



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS  
AND EDUCATION LEGISLATION COMMITTEE

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

THURSDAY, 24 MAY 2001

CANBERRA

BY AUTHORITY OF THE SENATE

**WITNESSES**

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## SENATE

EMPLOYMENT, WORKPLACE RELATIONS, SMALL BUSINESS  
AND EDUCATION LEGISLATION COMMITTEE

Thursday, 24 May 2001

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

**Substitute members:** Senator Murray for Senator Stott Despoja

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

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

**Terms of reference for the inquiry:**

Workplace Relations Amendment (Transmission of Business) Bill 2001; Workplace Relations (Registered Organisations) Bill 2001.

**Committee met at 4.37 a.m.**

**BOHN, Mr David, 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, 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**—The committee is resuming its hearing into the provisions of the [Workplace Relations Amendment \(Transmission of Business\) Bill 2001](#) and the [Workplace Relations \(Registered Organisations\) Bill 2001](#). I welcome officers from the Department of Employment, Workplace Relations and Small Business. The committee has before it submission No. 10. Are there any alterations the department wishes to make to the submission?

**Mr Smythe**—No.

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

**Mr Smythe**—I have just a few comments. I understand that senators may wish to raise issues with us arising out of evidence given by other witnesses before this committee. The department only had access to the transcript of last Friday's proceedings on Tuesday and we only had access to the submissions of the other witnesses on Tuesday. That, coupled with the fact that some members of our team have been ill this week, has left us in a position of not having had time to go through those submissions and evidence of parties with a fine

toothcomb. So we seek the indulgence of the committee if we take more questions on notice than we otherwise might.

Another issue is that, in the last proceedings, Senator Collins raised with us the question of the need for the consequential and transitional bill to be separate from the main bill, and we gave some indications that that was normal practice of OPC. We now have some explanatory words from the Office of Parliamentary Counsel, and my colleague Mr Bohn can take you to those.

**Mr Bohn**—I will just hand them up, if it is of interest to the committee. The basic position is that it is OPC practice to separate them like that, and the reason is to avoid cluttering the new principal act with provisions that are not to have ongoing effect. I will hand that up to the committee.

**Mr Smythe**—We do not wish to make any more opening remarks.

**CHAIR**—Thank you. I call for questions now.

**Senator JACINTA COLLINS**—I will just go to that issue, but I do not intend to make a big point of it; you would normally intend to table it around the same time though, wouldn't you?

**Mr Bohn**—We have spoken to the Office of Parliamentary Counsel, and they have provided us with just a few examples of cases where principal bills and consequential bills have been introduced at separate times. If that is of interest, I can provide that to the committee as well.

**Senator JACINTA COLLINS**—It is only of interest to the extent that we end up with the conundrum that we had on the last occasion. It is more a timing and process issue that we can hopefully avoid being a problem in the future.

**Mr Smythe**—Senator, you would be aware that the consequential and transitional bill was introduced into the House of Representatives yesterday.

**Senator JACINTA COLLINS**—I certainly am, and I am quite happy to indicate that, on reviewing that bill, I do not have any questions.

**Mr Smythe**—Thank you.

**Senator JACINTA COLLINS**—I have other questions, though, relating to the earlier bill.

**CHAIR**—We thought we were going to adjourn.

**Senator JACINTA COLLINS**—Sorry. Let us start first with registered organisations. I think I indicated on the last occasion that there were still a few other issues that I wanted to cover with you on that bill. We had a discussion in relation to the requirements regarding disclosure of payroll deduction arrangements, but on reviewing the transcript the question I did not ask there was: what is the actual rationale for that provision?

**Ms Shakespeare**—Which provision are you referring to? The regulations regarding payroll deductions or the requirement to report?

**Senator JACINTA COLLINS**—The requirement to report.

**Mr Bohn**—It is basically that members be aware of how membership money is spent. From an FOA perspective—

**Senator JACINTA COLLINS**—Sorry, FOA?

**Mr Bohn**—Freedom of association. From a freedom of association perspective, it is appropriate that members be aware that, by providing payroll deduction facilities, the employer is not providing any encouragement or coercion to join an organisation; it is a commercial arrangement.

