensuring that those who are in registered organisations can be confident about the

integrity of those organisations. The issues you raised I think are for examination in a different context—a more fundamental addressing of representational issues in the system.

Senator MURRAY—Earlier you were asked this question: why is this bill separate? I actually thought it was a good idea that it was separate. For me, the Workplace Relations Act and its predecessors arise from a constitutional understanding that disputes need to be resolved; that industrial relations, or workplace relations as it now is, create disputes and we need a mechanism for resolving those disputes. To me the registered organisations bill is about a different thing. It is about facilitating the collective organisation of groups of employers and employees to enable good interaction in the workplace. But, as we know, it is not just in the workplace that they have an impact. The ACTU is very strong on social and welfare issues. Employer organisations are very strong on tax and educational issues, to use some examples. I would like you to take this question on notice and to inquire as to whether, in a sense, the government got itself involved in trying to encourage philanthropy, volunteer associations or that sort of thing without giving any thought to the promotion of greater participation in civil society through this means.

Mr Smythe—I will take that question on notice.

Senator MURRAY—Do you understand what I am saying?

Mr Smythe—I understand precisely what you are saying. Is it your desire that we come back to you with some response from the government, or are you simply asking us to draw to the attention of policymakers the sorts of issues that you raise about the greater addressing of representational issues for people who, for one reason or another, are not part of the formal, registered organisations system?

Senator MURRAY—I am really following on, in a sense, my interpretation of what Senator Collins was saying—that is, that without a meaningful motivation for the bill, it will end up as kind of a convenient administration or organisation or a modernisation of practices. But taking it out of workplace relations is far different for me. It is taking it out of agreement-orientated legislation and putting it into an area of encouragement, if you like. I think that without the minister or the government attaching greater meaning to it, it lacks meaning when we come to consider it.

Mr Smythe—I am not sure whether or not I can take this debate any further, Senator, but I will take on notice the issues that you have raised.

Senator MURRAY—You would be aware, because you are well read in this area, that academics and others are deeply concerned about the decline in the union movement. They have put up propositions for alternative forms of collective organisations. Works councils and staff associations are two of the most obvious such organisations. My belief is that that will have greater relevance in years to come. Therefore, the organisation of employees and collective organisations of employers must be thought about and facilitated.

Mr Smythe—Indeed, Senator. When this government established the capacity for certified agreements to be negotiated by groups of employees other than as represented by unions, issues such as works councils and representative groups were considered in the melting pot when developing that policy. I agree that it is something that has been looked at and that will be looked at further in the future. But I can only come back to the point that it is not addressed in this bill, which is largely about operations and the administration of existing, registered organisations.

Senator MURRAY—I am not deeply immersed in the bill, but my impression of it from my reading of the summaries is that it certainly does not make things harder or more difficult for registered organisations. It does not impede on new systems or the formation or development of registered organisations.

Mr Smythe—I would have thought that was a fair comment. It has objects to facilitate registration and to facilitate efficient management. I think it is a facilitative bill; it is not a bill that is designed to introduce impediments.

Senator MURRAY—I also gained the impression that your department has probably consulted affected organisations more on this bill than it has on others. Are there any major sticking points with either the unions or employer groups with which you have decided to proceed? Should we know about those?

Mr Smythe—I do not believe that there are any major sticking points, Senator. As I indicated in my opening statement, there were some major sticking points dealing with political donations, paying for elections, and changing criteria for registration of associations. The government withdrew those matters from the bill. Although it would not be correct for me to say that we have total support from all the parties, I do not believe that there is anything that could be described as a major sticking point. But perhaps my colleagues might care to comment.

Mr Bohn—No. There would be matters of detail on which people would disagree, but in relation to the broad thrust of policy I do not think there are any major outstanding points. There was only one that was raised from memory by the union movement. The extension of the grounds of deregistration was an issue that they had concerns about. But the government decided that that extension should proceed to reflect the changes in the system. That is the only one that I can think of that would possibly fall into that major category.

Senator JACINTA COLLINS—I want to clarify something. Further to Senator Murray's discussion, what is the rationale for the removal of the objective of encouraging members to participate in the organisation's affairs?

Mr Bohn—The idea there is that there should not be member participation in organisations but that a statutory preference for the engagement with organisations in an active way should not be in the legislation. The question of the degree to which members participate in an organisation is a matter of choice for those members. There should not be a statutory preference in favour of active participation.

Senator JACINTA COLLINS—So you are suggesting that the administrative arrangement for a democratic organisation should not have as one of its objects the facilitation of the participation of the members of that organisation?

Mr Bohn—No, the democratic processes and the enhanced accountability arrangements would certainly encourage a greater level of participation.

Senator JACINTA COLLINS—But you just do not think it should be an object?

Mr Bohn—It is not an object. The degree to which a member decides to participate in an organisation is a matter of choice for that member rather than it being a statutory preference that that should occur.

Ms Shakespeare—The legislation should be neutral.

Senator JACINTA COLLINS—In relation to encouraging democratic participation?

Ms Shakespeare—In encouraging that participation.

Senator JACINTA COLLINS—With respect to discrimination, given the government's position on junior rates, why is it not similarly providing an exemption for registered organisations in relation to juniors?

Mr Bohn—The answer to that is that we do not believe it is necessary because organisations will still be able to charge varying levels of fees based on levels of income.

Senator JACINTA COLLINS—Yes, but is one of your criticisms for some of the models to do with the junior rates issue finding other means of organising their pay structures?

Ms Shakespeare—A commission inquiry looked at those models and said that in relation to the setting of wages those models were not feasible. However, as far as union dues go, there do not seem to be the same sorts of difficulties.

Senator JACINTA COLLINS—So you do not think there would be a difficulty with unions in relation to maintaining accurate records of the rates of pay of all their members?

Ms Shakespeare—Not in existing organisations.

Mr Bohn—Organisations do it now, Senator. The CPSU, for example, charges membership dues on the basis of level of income.

Ms Shakespeare—And it relies on members to report their income accurately to the organisation when they are paying dues.

Senator JACINTA COLLINS—In relation to the discrimination provisions and the recommendation by HREOC, does that deal with discrimination in its narrow or its broad sense? Does that encompass indirect discrimination as well?

Ms Shakespeare—I think we will have to take that question on notice and have a look at the HREOC report.

Senator JACINTA COLLINS—I would appreciate it if you could provide me with that information. I refer to Mr Bohn's response to Senator Murray relating to concerns about this bill. An additional concern that has been expressed relates to the pecuniary provisions highlighting arrangements for employers to make payroll deductions. That was an additional measure, was it not? A number of those who were consulted thought that it was a strange provision to include.

Mr Bohn—There was not total agreement on that, Senator, that is true. In the scheme of the bill I suppose that I treated that as falling more within the technical category rather than the major category. But, yes, that is an area on which not everyone agreed.

Senator JACINTA COLLINS—One thing on the transmission that it would be useful to clarify at this stage rather than after we see other witnesses relates to the pre-1996 arrangements concerning certified agreements. Are you able to tell us the rationale for the removal of those provisions in the 1996 Act?

Mr Smythe—Nothing was removed in the 1996 act. Prior to 1996 certified agreements were awards. There were some provisions about certified agreements but, in brief, the commission had some capacity through various certified agreements which would have been applicable in the context of transmission. Since 1996, under the new arrangements, because what was removed was the definition of 'certified agreement' as being an award, inadvertently any capacity for the commission to deal with problems that arose on the transmission of certified agreements disappeared. There was not a conscious decision in 1996

not to have any such capacity in the commission. It was a consequence of the changing status of certified agreements.

Mr Bohn—As we note in our submission, concerns arising in relation to the transmission of certified agreements were not that big an issue in those days, which is why it was not given any particular attention.

Senator JACINTA COLLINS—I refer to page 2 of the ACCI submission which refers to the position under the Industrial Relations Reform Act 1993.

Mr Smythe—We do not have a copy of the ACCI submission.

Senator JACINTA COLLINS—I will ask you to look at it, but I will refer to it briefly now. Under section 170MM, which operated prior to the 1996 act, the Full Bench of the Industrial Relations Commission had the power to terminate a certified agreement other than by agreement and in the following circumstances. I am not sure exactly what it is referring to here, but you will be able to see this in the submission when you go to it.

Mr Smythe—I am familiar with section 170MM as it was under the previous act.

Senator JACINTA COLLINS—Under ‘Options available to Full Bench on findings’ you find, ‘If the Full Bench finds in the case of any agreement that the continued operation would be unfair to employees ... or contrary to the public interest.’ Why did those provisions not carry through to the 1996 act?

Mr Smythe—Those provisions did not relate specifically to the transmission of business bill. They were general provisions about the capacity of the commission to vary certified agreements during their lifetime. The policy of the present government in respect of certified agreements is such that certified agreements are agreements that are made between the parties. The commission should, in no circumstances, have any capacity to deal with their content. At the time when that decision to remove any capacity of the commission to deal with the content of certified agreements was developed, inadvertently the issue of the need for such a capacity in the context of transmission was overlooked.

Senator JACINTA COLLINS—So you agree with AIG that it was inadvertent?

Mr Smythe—As someone who was fairly closely involved with the drafting instructions, I think I can say with some confidence that it was inadvertent.

Senator JACINTA COLLINS—It intrigues me as to how these new provisions might apply. You are now faced with a circumstance in which the commission would have broad discretion in relation to certified agreements within the nominal expiry term of the agreement. That discretion is broader than the discretion than the commission will have in relation to certified agreements after the normal expiry date.

Mr Smythe—No, under the new provisions there is discretion for—

Senator JACINTA COLLINS—The only discretion for the commission that currently exists for the termination of a certified agreement past its nominal expiry date is the public interest.

Mr Smythe—Under these provisions, on transmission of business the commission would have the discretion to determine that the certified agreement did not apply or only applied to a limited extent at any time. It would make no difference whether it was before or after its nominal expiry date.

Senator JACINTA COLLINS—Okay. So these provisions have scope beyond the nominal expiry date?

Mr Smythe—They do.

Senator JACINTA COLLINS—Okay. As I have indicated, we are likely to have further questions following the other evidence we hear today.

Mr Smythe—Is that further questions of us today?

Senator JACINTA COLLINS—No.

CHAIR—No, we will need to see the other bill.

Senator JACINTA COLLINS—I indicated to you earlier that I would try and get to you other questions—

Mr Smith—I thought that was about the registered organisations bill. I did not appreciate that was also about the transmission of business bill.

Senator JACINTA COLLINS—No. I will try and get to you any further questions we have from today's hearings prior to whenever it is we might receive that other bill.

CHAIR—Thank you for appearing today.

[9.52 a.m.]

CALVER, Mr Richard Maurice, Director, Industrial Relations, National Farmers Federation

CHAIR—Welcome. The committee has before it submission No. 2. Are there any changes you wish to make to the submission?

Mr Calver—No.

CHAIR—The committee prefers all evidence to be given in public, although the committee will consider any request for any evidence or part of evidence to be given in camera. Such evidence, however, may subsequently be made public by order of the Senate. I invite you to make a brief opening statement.

Mr Calver—Thanks for the opportunity to provide evidence to this committee. NFF's view is set out in our short submission on both of the bills. We believe that the system of workplace relations will be improved by the passage of these bills. First, the [Workplace Relations Amendment \(Transmission of Business\) Bill 2001](#) has the effect of providing the commission with the power to order that a certified agreement does not transmit to a new operator of a business or transmits only to a limited extent.

