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SENATE

EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION
LEGISLATION COMMITTEE

**Reference: Workplace Relations Amendment (Award Simplification) Bill 2002,
Workplace Relations Amendment (Better Bargaining) Bill 2003, Workplace
Relations Amendment (Choice in Award Coverage) Bill 2004 and Workplace
Relations Amendment (Simplifying Agreement-making) Bill 2004**

THURSDAY, 15 APRIL 2004

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SENATE
EMPLOYMENT, WORKPLACE RELATIONS, AND
EDUCATION LEGISLATION COMMITTEE

Thursday, 15 April 2004

Members: Senator Tierney (*Chair*), Senator George Campbell (*Deputy Chair*), Senators Barnett, Carr, Johnston and Stott Despoja

Participating members: Senators Abetz, Bartlett, Boswell, Brown, Buckland, Chapman, Cherry, Jacinta Collins, Coonan, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Forshaw, Harradine, Harris, Hutchins, Humphries, Hutchins, Knowles, Lees, Lightfoot, Ludwig, Marshall, Mackay, Mason, McGauran, Murphy, Nettle, O'Brien, Payne, Santoro, Sherry, Stephens, Watson and Webber

Senators in attendance: Senators Jacinta Collins, Marshall and Tierney

Terms of reference for the inquiry:

Workplace Relations Amendment (Award Simplification) Bill 2002, Workplace Relations Amendment (Better Bargaining) Bill 2003, Workplace Relations Amendment (Choice in Award Coverage) Bill 2004 and Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004

Committee met at 9.06 a.m.

BARKLAMB, Mr Scott Cameron, Manager Workplace Relations, Australian Chamber of Commerce and Industry

CHAIR—I declare open this public hearing of the Senate Employment, Workplace Relations and Education Legislation Committee. On 2 March 2004 the Senate referred to the committee the Workplace Relations Amendment (Award Simplification) Bill 2002, Workplace Relations Amendment (Better Bargaining) Bill 2003, Workplace Relations Amendment (Choice in Award Coverage) Bill 2004 and Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004. These bills propose to amend the Workplace Relations Act 1996 in relation to, among other things, changes to the award safety net provisions and allowable award matters, bargaining and dispute resolution provisions, limited trade union involvement in wage claims in the small business sector and changes to agreement making at the workplace level. Before we commence taking evidence today, I wish to 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 special rights and immunities attached to the parliament or its members and others necessary for the discharge of their parliamentary functions without obstruction or fear of prosecution. Any act by any person which 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 wish to advise that Senator Murray is not able to attend today's hearing and extends his apologies to witnesses appearing before the committee.

I welcome our first witness from the Australian Chamber of Commerce and Industry. The committee has before it submission No. 5. Are there any changes you wish to make?

Mr Barklamb—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 any questions in camera you may request to do so and the committee will consider your request. However, such evidence may subsequently be made public by order of the Senate. I invite you to make a brief opening statement.

Mr Barklamb—I will make a brief opening statement. I have a query which has been put to me by email on an issue we did not address, which I intend to come to at the conclusion of my opening statement as a first question. I have some general comments on these bills. ACCI has been on the record previously as supporting a number of propositions in these bills. This is consistent with a general position of supporting the need for ongoing regulatory improvement in the area of workplace relations, reflecting that the workplace relations regulatory system should evolve with changing circumstances and changing demands and that lessons of experience are learned. Australia experienced significant workplace relations reforms during the 1990s under both ALP and coalition governments. These reforms have delivered very real achievements and very real gains to Australians in the key areas identified in the objects of the Workplace Relations Act. However, the system is not perfect. ACCI does not support any notion that the business of reform is in any way complete in the workplace relations system. It is an area that demands a process of continuous re-examination and improvement.

The major changes of the 1990s need revisiting and refinement in light of experience, and that is the basis on which ACCI views the bills currently before the committee. These bills are important. The process of ongoing refinement and evolution of the act is important because workplace relations reforms and workplace relations policy do matter. These are regulatory settings which deliver jobs, incomes, productivity and fairness to Australians in one of the core facets of their lives—their work. This has been the case since the creation of the Conciliation and Arbitration Act in 1904. It has always been a major national consideration for Australia. There is international consensus, including from the OECD, that the Australian economy and labour market must continue to change and to reform.

Before briefly addressing the four bills, I would like to thank the committee for posting the reasons for referral for each of the bills. Whilst ACCI do not agree with the premise of a number of the questions referred, we think it is very useful to know the basis on which the committee will examine and make its recommendations. In our written submission, marked No. 5, we have addressed each of the concerns and questions which we say should mitigate in favour of the passage of the amendments. I understand there is limited time, and I will be very brief on each of the four bills.

With respect to the Workplace Relations Amendment (Award Simplification) Bill 2002, ACCI strongly supports award simplification. It has delivered real gains to the system. It has delivered a superior process of award regulation as an end in itself and as a safety net where it applies. Properly understood, this was an evolutionary, not revolutionary, change and

followed a passage of amendments through from the 1980s, rendered by the commission itself, and in the early 1990s by the former Industrial Relations Act 1988. It is proper and merited that that evolution should continue—that the system should continue to learn and evolve in the awards area. Beyond that, we commend our detailed submission to the committee. I wish to raise only two things. I wish to be clear on our position on the inclusion of long service leave as an allowable matter. ACCI cannot support the direct deletion of long service leave as an allowable matter at this time. There would be significant costs to a number of employers in the transition to direct state regulation of long service leave. It may, however, be appropriate to re-examine the bill and to look at an approach which does not significantly increase long service leave costs.

ACCI strongly welcomes the opportunity for debate on the Workplace Relations Amendment (Choice in Award Coverage) Bill 2004. It renders stark the duties of the system to those who are regulated by it. Employers can accept that logs of claims are a historical accident and a constitutional contrivance. They are something of a necessary evil for both unions and employers, upon which the federal award system is erected. However, the system should do what it can to ensure that this inherently complex and potentially misleading process is rendered as sensible and as comprehensible as possible to users. That is the basis on which we have considered these amendments. In short, we would simply say that the proposed procedure in the bill appears to deliver a superior level of natural and procedural justice for those involved in the award making process, particularly Australia's smallest employers, who have the least capacity to comprehend complex and very misleading documents like logs of claims. ACCI took the opportunity in our submission to append two logs of claims as an example of the kinds of documents employers can be faced with. We do not believe that union rights are in any way diminished in the award coverage bill. We can see no basis to conclude that there is not an enduring capacity for award making for the extension of the safety net where that is merited.

Regarding the Workplace Relations Amendment (Better Bargaining) Bill 2003, all parties have accepted that we operate under a system of protected action. However, ACCI believe that we cannot change or ignore the constitutional imperative to prevent industrial disputation and that it remains something that should be a goal of the system to minimise. If the system is to legitimise strikes and lockouts, which it does, it clearly needs boundaries to those rights. ACCI understand that no system in the world has an unfettered right to strike. Again, it is important that the system learn the lessons of experience and address contemporary challenges that emerge.

ACCI believe there are four keys to understanding this bill. It empowers the commission to exercise discretion to settle more disputes. We say that it is not legitimate to strike during the life of an agreement. It is an Australian value to do a deal and to stick to it. That is consistent with the notion of a fair go embodied elsewhere in the act. We say that it would be an absurd proposition to continue a situation in which a party could strike in pursuit of a matter which the commission could not then legitimately include in an award or an agreement, which is another thing the bill appears to overcome. What would be removed by the bill are illegitimate or accidental capacities for industrial action that are inconsistent with the goals of

the system. I will leave my comments on that bill there in the interests of moving fairly quickly.

The Workplace Relations Amendment (Simplifying Agreement-making) Bill 2004 seeks to address simplifying agreement making. Simply put, ACCI believe that the Senate and the parliament can make the changes proposed with confidence because of the checks and balances provided both within the bill and within those remaining areas of each of the areas of regulation that are not touched. It is a long and detailed bill. It is not appropriate to spend too long addressing it now. We would say, however, that it reflects again learning from experience in bargaining and it reflects experiences since 1997 and identifies a number of areas that need to be addressed. I will address questions on that separately.

In concluding our opening statement I will turn to a specific question that was put to me by email from one of the members of the committee, or the committee as a whole. The question was on our position on the notion of extended agreements. That is proposed section 170LGA of the Workplace Relations Act under the simplifying agreement making bill. That is the proposal that there be a capacity for agreements for up to five years duration. We do apologise for omitting reference to that in our initial written submission. We note a couple of things in regard to that. We understand that it would not be proposed or that it would not be a likely outcome of these amendments that agreements beyond three years would become the norm in the system. Our analysis of these amendments is that this would become an exceptional option under the act. We would also note that there are additional safeguards proposed, for example, section 170MCA will preclude employee disadvantage and bring an extended agreement to an end if that occurs.

The agreements will be specifically entered into as extended agreements. The effect and the compact at hand will be very clear. There will be, we say, no disadvantage after three years of operation in those agreements. We would also like to make very clear why the proposition for extended agreements has been supported by ACCI and its members. Primary demand is anticipated from the mining and resources sector in particular and, in particular, these provisions may be used to address very significant national project agreements without necessarily saying that this would be applied for a particular project. As an example, the Gorgon project on the north-west shelf is an \$11 billion project that is set to employ some 3,500 Australians over four years. The four years is the crucial point as to why the system is, we say, in need of an accommodation of longer agreement making. Persons seeking to finance such agreements rely on being able to convince investors of the continuity of labour across the life of such projects. They also rely on not needing to recommence a costly and complex renegotiation process part way through a project activity.

Agreements for such projects and particularly for construction in the resources sector, operate well above award levels to the point where a no disadvantage test is hardly a consideration. It appears to us, for example, that proposed section 170MCA would be largely irrelevant to such agreements given the extent to which they would operate above awards. There are often multiple unions and potentially employers involved in such projects. All would be making an assessment of an extended agreement with their eyes open.

They could pursue in bargaining, for example, CPI adjustment clauses, options for bargaining or linkages to changes triggered by changes in the award system. Unions might

pursue, for example, additional remuneration for entry into an agreement that lasts beyond three years. I do not make any particular endorsement of those propositions, but it is saying that parties negotiating an agreement of over three years duration would be well aware of what they are entering into and able to reach their own considerations on that. In closing on that issue, we invite the committee to consider how it would work in practice, to consider the parties most likely to use the extended agreements and to consider the checks and balances involved. I apologise if that is a little truncated, but I did want to move fairly expeditiously through our opening.

CHAIR—Thank you very much, Mr Barklamb. You said awards were a complex and misleading process. We understand that they are complex. Could you explain what you meant by ‘misleading’?