**Senator JACINTA COLLINS**—So it is an FOA issue—

**Mr Bohn**—And also a disclosure issue that union members are aware of how membership moneys are being spent.

**Senator JACINTA COLLINS**—I will ask you this question in relation to payroll deductions in particular, but I will also ask you the general question as well. I have picked up disclosure in the general sense from your submission as being an argument for a number of the provisions, particularly in chapter 8. But is there any evidence in general or evidence from the registry of a need for the proposals, in terms of union members having problems getting access to information in the current arrangements?

**Mr Bohn**—It is more a case of improving the current arrangements, rather than addressing specified defects in the existing arrangements.

**Senator JACINTA COLLINS**—So there is no demonstrable need?

**Mr Bohn**—We could not point you to particular examples, I do not think.

**Ms Shakespeare**—No, there are no particular examples where members have complained to the government that they have not been given access to these types of specific—

**Senator JACINTA COLLINS**—Or to the registrar?

**Ms Shakespeare**—Or to the registrar.

**Senator JACINTA COLLINS**—I would say that would be where a complaint would go, wouldn't it?

**Ms Shakespeare**—Yes. We would also be aware if complaints had been made to the registrar. However, as part of developing the bill, we have reviewed the current reporting requirements, which are fairly extensive, set out in the regulations. Regulation 108 contains a whole list of things that organisations are currently required to report on. The bill adds to that in a few areas where the government thought disclosure of information to members could be improved.

**Senator JACINTA COLLINS**—Do some of these issues relate to the joint inquiry? Was this area covered by the inquiry?

**Mr Bohn**—That would be the changes in relation to elections rather than—

**Senator JACINTA COLLINS**—No, they did not go to issues associated with disclosure of information.

**Ms Shakespeare**—No, that was electoral matters.

**Senator JACINTA COLLINS**—Sorry?

**Ms Shakespeare**—The joint committee was on electoral matters.

**Senator JACINTA COLLINS**—Yes. Was there—and what was it if there was—the identified need to require organisations to maintain registers for members for seven years?

**Mr Bohn**—That came from a recommendation of the Blake Dawson Waldron report, but the principle is as in other places in the current act and proposed in the bill and in the Corporations Law. Seven years is a fairly standard time for record keeping.

**Senator JACINTA COLLINS**—The seven years comes from the Corporations Law area, does it?

**Mr Bohn**—Seven years is the requirement for the keeping of records under the Corporations Law and for keeping accounting records under the current act and under the proposed bill.

**Senator JACINTA COLLINS**—Does clause 244(2)(b)—disclosure of litigation costs—include the costs involved in representing members before the commission?

**Mr Bohn**—Legal costs, litigation and other legal matters. It may well. Yes, it is the total amount of moneys spent on litigation and other legal matters.

**Senator JACINTA COLLINS**—So in itself, it is not necessarily going to be that meaningful, is it?

**Mr Bohn**—It is a total figure. It is not broken up by individual matters or anything like that, no.

**Senator JACINTA COLLINS**—Going back to part 4, representative orders, have there been any examples of existing registered organisations using section 118A to limit the representative rights of the newly formed organisation? That relates to your submission. I think it is at 4.15.

**Ms Shakespeare**—No, there have not been any examples that we are aware of. However, there are examples of applications by new organisations seeking registration where existing organisations have used legal proceedings to tie up the new organisation for several years. I suppose one of the reasons we have proposed this clause, in the form that it is in, is to avoid new organisations that become registered not being able to represent their members where there are exclusive representation orders applying, if, for instance, they had to seek a variation instead of just getting automatic exemption from the exclusive representation order, as I think was suggested by the ACTU in the hearings last week. It is to avoid them having to go through several years worth of legal proceedings before they can actually commence operation and start to represent their members.

**Senator JACINTA COLLINS**—So unions, to achieve section 118A orders, usually go through what can be years of representation in the commission and the like. Is that not the case?