The Workplace Relations Act gives primacy to agreement making at the workplace, a priority that the National Farmers Federation agrees with. This bill quite simply gives the commission the same powers with regard to certified agreements that already exist in the award stream. In that sense we believe that it is a simple and warranted step forward.

There has been some media speculation that the provision could produce avoidance measures. We find this difficult to accept. The issue is that the anti-avoidance mechanism itself, section 149 for awards and section 170MB for the transmission of certified agreements, may give rise to outcomes that are unsatisfactory. Hence, that result is leavened by providing the commission with the discretion, currently in section 149 and, subsequent to the passage of this bill, in section 170MB. Quite categorically, a rule of general application may give rise to results that are not appropriate. The transmission of business rules can give rise to inappropriate results if the commission is not vested with the discretion to make an order that would alleviate the problems of the kind that we articulate in paragraph 2.2 of our submission.

The anti-avoidance purpose of the principal provision is not subverted; instead, there is a power vested in the commission to make practical solutions possible. We say that the current method of resolving the problem of which certified agreement prevails if there is more than one that might affect a business—that is, section 170LY—depends on two factors. Those factors are somewhat arbitrary: which agreement was certified first and whether either or both of the agreements have gone past their nominal expiry date. That method is not the most efficient way of ensuring that an employer's enterprise is covered by an appropriate certified agreement. The bill's answer is more satisfactory to the problem.

In relation to the second bill, the National Farmers Federation has consulted its registered organisations, the NFF being a federation of organisations. We have been instructed that those organisations have no difficulty in the greater levels of accountability set out in the [Workplace Relations \(Registered Organisations\) Bill 2001](#). My registered affiliates believe the principal act would be less burdensome in terms of volume and complexity if the regulatory framework for registered organisations was in a separate statute. They are prepared to adopt the increased burden of responsibility imposed by the bill. Beyond those comments, we have nothing further to add. I would welcome questions.

CHAIR—Can you provide the committee with any concrete examples of problems the NFF has experienced or has identified in the current arrangements in the application of transmitted business? In particular, has there been much impact on rural based industries?

Mr Calver—The evidence that we have from the members whom we service is that this is a particular problem in horticulture where horticultural groups are beginning to incorporate. The particular problem—obviously confidential—that has arisen arose in the Mildura region, where there are already existing difficulties in determining what underlying award applies, given that most of the businesses located there can operate across New South Wales, Victoria and South Australia. The dried fruits award—as it was until recently, now rolled into the Horticultural Industry (AWU) Award 2000—is an award that applies to a very large number of named respondents. It is not, unfortunately, common business practice in the sale of these businesses to adequately disclose industrial instruments that bind the transmitting business. So, yes, we have experienced some difficulty with both the transmission of awards about which horticulturists are not subsequently aware and even transmitted agreements—particularly where a larger horticulturist might subsume into their business a small trucking firm, for example. This provision would assist to alleviate those difficulties.

CHAIR—Your submission indicates that the NFF remains concerned about the possibility of anti-avoidance provisions—that they might remain a problem. Would you care to explain what your concerns are and do you have any suggestions about how they might be overcome?

Mr Calver—The section 149 rule is somewhat harsh where there is no disclosure of the transmission of the award. The section 170MB provision, that currently lacks a discretion, is even more difficult. We believe that this bill is a good start. Some of the other difficulties that existed with section 149 have been resolved, of late, by the PP Consultants decision of the High Court which, thankfully, clarified some of the matters which were set out in the prior ministerial discussion paper. Since that decision, some of the problems that existed with section 149 have been alleviated, but in this area of certified agreements that stands out starkly as in need of reform and for the addition of the discretion that the bill contains.

CHAIR—Is the NFF satisfied with the powers that have been given to the commission under this new legislation? Or do you believe that, on past performance, the commission might take a more sympathetic view of union submissions than of those of employer groups?

Mr Calver—The discretion is not fettered. The commission has an open discretion. We have no evidence that the commission has been exercising its discretion in relation to section 149 in a way that is inappropriate. Generally we believe that the discretionary component of some of the commission's decisions does lead to uncertainty, and that is not good. But, in this instance, we do not think that is the case.

CHAIR—Is that discretion appealable?

Mr Calver—The difficulties of appealing against discretionary decisions of the commission are quite large. Recent decisions have shown that there is much less room to move now. Where a commissioner or a full bench exercises a discretion, it is appealable, but the chances of success are quite remote.

Senator MURRAY—Mr Calver, in your experience, when the commission exercises discretion in these matters, does it take into account the motives of the seller or those of the buyer of a business?

Mr Calver—I believe that this discretion is unfettered. Those affected at the workplace by the certified agreement would be permitted to give submissions in relation to the manner in

which the commission could exercise that discretion. One would imagine that, if the commission determined that the sort of factors you are talking about were relevant, they could be used as evidence. There is certainly nothing from the bill that would preclude that evidence being adduced.

Senator MURRAY—As you would be aware, one of the key reasons that this issue generates some passion is that it is believed that in some circumstances the motive of the seller is simply to rid themselves of employee costs or on-costs, or the difficulty of managing agreements with the employees. Whereas, if you contrast that with the motive of the buyer, who may simply see a business which is capable of generating added value, given their skills, that is entirely a different matter. I accept the need for discretion; but you always need to know if there is a precedent or a set of rules or guidelines against which the discretion is operated.

Mr Calver—Yes. In the agricultural industry's experience, most of the difficulties arise because of the lack of disclosure in selling documents of prior industrial agreements and particularly awards, as I mentioned to the Chair. In answer to that, if the commission is given a discretion which is quite wide, and the intent of the provision of both section 149 and section 170MB is that there is an anti-avoidance mechanism—and there is plenty of authority for that—one would be very surprised if the commission would not conceive as relevant evidence that there was an anti-avoidance purpose about the application that was being brought to it. So, whilst I understand your concern, I do not believe that this waters down the anti-avoidance tenor of the principal provisions.

Senator MURRAY—Do you think it would be desirable or advisable for the commission to develop principles against which it would exercise its discretion? Or do you think those already exist sufficiently?

Mr Calver—Principles against which to exercise its discretion, having regard to certified agreements, would be a very useful strategy for the commission to ensure certainty. As I said to the Chair, one of the difficulties we have with the exercise of discretion by the commission is if it does so in the absence of principle. That is one of the reasons that the development of principles in relation to, for example, its discretion to award compensation in the unfair dismissal regime where a reinstatement is not possible—the Spriggs case—was very much welcomed by our organisation. So yes, we do support the commission setting down the principles against which the discretion invested in the act is exercised. And it may well be that the sort of discussion that we are having assists them in terms of making sure that the guidelines encompass the anti-avoidance purpose of the principal provision that you are concerned with, Senator.

Senator MURRAY—Do you think it would be appropriate or inappropriate for the legislation to require the commission to develop and establish principles so that they were known?

Mr Calver—If the purpose of introducing this legislation was to reinforce the anti-avoidance matter—and the extrinsic evidence that we are now contemplating is quite categorical that that is the purpose of these provisions—then that is certainly something that the commission, I believe, would legally have to have regard to when exercising its discretion in any event.

Senator MURRAY—So it is unnecessary, you are saying, for it to be in legislation?

Mr Calver—I believe it would be unnecessary, yes; but the manner in which that can be done is through extrinsic evidence that that is the purpose—to reinforce the anti-avoidance provision. I do not think there is any hidden agenda here. The evidence of the department was that this was a matter that was overlooked. It is timely, as certified agreements become more commonplace, that there be a sensible mechanism vested in the commission for working out priority that is different from the somewhat arbitrary criteria of section 170LY.

Senator CARR—It is put to us on occasions that one of the reasons companies restructure their business affairs in terms of contracting out and various other means is to actually reduce costs of labour. Would you be aware of that?

Mr Calver—Undoubtedly.

Senator CARR—Do you think that is a reasonable practice in terms of the operations of a business?

Mr Calver—It depends on what the core business of that operation is. We live in very competitive times. We live in times where the international competitiveness of agriculture, for example, is absolutely critical. Moving to operate your business efficiently by going back to the core business and having ancillary services costed at the best market price is nothing that our organisation views as illegitimate. If you have a core business and you are sticking to that—which we are finding more and more frequently—and you can make sure that ancillary businesses operate at the best market price, then that is perfectly legitimate.

Senator CARR—The issue that comes to mind here is the commission's role to protect employees' entitlements within those arrangements.

Mr Calver—Yes.

Senator CARR—Why is it that employees ought to bear the brunt of a company restructure in that way, when the purpose of the arrangements might be to reduce wages and conditions? Why should the commission turn a blind eye to that? Or should they have regard to that?

Mr Calver—I do not think, with respect, this bill is asking them to turn a blind eye to it; it is in fact giving them a discretion which determines whether or not the certified agreement that will apply is appropriate to the business. One of the factors that can be taken into account is the fact that the purpose of both section 149 and section 170MB is anti-avoidance—that is, not to arbitrarily take away employee entitlements. The commission can exercise a discretion to determine that an appropriate certified agreement is in place to assist those employees. So I do not think what the government is suggesting is unbalanced or leans to one side of politics or the other. We just think it is a simple step to repair an omission.

Senator CARR—Given the transition arrangements in this bill, I remind you of your organisation's involvement in the Patrick's dispute and the waterfront dispute. You were involved with a training company which was basically aimed at replacing a unionised work force with a non-unionised work force, which presumably would reduce substantially the costs of labour on the waterfront. Do you think this bill would cover that circumstance? How do you think it would change the circumstances that occurred in that dispute?

Mr Calver—There was no transmission of business. The Producers and Consumers Stevedoring Company was not controlled by the National Farmers Federation; it was a separate entity and it merely sought to enter into a market to compete against a stevedoring duopoly and to have a work force that was competing against a union monopoly. That

situation differs markedly from a simple provision to strengthen an anti-avoidance section in the workplace relations legislation. I do not think they correlate whatsoever.

Senator CARR—So as far as you are concerned these measures would have no applicability to a circumstance such as the involvement of the organisation that your former director set up and was used by this government to seek to change the employment patterns and conditions of waterside workers?

Mr Calver—I think you can view the waterfront dispute as being an attack on monopolies, wherever they exist in the economy, and on controlled duopolies as well. It is the inappropriate exercise of market power. If the question you are now asking me is: ‘At the point when Webb Dock was leased from Patrick, should the certified agreement that applied to the MUA workers also have applied to the workers that were engaged by PCS?’ I do not think that was a transmission of business; it was a leasing of plant and a leasing of space. It was not a transmission of part of the business in the normal sense; it was a leasing arrangement with a new labour force.

Senator CARR—With the effect of substantially reducing labour costs if you had been able to do it.

Mr Calver—One of the effects would be to reduce the monopoly power of one organisation. As subsequent events have shown, with a 50 per cent reduction in manning on the waterfront, new levels of productivity have been achieved. So when monopolies gather to themselves the economic wealth of this country, we find that we have inappropriate levels of productivity and we have overmanning, and I think subsequent events have borne us out in that regard. But I do not think, with respect, that those events are very relevant to what we view as a very simple moving forward with a repairing of the act in relation to transmission of business.

Senator CARR—Just a side question: are you satisfied with the lowering of shipping costs to farmers that have occurred following that dispute?

Mr Calver—I am not sure that that is completely relevant, with respect, to the bill in front of us. I would be happy to talk to you about that outside this room. I would be happy to give you lots of data.