Mr Barklamb—I made that comment particularly with regard to the logs of claims process, not the awards themselves. The awards themselves through simplification have been rendered significantly more accurate and comprehensible. That is a process relating to one of the other bills that we say should continue. On the log of claims, perhaps I can slip into a scenario. I am a small business person. I am running my business as best I can and coping with a wide range of compliance, financial and financing issues. I have no union members. I have never seen the union. None of my employees have ever expressed any wish to join the union. I have had no communications from them. A document turns up from the union demanding levels of pay that are four or five times what I pay. I might pay a shop assistant \$500 a week and receive a demand from the union that I pay them \$2,500 or \$3,000. That is an inherently misleading and complex thing for a small business person to face. They have no idea of the status of this document or whether they should give effect to it. It appears as a formal demand. That is the basis on which that comment about logs of claims in particular being misleading was made.

CHAIR—So you were referring to wide ambit claims?

Mr Barklamb—Yes.

CHAIR—In your opening statement you took a broader view of the act and reforms to the act. You mentioned that the reforms of the nineties need to be refined and need to evolve. Obviously we have tried to do that on many occasions. The bills before us today are a further attempt to do that. Elements of them have a history in earlier attempts at refinement in the late nineties and the early part of this century. What do you see as the main things in that 1996 act that need refining at this point, looking at it broadly?

Mr Barklamb—In particular they are a number of the things that are focused on in these bills. There is the ongoing refinement of the award system further towards a genuine safety net. There is the ongoing refinement of bargaining to ensure that the regulation of bargaining is only that which is genuinely necessary to protect fundamental interests and rights. We would support the further reform of the act more generally to become a shorter, more concise and more usable document. I think the core areas are really bargaining and the award safety net. There are also prospects for further reform in the area of unfair dismissals, for example, which we have spoken of. The Senate and the committee will be well aware of the history of various propositions with regard to the further reform of that area.

CHAIR—We have had about five attempts, it is true.

Mr Barklamb—Indeed.

CHAIR—We will keep trying, because it is very important. You have pointed to the award simplification bill as being one of the key changes needed. What do you see as the specific benefits that would flow, particularly in the operation of business and the economy, if we could actually get this bill through?

Mr Barklamb—The benefits would be twofold, we believe. There would be a much clearer articulation of each of the particular award matters that are addressed in the bill. Further simplification would, for example, ensure that you do not have to look to multiple documents to examine things like jury leave. We think that the primary benefits of that bill would flow from a more concise safety net providing greater confidence in bargaining and a much easier assessment of particular matters addressed in bargaining. The particular issues addressed in that bill—for example, the refinement of types of leave and the refinement of remuneration to not include bonuses and the like—are not direct simplifications that will deliver an instant dollar benefit in workplaces. Their benefits lie in assisting and furthering the bargaining system.

CHAIR—You mentioned the safety net. In further clarifying the awards safety net contribution, what sorts of gains in productivity and efficiency would that lead to?

Mr Barklamb—The gains would be twofold: it would be a much simpler and more direct system of workplace regulation for those who continue to work under the award and it would also provide encouragement and confidence to those who move off the awards into a bargaining process. So it delivers for both sets of award users because, in a very real sense, those who are bargaining are still users of the award; they rely on it as a springboard into their own agreements.

Senator MARSHALL—I am not sure how it does that. Could you explain that to me in some detail?

Mr Barklamb—Yes. It would render potentially more comprehensible individual matters upon which an employer must make an assessment in bargaining and upon which the Office of the Employment Advocate and the commission must make an assessment in bargaining. For example, in the area of bonuses, to the extent that an award might make a complex regulation of bonuses at the moment, and it must be said that that is not a typical matter for award regulation, to the extent that an award did address a performance pay system or a bonus system, that would be removed and the award would be refined to a regulation simply of base pay. That would render things much more simple and comprehensible for an employer and unions seeking to bargain the wages arrangements they must meet.

CHAIR—What evidence is there to support your claims in paragraph 46 where you say:

... awards are operating ... at an over safety net level, which carries with it the prospect of discouraging ... further productivity and economic improvement.

Mr Barklamb—We did not rely on any particular econometrically modelled evidence for those contentions, other than the clear feedback from our members and the cost-benefit analyses done by various employers who determined that it remains appropriate to remain on

the award. The awards are long, detailed and complex documents and addressing each of the matters in them would be difficult to bargain from, so it is both a matter of financial capacity to bargain above the award and a matter of complexity demanded by bargaining above the award.

CHAIR—Since the reforms of 1996, the Senate has had a habit of knocking back virtually every proposed change to industrial relations bills. What do you see as the outcome, if indeed we follow that pattern with the bills before us, because we have four different bills before us to improve the industrial relations system? If we end up with the status quo and we do not have any of these changes, what are the implications for business, particularly small business?

Mr Barklamb—Thank you for that question; I will go through it sequentially. The implications of not reforming the system and not continuing to learn the experiential lessons of the period since 1996 are twofold: one is that the initial financial gains and productivity employment gains and the like of workplace relations reform, including the sorts of things identified by the OECD at various stages, will not continue to be delivered. The second, however, is that each of the areas of reform in 1996, perhaps with the exception of AWAs, was a continuation of reforms or areas of regulation that had commenced previously—for instance, unfair dismissal reform, reform to the system introduced by the Keating government in the early 1990s; reform of bargaining, which reformed areas of the act that had in fact been there since 1904; and award reform, that again reformed areas of the act that had been there since 1904. In addition to not securing a continuing gain of the type delivered by the initial round of workplace relations reforms, we risk a suboptimal operation of core areas of workplace regulation by not continuing to evolve, to learn and to amend.

In relation to the four bills themselves, if the awards are not simplified—and I think I addressed this in relation to earlier questions—they will remain unduly prescriptive, and that will have consequences for both those who continue to operate under the awards and those who would otherwise have entered bargaining. It will impede both a further flow into bargaining and improper and productive operations for those who continue to operate under the award system. We will continue to have what is an inherently unsatisfactory process for our small businesspeople when logs of claims are served. To be clear on those particular proposed amendments: they are in a sense amendments to assist through a difficulty that has been there for decades.

The complexity of the service of logs of claims has not been rendered by the former Keating government or the current Howard government; it is an inherent difficulty in the system which this legislation now seeks to address and correct. We will continue to see a costly process of the service of documents for unions, not that the bill would propose doing away with logs of claims entirely. We will see unions being forced to serve claims that are more complex than they need to be. We will see employers being faced with claims for things that cannot actually be included in awards and provided with absolutely no assistance when these documents turn up at their workplace.

We will see the many thousands of employers and employees who demand entry into AWAs and certified agreements have that entry impeded by continuing inefficiencies in the procedures for entering into the agreements. We have, for example, in Western Australia—and, indeed, throughout the rest of the country as well—a very clear demand for significant

entry into AWAs. On 450,000-plus occasions Australians have chosen to enter into these agreements. There are tens of thousands being entered into each month. Those people will have their entry into those agreements and the commencement of agreed working relationships and arrangements impeded without the passage of the amendments.

For certified agreements there is the kind of difficulty I mentioned before in relation to projects. We will also have the ongoing expense, in particular on the issue of whether certified agreements require a formal hearing by the commission, both for the state through the Industrial Relations Commission and for parties through representation for entry into agreements that are entirely agreed and well above the safety net. In relation to industrial action and protection action we will have an ongoing unsatisfactory situation in which industrial action can be pursued during the life of agreements and in relation to claims that do not relate to industrial matters. In terms of how that will affect productivity and efficiency in our community, we will continue to have the damaging impacts of industrial action, which are well understood, in matters that are not capable of being included ultimately in instruments. We will have an ongoing inability to do settled deals. That is a rather longish answer, but I hope that addresses the query.

CHAIR—Finally, in all state and territory awards and systems we have complete control by Labor governments right across the country. If a Labor government were elected at the end of this year, all industrial relations across the country would be under the control of Labor governments. This is a crystal ball gazing exercise: what would you see as the likely changes to industrial relations or the direction of industrial relations in relation to the reforms that have commenced since 1996?

Mr Barklamb—Earlier this year ACCI published a detailed analysis of the stated ALP platform that was addressed at the recent ALP congress with regard to workplace relations. Obviously, whichever party wins the next election it will face the challenges of learning from the evolving system that I outlined before. It will face the challenges of continuing the gains rendered by both the Keating government in the early nineties and the Howard government since 1996. In relation to particular challenges under any change of government, we are still awaiting the publication of the ALP's more detailed political platform, as distinct from the party platform. ACCI will look at that with significant interest.

It will be a challenge for all parties to continue to ensure that our awards system continues to acquit the role allocated to it by both the previous Labor government and the current government that awards are genuinely a safety net. That is a decision that has already been made. It is embodied in the objects of the act. Those words need to continue to be given meaning. Awards need to continue their evolution to a safety net. We need to be able to continue to bargain. We need—and this is potentially an area of stark contrast—to be able to enter into individual agreements. Australian workplace agreements have delivered very real gains and have been chosen by many thousands of Australians. ACCI is on record as saying that should remain part of the system. The consequences of removing that would be very dire for the small businesses that have chosen to enter into those agreements.

I hope that is a satisfactory answer. They are some of the key challenges that will be faced. The gains are clear since 1996. The challenges that need to continue to be met to build on

those gains are relatively clear. They will be the challenges for whichever party wins the next election.

CHAIR—You mentioned ALP policy but did your analysis also include union policy and views on how future industrial relations might move under all Labor governments—state and federal, if that were indeed to be the case after the next federal election?

Mr Barklamb—We certainly did not undertake a comparable exercise from the preceding ACTU congress or specific union pronouncements, but obviously there are a number of union propositions which have been put with regard to a number of things, including the future capacity to reach certified agreements on a collective basis without union involvement or without mandatory union involvement—for example, the current agreements that may be reached under section 170LK of the Workplace Relations Act. There are certainly a number of statements regarding key areas of current regulatory policy that have been proposed by the union movement that would be of considerable alarm to us.

CHAIR—Which ones alarm you the most?

Mr Barklamb—The removal of section 170LK agreements would alarm us significantly. The removal of AWAs would directly fly in the face of the choices of many thousands of Australians and their employers. They would be areas of alarm for us.

Senator JACINTA COLLINS—The act is not getting any shorter, is it?

Mr Barklamb—It is not.

Senator JACINTA COLLINS—None of the proposals that have been before the parliament actually propose to make it any shorter, do they?

Mr Barklamb—No. With particular reference to the awards simplification propositions, the removal of some line items are replaced with clarification of others. That is a proposition with which we agree.

Senator JACINTA COLLINS—That is with respect to awards. That is not about simplifying the act.

Mr Barklamb—Yes.

Senator JACINTA COLLINS—I just picked up your point that the ACCI would like to see a shorter act as opposed to award reform.

Mr Barklamb—Yes, we would.

Senator JACINTA COLLINS—With regard to your answer to the Chair's question about paragraphs 46 and 47 and your highlighting that we need to learn from experiential lessons, I am a bit concerned that you express concerns about awards operating at over the safety net level but you cannot really give us any detail about where those experiential lessons are derived from. Can I give you another opportunity to inform us on that point?