**Ms Shakespeare**—That is the case.

**Senator JACINTA COLLINS**—So what you are saying here is that a new organisation should have access to those benefits with no pain even though, as you have just acknowledged, the pains for existing organisations have been borne some time in the past.

**Ms Shakespeare**—I think in that situation, however, the new organisation has come into operation after the commission actually considered the requirements for an exclusive representation order and circumstances would have changed. So it would probably be best for the commission to reconsider on application from an organisation or an employer who wants to maintain the exclusive representation order whether or not that is most appropriate.

**Senator JACINTA COLLINS**—Why not the other way, as you said the ACTU suggested?

**Mr Smythe**—Perhaps we should also point out that it would be open for the organisation seeking the exclusive order to have that specifically include a new organisation. It will only allow a new organisation to have access where that has not been adverted to in the earlier proceedings. If in the earlier proceedings the order sought is for an exclusive representation order as against all other existing organisations and any new ones, such an order would be available.

**Senator JACINTA COLLINS**—Except that it is not relevant in the current regime. It was not a relevant factor because these provisions were not in force.

**Mr Smythe**—No. But what I am saying is under the provisions that are proposed, the organisation which seeks each section 118A order could get that. I think what you are saying to me is that existing orders will not be able to do that because they will not have adverted to it. That is correct, but neither could you say that the order took into account the possibility of new organisations when it was made.

**Senator JACINTA COLLINS**—But if we did not want this provision to have retrospective impact, then an amendment which ensured that existing orders were exclusive of new organisations might be in order.

**Mr Smythe**—That would be to assume that the existing order was meant to exclude newly springing up organisations, which I do not think is an assumption you can make.

**Senator JACINTA COLLINS**—Or you could, assuming one way or the other, to the benefit of one or the other.

**Mr Smythe**—I think the government's intention is to have an assumption in favour of encouraging new organisations.

**Senator JACINTA COLLINS**—Yes, I think that is obvious. Who previously had the right to vary a representative order, referring to 4.19 of your submission?

**Mr Bohn**—There was no express provision in the legislation about that, so it would have been the parties affected by the order.

**Senator JACINTA COLLINS**—So you are adding to that 'the minister'?

**Mr Bohn**—Yes.

**Senator JACINTA COLLINS**—Is that correct?

**Mr Bohn**—Yes.

**Senator JACINTA COLLINS**—Going to part 6, what is the rationale for the OEA being responsible for a breach of clause 174 when the industrial registrar is responsible for enforcement of clause 173?

**Mr Bohn**—From memory, 173 is about representation and resignation from an organisation. Under the Workplace Relations Act enforcement of matters relating to freedom of association is vested in the OEA, and the government sees this as an FOA related provision.

**Senator JACINTA COLLINS**—Is clause 174 the resignation clause?

**Mr Bohn**—That is the resignation one.

**Senator JACINTA COLLINS**—It is not necessarily a freedom of association issue, is it?

**Ms Shakespeare**—It can affect freedom of association though.

**Senator JACINTA COLLINS**—Yes, but so could 173.

**Ms Shakespeare**—If somebody makes a misleading statement about resignation rights that impacts on the person's knowledge of their rights to resign and, therefore, ability to resign if that is what they wanted to do.

**Senator JACINTA COLLINS**—Yes, but 173 could equally associate to freedom of association issues.

**Mr Bohn**—All 173 does is say whether a person is or is not a member of an organisation. It does not then have that necessary next step that 174 might have—a false statement under 174.

**Ms Shakespeare**—173 also replicates a current provision of the Workplace Relations Act—section 337. It is about making false statements in applications, so rather it tells people about their rights.