Senator CARR—You are very concerned about the issue of market power, and I am just wondering whether or not you think the so-called cost savings have actually been passed on to consumers and producers.

Mr Calver—As I say, we would be happy to brief you on that subject at any time. We keep abreast of those developments.

Senator JACINTA COLLINS—Am I correct that it is your submission that you think this bill reinforces the current anti-avoidance provisions?

Mr Calver—Absolutely.

Senator JACINTA COLLINS—How can that be from the perspective—and certainly a number of unions have put this position—that the current arrangements are essentially, ‘Buyer beware: a deal transmits’? This allows scope to weaken that so how can it be strengthening it?

Mr Calver—It strengthens an anti-avoidance provision where it has an inappropriate outcome. It strengthens it because it gives the commission discretion to take into account any anti-avoidance motivations we would submit, as Senator Murray put on the table, that might exist in the restructuring of certified agreements. Section 170LY might result in an

inappropriate bargaining arrangement applying to the detriment of the employees. At least here you have the matter out in the open and you have the commission exercising a discretion. With section 170LY, as I mentioned in my remarks, the way that that problem is resolved is arbitrary: it depends on whether or not either or both have gone past their nominal expiry date and which agreement was made first. Surely the commission should have the ability to ameliorate those factors, which are arbitrary, particularly if one of the certified agreements does not fit well with the business plan of the employer and does not fit well with the entitlements of the employees. So, yes, it does strengthen the current anti-avoidance provision because it provides the commission with the power to have a sensible outcome rather than one based upon arbitrary factors.

Senator JACINTA COLLINS—But, if it were a sensible outcome, why would the parties not be using the current provisions of the act?

Mr Calver—Which provisions of the act are you referring to?

Senator JACINTA COLLINS—Section 170MD.

Mr Calver—I do not have the act in front of me, but 170MD, from memory, relates to cancellation of a certified agreement, doesn't it?

Senator JACINTA COLLINS—Yes.

Mr Calver—It may well be that the parties do not agree to cancel that agreement. It may well be that you have unions that are in conflict. Let me give you an example from the horticulture area I talk about, where the Transport Workers Union and the Australian Workers Union might be two unions that differ. There might be a small transport company that is absorbed by a large horticulturalist, where part of the problem with the certified agreements cannot be resolved by seeking to have the union renegotiate them because there is a struggle for union power. For all sorts of reasons, cancellation might not be the appropriate outcome, and you might need the commission to exercise a discretion about what is most appropriate. From the point of view of giving power to the commission, my understanding was that the Labor Party wished to give the commission more power in many instances.

Senator JACINTA COLLINS—That actually leads to my next question—that is, it is put to us that transmission of business was an oversight in this government's agenda to remove power from the commission in relation to certified agreements. What other areas do you think this sort of oversight might apply to? Where else is the government backtracking on the practicalities of its ideological agenda?

Mr Calver—That question has about three different limbs to it. First, let me say that we do not think this particular bill has an ideological agenda. This bill is quite simple—

Senator JACINTA COLLINS—To further that issue, let me ask you then—because I think it does have an ideological agenda—

Mr Calver—It was a loaded question in that sense.

Senator JACINTA COLLINS—Yes, it relates to what you are about to answer here. Why then aren't AWAs a component of it?

Mr Calver—I do not know, but there are certainly reforms that are needed in AWAs—

Senator JACINTA COLLINS—They transmit.

Mr Calver—and the way that they react with the transmission of business, yes. I do not know the motivation for not doing this, other than the fact that it may well be dealt with in

small bites. The issue though is that, from a simple reading of this bill, in legal terms, it does not have any ideological baggage attached to it at all.

Senator JACINTA COLLINS—No. As I said, the problem with this bill is that it does not do all that it should do if it is actually meeting its intention, because AWAs fit in exactly the same position as CAs.

Mr Calver—I think the ministerial discussion paper began a very good discussion to address the whole of transmission of business area. Since that discussion paper was handed down, we have had PP Consultants and a couple of full Federal Court judgments that clarify the way that PP Consultants works in practice. Some of the problems that were set out in the ministerial discussion paper have been dealt with adequately by the courts. This provision deals adequately with certified agreements. I am not party to the government's future legislative agenda, other than that which has been announced. But one would imagine that, if there were unresolved areas left from the discussion paper, they would be subject to legislation in the future.

Senator JACINTA COLLINS—What are your views about AWAs?

Mr Calver—AWAs are increasingly being used in agriculture as agricultural enterprises become larger and incorporate, although the majority of agricultural enterprises are still unincorporated entities and so they do not have effect. They certainly are being used successfully in the cotton industry—

Senator JACINTA COLLINS—No, I mean on the transmission issue.

Mr Calver—I was just giving you my general views on what we thought of AWAs, I apologise. On the transmission issue, I think there are some problems that need to be resolved, yes, I agree. We could articulate those, but at a later stage; I am not fully armed today with all of the difficulties that might arise with their transmission. When we draft AWAs, we put a transmission provision in them that they do transmit.

Senator JACINTA COLLINS—Yes. But, even despite that transmission provision, were a transmission to occur and all the sorts of problems you are describing with CAs to occur with respect to AWAs, should the same relief be available?

Mr Calver—That is a question that I would have to take on notice and receive instructions on. The National Farmers Federation industrial committee has not yet addressed all of the issues with AWAs that you are putting on the table. I will have to take instructions on that.

Senator JACINTA COLLINS—But you see the potential?

Mr Calver—I do.

Senator JACINTA COLLINS—Those are all the questions that I have.

[10.22 a.m.]

RUBINSTEIN, Ms Linda, Senior Industrial Officer, Australian Council of Trade Unions

ACTING CHAIR (Senator Carr)—Welcome, Ms Rubinstein. The committee has before it submission No. 6. Are there any changes that you wish to make to this submission?

Ms Rubinstein—No, there are not.

ACTING CHAIR—The committee prefers all evidence to be given in public, although the committee will also consider any request for all or part of evidence to be given in camera. I point out that such evidence may subsequently be made public by order of the Senate. I now invite you to make a brief opening statement.

Ms Rubinstein—As the submission states, the ACTU does not believe that either of these bills should be passed as neither is necessary or beneficial to employees. I will turn first to the transmission of business bill. The most disappointing aspect is the government's failure to deal with the real problem—the way in which privatisation and outsourcing are used for no other reason than to reduce the wages and conditions of employees, frequently the lowest paid.

If we think about the call centre workers who were the subject of the Stellar case, the bank employees in the St George case or the home help workers in the Greater Dandenong City Council case, these are not some kind of labour aristocrats. They are people earning around \$500 a week or less in most cases. The Rail, Bus and Tram Union has made a submission in which it gives concrete evidence about how employers have used the existing law in outsourcing and privatisation cases, increasing working hours from 38—which is, I am sure you are aware, the community standard—to 40 and by making significant wage cuts, again for relatively low or middle paid employees.

We would argue that the key priority for the government is to address the need to modernise the transmission of business provisions to broaden them beyond the kind of simple sale of assets which was the means by which employment was transferred in earlier times. Instead we have a proposal which is aimed at facilitating this kind of practice and reducing even the limited protection which exists at present. As has been pointed out in a submission from the Catholic Commission for Employment Relations, in this kind of proposal in relation to agreements, there is no provision for the commission to consider a no disadvantage test.

It needs to be borne in mind that, with the current section 149, where an award is transferred subject to an order of the commission, the commission has the power to vary the award—either the transmitting award or the award that currently applies—to end up with appropriate conditions. That is of course not the case with agreements. It is difficult to see how the commission could vary an agreement to ensure that employees were not disadvantaged if this proposal were carried. So it is not in fact an unfettered discretion. It is really only a discretion to take it or leave it.

There is no evidence of any actual practical problems arising from the transmission of agreements: not one, from what we can see, has been put before this committee. Issues have been raised in relation to transmission of awards, but the equivalent of this provision already applies in relation to awards—which, as I have said, is a different situation. Issues have been raised in relation to AWAs, and I think there has been only one employer, BHP, who said that there might be a problem where employment would transmit and then AWAs could then not be made the conditions of employment for those transmitting employees—who, of course,

commence a new contract of employment. Well, if that is the concern, it is not one with which the parliament ought to have any sympathy.

A number of submissions have come from labour hire companies of various kinds and from labour agencies. Again, this proposal is completely irrelevant to the operations of those agencies, because it applies only to transmissions which involve the assignment or sale of a business or part of a business. Even the Commonwealth department itself, giving evidence in favour of the proposals and on behalf of the government, is only able to say that there 'may' be difficulties that arise if this proposal is not carried. There have been no difficulties, and they cannot point to any.

No consideration has been given to the reasonable expectation by employees who have made or approved an agreement that it should continue to apply to them, even if their employer enters into structural arrangements which have the effect of changing the identity of the employer. I believe that the issue of motivation was raised here by Senator Murray earlier today. In that context, the wisdom of the High Court in its 1923 judgments in the case of *George Hudson v. Australian Timber Workers Union* remains relevant today:

Men are not so likely to submit to peaceful methods of settling their disputes by agreement... or award...if they feel that those with whom they dispute can evade the obligations imposed by transferring their business to their sons, or by assigning it to a company having the same name or the same shareholders.

If we were to rewrite that today, we would say 'by transmitting their employment to a labour hire company or a private business or the like'—whether or not, of course, that company is operated by their sons or daughters or next-door neighbours. While methods have changed, the intention behind these kinds of changed arrangements has not, and that is what the current provisions are designed to address. There is growing evidence that issues of job security and employment conditions are key concerns to Australian workers. This proposal, which has already been rejected once when included in the 1999 More Jobs Better Pay bill—perhaps better known as the 'second wave'—can only increase those feelings of insecurity.

Turning now to the [Workplace Relations \(Registered Organisations\) Bill 2001](#), I submit that the ACTU believes that it was unnecessary. While it purports to make needed changes to requirements applying to organisations in relation to financial accounting and democratic functioning, in practice it is merely an additional layer of prescription, without dealing with any real problems which could be held to exist. The ACTU recognises that the government has removed a significant number of the most objectionable provisions from the bill, but the ACTU is still opposed to its passage and, in particular, if it were to be passed, it seeks a number of amendments which are set out in our submission.

The most objectionable and clearly politically inspired proposal is to extend the disamalgamation provisions of the Workplace Relations Act. This proposal is a breach of the government's commitment given in 1996 that parts of amalgamated unions would be given a once only opportunity of three years to withdraw from the amalgamation. There is no evidence of a queue for withdrawal which could not be satisfied in the three years available from 1996. There is no evidence that withdrawals were prevented by problems with the legislation in the period before the sunset provision came into effect.

As time goes by, there are fewer and fewer union members who were members of the union at the time of the amalgamation who would have a concern about the amalgamation per se, given that most of those amalgamations occurred six or seven years ago, or before that. This proposal is a blatant attempt by the government to encourage costly litigation within

organisations, which should instead be encouraged to settle any internal differences through processes set out in the democratic rules which they are required to have under the current legislation. Of course, if a group of members feel that they would be better represented by a separate organisation, they could, of course, seek to establish a new one, which is a process which was facilitated by the 1996 amendments to the act. It would also, of course, be possible, if they wished, to join another organisation. It is easier for the rules of that other organisation to be varied to accommodate those employees than was the case prior to 1996.