Mr Barklamb—Yes. We are using the safety net in that statement in the context of the wide range of statements that have been made describing the safety net as a point we are moving towards as a growing system. At paragraph 76 on page 12 of our submission, we repeat the articulation of an end-point of the system by former Prime Minister Keating about awards, where he says:

Over time the safety net would inevitably become simpler. We would have fewer awards with fewer clauses.

We made very real gains in simplification in the consistency between awards and the clarity with which they are expressed and the removal of some matters. Using that term as a safety net, we say that the clear, desirable endpoint for the award system has not been reached.

Senator JACINTA COLLINS—To cut you short, because we are limited by time, I understand what you are saying but I am asking: what evidence is there that bringing awards down to your notion of a safety net—and I will get to a point about that further—will produce further productivity and efficiency gains? Where is the experience to hang that statement on?

Mr Barklamb—We have certainly had gains in productivity and efficiency in the wake of the reforms of the early nineties and in 1996. I cannot model the removal of various award clauses and award simplification as distinct from the capacity for agreement making. The two are mixed together but, certainly, those gains have accompanied the refinement of awards towards a safety net. I cannot provide a specific industry example for you today, but industries have secured significant gains through bargaining at the same time or in the wake of the simplification of industry awards.

Senator JACINTA COLLINS—The reason I ask you this question is that if you look at AiG's submission for instance, as an alternative employer proposition, they would argue that we do not want to go to a basic award safety net but rather a comprehensive award safety net. They would argue that the costs involved in going through another process of simplification are not worth the benefits that some might argue would be derived. I am asking you where is the evidence that there would be benefits derived, because another major employer organisation seems to dispute that?

Mr Barklamb—It is the clear position of our members in a wide range of industries that their industry awards would benefit from further simplification. It is the feedback of their members on the ground that awards continue to be too prospective.

Senator JACINTA COLLINS—But in terms of any suggested experiential evidence of further productivity and economic gains, it is just your members' expressed demands.

Mr Barklamb—It is a case of having benefited from the gains to date and an assessment that further simplified awards would benefit them. I would say one thing in relation to that question you put to me regarding the AiG's submission. I have not read it, but our industry association and state association members stand well ready to participate in further simplification of awards.

Senator JACINTA COLLINS—Senator Marshall asked you to express more on this point about the complexity of awards. Some argue that the complexity of awards is one of the drivers to encourage employers to go into workplace based enterprise bargaining, again, one of the objects of the act. Yet you seem to be arguing that we need to address awards so that we allow more employers to stay on awards. In which direction does ACCI want to head?

Mr Barklamb—It need not be one or the other. There is a proportion of employers who would enter agreements if provided with proper incentives and capacities. There is a significant, unrealised area of further potential spread of agreement making. There does however remain a set or a subset of employers in Australia, often concentrated in particular

industries, who will continue to work in significant numbers under the award system into the foreseeable future. It is appropriate that there be changes to the award system for both groups both to allow more to move into bargaining and to provide a simpler award system for those who remain and will remain under that award system.

Senator JACINTA COLLINS—I do not see how addressing the award system is going to allow more to move into bargains. If anything, it seems that the complexity of the award system is what is encouraging more to go into bargains. It might have the reverse effect.

Mr Barklamb—I certainly do not question that there are a number of people for whom the complexity and the prescriptiveness of the award system is a rationale for entering into bargaining. But there are others who may wish to enter bargaining for applied and workplace level considerations in particular; the very direct things such as, for example, particular employees wanting to change their start and finish times to collect children from school—the very localised demands for bargaining, particularly in smaller workplaces. Those people will be more likely to be able to acquit those particular forms of agreements if they have a simplified base to move from and if their assessments of the financial to-and-fros for the no disadvantage test are rendered simpler.

Senator MARSHALL—Or lower. It is not really a matter of it being simpler; it is a matter of it being a lesser standard, isn't it?

Mr Barklamb—We would certainly dispute that, having gone through the allowable matters that are proposed to be addressed in particular. Those matters that would be proposed to be deleted or adjusted are either replaced or would spring back to state legislation. As to whether the proposed changes to section 89A(3), where we talk about further indications to the commission, that its awards operate as a minima, I do not know that that would necessarily translate into any particularly lower outcomes.

Senator JACINTA COLLINS—Minimum hours for part-time workers, as one example.

Mr Barklamb—Minimum hours for part-time workers are often a restriction on part-time work in workplaces. That is not a matter which I addressed in particular detail before coming here, but it is an area which may be hindering bargaining in some areas.

Senator JACINTA COLLINS—Accident make-up pay?

Mr Barklamb—You have me at somewhat of a loss. I remember quite an exchange on the allowability of accident make-up pay in the late nineties. I do not recall the outcome of that.

Senator JACINTA COLLINS—The reason that Senator Marshall raises this point is that you say in relation to long service leave that you do not want any cost impost on employers if they revert back to more favourable state based provisions, which I presume is the problem. Yet we could sit here and pick out numerous potential provisions that would add a cost impost or a disadvantage to employees through many of the other areas that you do support being simplified. The test in your submission seems to be that if there is a potential cost to the employer, don't do it; but if there is a potential cost to an employee, that is okay.

Mr Barklamb—We attempted to go through the propositions and look for areas where there were potential losses for employees and were not able to identify those as such. You

have raised two things that I had not put my mind to. I certainly cannot distil those from the direct deletion of line items in 89A(2).

Senator JACINTA COLLINS—Another example would be the one you raised about school based career paths.

Mr Barklamb—That certainly appears to us to be a matter that is best determined by bargaining at the enterprise.

Senator JACINTA COLLINS—But it would still drop some employees down classification levels.

Mr Barklamb—I think the translation of it into particular awards would be a matter for the commission. I do not know that the commission would not, for example, be able to include a savings provision so people did not drop.

Senator JACINTA COLLINS—So you would support the same sort of savings provision for employees that follows on from what you say about long service leave arrangements: that there could be a no-additional cost impost for employers in relation to long service leave and a no disadvantage test for employees for the simplification process?

Mr Barklamb—No, I certainly do not speak with prejudice to any particular industry matter in the wake of these amendments. It may be, however, that the commission was asked to consider a savings provision in relation to someone moving from a skill based career path in an award to a genuinely minimum oriented classification structure. I do not commit myself or any of my members to a particular position in that, but the commission may still be at liberty to make that transition as it sees fit.

Senator JACINTA COLLINS—We need to be clear on this point. For instance, the commission made the decision recently about TCR provisions for small employers. I think I am correct in saying that ACCI is one of those supporting the government and saying that we should legislate over that decision, and yet you are here saying, ‘Oh no, these sorts of matters should be left to the commission.’ You cannot have it both ways.

Mr Barklamb—We will support appropriate measures to redress a decision that we say will render quite unsatisfactory outcomes for small employers. There is a difference in our view, and we think a clear difference, between addressing the consequences of an adverse and inappropriate commission finding and allowing the commission to make an appropriate transition to implement a change of statute by parliament.

Senator JACINTA COLLINS—But, equally, it is available for us to legislate such a matter now rather than let that process occur and then have ACCI or others object to the nature of the commission’s decision and ask us to legislate again later.

Mr Barklamb—Are you speaking in relation particularly to the transition out of something like skill—

Senator JACINTA COLLINS—I am speaking in relation to this issue.

Mr Barklamb—The Senate is at liberty to address this bill as it will.

Senator JACINTA COLLINS—It was the parliament—I think it was probably the Australian Democrats—that created the no disadvantage test in relation to AWAs. That was done through parliament; it was not done through the commission’s processes.

Mr Barklamb—The parliament is sovereign in regard to this bill, whether it wants to consider transitions or empower the commission to consider transitions in relation to allowable matters.

Senator JACINTA COLLINS—Moving into a bit more detail on the skill based career paths issue, in your submission at paragraph 12 you submit:

... the current status of “skill based career paths” as an allowable award matter is not being used to implement changes within enterprises or to foster particular skills development.

On what evidence do you base that assertion?

Mr Barklamb—I think that is probably more correctly assessed as not being widely used. On re-examination, I think that is probably an appropriate clarification.

Senator JACINTA COLLINS—Yes, on the evidence.

Mr Barklamb—Most major awards of the commission, to my understanding, implement or embody minimum rates arrangements in their classification structures through descriptors of particular discrete tasks or responsibilities. It is only a minority of awards that refer to particular skills and skills transitions for progression between levels. There are certainly wide numbers of awards that do not embody those arrangements and operate as genuine minima in regard to their classification structures.

Senator JACINTA COLLINS—But you are arguing here that they are not being used within enterprises or to foster particular skills development.

Mr Barklamb—Yes, to be clear what we say there is that those enterprises that are pursuing detailed employer-employee negotiation and skills development, including with trade unions, are most often giving regard to that through agreement making.

Senator JACINTA COLLINS—Where is the evidence for that as an argument that this should be removed as an allowable matter? There has been, over time, some significant work done in some industries to build up an appropriate skills classification career path structure. You are suggesting here that we should just rip them out of awards with no clear indication of why or what the impact might be. It is almost like saying we have had some progress but it is not widespread; therefore we should rip it out.

Mr Barklamb—The notion of skills development and career pathing we say is correctly oriented towards an industry focus. There is significant work that a number of our members and industry unions do towards industry skill development or an enterprise focus, both of which are matters which could be addressed appropriately in agreements. Building on your query regarding development of skills structures to date, that work need not be lost. It is certainly something that could inform agreement making and be either directly applied through a certified agreement or an AWA or applied with suitable workplace modifications. It does, however, render very complex classification structures under the awards system that can be quite difficult to comprehend for award users and which are inconsistent with, say, awards operating as a safety net.

Senator JACINTA COLLINS—I need to move on to the better bargaining bill, and then Senator Marshall has a couple of questions too. In relation to agreements, what do you say should occur if the parties agree that there can be additional claims during the life of an agreement, or do you not foresee that that should occur at all?

Mr Barklamb—No, I apologise that I cannot get you the reference there, but I have some memory of having addressed this in our submission. If a union, for example, pursued a claim that wanted to reopen an agreement based on changes in the CPI then an employer would need to go into that with open eyes. An employer may well agree to that.

Senator JACINTA COLLINS—Let us say that the parties agree to an agreement and they have decided that there is a handful of matters that they cannot resolve presently but they accept that such matters would need to be resolved during the life of the agreement. Would you say it is acceptable, if both parties enter that agreement with their eyes open, that protected industrial action could occur in relation to those other matters?

Mr Barklamb—If the express will of the parties was that there was a renegotiation process, that certainly is something, as we say, where we would support parties being empowered to reach whichever agreements they will and whichever boundaries they will. I am a little reticent to go the next step to say that that should be protected action, because protected action under the act has very discrete paths, triggers and requirements for entry. I am not sure under the current act whether you actually could do an agreement and expressly reserve a right to further industrial action during the life of the agreement, and I am not sure the system should necessarily empower that, but certainly parties should be able to reach whatever compacts regarding renegotiation they wish.

Senator JACINTA COLLINS—Finally, in your statement at 119 you say:

The Commission will have new tools to assist in dispute settlement, including new capacities to order cooling off and suspension of bargaining periods.