**Senator JACINTA COLLINS**—Is there any demonstrable need in relation to 174?

**Ms Shakespeare**—We have had some complaints.

**Mr Bohn**—We have had anecdotal examples brought to our attention.

**Senator JACINTA COLLINS**—By whom?

**Mr Bohn**—By members of organisations. They have been made to us or in correspondence to the minister's office.

**Senator JACINTA COLLINS**—What has been the nature of those examples?

**Ms Shakespeare**—Not long ago we were contacted by a man named Glen who is a plumber in Victoria who had 10 years previously worked in a Victorian construction site as a plumber, and at that time had joined a member of a registered organisation. He left the industry for a while and became self employed and ineligible to be a member of that organisation, and subsequently I think for about five years he kept on being contacted by the organisation saying that he was required to pay membership dues without giving him any information. He kept responding to the organisation, 'I am ineligible to be a member and I have resigned.' He received some representation saying that he was not allowed to resign. At the end of this 10-year period he was awarded a contract to work on another Victorian construction site and was told that he would not be able to work on the site unless he paid 10 years worth of membership dues that he owed. This was following a series of representations that were probably not accurate about his ability to resign from the organisation.

**Senator JACINTA COLLINS**—There are other provisions in this bill to remedy part of that situation, aren't there?

**Ms Shakespeare**—That is right. The membership dues that he would be responsible to pay after 1996 were limited to 12 months, so I think rather than the 10 years worth of membership dues that he was charged for, he probably only could have had six years worth collected. The result was that his head contractor told him that he would need to pay up to avoid further disputation on the site and he entered into an arrangement where he would have that deducted from his wages.

**Senator JACINTA COLLINS**—Under the current act in relation to the provision of mis-information by registered organisations, where would such a person go?

**Mr Bohn**—There is no equivalent provision to section 174.

**Senator JACINTA COLLINS**—Couldn't he make a complaint to the industrial registrar under the current provisions?

**Mr Bohn**—I cannot see the basis that they could.

**Ms Shakespeare**—No.

**Senator JACINTA COLLINS**—There is no provision where a registered organisation is providing misinformation?

**Mr Bohn**—I cannot think of one. It might come in under freedom of association but that would not be a complaint to the registrar.

**Senator JACINTA COLLINS**—Would it then go to the Employment Advocate?

**Mr Bohn**—Yes, it would.

**Ms Shakespeare**—But I cannot actually think—

**Mr Smythe**—There is no general provision which allows the industrial registrar to take action simply because generally an organisation provides false information. There presently is not a remedy. That is why this provision has been included.

**Senator JACINTA COLLINS**—But the membership one is presently there.

**Mr Smythe**—The membership one is more aimed at people not being able to make false statements as to their membership in making applications for various other remedies under the act. It is not about people being provided with incorrect information about their capacity to be a member of the union or not.

**Ms Shakespeare**—There is currently a requirement for organisations to provide in their financial reports statements about members' membership rights to resign, but there is no equivalent provision to 174.

**Senator JACINTA COLLINS**—What is the current arrangement?

**Ms Shakespeare**—Organisations have to include statements in their financial reports about membership rights to resign.

**Senator JACINTA COLLINS**—Is this provision at clause 174 the only issue where you think that there is a crossover between freedom of association and provisions appropriate for registered organisations?

**Mr Bohn**—It is the only provision in the act that involves the Employment Advocate. But as we were saying, some of the rationale for the payroll deduction provisions, for example, have an element of freedom of association in them, as do the protections against discriminatory conduct when you are seeking to register a new organisation. But none of those would involve the Employment Advocate. This is the only one that actually attracts the involvement of the Employment Advocate.

**Senator JACINTA COLLINS**—Moving on to part 7, in relation to clauses 200 and 201, is there some demonstrable need for those provisions? What is the government's rationale there?

**Mr Bohn**—Clause 200 reflects an existing provision of the act, which is just to allow the court to ask the registrar to go and get relevant documents. Clause 201, the identity card requirement, is a general Commonwealth criminal law right of officers to access premises principle, which is not in the current act, but when the current act was drafted that was not particularly the policy. It is a newer policy than that. It was included at the request of the Attorney-General's Department.

**Senator JACINTA COLLINS**—Moving now to chapter 7, how many requests have there been for exemption under section 212 of the act?

**Mr Bohn**—I would have to take that on notice; I do not actually know the answer to that. Sorry, I will go back: I do not know about the matter of making of a request. Are you talking about someone who has been disqualified who has then made a request to the Federal Court?