In general, the bill represents a degree of interference in the internal working of organisations which is unacceptable by international standards and which cannot be justified. The proposals appear to be based on a contention that organisations should be regulated along the same lines as corporations, while ignoring the obvious and deep differences between companies which accept and solicit investors' funds, with those investors hoping for a return, and voluntary membership organisations. The ACTU urges the committee to make recommendations in line with our submission. Thank you.

Senator MURRAY—Thank you, Ms Rubinstein, and the ACTU, for yet another very precise submission. It is very helpful. Dealing with the registered organisations first, you might have heard me questioning the department about the motives for the bill. It seems to me that registered organisations, in terms of workplace relations matters, need to be dealt with separately from the main constitutional intention which lies behind the commission and resolving disputes, creating agreements and that type of thing. The core question is whether any registered organisation bill is necessary at all, either in the act or outside the act, because we have Corporations Law, we have unincorporated associations law in all the states and we have entities law to do with trusts and so on. The legal entity which you form exists in other forms, doesn't it?

Ms Rubinstein—It is a very big question, Senator. The historical origins of the notion of registered organisations are no doubt known to you. One purpose was to enable unions to incorporate, to have a legal identity, which would otherwise not necessarily be the case. That is different now, and it could presumably be done differently. There has also been the assumption behind the rules regulating trade unions and employer organisations that, in order to have the privilege of participating in the industrial relations system and, in particular, in the award system and in the structures of the Industrial Relations Commission, groups of workers or employers should subject themselves to regulation and control by the state through legislation. That has been the case. In fact, there is nothing to prevent a group of workers establishing a union that is not registered and that is not subject to these matters. It might incorporate as an incorporated association or it might incorporate in some other way. It would then be subject to those laws. But the system of organisations is integrally bound to the system of conciliation and arbitration and to the award system. We believe that that system, although it has to change, and has changed, has been a vital contributor to the welfare of this country. We would want it to be strengthened and to continue.

Senator MURRAY—It seems to me that in most essential characteristics the bodies which form part of the ACTU, and indeed the ACTU itself such as it has a legal character, are no different from any other not for profit organisation.

Ms Rubinstein—The ACTU in fact is not incorporated and does not have a legal identity.

Senator MURRAY—But that is like a political party. Political parties are not for profit organisations. Most are unincorporated.

Ms Rubinstein—If they are not incorporated, they are like the ACTU. If they are incorporated, then they are not. I do not know about political parties. As I understand it, most not-for-profit organisations are incorporated or they are unincorporated associations under the association acts of the different states. They have some legal identity. The ACTU does not. I have never tried to sue a political party. I do not know whether you can.

Senator MURRAY—Very difficult.

Ms Rubinstein—However, the point I am making is that the legal identity that unions have comes from the Workplace Relations Act. They are incorporated under the Workplace Relations Act. They could be perhaps incorporated in some other way but they are not in the current circumstances.

Senator MURRAY—Let me take you where I am going. It seems to me there is a contradiction in your thinking and submission because a consistent proposition would be that you do not need to have registered organisations at all; you simply can exist as any other not for profit organisation does. However, if you take the view that you need to have registered organisations because that makes the interaction with the Workplace Relations Act more meaningful, then I can see no difficulty with separating out the two if that is what the government of the day wishes to do. However, I think there is something missing and that is what I was exploring with the department earlier. I think that what we need is legislation and government policy which encourages the collective. It may not be a union. It may be a staff association, a work council or a non-union organisation of employees, and similarly with employer organisations. In my view, the more organisations we have which represent the collective the better represented the employees and employers are. I do not think it is healthy for more than 25 per cent of employees not to be represented because we miss a lot as a result. I look at this bill and say, ‘Where does it go in that sense, in terms of incentivisation and creating an environment for the greater involvement of people in collective organisations and civil society?’

Ms Rubinstein—The short answer is it goes in completely the opposite direction. The bill is not about encouraging collective organisation of any sort. I would say that any independent organisation of employees, whether registered or not, is a union. The difference between a union and a staff association is that of control and independence from the employer. What this bill is designed to do is not encourage collective representation of any kind; what it is encouraging is litigation and internal difficulties within established organisations, the reality being that those are not generally led by employees. Employees who wish to set up an organisation can do that. It is easier than it used to be to become registered. But they can of course do that and be unregistered. There is no issue with that. The bill does not make that any easier or harder. The bill is about putting increasing pressures and inappropriate requirements on organisations and in particular encouraging, through these withdrawal proposals, litigation and internal difficulties. That is perfectly consistent with everything that we know about this government.

There is this extraordinary statement of the minister’s in relation to the proposal, which I think Senator Collins referred to—which is that part of an organisation can withdraw and remain party not only to the certified agreements that it had been involved with but those that are made in the future. This is somehow to encourage collective negotiations, a principle that I think most people would agree the government is not precisely committed to.

So I think there is much in what you say, Senator, and we do need to explore in a different environment different ways of encouraging collective expression of people’s wants. You may

be aware that the ACTU recently sponsored a seminar for the unions about the work council concept. That is a matter of some controversy within our own ranks, but we think it needs open and vigorous debate from all sides, which we certainly got on that occasion. We would be hoping to see that widening out to other forces in society that have views on this issue, and that would no doubt include some or all of the political parties.

Senator MURRAY—But when I listen to your response, it seems to me that well-crafted amendments could address particularly the areas which you say would create unnecessary division, litigation and aggression between collective organisations, whether they be employers or unions but I suppose it is principally unions. Why would it be necessary to knock out the bill altogether if that could be done?

Ms Rubinstein—It probably would not. We think the whole bill is unnecessary in the sense that there is really nothing substantial in the bill other than those few provisions that we have pointed to that are objectionable. In some cases, there are proposals in the bill which, while they are not objectionable as such, do represent a level of prescription which we think is unnecessary. However, we also have concerns about splitting the bill in terms of what that reflects about the government's view of organisations within the statutory industrial relations system, while recognising that there is a non-statutory system that also exists out there. Having said that, certainly our position is that, if the bill were substantially amended in the ways which we have directed in the submission, it would not do the great harm that would otherwise be the case.

Senator JACINTA COLLINS—In your opening statements, did you refer to amendments that were included in the submission?

Ms Rubinstein—Not precise amendments. We raised issues of concern in the submission, which essentially are aspects of the bill which we believe ought to be deleted by amendment in that sense.

Senator JACINTA COLLINS—I just wanted to clarify that there was not additional—

Ms Rubinstein—No, we have not drafted amendments.

Senator JACINTA COLLINS—In relation to requirements of registered organisations, the department's submission refers to the Blake Dawson Waldron report as leading to this bill in part, although your submission highlights a completely different perspective from the same report. Would you care to comment on that?

Ms Rubinstein—Yes. The ACTU participated in the Blake Dawson Waldron review, and we had no great difficulties with the recommendations of that review. We believe that the bill has, in a number of respects, gone beyond the recommendations of that review. In particular, the report endorsed the view that registered organisations are not corporations and should not have the degree of regulation that applies to corporations.

Senator JACINTA COLLINS—I agree with Senator Murray that your submission itself probably highlights most of the issues that we need to address. Perhaps you would like to comment further on the OEA's role in this bill.

Ms Rubinstein—Perhaps you could—

Senator JACINTA COLLINS—Point to the precise area I am talking about?

Ms Rubinstein—Because in earlier drafts of the bill, there were some concerns we had about the role of the OEA.

Senator JACINTA COLLINS—I am talking about the role of the OEA in relation to the provision of information in relation to resignation of organisations.

Ms Rubinstein—In deregistration?

Senator JACINTA COLLINS—No.

Ms Rubinstein—I understood that there was a proposal that the OEA be able to obtain information about membership records, and I understand that has been deleted. But if not, perhaps you could—

Senator JACINTA COLLINS—My understanding of the last version—and I think this was from the department's submission, and it is still there—is that there is the provision that the OEA is responsible for pursuing matters of misinformation in relation to union membership, rather than the Industrial Registrar.

Ms Rubinstein—That might be one that I would have to take on notice, if I could.

Senator JACINTA COLLINS—Yes. All other matters pertaining to the rules of organisations and their reporting of information are in the hands of the Industrial Registrar, as I understand it. This is one exclusion to that where it is proposed that, since the OEA is likely to be the one that gets the complaints, perhaps it should handle the pursuit of such matters.

Ms Rubinstein—Perhaps I could get back to the committee on that one. The department had pointed out to us that the right of the OEA to have access to organisations' membership records—which was a most objectionable provision—had been deleted. I would need to look at that. We did not have the possibility of seeing the department's submission prior to today, so I am not aware of the section that you are referring to. In general, there is obviously a concern amongst unions and by the ACTU about the role of the Employment Advocate. The Employment Advocate is not seen as behaving neutrally in relation to employers and unions. That is a matter of general concern. I would have to look at that specific provision to be in a position to respond to it.

Senator JACINTA COLLINS—Ms Rubinstein, I have just had clarified that the normal practice for this committee is to release submissions essentially on receipt, once it is ascertained that there is nothing problematic in the submission. These submissions were released a couple of days ago, which is also one of our frustrations—

Ms Rubinstein—Last time I looked at the Internet they were not posted, and I have been away from my office. The fault may be mine, but I had not seen them until this morning.

Senator JACINTA COLLINS—My frustration is in a broader sense, in that the department themselves had not had an opportunity to look at the submissions and were not in a position to answer questions. Perhaps, Ms Rubinstein, you could have a look at the department's submission and respond to us in writing if there is anything additional.

Senator CARR—You could produce a supplementary submission, if you are able to.

Senator JACINTA COLLINS—We asked the department this morning if they had any indications of the need to extend the disamalgamation period. They gave no example at all. Does the ACTU have anything further to say on that matter?

Ms Rubinstein—No.

Senator JACINTA COLLINS—Do you think there should be some finality to the disamalgamation process?

Ms Rubinstein—Yes, we do. We believed, of course, that it ought to be final once the members had voted for the amalgamation. Remember, this is a very democratic process and there are many pages in the Workplace Relations Act setting out the procedures in relation to the ballots for amalgamation. Once decisions are made, they should not be able to unmake them. To the extent that the election result in the last federal election was taken to be a vote for the GST, I suspect that if people had a second go at it, they might well decide to withdraw from the GST as well. But the need for finality is one that is generally accepted. There was a once only opportunity. The government itself in the explanatory memorandum said that that would be the case. The disamalgamation provisions were carried by the Senate on the vote of one senator; they were very narrowly carried indeed. This reopening can be seen as nothing else than an attempt for political reasons to encourage this kind of internal instability within organisations.

Senator JACINTA COLLINS—Taking you back to the OEA issue, the bill states that the OEA is responsible for a breach of clause 174, whereas the Industrial Registrar is responsible for enforcement of clause 173. So it is still in there, in terms of that role for the OEA. You might care to consider that separately.

Ms Rubinstein—Yes.

Senator JACINTA COLLINS—Your submission does not deal with the provisions of part 5, the rules of organisation; part 6, membership; and part 7, democratic control. Should we assume from that that these areas fit the category of your earlier description to Senator Murray?

Ms Rubinstein—They have duplicated or they have made changes which, while possibly unnecessary in themselves, are not in their terms objectionable.

Senator JACINTA COLLINS—Is there anywhere in the current act where you believe there should be change with respect to provisions of registered organisations?

Ms Rubinstein—No doubt there are. For example, the provisions about enterprise associations would be an issue about which we would have some concerns, and we have previously expressed them. I would have to say that the ACTU has not done a review of the registered organisations provisions of the act, and it would be fair to say that there are other concerns we have with the act which would be of a higher priority. But certainly they could do with a proper bipartisan review, if that were possible.