In the course of the building industry inquiry that is also running at the moment we have had some employers suggesting that it would be helpful were the commission re-empowered to be able to conciliate and arbitrate to settle disputes. What is the ACCI's view on that issue?

Mr Barklamb—I am not familiar with the particular submissions that have been put to you in relation to the building industry, but I would say that these are significant new tools. We certainly would not support a widespread movement away from the notion that awards and orders operate as a safety net. We would not support the wide reintroduction in the system of over safety net bargaining. However, we would note that the commission is already empowered to make some arbitration in relation to exceptional matters. So, through exceptional matters orders that the commission can make, there is already a default in the system in regard to bargaining that becomes particularly protracted and threatens various societal outcomes.

Senator JACINTA COLLINS—Yes, but I am essentially asking about extending that power and whether ACCI has a view.

Mr Barklamb—I am not instructed by my colleagues who have dealt with the building industry matters.

Senator MARSHALL—You said in your opening submission that the process of industrial relations reform should be seen as an evolutionary change. You went on to say that awards should be a genuine safety net that only protect the fundamental interests and rights of the parties. Can you explain to me further what you think are the fundamental rights and interests that should be included in awards and how much further you think this evolutionary reform process needs to go?

Mr Barklamb—ACCI policy articulates a number of core minimum standards, and that is a fair way reduced from the allowable matters in section 89A both in its current form and were the Senate to accept these changes in full. Our core minimum standards include minimum rates of pay for an adult; minimum rates of pay for juniors; minimum annual leave, sick leave and parental leave; and some further extensions beyond that. Clearly, that is a long way beyond the propositions at hand. As to what is an appropriate set of allowable award matters at this juncture and as we make the evolution across the next few years, there is a core of things which we say employers and employees in workplaces understand to be the core areas that are regulated—wages, leave, hours and to some extent overtime penalties. There are core things in awards which people understand are the regulated minima in their employment. But there remain other things in awards, other matters of detail and process, that we say need to be re-examined on an ongoing basis. As to where you draw those boundaries in particular awards, it really needs a detailed examination of a particular set of matters. But I think there is clearly a core of things which are understood to reflect the expectations of both employers and employees. There is a core of matters that there is an expectation will be addressed or guided in the regulation at this time.

Senator MARSHALL—Coming back to the question I asked you earlier, if we end up where you want to be, doesn't that lower the bar in the no disadvantage test? If we go to where you want to be with only those four, five, six core conditions—

Mr Barklamb—I apologise; I have not got a copy of my policy in front of me. It seems slightly beyond what I was talking about but it is certainly a much tighter core of propositions than is there at the moment.

Senator MARSHALL—You would have to concede that that is going to lower the no disadvantage test, wouldn't it?

Mr Barklamb—We certainly would not concede that it lowers the no disadvantage test because that is a comparator against whatever the standards are. It would certainly reduce the scope of the regulation, the scope of matters for which minimum standards are set. With regard to the bill at hand, we do not think that these propositions reduce in any way for either party the protection of the legislation.

Senator MARSHALL—Let us talk about better bargaining for a moment. You say that employees will not be disadvantaged in things such as long service leave because it will just be pushed off to the state legislation. What if the state legislation is then changed? That has a direct impact upon the employment conditions of the employee even though that is not governed by the employer. You would agree to that principle?

Mr Barklamb—I would. Long service leave is the proposition in the simplification bill and it is the one we have a reservation about in its current form.

Senator MARSHALL—Let us assume that that goes through. I could use other examples—accident make-up pay, for instance. You transfer the responsibility to the states. If there is then a change at the state level, what do you say about the ability of the employees to meet collectively to talk about that change to their employment conditions, which are not governed now by the employer but governed elsewhere? What would you say about their ability to actually take political action, for instance, to try to effect change to protect their conditions?

Mr Barklamb—Long service leave is a statutory matter.

Senator MARSHALL—Let us not talk about the issue. I am talking about the principle. You say that people ought not to be able to take any form of industrial action during the life of the agreement. You are saying that the responsibility for some employment conditions can be transferred to somebody else who is not the employer. If the ‘somebody else’ changes their employment conditions, what ability does the employee have to pursue that industrially? For instance, if the union or industry calls a meeting during working hours to discuss the impacts of the proposed change, can they attend? Would you say that is industrial action? Would you support people being able to attend those meetings? And then if they determined to protest politically, which you would see as industrial action, would you say that that is appropriate or inappropriate?

Mr Barklamb—Action of that form would be unprotected and would have been unprotected in our system for 10 decades. Its status would not change, as we would understand it, by the creation of a protected action system.

Senator MARSHALL—The point you were making is that once we enter into an agreement, good faith should prevail and an agreement is an agreement. What you are saying also is that some of the things should not be in agreements; we should push them off to other parties to regulate. We then have no control over that. In the sense that they are breaching your principle of fairness in entering the agreement, they are not. But reading your submission, you also wish to restrict their ability to pursue their legitimate rights that you have transferred elsewhere.

Mr Barklamb—Let me address that. Any party to an agreement, in its negotiations, is considering how comprehensively it wishes to address the employment relationship. Long service leave for by far the majority of employees is regulated by state legislation, even where there is a federal award. Most federal awards are either silent or simply call up state legislation. It may be, for example, in the clothing trades area, which is clearly federal award regulated, that the award is silent on long service leave and always has been. If a union had a clear apprehension that the state government was looking at reducing long service leave it would be for that union to decide whether it wanted to separately address long service leave in any agreement with that employer.

Senator MARSHALL—How would you do that five years out?

Mr Barklamb—That is a particular—

Senator MARSHALL—Can you tell me what state government might be in power in each state in five years and what they will think about industrial relations?

Mr Barklamb—I certainly cannot.

Senator MARSHALL—Can you tell me what interest rates will be in five years?

Mr Barklamb—I certainly cannot.

Senator MARSHALL—Can you tell me what the CPI will be in five years?

Mr Barklamb—No.

Senator MARSHALL—Can you tell me what university fees will be in five years?

Mr Barklamb—I do not want to interrupt you, but I certainly can create a clause that—

Senator MARSHALL—The proposition that you are putting to me is that people ought to be able to determine what they want to do and pre-empt that.

CHAIR—Order! Senator, would you please let the witness answer a question before you ask the next one.

Mr Barklamb—Thank you, Chair. I apologise, Senator. I am trying to get to your answer. I certainly could construct a clause that would account for changes in CPI in a five-year agreement and protect my employees if I were a union. But having said that, to come back to the core of your question as I understood it, an employee wanting to counteract a state change to, for example, long service leave or jury service—they are the two principal items that are there—would have the same political rights of protest and of representation that they have always had. That said, the way we would see it after these changes is that it would be as illegal to leave one's workplace as it would have been in 1944, 1964 and 1974. So it does not render any additional illegality; it simply removes the prospect of protected action from that.

But it is also worth considering what protected action would mean. We would find it very hard to believe that unions would notify widespread bargaining periods with employers in relation to, for example, a politicised and state statutory change to long service leave. In practice, we would find it hard to believe that unions would initiate bargaining notices to even attempt to lawfully empower people en masse to attend a public rally.

CHAIR—Thank you very much for appearing.

[10.07 a.m.]

BURROW, Ms Sharan Lesley, President, Australian Council of Trade Unions

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

CHAIR—Welcome. The committee has before it submission No. 1. Are there any changes you wish to make?

Ms Burrow—No.

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

Ms Burrow—I will make a very brief opening statement and then ask Ms Rubinstein to make a few comments as well. These are very serious bills, and it is very disappointing to see them in large part back again before the Senate, because they really represent another round of attacks on the wages and working conditions of working Australians. As a whole, the four bills seek to weaken the wages and working conditions of award-dependent workers; initiate another resource intensive and negative round of award stripping; deny federal award coverage to a greater proportion of employees; further restrict the ability of unions and their members to take lawful industrial action in support of their collective bargaining, such as the rights they currently have; further restrict the matters about which employers and employees can bargain; and facilitate the operation of AWAs with a view to weakening employee protections as well as facilitating non-union agreements.

When you look at the bills individually, you see that they actually amount to what we have termed an ‘uncivilised attack’ on employee entitlements. If you start with another round of award simplification, I think you will find today that even large sections of the employer community understand that this has gone far enough. To strip away further award entitlements at the level of the minimum safety net, which is the space that awards now occupy, would be simply to create further discontent, further disruption and potentially greater industrial relations disputation.

When you actually look at what the government would seek to take away, it is pretty shocking, really. They seek to take away the right to a reimbursement of transport costs for people who are required to work late at night—that is about safety. At its very core it is about personal safety in a world that is increasingly unsafe. Why a government would want to weaken the rights of vulnerable people to that level of personal safety I have no idea. When you add up all the leave that might be stripped away—paid leave to undertake training courses, personal emergency leave, long-established public holiday entitlements, allowances for employees required to launder uniforms at home and long service leave rights—it is a significant loss of entitlements. Some of them are petty, some of them are dangerous in terms of safety and some of them are serious in terms of long-established entitlements. The senators were just discussing the issue that is dear to my heart: the right to leave for training. Taking that away would actually put at risk the skills base of Australia, which is already incredibly

vulnerable. Again, if you looked at the Ai Group's media statements this morning, like us they see that—and responsibly so—the commitment to skills and skilling, and the standards associated with that with regard to capacity for workers to access appropriate training, are critical.

If you then go to the question of collective bargaining rights, we already sit at odds with international standards as the only country in the Western world that does not have an absolute right to collective bargaining. I noticed our employer colleague just stated that it is a proposal for a greater set of tools for the commission. That set of tools would, in fact, effectively deny working Australians the right to strike. While it affects all Australians, we are incredibly intrigued that the minister in particular seems to have a vendetta against teachers and nurses, two very important professions. Having said that, of course, the fact that third parties could claim injury and therefore have entitlements for working people to protected action stripped away from them clearly reduces the capacity for collective bargaining in an environment where already good faith bargaining simply does not exist—and the government continues to oppose it when put up by the Democrats, Labor and the Greens as amendments to this act.

Very quickly I will refer to the question of Emwest. I can tell you, as someone who negotiates numbers of settlements, that it is a shocking thing when a government would not only seek to not agree to bargaining in good faith but leave the door wide open for matters to come onto the table between bargaining periods that are serious, that go to the heart of employee relationships and wages and conditions and that leave workers without any power to oppose those with regard to protected actions where they have not been part of any bargaining agreement. Of course I do not need to go in any detail to the question of the weakening of the framework or the context around the awarding of AWAs. To allow agreements not even tested to contain greater exploitation provisions for working people is, I think, a shocking indictment of a government which, clearly, is simply now saying that, whatever the issue, it does not stand for the rights of working people. The government is simply about shifting the entire basis of power to the employer. It is not what a fair Australia should be about.