**Senator JACINTA COLLINS**—On how many occasions has an exemption under section 212 been sought?

**Mr Bohn**—We will try and find that. It may be difficult information to get, but we will certainly do our best to get it.

**Senator JACINTA COLLINS**—Have there been any complaints of threats in relation to exemptions from section 212 of the current act?

**Mr Bohn**—Sorry, you are talking about the current act. I was looking at clause 212 of the bill. That is information we would have to seek from the registrar about section 212.

**Senator JACINTA COLLINS**—Have there been any complaints concerning bribery to withdraw nominations? That is another question you might need to direct to the Industrial Registrar.

**Mr Bohn**—It may be the AEC; I am not sure.

**Senator JACINTA COLLINS**—It could be that, too.

**Ms Shakespeare**—We can talk to the AEC. The rationale for introducing the bribery provisions is predominantly to bring it into line with the provisions of the Commonwealth Electoral Act.

**Senator JACINTA COLLINS**—So that is the relevant rationale there?

**Ms Shakespeare**—Yes.

**Mr Bohn**—It is just a gap that we identified when moving the provisions.

**Senator JACINTA COLLINS**—I am interested in how clause 188 might work in practice. For example, would an official who was visiting a work site during working hours who handed out how-to-vote flyers be contravening this section?

**Mr Bohn**—It depends on whether the resources of the organisation were involved.

**Senator JACINTA COLLINS**—So if the person is an official during his working hours—

**Ms Shakespeare**—In paid working hours and the flyers are printed on their paper?

**Senator JACINTA COLLINS**—No—presumably the resource is his time. Would it go to that extent?

**Mr Bohn**—It would certainly be an arguable proposition, yes. Because that matter is an offence, it would have to be proved in the Federal Court at a criminal standard, but it would be

an arguable proposition. I note that that provision reflects a provision of the Queensland legislation.

**Senator JACINTA COLLINS**—When was that introduced?

**Mr Bohn**—Under the previous government, I think, but it was retained by the existing government.

**Senator JACINTA COLLINS**—Do we know whether it has been explored?

**Mr Bohn**—I am not aware of any cases.

**Ms Shakespeare**—We can find out.

**Senator JACINTA COLLINS**—In terms of its scope?

**Mr Bohn**—It also reflects a recommendation of the joint standing committee.

**Ms Shakespeare**—Can we take that on notice and get back to you about any cases involving the Queensland legislation?

**Senator JACINTA COLLINS**—I would appreciate that, thank you. Finally, in relation to chapter 10, why is it considered necessary to provide financial assistance for dis-amalgamation proceedings—clause 303?

**Mr Bohn**—On the inquiries into dis-amalgamation ballots, when the provisions were initially put in they were just accidentally not put on the list.

**Mr Smythe**—There is presently financial assistance available in respect of amalgamation, and all this does is mirror those circumstances for dis-amalgamation.

**Senator JACINTA COLLINS**—So it was an oversight in the original drafting?

**Mr Bohn**—Yes, it means that, with all inquiries into ballots or elections under the act, financial assistance is available.

**Senator JACINTA COLLINS**—That is it for registered organisations, as Senator Murray has not thought of anything further he wants to ask on that one. I now move to transmission of business. Mr Smythe, have you had an opportunity to look at the AIG submission?

**Mr Smythe**—I am generally aware of the AIG submission. I have not analysed it.

**Senator JACINTA COLLINS**—The issue in the AIG submission—which I did not identify, I must admit, on my first reading—was, in a sense, a response to a question that I had framed for the inquiry last time, which was whether, in situations where employees are not expected to lose terms and conditions of employment, it would be relatively straightforward for an employer to gain the agreement of the majority of employees to terminate under the provisions of 170MG or to vary under 170MD. AIG referred to problems associated with needing a valid majority of employees, sometimes encompassing employees from the transmitter organisation.

**Mr Smythe**—That is correct. In a circumstance where a business had a certified agreement which covered all its employees and part of that business involving, say, 10 per cent of those employees was transferred to another business, as presently operates under the act, the certified agreement transmits with the transmission of part of the business. To vary the agreement involves varying the agreement as a whole, which would involve, as the act is presently framed, getting a valid majority vote of all the employees—both those who are in the transmitting part and those who stayed with the original business. It would also involve getting the

agreement of both the new employer and the previous employer. That, I think you will agree, would be a fairly cumbersome process.