Senator JACINTA COLLINS—Just on one technical area, can you explain the ACTU's objection to clause 105, which relates to a change to an application for a disamalgamation?

Ms Rubinstein—To the amendment of the application?

Senator JACINTA COLLINS—Yes.

Ms Rubinstein—Again, we would say it is unnecessary. Applications can currently be amended and, in the submission, we put a number of cases to you where that was the case. The case that we believe this proposal is based on was one case for disamalgamation—which, I might add, is still proceeding—where the barrister for the party seeking to withdraw from the amalgamation was attempting to change the application as he was on his feet, without any authority or without any reference back to anybody who was responsible for any of this. It would appear that this is an attempt to facilitate that kind of 'on your feet, anything to get this through' type of amendment. We have given evidence in the submission of a number of cases where amendments of applications have been made.

Senator JACINTA COLLINS—There are one or two other technical matters. In relation to the justification for deregistration, what is the ACTU's position about the additional grounds?

Ms Rubinstein—We are opposed to that. We recognise that already certain breaches of the act can give rise to proceedings for deregistration and we also recognise that this is rarely, if ever, used. Nevertheless, we do not believe in double or triple jeopardy. If there are breaches of the act—and they generally are breaches by particular people—it seems unfair to be seeking to deregister the organisation. You need to bear in mind that deregistration means that the union loses the ability to be party to awards. This can have the possibility of affecting hundreds and thousands of union members who may have had no part whatsoever in any breach that may have occurred.

Senator JACINTA COLLINS—Finally, in part 4, to do with representative orders, can you explain your opposition to clause 135?

Ms Rubinstein—That is the provision which allows for a newly registered organisation to become party not only to agreements by which the employees it covers may once have been covered but also to agreements made by the organisation in the future. For example, if union B becomes registered in respect of employees who are also eligible to join union A, then union B becomes party to agreements that have been made by union A.

It has just occurred to me that the point you have made also goes beyond that, which is the particular provision about newly registered organisations being exempt from the 118A order. What that is about is where, again, union A has exclusive representation under the 118A order, and union B is registered in respect of those same employees, the 118A order, which gives exclusive coverage to union A, would also give coverage to union B, although unions C, D and E who are all excluded by the original 118A order would still not be in a position to have their representational rights restored. In that respect we would say that, under the current situation, if a new organisation is registered, it would have the right to go to the commission and seek a variation of the original order; and it would have the right to seek to have the order set aside. That really ought to be all that is necessary in that respect.

Senator JACINTA COLLINS—Rather than automatically being able to have access?

Ms Rubinstein—Rather than automatically having representation rights, when none of the circumstances which led to the making of the original order would be considered. We are saying the matter should go back to the commission for the commission's decision.

ACTING CHAIR—As there are no further questions, thank you very much, Ms Rubinstein.

Proceedings suspended from 10.58 a.m. to 11.11 a.m.

RAMSEY, Mr Steve, Legal Officer, Community and Public Sector Union

JONES, Mr Stephen Patrick, Assistant Secretary, Communications Section, Community and Public Sector Union

CHAIR—Welcome. The committee has before it submission No. 18. Are there any changes you wish to make to the submission?

Mr Ramsey—No, Senator.

CHAIR—I now invite you to make a brief opening statement.

Mr Ramsey—Thank you, Senator. With your indulgence I will make some brief comments and then Mr Jones will briefly add something to what I have to say. Firstly, as an affiliate of the ACTU we support the submission of the ACTU. We have made a submission with respect to the transmission of business bill, and that is what we are here to give evidence about. We will of course try to answer any questions you may have about the other bill. Our submissions are primarily with respect to the bill that we have made a written submission about. Generally we find it regrettable that this bill deals with only one small part, and in a way that we would say was retrograde. We think transmission of business is a complex issue. The litigation that has been around in recent years shows how complex that can be. We think some sensible sorting out needs to be done, and we do not think this bill does that.

There are three things I want to touch on briefly. The first is that this bill is aimed at giving the commission the power to make orders with respect to the non-transmission of certified agreements on application of certified agreements. We would like to remind senators that the whole scheme of the act is about making certified agreements. It is about abiding by agreements. There are parts of the act that enable both employers and employees to enforce those agreements. Indeed, it locks both the employer and the employee out of making claims on each other with respect to conditions during the life of the agreement. What this amendment would do would be to enable one part of the equation, the employer, to come along to the commission and say, 'Look, we have changed our mind. We have thought of a more profitable way to do things, and that is by outsourcing. We would like you to undo the arrangement we have entered into with staff.' They could not do that in any other circumstance. The employees cannot come along and say, 'Look, our bank employer has just made a bloody big profit and we would like to undo our agreement to get our hands on a bit of that.' We think that this bill is the obverse of that and it should be rejected.

The second point I would like to make is that the problem identified to be remedied by the explanatory memorandum can probably be summarised as being 'to remove difficulties an employer might have with a certified agreement that transmits to them'. Ms Rubinstein from the ACTU cited the case of George Hudson and quoted from it. Another quote is from Justice Isaacs in that decision, when he was discussing the rationale for these transmission of business provisions in the first place. He said:

The parliament knew, moreover, that a successor to a business could not become so without knowing the statutory obligations of his predecessor to his employees.

We say that is the same today. People enter into these arrangements with their eyes open. I suspect they know every single asset, every liability and every detail of the business that they are either tendering for or seeking to buy. Why should staff commissions be any different? They enter into these things with their eyes open and they should be held accountable for them.

The other thing, too, is that we are not talking about something that is writ in stone forever. These agreements have a life; they have an expiry date. They have a maximum life of three years. In our experience in our sector, the average is about two on the basis that both parties are not willing to tie themselves up with respect to their arrangements for extensive periods of time. New employees coming into an organisation are bound by the CAs that were entered into. Why shouldn't new employers be in exactly the same situation?

The final thing I would like to say has been touched on before by some of the senators and in some of the evidence already given, and that there is no mention in this bill of AWAs. AWAs are in no different a position than certified agreements with respect to the potential problems they might cause. If indeed there are problems caused by transmitted agreements, then they can be caused by AWAs. Indeed, the original discussion paper suggested that they be subject to the same type of audit that is in this bill. Yet there is no mention of them in this legislation. We say that is an inconsistency that at its best just leaves the bill open to criticism that it does not address all the things that it should and at its worst leaves the bill open to a complaint that it is really about promoting AWAs over collective agreements. With your indulgence, Mr Jones will now say something.

Mr Jones—Thank you, senators. The CPSU has been directly involved in two matters which have had the result of litigation in the Federal Court around these very sections. They involved the government corporation, Employment National, and the subsidiary of Telstra, Stellar Call Centres. I would like to talk about the second of those very briefly because I think it is typical of the way that the proposed amendments to the bill will affect the employees of what is a burgeoning industry.

Stellar is a 50 per cent owned subsidiary of Telstra. It was set up with the explicit purpose of avoiding the CPSU awards and agreements. That was admitted by one of the directors of the company in evidence before Justice Wilcox in the Federal Court. It was set up specifically to avoid awards and agreements. What Telstra then did was sack 1,000 workers and move the work of those workers into its subsidiary Stellar Call Centres. There was a big effect on the wages and conditions of the employees who took up those jobs in Stellar Call Centres doing exactly the same work as they were previously doing in Telstra. Their wages were decreased from an average of \$35,000 a year to an average of \$28,000 a year.

They were working in Telstra an average of 36¾ hours a week from Monday to Friday. They are required to work 40 hours a week for less pay now, and they can be scheduled to work 24 hours a day and seven days a week. So the notion of family time and weekend is just thrown out the window. They are the real impacts that we are trying to militate against by preventing this sort of bill being passed into law. This is not the sort of company that should be encouraged. It is the sort of company which, when it lost the original Federal Court application, forced all its workers to sign AWAs. It sacked and harassed workers for becoming union delegates and union activists, it refused to allow the union to lawfully enter the workplace to talk to its members on the premises and it refuses to allow its workers to be represented in the most minor or the most serious of matters by their chosen union representative.

It is our submission to the Senate committee that these sorts of companies should not be given legislative assistance to do the sorts of things that I hope this committee and the majority of Australians would find are abhorrent. Therefore, we are asking the committee to make a recommendation to reject this sort of legislation.

Senator JACINTA COLLINS—Have you had the opportunity to look at the submission from the Australian Industry Group?

Mr Ramsey—No, I have not, Senator.

Senator JACINTA COLLINS—There is a hypothetical example of a business there going through a transmission process which is interesting. I would be interested in your response to the hypothetical example and what remedies have perhaps been overlooked in the way that example has been described.

Mr Ramsey—Senator, I note that you mentioned to Ms Rubinstein that perhaps she could put something in writing. I would be happy to look at that submission and do exactly the same thing, if it would assist the committee.

Senator JACINTA COLLINS—Yes, thank you. In part, just for our purposes now, a few of the submissions deal with the example of a business acquiring and consolidating businesses. They argue, for instance, in a call centre example that you could have one business acquire another and have employees performing work across the two businesses. A certified agreement could end up overriding a current certified agreement in the business that has acquired the other business. Are you aware of that sort of hypothetical example?

Mr Jones—This is an argument that is used often by employers in the call centre industry, and it is actually at odds with the facts in most call centres. In most call centres, the employees are required to exercise a fair bit of specific expertise on certain products and areas for one specific client. So it is not as though they jump from one day to the next across a different set of clients. The contracts that they have with those clients have all sorts of specific requirements related to the client that they are working for. Say, for example, that there was a contracting call centre that had a contract with Telstra. They are not Telstra employees but they would be bound by all sorts of statutory regulations as set down by the Telecommunications Act and all sorts of other privacy arrangements which would pertain to those employees when they were working on the Telstra contract. We say that is completely analogous to the awards and agreements that apply to them too. When performing work for Telstra, if they have to abide by the telecommunications legislation, the privacy legislation and all the requirements of the contract that Telstra might impose upon that call centre, why should they not also be required to abide by the awards and agreements which might be imposed upon that worker as well?

Senator JACINTA COLLINS—This example, though, in part highlights your concern about what is not being done by this bill more than anything else, does it not? We are not modernising the transmission of business issue to reflect contemporary examples with a broader interpretation, which I would have thought would actually highlight that problem more than anything else.

Mr Jones—Indeed, that is true. It is our submission that the approach the courts have taken of late to these provisions has the direct effect of discriminating against certain types of workers, particularly those sorts of workers the courts do not believe are performing tasks which are core to the nature of a business. I will use an example of a person doing cleaning or clerical work for a large metal industry company. Those jobs are usually occupied by women or by migrant workers. They deserve the same sort of protection envisaged by the act in this provision that any other worker would have. But the approach that the courts have taken by using the characterisation test is effectively saying that, if they are performing work which is related to the metal industry and they outsource that work and another metal industry employer picks that work up, they will be protected by the act. But if the clerical work for that

company is outsourced to a company that provides clerical services, then they will not have the protection of the Workplace Relations Act transmission provisions. We think that taking that approach directly discriminates against people who are in a very vulnerable position and usually have much less bargaining power within the workplace. They are the people that the act is supposed to provide some benefit to. It is for that reason that we submit that a holistic approach needs to be taken to these provisions, not piecemeal approaches which are designed to benefit employers but not employees.