I would say to the senators: as law-makers, think about your children and your grandchildren and what set of laws you will leave so that as working people they will have a set of expectations to a fair set of rights and a decent society. These do not reflect those standards. They are, therefore, at best a further attack—and a serious attack—on the basic rights of working people. We would ask you to reject them wholeheartedly. Ms Rubinstein always has a much greater grasp of the technical detail than me, so I would ask her to make some statements.

Ms Rubinstein—I would like to make four quick points—one, as it happens, about each of the bills. We cannot stress enough how important the process element of the award simplification bill is. The fact is, although most awards have been simplified, that has taken a process of seven years and it is really very difficult to point to any substantial gain—whether to employers or to employees—that has come from this. It must have one of the highest transaction costs of any similar process that we have seen. A new award simplification process would simply drag employer organisations and unions into a kind of make-work

scheme in which every wage rate and every award provision would have to be examined in the context of not only whether or not it was allowable but whether it met the new criterion of only basic minimum entitlements being in awards—whatever that means.

On the better bargaining bill, I would like to make the point that I believe it is directed entirely to protected action and to limiting the ability—in some cases on quite technical grounds, such as whether or not a claim is within the jurisdiction of the act—in order to make it difficult if not impossible for unions to take protected industrial action. I would urge you to look at that proposal in the context of the award simplification process—that is, awards will contain less and less and lower and inferior conditions. It will not be possible to replace those with agreements in many cases because, unless employers voluntarily do that—and only some will—unions will in effect have their hands tied behind their backs. The tools that have been referred to are probably not much more than a couple of bits of string for the aforementioned tying up. Certainly the commission will have no additional tools to ensure that employees have access to fair and relevant conditions of employment.

On the choice of award coverage bill, in our submission we have made the point that the circumstances which initially gave rise to this proposal—that is, the SDA log of claims served primarily in Victoria, and I see that it still gets an honourable mention in the department's submission—have largely been dealt with. I would like to make an additional point to that made in the submission: it is not just current award free or state covered employers who could continue to be excluded from the federal system. It is normal every few years—as awards expire, as conditions become outdated and as new conditions become normal—for unions to serve new logs of claims on existing award respondents in order to make new awards. This would bear very heavily on that process so that the effect over time would be a decline in federal award coverage and therefore, of course, an increase in state award coverage—and in many cases in common rule awards—that would in itself operate against the desire for consistency and a strong federal system. Oddly enough, should the common rule award system in Victoria go as expected, this would presumably have least effect in Victoria.

Finally, on the bill concerning agreement making, the proposals in relation to certified agreements are directed solely at encouraging non-union agreements. The proposal to extend the period of operation to five years was proposed, I believe, initially by the miners association to extend non-union agreements for that period of time across almost two political cycles in fact. It is not an issue of transaction costs or of allowing the parties to agree because if the parties do agree to continue the operation of an existing agreement, they can do that. Nobody needs to do anything and the agreement will continue in operation for as long as the parties want it to. So this can only have a practical effect where there is no such agreement. That concludes what I would like to say.

Senator MARSHALL—ACCI in their submission this morning indicated that the simplification process would actually encourage more agreement making as a result. I found it difficult to understand their argument. Could you explain to us why, in your experience, employers opt for award coverage as opposed to negotiating enterprise agreements and whether or not the simplification process will actually drive more bargaining or in fact reduce it?

Ms Rubinstein—I think it will reduce bargaining. The point about bargaining is that there has to be something in it for both sides. If awards are at a pitiful level and employers can employ at those rates, why would they bargain? The point of bargaining is to try and get a win-win situation, changes that benefit both sides. If one side sees no possible benefit in change because everything they want they are allowed to do then there will not be any incentive to bargain. That is clear. The employers who choose to be covered by the award system are, by and large, in my view, small employers who either do not want to bargain—and this can actually apply to larger employers as well; for example, major hotels, where labour costs are a reasonably high component in a competitive industry—or do not want to have to compete on the basis of what they pay their employees. By opting for award coverage they know that they are all on a level playing field as far as that is concerned and they have to compete on service, quality, price and so on.

Ms Burrow—But there is the additional factor that, if you look at award-dependent industries, they essentially involve the lower paid and the most vulnerable workers. So the argument by the employers does not make sense. If you are going to strip away rights from predominantly award workers where they are most heavily concentrated—in accommodation, cafes and restaurants, the retail trade, health and community services—not only are they likely to be more lowly paid workers but also probably mostly female in terms of the work force. If we are talking about those industries with more bargaining power, of course if there were a further round of award stripping there would be an attempt by those unions to put those very provisions into enterprise agreements. That has been the nature of the first round of award stripping. However, that would cause increased disputation given the absolute acknowledgment of that by another group of employers, the Ai Group, this morning. ACCI's submission, at one level, is just nonsensical, frankly.

Senator MARSHALL—How do you see it impacting upon AWAs? I made the point earlier—and I do not think ACCI addressed my concerns completely—about lowering the benchmark without disadvantage. Given the so-called choice that employees have about whether to go into an AWA or not, if the benchmark has been lowered again, won't an inevitable impact be that employers will be able to put forward a 'take it or leave it' situation with a reduced level of pay and conditions in AWAs? So we will see an increase in AWAs with even lower rates than now.

Ms Burrow—Of course. The reality for AWAs at the moment is that, where they are used, they are largely exploitative. You still have a situation where all of the power resides with the employer. 'Sign here or you don't get the job' is the reality for new entrants in the very small number—I might add—of situations where AWAs have been taken up. It is still an exploitative arrangement, and you are absolutely right: this would make it more so.

Senator MARSHALL—Does the taking of protected industrial action increase the bargaining power of the negotiating parties?

Ms Rubinstein—That is probably not a simple question. Sometimes it will and sometimes it will not. In some circumstances when workers go on strike after a period of time and they are not receiving an income, their bargaining power starts to decline. It all depends on the effect on the employer and the effect on the workers. We would say that the ability to take

industrial action is a critical corollary to the right to bargain collectively, but in a particular case it will depend on the nature of that particular employer and the work force.

Ms Burrow—It is about balance. Again, this bill makes no sense to me when the ABS statistics this week show that we have the lowest number of working days lost due to industrial disputes in about seven or eight years. Unless you were absolutely opposed to working people having the fundamental right as a balance of power piece to withdraw their labour or take protected action, why would you introduce this bill at this time? It is not logical unless it is about stripping away workers' rights, and we know that is the case.

Senator MARSHALL—Is it true to say that unions and employees take industrial action on the whole?

Ms Rubinstein—It depends on what you call 'industrial action'. In terms of going on strike versus locking out employees, overwhelmingly, although not entirely, industrial action is taken by unions and their members. On the other hand, if you look at the definition of industrial action in section 4 of the act, you will see that employers have a number of ways of altering conditions of work—for example, the way in which overtime is allocated, the way in which rostering is done, staffing levels and other things. In our view, that can be and ought to be classed as industrial action. We regret that the commission seems to have taken a relatively narrow view of employer industrial action when unions have sought section 127 orders in relation to that, although a small number have been made. I think it is probably fair to say that most of what we understand as industrial action is taken by unions, because employers have available to them the prerogative rights that go with being an employer. They do not need to lock out employees; they can make changes that achieve what they wish in many cases.

Senator MARSHALL—Do you accept that almost all, if not all, industrial action impacts upon a third party?

Ms Burrow—Unquestionably, somebody will feel aggrieved—whether it is a parent of a child who feels they should keep their children at home or make care arrangements, whether it is the business down the road who might cater to the workers who are on strike for that particular period. You cannot have an industrial relations system which, by dint of design by the government, is an adversarial system based on a balance of power being struck by protected action rights in a bargaining environment where you do not have a commitment to good faith bargaining or a test around good faith bargaining and where there is access for third parties to say, 'Excuse me, we don't like this because we are being impacted.' Otherwise you simply diminish again the rights of the employees and their representatives. The Orwellian language of the better bargaining bill is simply about reducing the power of employees, full stop. It is a shocking thing to see that, taken as a whole, these bills are about shifting further the balance of power to the employer.

Senator MARSHALL—Would you say that third parties can be used to actually frustrate the bargaining process?

Ms Burrow—Absolutely.

Ms Rubinstein—There is no question about that. The law has this notion of 'busybodies'—people who intervene in legal proceedings when they do not have a legitimate interest. That is why we have the notion of standing. Although the bill would require some

degree of damage to be caused to this third party, there is nothing to stop a range of so-called third parties instituting these proceedings and tying people up in litigation in order to make the position more confusing. It is also, as Ms Burrow said, something of the nature of the beast. It would be difficult, although not impossible, to find industrial disputes which, however indirectly, do cause some damage to third parties. The example we used to use was when we had bus conductors and tram conductors and they did not collect the fares. Who was hurt by that? The government in a sense was hurt by that, and even with privatisation it still would be; so taxpayers would be a third party in that way. There is always going to be somebody who is affected—for instance, because they are getting their delivery of widgets late or whatever it might be—but it is a question of balancing rights. What this does is give absolute rights to employers and to third parties and, when you look at the whole deal, minimal rights to first parties—unions and their members.

Senator MARSHALL—The example that jumps out at me is the vehicle industry, where we have seen legitimate industrial action. Because of the supply chains that those industries now use, that can have fairly quick consequences for a major employer which has substantial resources. I am interested in your view. My view is that it would really make bargaining in the auto parts supply industry, for instance, just about unworkable, given that you have major employers that are going to be affected because of the way they have set their businesses up.

Ms Rubinstein—Other components manufacturers get involved as well. It not only damages employers; it damages employees as well, who would be stood down by those major companies. So there are real issues involved in that. In our submission I think we refer to the discussion that we had with the Productivity Commission about bargaining in the automotive industry. It seems ludicrous to have just in time supply chains where everything is dependent on certainty of supply, but not have a bargaining system that caters to that by having coordinated, predictable and certain bargaining that includes the whole industry, so that the whole industry can then know where it is for the next three years.

Senator MARSHALL—Or five years, as the case may be.

Ms Rubinstein—That is what is so ludicrous: that we have such a fragmented bargaining system in an industry that lives by coordination.

Senator MARSHALL—Potentially, there could be 1,000 different suppliers with agreements expiring on a different date over a five-year period, which does not seem to make much sense to me.

Ms Rubinstein—It makes no sense at all. The Manufacturing Workers Union campaigns which have focused on common expiry dates have in fact been helpful in that way, in that we have not seen these disputes go right through the process—you have two or three of them at the bargaining stage but then you have relative peace and quiet for the next three years. That is not what the government wants. The government wants these agreements to keep expiring at different times so that you will have these problems. It would seem much better, in that industry in particular, to have a sector-wide bargaining system.

Ms Burrow—It goes to the heart of an interventionist government that is not about introducing constructive, consensual, good-faith bargaining practices designed to meet the needs of industries. It is about disruption and it is about denying people's rights and creating

chaos in an adversarial system, which is not one that we endorse. It is hard for us to understand why employers continue to endorse what are disruptive and ultimately unhelpful industrial relations frameworks around bargaining just because this government happens to have a view that we ought not have a system where people have a balanced set of rights between employers and employees. It is a disgrace, really, in an otherwise civilised nation.