**Senator JACINTA COLLINS**—Administratively, for starters, it might be difficult. The problem at the other end, of loosening up that current constraint, is that it facilitates examples such as the Joy case where there is an incentive for the employer to undermine collective organisation by carving up its business.

**Mr Smythe**—I think the answer to all those sorts of criticisms is that this is not something which automatically means that the certified agreement will not transmit. It is something that is left to the discretion of the commission, who will hear from all the parties.

**Senator JACINTA COLLINS**—I have not got to that stage of the bill; I am just talking about the current scenario, because I do not see this bill as being the only potential solution to a legitimate problem of that nature. It may well be that there are more appropriate means of dealing with a problem of that nature.

**Mr Smythe**—As you would be aware, the minister issued a discussion paper on the whole issue of transmission of business, and there were a large number of submissions made and a large number of issues raised. I do not think the government would claim that this comprehensively addresses all those issues. This is just one small, simple measure to address some of the more obvious and urgent problems that arise with the interaction of multiplicity of certified agreements on transmission. There may well be other issues that could be raised, and other remedies that could be made available. This is just one very simple way of addressing some of the issues that arise in transmission.

**Senator JACINTA COLLINS**—But I am talking about remedies that may be an alternative to what is being proposed here rather than remedies that could follow this particular one. I understand what you are saying about the discussion paper and the other issues raised there, but let me give you an example. Rather than going to the stage of giving the commission broad discretion to determine, isn't it within the general philosophy of the act to encourage or facilitate the parties to resolve the matter first amongst themselves?

**Mr Smythe**—It would be consistent with the act at some stage for the new employer and the new employees to negotiate an agreement which was appropriate to that new workplace.

**Senator JACINTA COLLINS**—Yes, but these are not necessarily new employees.

**Mr Smythe**—They are new employees of the employer. They have a new contract of employment with that employer.

**Senator JACINTA COLLINS**—Yes. But you accept, Mr Smythe, that full transmission is appropriate in some circumstances.

**Mr Smythe**—Certainly, the commission may well find that. The other thing I should point out is that it would be open to the commission to find that an agreement only transmitted for a limited period of time—say, three months or six months—to give time for new arrangements to be negotiated. It would be possible for the commission to order that parts of the agreement transmitted and parts did not, so that there was no unfairness. The government has gone forward with this particular solution because it is the simplest and most flexible remedy. The possibility of amending the provisions relating to variation of agreements was considered as a possible remedy but the government believed that this approach, giving the commission a broad discretion, was the simplest approach.

**Senator JACINTA COLLINS**—Going back to what was considered then, are you able to apprise the committee of what was considered in relation to those sections of the act?

**Mr Smythe**—I do not think it would be appropriate to apprise the committee of issues that were raised in policy development, but the point that we make is that there are—

**Senator JACINTA COLLINS**—Perhaps, Mr Smythe, you could take that on notice because that is exactly the issue that interests me. The minister can obviously decide whether or not we can have the benefit of what he has considered in this area in terms of policy development.

**Mr Smythe**—I am sorry; what is it that you wish me to take on notice?

**Senator JACINTA COLLINS**—You indicated that, with respect to the provisions for varying certified agreements, the variation means was considered as an option.

**Mr Smythe**—The variation means was, yes.

**Senator JACINTA COLLINS**—I have asked you whether the committee could have the benefit of that consideration. You have, quite rightly, indicated that that is not something within your purview to offer the committee, but I have asked you to take that on notice and ask the minister to consider whether he is prepared to make that policy development process available to the committee.

**Mr Smythe**—Yes, okay.

**Senator JACINTA COLLINS**—You say that the government has been assured that that is not the simplest way to go. I say back to you—

**Mr Smythe**—I will correct that, Senator. I do not think I could say that a particular option was put up and the government said that that was not the simplest way to go. What I am saying is that, in the broad range of possible things that might be brought forward to address the transmission issues, this bill is regarded as a simple remedy to some of the problems.