Mr Ramsey—Just going back a slight step, in the decision by Justice Wilcox at first instance in the Stellar case—of course, the full bench in the Stellar case found that there was not a transmission—I think his honour heard the type of evidence that Mr Jones was talking about, and the decision was to limit the transmission to the employees who were doing work pursuant to that contract for Telstra. So it was contained within the consolidating organisation, to go back to your example and the AIG example.

Senator JACINTA COLLINS—Another of the arguments posed, particularly by employers in this area, deals with allowing organisations to organise themselves in a competitive globalised environment. What was useful in your submission was the references to the EEC directive and to the current state of play in the UK because, if you are looking at methods of dealing with this issue in other industrialised countries and those countries with a history of industrial organisation, it appears as though there has been a far more comprehensive view applied. Do you have further comments there?

Mr Jones—There are a number of benefits in the EC and the UK legislation. Firstly, they go one step further than our legislation could go, or would even anticipate going, in its current form. They protect not only the awards and conditions of the employees but also the employment itself. The UK legislation, particularly, would make it an offence for an employee to be sacked when an outsourcing contract occurred. The UK legislation says that that should not lead to the dismissal of an employee. Our legislation does not go that far. All it does—and perhaps ironically—is protect the terms and conditions even if the employees do not go with them. We might ask what sort of protection that is where it protects the employment conditions but not the employees who are attached to them. We think there is a definite need for reform there—to have some sort of protection for the jobs of people when an outsourcing occurs.

Another important thing within that UK legislation and the EC legislation is that they try to get in behind some of these artificial outsourcings where companies set up subsidiaries, shift the work into the subsidiaries—like a Patrick or like the Stellar situation that I talked about earlier—and say, ‘This is a new company, a new employee, a new award, and the old awards do not bind’. The UK legislation says that in looking at that you have to look behind to see whether there is any relationship between the company that the work was outsourced to and the company that outsourced the work to see whether this is some sort of charade to avoid the employment. That is a relevant consideration. There is nothing in our legislation, certainly in 149 or 170MD, which goes directly to that. We think that, if there is to be genuine legislative reform, they are the sorts of things that our legislation should go to. It has been accepted in the European market as a fair safety net of conditions, and we think it should be accepted here.

Senator JACINTA COLLINS—Aside from the question about whether issues such as motive and, as has been raised earlier, the fact that the no disadvantage component which one

might expect is not reflected either, do you have a concern with how the commission might apply its broad discretion in terms of its behaviour to date?

Mr Ramsey—Perhaps not so much with respect to its behaviour to date, but certainly where you have a broad discretion you leave the whole field open for interpretation and submissions. We would certainly think that any discretion should be subject to guidelines—a no disadvantage test and things like that. The problem with broad discretions is knowing exactly where the boundaries are going to be drawn. You only sort those things out through litigation. It is interesting that when it comes to certifying agreements there is no discretion of the commission, or very little discretion of the commission, allowed. They are just told to certify this agreement provided certain statutory requirements are met. At the other end of the equation it is suggested they should have *carte blanche* to look at absolutely everything and anything with respect to terminating.

Mr Jones—There are two cases which I might advert to in answering your question, Senator, which might shed some light on the way the commission has dealt with this. The first of those is the case of Employment National, which I mentioned earlier, where the commission decided to ignore the fact that an award had transmitted. The Federal Court subsequently found that and decided to make a new award binding those employees. A real effect of that was that the paid maternity leave that was once protected by the award was removed by the commission. Although it was the same employees performing the work in Employment National as had been performing the work in the CES, the commission decided—it had to, in effect, because of the allowable matters provision and the minimum rates provisions within section 89A of the act—to remove paid maternity leave from that group of workers as an award condition. That is a real example of how we have some concerns about how different sections of the act might interrelate if we just leave a broad discretion to the commission.

Secondly, there was a case last year involving an IT outsourcing company, a multinational by the name of EDS, which has a subsidiary here in Australia called EDS Australia. The employees in that instance applied to the commission for an ouster order under the provisions of section 149 of the act, which are being attempted to be imported through this proposed bill. They were successful in that case; but of concern to our union, which was a respondent in the matter because we have members in EDS, was that there was no award in place. The commission made an order saying that ‘none of these transmitted awards shall apply to EDS’ despite the fact that there was no award there in the first place.

Our principal submission to the committee is that these provisions should not go ahead. But, if that is not accepted, the commission should be at least fettered in saying that you should not oust the operation of a certified agreement if nothing exists there—if there is nothing there that is going to be in operation. We have concerns that the commission has already done that, in one case at least—that is, removed the operations of safety net awards from a company when there were no other awards binding certain classes of work. With that track record, we are very concerned that, if these provisions were brought forward, that would have the same effect. It highlights two things. You cannot take one section of the act and try to amend it without it having effect on other sections of the act. It also shows the track record of the commission. There is some concern on the part of the union movement about what they would do with an unfettered discretion.

Senator JACINTA COLLINS—You also raised the issue of redundancy as an example of where these inconsistencies in approach might have quite significant implications.

Mr Jones—The commission has, for nearly 20 years now, adopted a test case standard known as the ‘termination, change and redundancy provisions’. They provide certain benefits to employees in termination circumstances. They have within them a definition of transmission of business. I will come back to the definition in a moment. Importantly, it provides that the benefits of redundancy payments do not apply if there is a transmission of business, the assumption being that the employee goes to the new employer and has continuity of benefits, so they do not get a redundancy payment. The problem with the legislation as it stands is that the employee could fall between chairs because the definition of a transmission of business as has been adopted by the commission in the termination, change and redundancy provisions inserted into most federal awards is extremely broad. It goes down to an individual trade or occupation or calling of an employee. So you could have a circumstance where the person does not get a redundancy benefit or continuity of benefits. They are caught out both ways. This is another example of how a simplistic approach is dangerous.

Senator JACINTA COLLINS—Is this an example of that definition having been established 20 years ago and the court’s view about transmission as it has evolved more recently?

Mr Jones—It certainly is. It is an example of the approaches the commission and a court have taken to a definition of transmission. The commission, dealing with these sorts of matters on a daily basis, is in a better position to judge what is a practical approach to these sorts of circumstances. They have said, ‘This is how it should work in practice; this is a definition of it.’ The court has taken a very different—dare I say rarefied—much more legalistic approach to what a transmission or a succession should be. We would prefer the approach taken by the commission in those early cases as one that is much more practical and perhaps one that should be looked at in terms of a review of the provisions in the act as a way to ensure that benefits do apply and that protection does occur.

Senator JACINTA COLLINS—You are talking about another opportunity lost through this process.

Mr Jones—Yes.

CHAIR—Thank you very much for appearing today.

[11.35 a.m.]

SMITH, Mr Stephen Thomas, General Manager, National Industrial Relations, Australian Industry Group

CHAIR—Welcome. The committee has before it submission No. 16. Are there any changes that you wish to make to the submission?

Mr Smith—No.

CHAIR—The committee prefers all evidence to be given in public but, if at any time you wish to give any evidence, part of evidence or answers to questions in camera, you may make the request and the committee will consider the request; but such evidence may subsequently been made public by order of the Senate. I now invite you to make a brief opening statement.

Mr Smith—Thank you. The AI Group submission focuses on the [Workplace Relations Amendment \(Transmission of Business\) Bill 2001](#). It is based very much around the practical experiences of our member companies. Many of our members have had significant difficulties with the transmission of business provisions in the Workplace Relations Act. In particular, those provisions have caused difficulties in the IT call centre and labour hire sectors—all sectors where we have a significant involvement. A great deal of outsourcing has occurred in those sectors, and it is significant that those sectors are growing rapidly. It is in Australia's interests to ensure that that growth is not inhibited. Some of the specific problems being encountered were outlined in a relatively comprehensive submission that we made in respect of the More Jobs Better Pay bill in 1999, but the example that Senator Collins referred to on pages 11 to 13 of our submission highlights many of those problems.

In our view the legislation does need to be amended substantially. The full set of amendments which we believe to be necessary is set out in the annexure to our submission. But one of those amendments, and a very important one, is addressed by the Workplace Relations Amendment (Transmission of Business) Bill 2001, and we would like to stress that there is no reason why that amendment cannot be made independently from others that we are proposing. It is not linked specifically to any other amendments and it would address a serious flaw in the legislation.

The bill would amend the legislation to give back to the commission a power that it had until December 1996, a power that we believe appears to have been removed due to an oversight in drafting. To understand that submission, it is worth thinking of the transmission of business issue back in 1996. It was a very uncontroversial issue and attracted very little attention or focus. The Federal and High Court cases that have attracted so much attention have all occurred since that time.

The power which the bill would reinstate to the commission is an important one. It would allow the commission to weigh up all the circumstances and determine whether or not it would be fair and reasonable for a certified agreement which applies to a transmitter to become binding on a transmittee. It already has the power with regard to awards and, as Mr Jones pointed out, the commission did use that power in respect of a recent case involving EDS Australia. We refer to that case and some relevant extracts from it on page 16 of our submission. EDS is a IT company. It has won a large number of contracts to provide outsourced IT services—for example, from the Commonwealth Bank. The Commonwealth Bank outsourced all its IT functions, as I understand it, to EDS.

In the case, the commission decided that it would be very unfair for EDS to be bound by 30 or so awards that were binding on the organisations which outsourced the work. The commission adopted a similar commonsense practical approach in the other case that the CPSU referred to: the Employment National case. This one was slightly different because it involved the making of a new award. But in that case a full bench of the commission said:

...it would be unfair to impose public service conditions created for the needs of the public service on an employer operating in a completely different environment.

We strongly endorse this commonsense, practical approach that has been taken by the commission in the Employment National and EDS cases. Such an approach takes into account the environment in which a company operates, and deems it to be unfair for a company to be saddled with employment arrangements that come from a totally different context.

The fact that the commission only has this power at the moment in respect of awards and not certified agreements is particularly inappropriate, given that our system now focuses on enterprise agreements as the primary mechanism for regulating workplace relations. When you think about it, the issue is more significant when it comes to certified agreements, because certified agreements relate by their nature to specific enterprises. So when they transmit they are likely to have far more detailed and specific provisions than an award would, where an award applies generally to only allowable matters. Also, where an award transmits, a transmitter can simply enter into a certified agreement to override that award; but, by virtue of section 170LY of the act, where a certified agreement transmits, generally a company cannot enter into another certified agreement to override that transmitted agreement until its nominal expiry date, which could be up to three years down the track.

The provision of the bill corrects the apparent drafting oversight that we have pointed out. It gives the commission the necessary increased power to ensure that commonsense can prevail. For these reasons, we strongly support the intention of the bill. We do, though, on pages 17 and 18 of our submission seek a slight amendment to the wording. We are concerned that the wording in the bill at the present time does not make it clear enough—and we are seeking that it be made quite clear—that not only can a business that is going to transmit the work make application for this order but that, if a company is going to take work on, it can make the order prior to the transmission. With the way that the bill is worded at the moment, it seems to say that only the employer bound by the agreement can make the application; but, in many cases, it will be the employer that will be bound by it, subject to an order of the commission. In that situation, it would allow the commission to make an order, thus allowing a company to have certainty before the transmission occurred.

Before I conclude, I would like to make one point about the comments made about Stellar Call Centres. Stellar is not here to defend itself, but I do have some knowledge of that organisation. All I can say is that the CPSU ran these arguments in the Federal Court. The Full Court of the Federal Court has come down in favour of the company. Stellar Call Centres is a very large employer. It has an excellent relationship with its employees. If it were here today, it would strongly object to the statements that were made about it by Mr Jones. We commend our submission to you.