Senator MARSHALL—I would like to move to the choice in award coverage. There are obviously some costs associated with roping employers into awards at the moment. Would the costs be increased as a result of the additional technical requirements proposed in the bill?

Ms Rubinstein—Yes, they would be increased in a number of ways, particularly in the proposal that if a claim is found to be outside the jurisdiction the entire process must be commenced again, rather than the current practice whereby that claim is severed, if you like, from the dispute. So, when the commission makes a dispute finding, those claims that are outside a jurisdiction are not included in that dispute finding and, therefore, cannot form a subject matter in the award. That is one significant way.

There is also the proposal to dispense with what is called ‘substituted service’, in which it is not a requirement to directly inform each proposed respondent to the award of the date and time of hearing. It should be remembered that each of those employers will have been notified of the claim and that the union will be notifying the commission, and it is proposed that some explanatory material might be included with that, which is not an issue. But there seems to be no reason why in appropriate circumstances as determined by the commission—and they will not do this in every case—a process of notifying employer organisations by advertising in newspapers and so on would not be sufficient.

Senator MARSHALL—In relation to simplifying agreement making, would you explain to us some of the benefits of having public hearings in respect of the certification of agreements.

Ms Rubinstein—There is clearly a benefit when there is a great deal of interest in the matter, because people can see the process by which it is dealt with. Those with an interest can hear the questions that the commission member is asking, and it is also an opportunity for those who may be opposed to the agreement or who may have concerns about it to raise those concerns. The question of whether routine agreements, where there is no opposition and no issue of intervention and so on, could be dealt with on the papers, so to speak, is not so big. The concern would be that this would be used in such a way as to reduce the ability of those who desire to intervene in the proceedings or who oppose the certification of the agreement to put their positions.

If you take the bill and those proposals as a whole, they are clearly designed to facilitate the process of non-union agreements and reduce union intervention in agreement making and the certification process. That is a problem because, although in some cases the commission is very diligent in searching out flaws in the agreement or examples of where the act has not been complied with, in some cases, without knowledge of the process, it is not possible for the commission to know that. In some cases issues will only arise as a result of them being brought to the commission’s attention by unions.

Ms Burrow—It is just about transparency and fair practice. That is what Linda has said. It goes to the heart of whether you have a right to a genuine stake in the process to be represented by a union who can actually uphold your interests or whether you have a process that is increasingly secret and designed to take away people's rights to appropriate representation in bargaining. If you come down on the side of fair practice and the international labour standards that guarantee the right to collective bargaining then you have to have an open system.

Senator JACINTA COLLINS—I have a question about what is in your submission in relation to the choice and award coverage issue and union membership. Do you see any broader concerns with respect to the notion of linking federal award coverage to union membership?

Ms Rubinstein—Clearly it is an attempt to overturn the basis of the conciliation and arbitration system and the award system. Awards are not statutory instruments per se. They represent the settlement of disputes between unions and employers or organisations of employers.

Senator JACINTA COLLINS—Unions have standing not by virtue of the fact that they have members but by virtue of the fact that they have potential members—is that correct?

Ms Rubinstein—That is exactly right. The logic is that unions have an interest not only in the wages and conditions of their members but also in ensuring potential members will have access to decent wages and conditions and, just as importantly, in ensuring that the same obligations attach to nonmembers. Clearly it is against the interests of the unions if nonmembers can be employed more cheaply than members because that of course increases the incentive for employers to not employ union members.

We can see how this operates in the United States where there is a crusade in some states to keep them union free—I think they call it 'right to work'—in order to maintain a competitive advantage based on non-union membership. In Australia we have a significant wages gap between union members and nonmembers but that is more because nonmembers tend to work in low-paid industries and tend to not have access to bargaining, rather than what you would have in the United States, which is people in similar industries or even the same industry next door receiving different rates of pay.

Senator JACINTA COLLINS—Clause 101B(3)(b) of the bill looks at providing the exemption for employers with less than 20 employees unless the commission is satisfied that the employer employs a member of that organisation. We had a representative from ACCI earlier talking about employers who do not employ anyone who is a member of the union. I meant to ask this at the time but forgot. How would they necessarily know?

Ms Rubinstein—Some of the explanatory material relating to the bill provides some sort of process. The idea is that the employer sends in a note to the commission that says, 'I have fewer than 20 employees and I don't employ a union member.' The union is given that information. It is then up to the union to disprove the employer's assertion. That means that the union has to go out there and if they have a member they can presumably look this up. There would be real problems with that because we are talking about a small business and even though the identity of that union member would not be given to the employer you would

not have to be too bright to figure it out in a small business. Clearly, there would be a problem with that. The other problem is that the unions would be encouraged to go down to the employer, count employees, check that they are casuals and do all of these kinds of things, all of which seem to be tying people up in time wasting activity—talking about transaction costs yet again.

Senator JACINTA COLLINS—So as you understand it from some of the explanatory material there is a protection of someone's confidentiality if they are a union member although, as you say, it might not be too difficult to work out.

Ms Rubinstein—Without being able to point you to it, I think that goes without saying. It is the normal process under the act that where there are issues about union membership it can be kept confidential. For example, where a member asks the union to represent them it can be kept confidential but in a small business that is a joke.

Ms Burrow—What you are saying is that there are two tiers of rights and I think that is a fundamental debate in and of itself, given the tradition of our arbitration and conciliation system. It is not a principle that we would support or employ when we believe all working people should have equal rights, whether they are in small business or large business, and whether they are union members or non-union members.

CHAIR—I thank the witnesses for appearing.

Proceedings suspended from 10.46 a.m. to 11.02 a.m.

SMITH, Mr Stephen Thomas, Director, National Industrial Relations, Australian Industry Group

CHAIR—I welcome Mr Stephen Smith, a representative from the Australian Industry Group. The committee has before it submissions Nos 8A and 8B. Are there any changes you wish to make?

Mr Smith—No.

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

Mr Smith—Thank you. The Ai Group welcome the referral of these four bills to the Senate committee and the opportunity to make submissions on the bills. We support the objectives of all four of the bills but we have proposed some amendments to some of them. In my opening comments I would like to focus on the Workplace Relations Amendment (Better Bargaining) Bill 2003, which is a particularly important bill that needs to be passed without delay. However, our focus on this bill should not be taken to mean that we do not regard the other bills as being important. The central component of any effective enterprise bargaining system is that, during the life of an enterprise agreement, there should be a period of industrial peace. This principle needs to be re-enshrined within the Workplace Relations Act, given the Federal Court's Emwest decision, which has interpreted section 170MN of the act in a way that we believe was clearly not intended by parliament.

The Federal Court's Emwest decision threatens the integrity of Australia's enterprise bargaining system and exposes companies to claims being pursued during the life of their enterprise agreement. This decision has created an unworkable bargaining regime and ongoing risks for employers. Firstly, there is the risk that a union will take protected industrial action during the life of an agreement over claims which were dropped as part of the enterprise bargain that was reached. Secondly, there is the risk that a union will take protected industrial action during the life of an agreement over new claims which were not pursued at the time the enterprise agreement was reached. Thirdly, there is the risk that a dispute will arise in a workplace during the life of an agreement over an issue which was not dealt with during the enterprise negotiations and a union will organise protected industrial action to further its position in that dispute. The bill addresses the problems caused by the Emwest decision in an appropriate way.

A second important component of an effective bargaining regime is that protected action should only be available for the pursuit of claims which pertain to the employment relationship. In its Electrolux decision, the full Federal Court extended union rights to take industrial action to matters which extend beyond the employment relationship. If the decision stands, unions may be able to organise protected industrial action in respect of a wide range of political and social causes. This would not be consistent with the objects of the Workplace Relations Act. The bill addresses the problems caused by the Electrolux decision in an appropriate way. The Cole royal commission recognised the problems caused by the Federal

Court's Emwest and Electrolux decisions and recommended that the problems be addressed through legislative amendments. The bill would make those amendments.

A third essential component of an effective enterprise bargaining system is that mechanisms should be available, firstly, to assist negotiating parties to reach agreement and, secondly, to prevent significant harm being inflicted upon non-negotiating parties. The bill would enable the commission to establish a cooling-off period during protracted industrial disputes. This is sensible, fair and in the public interest. The Workplace Relations Act enshrines a scheme whereby negotiating parties are entitled to inflict some harm upon each other within certain boundaries in pursuit of their bargaining claims. However, such actions should not be able to inflict significant harm upon third parties without those third parties having access to a mechanism to argue for relief. The bill would provide that mechanism.

During a protracted industrial dispute, industrial action taking place at a workplace could lead to, firstly, employees at other workplaces being stood down for lengthy periods and suffering extreme hardship and, secondly, other businesses not receiving critical supplies and therefore suffering significant damage and loss of contracts. The bill would not allow the commission to intervene in all circumstances where harm was inflicted upon third parties but would allow it to intervene where significant harm was inflicted upon such parties. This approach is appropriate and in the public interest.

A fourth element of an effective enterprise bargaining regime is that protected action should only be available where it is pursued at the enterprise level, not where industrial action is taken in a concerted manner across many enterprises. During the unions' Campaign 2000 and Campaign 2003 in the manufacturing industry and in various construction industry matters, companies were faced with industry-wide strikes, which were purportedly organised in pursuit of enterprise agreements. Hundreds of bargaining periods were established at a common time and hundreds of identical section 170MO protected action notices were forwarded to employers advising of a strike on the same date. The strike, in turn, was in pursuit of common claims in each workplace. Section 170MM and section 170ML of the act need to be amended in the manner proposed in the bill to protect the community from these damaging union tactics and to ensure that the objects of the Workplace Relations Act are achieved. The legislative amendments proposed in the bill will be highly important in 2006, when thousands of manufacturing and construction industry agreements will expire at a common time.

In summary, we believe that the better bargaining bill has great merit. The provisions of the bill are fair and balanced. We urge all senators to support its passage through the parliament without delay. We have only had time to focus on the better bargaining bill in our opening comments but, as I have said, this does not mean that we do not regard the other bills as important. Our position on all four of the bills is set out in our written submissions.

CHAIR—On the better bargaining bill, you say 'without delay'. You are obviously sensing an urgency here. What is occurring out in the economy that means that this must happen without delay in your view?

Mr Smith—We regard all of the elements of this bill as very important. As I said, the Emwest decision and the Electrolux decision have created a situation where there is

significant risk for employers. That risk might be manifested in significant losses to employers at any time because of the problems that have been caused. We are in an environment where there is intense international competition. Manufacturers, for example, are dealing with an exchange rate that has appreciated very quickly. There is an ongoing need for efficiency improvements and productivity improvements, and companies cannot afford unnecessary disruption. This is not a one-sided bill; it is a very balanced bill. The cooling-off period is a very practical proposal and a very modest proposal, as all of the provisions of the bill are.