**Senator JACINTA COLLINS**—I am still working my own mind through the earlier potential remedy. If the government has gone through the process of that consideration, and it would be useful to my own consideration, I would be interested to see it.

**Mr Smythe**—I will take that question on notice.

**Senator JACINTA COLLINS**—Because of my earlier comment, which was that I thought that the general thrust of this act was meant to be to encourage the parties to resolve such issues before you needed to rely on a determination of the commission's discretion, it seems that the government, for whatever reason—and I do not know it at this stage—has decided to completely bypass that process.

**Mr Smythe**—I do not think that is a fair comment. As I said, it may well be that the government will come up with further legislation at some point to address a broader range of issues that arise in respect of transmission of business. This is one simple remedy to address some urgent problems in respect of the inappropriate interaction of the said agreements.

**Senator JACINTA COLLINS**—Yes, but in relation to these sorts of cases, it is a very broad remedy. I am asking why a narrower remedy, which would focus on—at first instance—facilitating resolution amongst the parties of a certified agreement—

**Mr Smythe**—I think I have already said that the government believes that this is the simplest approach. But, as I have said, I will take on notice whether we can apprise the

committee of what other consideration the government may have given to the approach you have outlined.

**Senator JACINTA COLLINS**—Okay. As a for instance in this sort of example that the AIG had given—and this is, in a sense, still going back to that variation model—it could be arranged that it becomes the commission’s discretion to determine exactly who the parties are that should be taken into account in negotiations about varying a transmitted agreement. Is that not the case?

**Mr Smythe**—I am sorry, I do not quite follow the question.

**Senator JACINTA COLLINS**—If the problem to get over is the AIG case, where they are saying it is too cumbersome to vary by consent, because you have got to go back to the employees of the transmitter of the business to achieve that, it could be that the commission’s discretion at first instance is to simply determine as appropriate who the parties are that need to be consulted. If you wanted to ensure that you protect employees against an organisation whose motive might be to carve up their work force in such a way as undermines a collective bargaining position, you could strengthen it even further by saying that that is particularly the issue that the commission must be mindful of.

**Mr Smythe**—That is something that might be addressed. The legislation might also address the issue of whether the employees in the gaining business, the transmitttee, also need to be consulted because, obviously, if some people are coming from an outside business into a workplace and doing exactly the same work, then there would be an issue, in terms of drawing together agreements, of whether or not they should be consulted. The point I make is that these are not simple issues. There are quite a large number of issues that need to be considered. I go back to the fact that by giving the commission simply the power to make some orders about whether or not an agreement transmits is, in the government’s view, the simplest way to address the issue. There may be other ways.

**Senator JACINTA COLLINS**—But it is a fairly heavy instrument because it does not allow for, or facilitate, the parties to that original certified agreement reaching a consent position in relation to varying it.

**Mr Smythe**—That is true. But, on the other hand, the mischief that the bill predominantly seeks to remedy is the situation where a certified agreement in the losing business is of a particular character, tailored to the needs of that business. The gaining business already has a certified agreement of its own which is quite different in character. When the two come together you have quite significant administrative problems. It may well be that the parties could negotiate their way through that, but that might take a long time. This bill addresses only a short-term solution to ensure that there is not an immediate conflict between those two certified agreements that cannot operate together.

**Senator JACINTA COLLINS**—Actually I am glad you came to that point because throughout my whole industrial career I have dealt with agreements where that very conflict has not been seen as such a problematic issue. Certified agreements are frequently developed to achieve a nationally consistent agreement across an organisation but in such a way as does involve people covered by savings provisions and all sorts of different clauses where you may still have two people working side by side but on different conditions. Employers do that every day. What is so special and problematic about this instance?