CHAIR—Thank you very much. Could you quantify in any way the economic loss that is experienced by companies that have been disadvantaged by the absence of sound transmission laws?

Mr Smith—I could not quantify it in specific terms, but it would be substantial. Not only is there the direct cost—and you have only to look at organisations like Stellar and others that

have been through the courts for years and spent an enormous amount of money trying to deal with these, as we see it, inappropriate transmission of business provisions in the act—but you also have a situation now where companies are, in our view, reluctant to bid for government work, without taking into account that what might come with it is an enormous amount of baggage with not only transmitted awards but transmitted certified agreements, which might impose on their organisations terms and conditions that are totally inappropriate.

When an award transmits, it is not only applicable to the employees or the operation that might come with it but also binds the company in terms of all its operations with respect to anyone covered under that particular scope of the award. So it can have enormous ramifications. In the example of that EDS case, these ramifications were considered by Senior Deputy President Polites. The commission said that here was a company that had gone to great lengths to make sure its employees were not disadvantaged and that offered very good terms and conditions, and it ordered that the 30 or so awards that are potentially binding on it would no longer apply. But that is only part of the puzzle, because there are a lot of certified agreements, potentially, as well. So that organisation and many others would, I am sure, support this bill very strongly.

CHAIR—You mentioned Stellar, for example. Perhaps you could provide the committee—you might want to take it on notice and do it later—with other examples or anecdotal evidence of firms suffering severe loss because of that absence of sound transmission procedures. Would that be possible?

Mr Smith—Yes, I will endeavour to do that.

CHAIR—Thank you very much. Could you give the committee some idea of the additional costs that firms bear as a result of having to absorb Public Service awards and agreements?

Mr Smith—In many cases, it is not a clear-cut thing because we do not believe that, in most cases, organisations outsource for the purposes of reducing costs. I think that is quite clear. It is all about focusing on their core business and achieving efficiencies. There would be a very, very small percentage of organisations that would outsource for the purposes of reducing costs, in our view. Take again that EDS example: it gives very favourable terms and conditions of employment but it would not provide some of the benefits that might apply in the public sector—things that would be totally inappropriate in the private sector, such as very detailed processes that might apply to issues about classifications or about disciplinary procedures, or whatever it might be. I cannot be specific on that, but it would be very significant.

CHAIR—There is a proposal on page 20 of your submission suggesting that AIG has less than complete faith in the ability of the commission to exercise its new discretions and powers effectively without legislative guidance. Why is that so?

Mr Smith—We do not have any difficulties with the bill in the way that it is drafted without that guidance being provided. If guidance is to be provided, then we have set out the sort of criteria that we think should apply. I think the CPSU spoke of the no disadvantage test, for example, and whether or not that might be appropriate. But we would see that as totally inappropriate because, if that is read in conjunction with the existing terms and conditions in the public sector, it may not pass that test—and it might be quite inappropriate that it be matched against that test; whereas we think the criteria that we have set out here should apply. In fact, since we developed these criteria, the commission has shown in that EDS case that these are the sorts of things that it looks at in making its decision. So we are now more

confident than perhaps we were prior to that EDS decision, and we are quite satisfied without having the criteria spelt out.

Senator JACINTA COLLINS—Sorry, Mr Smith: what were the EDS criteria that the commission outlined?

Mr Smith—It did not outline very detailed criteria, but what it did do—and this is on page 16 of our submission—was to say that EDS had ‘made a compelling case’ and that:

...the evidence is overwhelming that EDS has clearly sought in all the circumstances where it has taken over employment of employees from other organisations to ensure that such employees are not disadvantaged.

Senior Deputy President Polites did point to the fact that confusion would be created if EDS were bound by a multiplicity of awards; that EDS employees worked, by and large, across many different organisations; and that EDS was covered by a certified agreement that applies to its employees right across the organisation. That is an enterprise agreement entered into directly with its employees through 170LK of the act.

Senator JACINTA COLLINS—Take me back to this EDS example. There is a current certified agreement under 170LK.

Mr Smith—That is correct.

Senator JACINTA COLLINS—In part, the question went to the standing of that agreement with respect to transmitted agreements from where?

Mr Smith—I do not know the specifics on that issue. To use a broader example—because I cannot go into the specifics—I do know that that company has a certified agreement and I am not aware of the details in terms of companies that have transmitted work to them. For example, take an IT company that has taken on work from, say, the department of health or the Department of Defence. Such a department would often have lengthy enterprise agreements—say, three-year agreements. So, when that work is outsourced, if the agreement transmits, the IT company has the baggage of a three-year enterprise agreement. Then, under 170LY of the act, it cannot enter into a later certified agreement to override that earlier agreement until its nominal expiry date. So, without this mechanism in this bill, it cannot enter into a certified agreement appropriate to its circumstances. That is a problem for the employees as well as the employer. Those conditions might be totally inappropriate, but there is nothing that anyone can do about it, and it is causing a major problem.

Senator JACINTA COLLINS—This is why I am trying to understand the EDS example. You say that it had a certified agreement, and so I am trying to understand where that sat with what was potentially transmitted.

Mr Smith—As to where it sat, we do not have the knowledge here today as to how that agreement is described in terms of other awards and so on, but it has been entered into in relatively recent times. But with all this work that it has been taking on, that company has grown exponentially in Australia over the last five or six years and it employs a very large number of Australians. So, up until it had that agreement, there were lots of potential awards, and even since that agreement has been entered into—depending upon how it is drawn up—it may well have had some significant problems as well.

Senator JACINTA COLLINS—The point that I am getting to is: if these are such ‘goodwilled’ employers providing such good conditions, why are they not able to vary agreements?

Mr Smith—I am glad you ask that question. Perhaps I can go back to my example of the department of health transmitting a certified agreement to a company. To vary that certified agreement, it would have to arrange a vote of every employee covered under it. That is totally impractical because you have thousands of employees in the department of health that are not going to be happy having a vote to help out an IT company that might have taken on an operation employing 10 employees, for example. So we believe that the way the act is currently being interpreted is totally illogical.

Senator JACINTA COLLINS—So you are saying that an agreement that has been transmitted cannot be varied solely with respect to the employees—that it applies in the new business.

Mr Smith—It can be varied with respect to those employees, but only if the majority of employees covered under that agreement vote to vary it. So you would have to organise a vote of thousands of employees just to vary it for 10. That is an issue that is identified in that example set out in our submission.

Senator JACINTA COLLINS—I am not sure that that point has been clearly made.

Mr Smith—Perhaps I could just take you to the relevant point. It is the last dot point on page 13, where it says:

The private sector organisation will not be able to make a new certified agreement which overrides the certified agreement transmitted from the Government Department ... Nor can the private sector organisation and its employees vary the transmitted Government Department's certified agreement unless they gain a majority vote which includes all of the Government Department's employees.

Senator JACINTA COLLINS—Thank you. That it is the government department's employees that remain with the government department is, I think, the point that has not been brought out well there.

Mr Smith—That is correct.

Senator JACINTA COLLINS—I think we were discussing the fact that you thought the EDS decision had given an indication of factors that the commission might be guided by, and you had said that you were reasonably satisfied with those. There was confusion, but that is the bit where you cannot provide us with the information at the moment. Can I ask you to do that for us on notice? I am curious about what reference Senior Deputy President Polites would be making, or what consideration he would be granting to EDS employees being covered by a certified agreement.

Mr Smith—Yes, I would be happy to provide a copy of the decision in which he does go into his rationale in some detail. I would be more than happy to do that straightaway.

Senator JACINTA COLLINS—But your general submission there is that you are relatively satisfied with the precedent established by Senior Deputy President Polites's guidance in this matter?

Mr Smith—Yes, but I think it is slightly broader than that. We are satisfied with the fact that the commission, given its role, its powers and the respect that it has, will make appropriate decisions in these matters. If there is to be criteria, then we would see our set of criteria as being appropriate. But we do very strongly put the view that we do not believe that this piece of legislation needs to be held up because of a debate about more substantial amendments to the transmission of business provisions. We think there is a very urgent need to give the commission back a power, which it had until recently and was taken away, which it clearly still needs.

Senator JACINTA COLLINS—Although the power—and this is courtesy of the ACCI submission—that the commission had previously was limited.

Mr Smith—I am not sure that I would agree with that, because the power that it had before came about through section 149(1)(d) of the act, which is the section applying to awards. It defined an award, under the legislation that the Labor Party implemented from 1993, to include a certified agreement. So the power for certified agreements was exactly the same as that for awards. Really all this legislation does is reinstate that power.

Senator JACINTA COLLINS—But the power to terminate a certified agreement, other than by agreement to terminate, was limited in that these were the factors that the commission had to be mindful of—and this was under section 170MM: that the continued operation of the agreement would be unfair to the employees; or, in the case of an agreement that does not apply only to a single business, part of a single business or a single place of work, that the continued operation of the agreement would be contrary to the public interest. So they are the two factors.

Mr Smith—Yes, but—

Senator JACINTA COLLINS—Neither of these factors cover the sorts of concerns that you have raised.

Mr Smith—No. I have not read the ACCI submission but, if that is what is being put, we would disagree, because 170MM was a provision that was about the termination of certified agreements, and there is an equivalent provision still in the current legislation. That is not a provision that went to the issue of the commission making an order ordering that a certified agreement not transmit, because the certified agreement would still be in force. It would not be terminated under 170MM but would just not transmit to, as in the example used before, the IT company; it would still apply to the government department.

Senator JACINTA COLLINS—From asking the department about this this morning—and we will have an opportunity to clarify this later—I gained the impression that, yes, the transmission provisions did come under that general guidance.

Mr Smith—I could take that on notice. That is not my understanding, but I would be happy to look at it.

Senator JACINTA COLLINS—Do you believe there should be consistent provisions applicable to CAs and AWAs?

Mr Smith—Yes we do. We believe that the same sorts of issues arise with AWAs, but it is a slightly different matter because the commission is not involved with AWAs, so it would require that there be some other mechanism—for example, perhaps the Office of the Employment Advocate might decide whether or not AWAs should transmit. Once again, we do not see that this bill needs to be muddied by linking with those other things. We think this bill should be passed and then the broader issues considered about a whole scheme of changes to the transmission of business provisions.

Senator JACINTA COLLINS—You do not need to go over your view about priority—I understand that.

Mr Smith—There is one point I would like to make to address something the CPSU said about the European legislation and an interpretation that they put on it. I assume that the committee is aware of the discussion paper that the former minister, Mr Reith, released. That discussion paper does go into some detail about the provisions in Europe. The provision that

we propose in schedule A that would be the definition of transmission of business is the one drawn from the European Union directive, so it is a far narrower situation in Europe in terms of the definition of transmission of business than it is in Australia. And if you go to New Zealand it is much narrower again: if someone is terminated over there and made redundant, then there is no transmission, as we understand it. So we are saddled with a very unusual regime here in Australia through the interpretations of these provisions.

Senator JACINTA COLLINS—You are suggesting that the New Zealand situation is similar to your clean break proposal?

Mr Smith—It is very similar, except our clean break proposal is more generous, if you like, to employees than perhaps the New Zealand one is. I read a report very recently on the provisions in New Zealand and that report said that, if someone is terminated and made redundant, there is no transmission of business. I will be happy to provide more detail on that if you would like.

Senator JACINTA COLLINS—I am curious about your view on the evidence from the CPSU on the redundancy issue—where the TCR provisions have a broad definition of transmission, whereas whether the conditions actually transmit might leave people caught between the two.