CHAIR—You mentioned that, because of the exchange rate, not getting the product out on time can be a risk. What other risks are there to the economy if this bill does not go through quickly?

Mr Smith—There potentially would be negative employment effects. This is a bill that furthers the interests of people remaining at work rather than industrial action being taken in an unnecessary environment. There are general economic risks that will arise, we believe, if this legislation is not supported. There are times during bargaining cycles and so on where there are more agreements coming up for renegotiation than at other times. The measures in this bill are important at those times, but they are very important now, and we are seeking that all political parties allow it to be passed without delay.

CHAIR—Are there any particular industries that are at risk, do you feel, if this particular bill does not go through quickly?

Mr Smith—The two industries that we have focused on most heavily in our submissions are the manufacturing sector and the construction sector. In those industries the unions are misusing the enterprise bargaining system to try to extend to industry bargaining the right to take industrial action that is in the act for enterprise bargaining purposes. Those particular sectors would be far more protected through the provisions of this bill. We are talking about employers and employees in those industries. It should not be overlooked that industrial disruption has a very significant impact on employees.

CHAIR—On page 6 of your submission you extol the virtues of award rationalisation. Could you expand on that a little further for the *Hansard* record? What would be the benefits of further award rationalisation?

Mr Smith—The point we were making is that we do support the idea of awards continuing to focus more on issues that should not be dealt with at the enterprise level. There has been little focus to date on award rationalisation. It has been on the simplification of the content of awards. Most industry awards in their coverage relate to the rules of unions that have long since amalgamated. If we take the areas, for example, covered by a union like the Australian Manufacturing Workers Union, we have the vehicle industry award that was the award that applied to the vehicle builders, we have the metal industry award, we have the graphic arts award, we have the food preservers award, we have the confectionery workers award and we have the drafting and technical officers award. All of those various unions merged into the AMWU but we still have half-a-dozen industry awards. The simplification process has led to their being less differences between them. We are saying that there are still 2,200 federal awards and there needs to be a focus on reducing the number of awards.

Senator JACINTA COLLINS—Your submission argues that the better bargaining bill has substantial merit but it does not address a number of the issues that have been raised in the ACTU submission, for instance. The ACTU points out that the suspension of bargaining periods where industrial action is threatening to cause, as you stressed before, significant harm to third parties has the potential to apply to a large proportion of industrial action, because harm to third parties is in the very nature of industrial action. What is your response to that concern? How would you see ‘significant’ being given a working definition by the commission?

Mr Smith—It does of course revolve around the word ‘significant’ and that is where the balance comes in. I heard the comments of the ACTU about the issue of people being stood down. That is exactly what we are getting at by saying that we support this bill not only because of the impact on employers but also because of the impact on employees. Why should an employee in another workplace lose their car, lose their house or lose their livelihood because of industrial action being taken by employees in another workplace?

There is little that can be done under the existing provisions of the act unless the hurdles in section 170MW(3) are met. There are two legs to that: one deals with significant damage to the economy, or an important part of it; the other deals with significant harm to the population, or part of it. If it is a group of employees, for example, in an automotive component company who are stood down because of a dispute at another automotive component company, why should those employees have no rights to pursue some relief to restore their livelihoods? The word ‘significant’ in the context of section 170MW(3) has been interpreted by the High Court, and a similar interpretation would probably apply with these proposals. The High Court has said that it cannot just be some vague view that a commissioner has; there has to be evidence there for the commission to base its decision on.

Senator JACINTA COLLINS—You cannot give us any further example of how ‘significant’ would be regarded from that High Court decision? What did it relate to?

Mr Smith—That was a construction industry matter. But if you take the campaign that the metal unions pursued last year, Campaign 2003, I would estimate that Ai Group was involved in eight applications to the commission to suspend or terminate bargaining periods based on significant damage to the economy, mainly related to the auto sector. The word ‘significant’ is interpreted by the commission in that context.

Senator JACINTA COLLINS—But this is a different context.

Mr Smith—It is a different context, but the presence of the word ‘significant’ gives a very different meaning than would apply were it not there. It is not just ‘harm’; it is ‘significant harm’.

Senator JACINTA COLLINS—But there is a difference between assessing what ‘significant’ would mean with respect to the economy in general, as opposed to the proposed section 170MWC which talks about, for instance, ‘the extent to which the action threatens to ... cause other economic loss to the person’. Those are vastly different concepts.

Mr Smith—Yes, but it does talk about ‘the extent to which’. It is very hard to put a precise definition on the word ‘significant’, and the bill allows the Industrial Relations Commission to assess the situation and to make that decision. We think that is appropriate.

Senator JACINTA COLLINS—Senator Tierney was asking you questions about your comments that this should be proceeded with without delay. You were referring to a current industrial campaign. I was just saying to Senator Marshall that I remember that the world was going to end with Campaign 2000, and that did not happen, nor indeed with 2002 and now 2003. How should we regard these concerns about an industrial campaign as other than an attempt to readjust the bargaining framework so that employer organisations are in a more advantageous position?

Mr Smith—As I said, the bill deals with about six issues. The changes proposed, contrary to the ACTU's assertions, are not sweeping changes. They address problems within the existing bargaining framework—issues that have arisen like the Emwest and Electrolux decisions, which have put unusual interpretations on the existing legislative provisions. We believe that this would be a very positive series of changes for employers and employees and it would put more emphasis on the existing objects of the Workplace Relations Act, given some of the bargaining developments, particularly the ongoing attempts by unions in manufacturing and construction to misuse the enterprise bargaining framework in relation to industrial action.

Senator JACINTA COLLINS—Would you say 'misuse' or 'used to its full capacity'?

Mr Smith—I would definitely say 'misuse' because, when the ALP was in power, protected action was incorporated within the Industrial Relations Act, as it was called at the time. As we understood that legislation and as we understand the changes that were made to bring the Workplace Relations Act into force, the right to take industrial action is a right that exists around enterprise bargaining. You can have a multiple business agreement under the Workplace Relations Act but there is no right to take industrial action in pursuit of that agreement. This is an attempt to have a big industry-wide campaign about common claims and a national or statewide stoppage in pursuit of those claims. A thousand or more identical bargaining notices go out and a thousand or more identical notices of industrial action go out. That is not enterprise bargaining; that is industry bargaining disguised as enterprise bargaining.

Senator JACINTA COLLINS—I am not sure of the extent to which you could argue that, back when protected action was brought in or introduced, the pattern bargaining concept was particularly canvassed.

Mr Smith—It was not. Pattern bargaining, it appears, was invented by the construction unions largely. The manufacturing unions adopted it after that. It is a highly damaging thing. One of the best descriptions of how damaging it is is in the final report of Commissioner Cole, in which he analyses in great detail pattern bargaining and all the arguments for and against it. He concludes how damaging it is and that very strong steps need to be taken to outlaw it. This particular bill does not deal with all of the problems but it contains a number of propositions that would give more protection for employers and employees against the negative effects of that sort of bargaining.

Senator MARSHALL—You talk about the construction industry but didn't that evolve as a natural step from paid rates awards that covered that industry? What you are talking about is nothing new. It is a continuation of the award structure that had been there.

Mr Smith—If that is correct then it is inconsistent, we believe, with the Workplace Relations Act. That was a different time under a totally different piece of legislation.

Senator MARSHALL—The legislation created the need to bargain on top of paid rates awards because you could not move paid rates awards after the legislation. I just want to make the distinction because you say that it was invented and it became incredibly damaging. I put to you that it was not invented but was a natural extension of the act because paid rates awards would not move and it had been there for many decades prior to that process. It is not something new. I cannot see where the damage has actually come from.

Mr Smith—The thing that is new about it is that unions have assumed they have a right to take lawful industrial action in pursuit of these claims. That did not apply under the paid rates award scenario. You have only to go back to late 1999 and early 2000 to see the damage caused in the Victorian building industry. It was a situation in which the construction unions dreamt up a long list of highly damaging claims, such as an 18 per cent wage increase, a 36-hour week and a raft of huge increases in allowances, and forced companies to agree to those claims. They managed to get one of the major builders to concede, and that flowed to other major builders and it went right through the industry. The industry lost many millions of dollars, and that highlights how damaging that sort of process is. We do not believe it is enterprise bargaining when an industry is pulled out with industry-wide industrial action in pursuit of common claims. That is the misuse of enterprise bargaining.

Senator MARSHALL—You are relying on Cole to pursue your avenue, but I put it to you that the findings of the Cole commission have been fairly comprehensively discredited, and I am hoping that you are actually basing your position on something other than what Cole said.

Mr Smith—We made three general submissions to the Cole royal commission. We have made two major submissions since the final report has been handed down plus we made submissions on all 18 of the discussion papers. So a lot of the material about pattern bargaining and its negative effects was based on arguments that the Ai Group had pursued very vigorously during the course of the royal commission. We do not agree that the findings of the Cole royal commission have been discredited—absolutely not. We remain hopeful that that bill with the amendments we have proposed will be passed at the earliest possible time.

Senator MARSHALL—I think you are one of the few who still believes that. In your submission you also talk about the ongoing need for companies to introduce efficiency and productivity measures during the life of an agreement, and I think you refer to that generally as ‘continuous improvement’.

Mr Smith—Yes, we do support continuous improvement.

Senator MARSHALL—Should employers be able to change any conditions or terms of employment throughout the life of an agreement, under the guise of productivity and efficiency?

Mr Smith—Companies make many changes on an ongoing basis. There is an ongoing need to change their quality systems or the ways in which they do business.

Senator MARSHALL—I specifically asked about things that might relate to conditions and terms of employment. For instance, if an employer wanted to change a shift pattern, that

would have an impact on the hours of work and sometimes on the allowances paid and the quantum of allowances paid. Should employers be able to do that during the life of an agreement?

Mr Smith—Yes, within the constraints set out under the agreement as read with the relevant award.

Senator MARSHALL—What if the agreement does not talk about those matters? I want to bring you to a point: you say that employees ought not be able to make changes, make any new claims or seek to influence any of those decisions during the life of an agreement. On the other hand, you say that employers ought to be able to make those changes. I am just trying to get your sense of things because you have also told us how fair this is to both parties, which I would like you to detail at some point in time because you certainly have not convinced me on that point. So would you talk about why employers should be able to make changes that affect terms and conditions that may not have been included and might be outside the terms of the agreement yet employees should not be able to?

Mr Smith—We are talking about the issue of the right to take industrial action. We would not support the idea of the legislation allowing employers to lock out people in pursuit of claims during the life of an agreement. In the same way, we do not support the idea of employees having the right to take industrial action in pursuit of new claims. We are not saying that employees cannot have grievances and issues that they might like to raise during the life of an agreement, and companies will have issues that are ongoing about productivity and efficiency improvements. This is an issue about whether there should be a right to take industrial action.

Senator MARSHALL—Would you say that any changes made during the life of the agreement have to be made by agreement between the parties to the agreement?