**Mr Smythe**—With respect, Senator, the world of certified agreements has been very dynamic, and it has been changing dramatically over the last five years or so. As we have

indicated in previous evidence, this issue was simply overlooked in 1996 because there were not a great plethora of certified agreements and there were not many certified agreements that were transmitting. But now that the whole industrial scene is focused far more on agreements at a particular workplace tailored precisely to the needs of that workplace, there is far more scope for conflict between agreements when an agreement which is appropriate to one workplace transmits to another workplace for which it is not appropriate. Certainly some years ago the trend in agreements was to have very broad framework industry-wide agreements, and there was a greater homogeneity, if you like, of agreements. The experience is that these days agreements tend to be far more focused on the workplace and therefore there is more scope for this incongruity or this conflict between inconsistent agreements, and this is the sort of anecdotal evidence that the government has received and it is why this remedy has been proposed.

**Senator JACINTA COLLINS**—But, Mr Smythe, even in enterprise agreements, quite apart from whether conditions have been transmitted or another agreement has been transmitted into a particular enterprise, enterprises themselves often find it appropriate to have inconsistent provisions between sections or between particular staff. That is the very notion of saving provisions in certified agreements.

**Mr Smythe**—In those circumstances I would imagine the commission would simply say, ‘This agreement can transmit. There is not a problem.’ I would imagine the commission is only going to say the agreement does not transmit where it has been demonstrated to the commission that these sorts of problems are going to cause difficulties.

**Senator JACINTA COLLINS**—Yes, but if the agreement does not transmit the difficulty is that the workers involved who, in good faith, formed an agreement with the transmitter essentially lose all of their conditions. There is no scope for the parties to negotiate an appropriate outcome.

**Mr Smythe**—No, they do not lose. They would still be covered by the agreement of the transmittee.

**Senator JACINTA COLLINS**—Yes, and that may be at a standard much lower than what they were previously working under.

**Mr Smythe**—And if it were, you would imagine the commission would not order that the agreement did not transmit. Or the commission might say, for instance, that the fundamental protections in the agreement, such as the base rate of pay and the leave, do transmit but some of the other aspects of the agreement such as the shift rosters or the way in which work is performed do not transmit, which is a flexibility that this bill provides.

**Senator JACINTA COLLINS**—What gives you the view that the commission would necessarily take that approach in applying a very broad discretion? Why would the commission, for instance, not take the approach that the appropriate benchmark is the award safety net? What guidance does the commission have to indicate that it would take into account the conditions that previously applied to these inquiries?

**Mr Smythe**—It would be up to the commission to apply equitable principles. As the NFF pointed out, the transmission provisions are anti-avoidance provisions—sections 149 and 170MB are there to ensure that people do not lose out, that obligations are not evaded by transmission of business. But where there are significant administrative problems and there is a capacity to ensure that some measure of protection is retained, then this bill allows the commission to unscramble the eggs, if you like.

**Senator JACINTA COLLINS**—We can all take the benefit of the NFF in terms of how they think the commission might apply its discretion. What guidance in the act exists?

**Mr Smythe**—The act does not provide any guidance, because the government believes that the commission will act consistently with the objects of the act and the fact that these are anti-avoidance provisions. From time to time, this government and previous governments have been criticised for trying to put too much regulation in about the way in which the commission should exercise the discretion. It makes the act complicated. It makes it more of a lawyer's picnic: every time you put in a piece of regulation as to how the commission is to operate, there is scope for argument about what that means. By providing the commission with a broad discretion and taking into account the objects of the act and the fact that these are anti-avoidance provisions, the government is confident that the commission will exercise its discretion in a fair and proper way.

**Senator JACINTA COLLINS**—But, Mr Smythe, that is exactly my point. You say that you take into account the objects of the act, and the objects of the act have changed considerably since prior to 1996. The objects of the act now refer to the importance of a safety net. I am asking what assurance there is that the commission will not be more mindful of its role with respect to the safety net, as opposed to anti-avoidance measures, with respect to collective bargaining.

**Mr Smythe**—I do not think I can take you any further than I have taken you in the responses I have given so far.

**Senator JACINTA COLLINS**—No. That concludes my questions.

**CHAIR**—I thank the officers for appearing today. That concludes the hearing on this bill. Thank you.

**Committee adjourned at 5.21 p.m.**