Mr Smith—It is worth reflecting on where those provisions came from: the 1984 termination, change and redundancy test case and the supplementary decision in that case. In a situation where employers have taken over employees in a transmission of business and have recognised length of service, that provision is designed to avoid them having to pay redundancy pay because that would be unfair. It does not extend to a situation where there has been an outsourcing of work, and a transmission of business has not resulted, by definition. That has been the million-dollar question, if you like, in all of those cases before the Federal Court and the High Court.

Senator JACINTA COLLINS—Yes, but there is still the potential for people to be caught between the two.

Mr Smith—If someone is terminated in an outsourcing situation, undoubtedly they would be entitled to redundancy pay, so they would not lose that. The only issue becomes one of: if people do transfer, what are their rights? It would be unfair for them to get redundancy pay plus full continuity of service. That is what the commission was getting at in that case.

Senator JACINTA COLLINS—Yes, but if you do transfer over and because of that you are ruled ineligible for redundancy under the TCR provisions, there are entitlements that you are not eligible to receive redundancy with respect to that will not necessarily transmit.

Mr Smith—Yes, that would be right. There would be elements of the employment contract that might change, but that does not go to the issue of this bill, as I see it, with respect, Senator, because in this case that is the sort of thing that the commission will take into account in deciding whether or not it is fair to make such an order. The commission is in a better position than any other body to really weigh up all of these competing interests and issues and decide what is fair. It does not have to grant this order; it looks at the circumstances of the matter.

Senator JACINTA COLLINS—You suggested that you were not happy with the notion of a no disadvantage type test because the commission might be mindful of previous entitlements. That is not the no disadvantage test which applies in the act with respect to AWAs, for instance.

Mr Smith—We think our list of criteria is a better list because with a no disadvantage test—and once again, I could have a better look at this if you wish, Senator—the relevant criteria are generally the award terms and conditions that apply or, in the case of an AWA, the award that has been chosen as the basis for the comparison. In this case, if the no disadvantage test were to be interpreted to mean that in our example the public sector terms and conditions are the basis of assessing no disadvantage, that might be totally unfair; whereas, in our list of criteria, if it is really looking at what would be fair and reasonable in the right commercial context, then that might be a totally different test, and that is where we see the problem.

Senator JACINTA COLLINS—Yes. Indeed, I would give AIG credit for the view that there are other areas of the commission's operation where it should have broader powers in that respect. Contrary, for instance, to submissions of some other employers who, I think, on this occasion, have been quite inconsistent, you are saying that the commission is the appropriate body to look at what is fair and reasonable in a particular commercial context.

Mr Smith—That is correct.

Senator JACINTA COLLINS—These are the very things that were withdrawn from the act in 1996.

Mr Smith—Yes, but in this case we think that it appears that it was an oversight and we would urge all political parties to support this legislation because all it is really doing is giving more power and appropriate power to the commission; it is not doing anything more than that. It is a very sensible piece of legislation.

Senator JACINTA COLLINS—All I am highlighting is that AIG has been consistent. You have the same view about intractable disputes— that the commission should be able to play a determining role in those sorts of circumstances—whereas the government's agenda and the agenda of some employer organisations have been to say that the commission should not be involved and that it should be up to the parties to resolve matters. In these cases, you have examples of agreements that have been formalised by the parties. When people take on a business, perhaps it should be a buyer beware situation where they understand what they are accepting when they acquire a business and they need to deal with the consequences of that without being able to diminish employees' entitlements as per an agreement which, the ideology would say, should not be interfered with.

Mr Smith— Yes, thank you.

Senator JACINTA COLLINS—That concludes the questions, thank you.

CHAIR—Thank you for appearing today.

Proceedings suspended from 12.09 p.m. to 1.06 p.m.

HAMILTON, Mr Reg, Manager, Labour Relations, Australian Chamber of Commerce and Industry

CHAIR—I welcome Mr Hamilton from the Australian Chamber of Commerce and Industry. The committee has before it submission No. 12. Are there any changes that you wish to make to the submission?

Mr Hamilton—No, Senator.

CHAIR—The committee prefers all evidence to be given in public, although the committee will consider a request for evidence, part of evidence or answers to questions in camera. However, such evidence may subsequently be made public by order of the Senate. I now invite you to make a brief opening statement.

Mr Hamilton—Thank you, it will be very brief, given the circumstances, and I apologise for my late arrival. There are two bills, the first one being transmission of business. Our members representing all the various sectors of the private sector see it as an important bill. It is a limited bill but it does address an issue which our members tell us is of some practical importance to them. The basis of it is that the Australian Industrial Relations Commission would be the equity check, if you like, on whether or not an application for non-transmission of a certified agreement would apply. In hearing such applications, we say it should prima facie be taken that the Industrial Relations Commission would have proper regard to the various equity and efficiency or industry considerations.

In relation to the second bill, very briefly, we support it as a public interest bill. There is a public interest in the internal affairs of registered unions and employer associations. I suppose our support is strongest for those parts of the bill which reflect the unanimous report of a Senate committee on elections, and secondly the Blake Dawson Waldron report on finances, which is similar to the previous government's Ernst and Whinney report on the same issues. There is a third element of the bill which is additional provisions.

Overall, we see it as an important bill, but it is important that measures be proportionate to the evils or problems they seek to address; secondly, that they do not make practical operations of unions or employer associations impossible or unduly difficult. Thirdly, they have to address real problems or evils. We are not wedded to every provision of this bill. We would certainly try to help the committee. If it were considering amendments, we would be happy to comment on any suggested amendments people might have.

CHAIR—Thank you. What does the ACCI believe are the chief benefits that are going to flow from the passage of these bills?

Mr Hamilton—In relation to the transmission of business, certified agreements transmit and there is no capacity to have them not transmit except by getting a valid majority of the employees affected and the agreement of the unions respondent to those agreements. We say that could be a very cumbersome process. There is a lot of restructuring and, without going overboard or seeking to cut anybody's wages and conditions or anything of the sort, we say a commission power to order non-transmission would help in restructuring so that there is a sensible set of agreement arrangements. Under the existing system, you can have a haphazard conglomeration of different agreements with different provisions. It can get very messy and unproductive for everybody.

The second bill is desirable because it does address after a decade the finances, the election provisions and so on—the internal affairs of registered unions and employer associations. It is

quite a timely bill. It has been a decade since the previous government's Ernst and Whinney review, plus their amendments and the Hancock committee amendments. As I said, it is important that these things be proportionate. We think there are. But we are certainly willing to comment on any suggested amendments people might have.

CHAIR—Could you provide the committee with any examples of particular industrial disputes that may not have occurred if this legislation had been enacted at the time?

Mr Hamilton—In relation to transmission of business, we have sought to provide two examples drawn from practical experience of our membership. They are at pages 3 and 4 of our submission. The explanatory memorandum contains a number of other examples. We could, if we had had the time, surveyed all our membership and given a much wider array of examples. But those are two examples we provide. They are anonymous because these are sensitive to business. Businesses do not want a lot of confidential and sensitive material debated and individual businesses used as debating points. That is why the names have not been provided. In relation to the second bill, I am not sure if many disputes would have been prevented, except that it would help disputes between members and unions and perhaps overall improved member and community confidence in the internal affairs of unions and employer associations—although employer associations to a much lesser extent.

CHAIR—Is the ACCI satisfied with the powers that have been given to the commissioner under this new legislation; or do you believe on past performance that the commission might take a more sympathetic view to unions' submissions than to those of employer groups?

Mr Hamilton—That has always been the view of some of our people in the same way that the other side, the unions, see it the other way. We both make those sorts of claims from time to time. I would just say this: it is a moderate bill; it leaves things in the hands of the commission. We have to assume *prima facie* that the commission will properly deal with our submissions and the submissions of unions. On past experience, they have always looked at things like protecting employees. They have not overlooked that. I hope and we expect that they would look at industry views fairly as well.

CHAIR—Thank you very much.

Senator JACINTA COLLINS—Going back to your comments about addressing real evils, is ACCI aware of any examples where an existing registered organisation has used section 118A provisions to limit the representative rights of a newly formed organisation, hence justifying clause 135?

Mr Hamilton—I am not aware of that off the top of my head. I am not sure there are many new registered organisations each year. There are some, I believe, but there are not many. I am not aware of any such examples.

Senator JACINTA COLLINS—Why does ACCI support the extension of time to lodge disamalgamation applications—again going to the real evils issue?

Mr Hamilton—Yes, going to the real evils issue. I do not think there has been much use of disamalgamations. There seem to have been some technical difficulties. The circumstances which led to the disamalgamation provisions were basically a finding about breaches of labour standards and the like on a challenge. It does not seem unreasonable to give some sort of limited extension, given the limited use of these provisions and the circumstances which led to them. We are not saying this is an overriding public issue.

Senator JACINTA COLLINS—Going to the transmission of business issue, one of the cases that you give us is a supermarket that essentially had not been wary of buyer beware.

Why should employees that in good faith from signed on to a collective agreement suffer because of the poor business conduct of an employer?

Mr Hamilton—Obviously, we would prefer that they did not suffer. However, the business in this example made a series of poor decisions and, rather than have the supermarket close and people lose their jobs or some such outcome, it might be desirable to have a variation and have a different certified agreement apply on the assumption that the new owners already had certified agreements in place. As I said, if we had done a proper survey of our membership, we could have produced quite an array of examples.

Senator JACINTA COLLINS—Might be it more appropriate to look at those sorts of provisions in examples where section 170MD has been demonstrated to deal with this thing by consensus amongst the staff or the parties and has been demonstrated to fail?

Mr Hamilton—Yes, that would be one obvious way to do it. It is possible to negotiate in these circumstances. These negotiations do occur in these circumstances and variations are made to save a business from time to time and to save jobs—that is true. However, that may not be possible in some circumstances. For example, the union may refuse or whatever. In those circumstances, it may be appropriate we say to have some sort of application to vary. I note also that the explanatory memorandum to this bill had a good list of examples of the sorts of circumstances on page 2. I am sure that, if we searched, our members would produce actual examples of most of those.

Senator JACINTA COLLINS—One of the examples that was canvassed earlier today, which I am interested in exploring further, is what vote would need to occur to achieve a variation under section 170MD. It was suggested in the case of a government department that is outsourced that, in order to change the certified agreement, you would need a vote of the majority of the all of the employees—not only those in the outsourced business but all of those that came in under the certified agreement. Is that your understanding?

Mr Hamilton—My understanding is that it would depend on the coverage of the two agreements, how the coverage was expressed and which one was in force first. So, for example, if the agreement which has been applying to the business already acquired is phrased in such a way as to apply to other aspects of the buying business and that agreement applying in the acquired business is earlier than the agreements applying in the buyer business, then you could have a situation where the new agreement would then be the operative agreement, if you like. In those circumstances, you would need a valid majority of the wider group. If circumstances were different then I think, without spending half an hour checking it in detail and giving you a proper technical answer, if circumstances were different then it would be a valid majority in the acquired business.

Senator JACINTA COLLINS—So you could get a valid majority in simply the acquired business under some circumstances?

Mr Hamilton—Yes, I think that is right. That is my understanding, but the agreement provisions are very complex and, quite frankly, in need of simplification.

Senator JACINTA COLLINS—That obviously requires some further investigation on our part. Under the circumstances, thank you for your appearance today.

Mr Hamilton—Thank you very much. Once again, I am sorry I was late.

Committee adjourned at 1.20 p.m.