Mr Smith—No. Take the example that you raised about changes to shift patterns, awards and enterprise agreements: if they are drafted in a sensible way, they do allow companies certain rights to change shift patterns. For example, if a company has shifts that go across 24 hours a day, seven days a week, but then loses a contract and needs to operate only five days a week, of course it needs to change the shift patterns. Our advice to companies is that they would be extremely unwise to lock in shift patterns where they have not got absolute certainty of demand, which will be almost never.

Senator JACINTA COLLINS—Senator Marshall was using shift patterns as an example. In a hypothetical case, you have an agreement based on shift patterns that can only operate until 11 o'clock at night, and circumstances change during the life of the agreement and the employer wants to institute shifts that go for 24 hours. Should that employer be able to do that during the life of that agreement, where the employees have no opportunity to respond?

Mr Smith—Within the constraints that have been agreed upon in the agreement or are set out in the relevant award, in most circumstances a company will have an ability to put on another shift if demand changes. We are not saying that companies should be able to breach their agreements. There may be circumstances where a company has agreed to something that proves to not be in its interest, but that is where the provisions of the act which allow agreements to be varied by agreement between the parties come in. I will restate what I said

before: this is an issue about protected industrial action being taken. We are finding that unions seek to rely on the Emwest decision most when a dispute arises in a workplace about something that is not dealt with in the enterprise agreement and was not contemplated at the time the agreement was reached. Then in an opportunistic way the relevant union will initiate a bargaining period and will seek to rely on the Emwest decision to say that they have a right to take industrial action during the life of the agreement. We believe that brings the whole enterprise bargaining system undone, because the basis of the system is that there should be a period of industrial peace.

Senator MARSHALL—Isn't that the problem with the whole basis of these bills, though? They seek to address the symptoms of industrial action without actually enabling the parties to resolve the issues that cause the industrial action. You cannot tell me that industrial action may be taken during the life of the agreement simply for the purpose of taking industrial action. There has to be a grievance that initiates that action, yet the bills in no way seek to assist the parties to resolve those grievances. All they do is try to put a bandaid on the consequences. My view is that you might put a bandaid on them, but if you do not heal those wounds they effectively just move around and manifest themselves in some other way.

Mr Smith—If you remove the right to take industrial action then the parties are required to go through the process in the avoidance of disputes procedure, which is the appropriate process and the reason why the act requires that that procedure be there. That process usually ends up with a position where the industrial commission has a role in assisting the parties to resolve that dispute. If the commission is given the power by the parties then, on the recent case law coming out of the commission and the courts, it has very significant powers to resolve industrial disputes under avoidance of disputes procedures.

Senator JACINTA COLLINS—I will go back to the comparison you made a moment ago about variations during the life of an agreement. You said that workers should not be able to take protected industrial action on the same basis that employers cannot institute lockouts. Do you seriously think that is a fair comparison?

Mr Smith—I do, because the Workplace Relations Act provides equal rights for employees to take industrial action as it does for employers to take industrial action. I would think it would be extremely unlikely—and I have never heard of an example—where an employer has sought to rely on the Emwest decision to argue that they should have the right to lock out their employees during the life of an enterprise agreement. That highlights just how unreasonable the process is the other way around, where you might have a union or a group of employees who have entered into an enterprise agreement for a term of two or three years—we support the idea of five-year terms—yet, during the life of the agreement, an issue arises, whether that be something that they dropped off the bargaining table at the time of the negotiations or a new issue, and they argue that they have the right to take industrial action in pursuit of it. We just think that is not fair, and it threatens the whole enterprise bargaining system.

Senator MARSHALL—Is that a hypothetical situation you are putting to us? Have you got examples or any evidence that this is a problem that needs to be addressed by legislation?

Mr Smith—We have, and we have submitted materials to the full Federal Court in the Emwest court case about some examples that have come up. We are not saying that this is

happening in every workplace but, as I said, the main circumstance where it arises is in an opportunistic way, where a dispute will arise about something else and suddenly the relevant union will say, 'Hey, we can use this decision. We'll initiate a bargaining period, we'll argue that the matter is not covered in the agreement and we'll force the employer to accept our view by taking industrial action.'

Senator MARSHALL—You did not include those examples in your submission to the Senate—

Mr Smith—No, but I am happy to provide them.

Senator MARSHALL—because I did not recall seeing them. I would be happy to see them, actually.

Mr Smith—I did provide an affidavit as part of that court case where I set out a number of examples. I would be happy to provide that to the committee.

Senator JACINTA COLLINS—But doesn't the comparison in this case, between employees taking protected industrial action as opposed to employers seeking a lockout during the life of an agreement, just reflect common practice? Even in terms of establishing agreements, the proportion of industrial action by employees as opposed to lockouts by employers would be miniscule, wouldn't it?

Mr Smith—It is a right that employers have, but most employers do not utilise that right for obvious reasons. Employers do not want to lock their employees out. There would not be an employer around, I am sure, that would say they want to lock their employees out. Sometimes in difficult industrial disputes, a company will use that right, but it is not anywhere near as common as strikes taken by employees. We do not see anything wrong with that; employers are to be commended for that.

Senator JACINTA COLLINS—Doesn't it also represent what options generally are available to either party? In the case of employers, as you were indicating before, much of what they want to effect they can do by managerial prerogative. With respect to employees, it is quite often the case that their only option is protected industrial action, whether it be a strike or some other form.

Mr Smith—I do not agree, Senator. I go back to the issue I raised with Senator Marshall, where, if the right to take industrial action is not there, there is a grievance procedure that can and should be followed. The steps in that procedure are designed to resolve issues like the ones that you have raised.

Senator JACINTA COLLINS—But you would accept, wouldn't you, that taking protected industrial action increases a party's negotiating power?

Mr Smith—It certainly does, and that power should only be available at the start of an enterprise agreement process when the agreement is being negotiated. It should not be available during the life of an agreement. That is not a system that operates anywhere that we are aware of. If you look at similar systems elsewhere in the world, the arrangements seem to be that there is often a right to take industrial action at the start of the process, when the agreement is negotiated, but, when a deal is done, that deal is to stick until the agreement expires. That is the nature of the system.

Senator MARSHALL—Except that you also say that right should not be available if it has significant effect on a third party at the beginning of the agreement. You say that too.

Mr Smith—We said that parties have a right to inflict harm upon each other within boundaries. Some boundaries are set out in the act at the moment and we believe that they need to be modified to deal with this issue about significant effects on third parties.

Senator JACINTA COLLINS—Going to the simplified agreement making bill, what specific examples do you have of problems from the operation of current agreement approval processes?

Mr Smith—We believe that bill is very sensible. Ai Group has thousands of members that have enterprise agreements. We process those agreements for those companies. The way that the industrial commission tends to handle the certification process is that they will have a running list. They will list 10, 20, 30 or 40 agreements at the same time. For 95 per cent of them the process is very mechanical and could easily be done without the need for a public hearing. I think that the ACTU is even acknowledging that. In the vast majority of circumstances, these things are uncontested and can easily be handled in a streamlined way. There do need to be protections there for situations which are not straightforward. We believe those protections are set out in a fair and sensible way within the bill.

Senator JACINTA COLLINS—What about public transparency?

Mr Smith—There is transparency, we believe, through the process in the bill. The members of the commission are bound by the objects of the act and their role within the act. There is an ability to have a public hearing if any employee wants one. It is a process that is optional. Any employee, or a union that is involved in that workplace, can force the employer to have a public hearing. But, where everyone agrees, there would not be a need for a public hearing.

Senator MARSHALL—You are really suggesting that an individual employee should stand up to the employer and say, 'I want a public hearing on this.' Are you suggesting that everything is fair and balanced and there are no ramifications from any of that?

Mr Smith—If the employee was a member of an organisation, the typical process would be that employee would get in touch with their organisation and they would then assist them with that. There is a process in the bill, as we understand it, where the employer would have to give a notice to the employees advising them of their right to request a public hearing. It is a very practical and sensible set of changes.

Senator MARSHALL—But the employee still needs to do it though, don't they? Are you saying that the union can actually do it, or that the union should be able to do it?

Mr Smith—No. What we are saying is that we have had a look at the process in the bill and we think it is a very fair and sensible process. We can take on board any questions that you might like to look at in detail.

Senator MARSHALL—Would you accept that there are a lot of employees that do not want their employer to know that they are a member of a union?

Mr Smith—There would be some employees, but there are protections in the way that the industrial commission handles those issues as well as protections built in to some of these bills and within the Workplace Relations Act at the moment to protect them.

Senator MARSHALL—They are theoretical protections only. I know and I think you should know that the practical reality of that is very different.

Mr Smith—We have looked at the bill in detail. We do believe that it has that appropriate balance.

Senator MARSHALL—Do you support the position of agreements being able to be made for up to five years?

Mr Smith—We do. There are many examples in the construction industry. Take the CityLink project, for example, where a series of enterprise agreements related to work on that project. That was a project that went for about five years. In the construction industry, if enterprise agreements relating to the contractors expire during the construction phase of a project, it can be extremely damaging.

As I mentioned in my submission, I was over in the US in December and visited a lot of companies. I visited the AFL-CIO, the peak union body, the United Auto Workers union et cetera. It was communicated to me consistently that in the US five-year terms are now very common whereas several years ago most agreements were for shorter periods. It seems that in that country there is a recognition now that there are benefits in having five-year terms. We believe that that sort of flexibility should be available here. We can see no good reason that an enterprise agreement should not go beyond three years. One concern we have about the legislative change proposed is that it excludes greenfields agreements continuing for up to five years. Greenfields agreements are particularly relevant in the construction context. We cannot see any reason why they should not be allowed to continue for up to five years like the other forms of agreement that are proposed.

Senator MARSHALL—Except that employees under those agreements have never had a say in the construction of that agreement.

Mr Smith—They have in a sense because those agreements have to be reached with an organisation of employees. You cannot just have the equivalent of a section 170LK agreement in the greenfields context. An agreement has to be reached between unions and employees. Of course the union will be representing the interests of the employees.

Senator MARSHALL—I am glad you recognise that.

Mr Smith—In the greenfields context, that is the only sort of agreement you can have.

Senator MARSHALL—Is that the only time unions represent the interests of their members?

Mr Smith—No.

Senator MARSHALL—Thank you.

Mr Smith—I do agree with you.

Senator MARSHALL—Can you tell me what interest rates will be in 2009?

Mr Smith—I could not—

CHAIR—It is a hypothetical question. It depends if the Labor Party is government. It will be very high if Labor is in government.

Senator MARSHALL—Can you tell me what the CPI will be?

Mr Smith—No, but this is where the bill is very balanced because it sets up a process to allow a review of the agreement in terms of whether it passes the no disadvantage test for that extended period.

Senator MARSHALL—Against the award.

Mr Smith—Against the relevant awards and laws, as the no disadvantage test is currently structured. If people are disadvantaged in the fourth or fifth year, there is a mechanism to allow them to say, 'I'm being disadvantaged.' There is a process there. That is not something that we proposed. We have been arguing strongly and consistently in support of this flexibility to allow five-year agreements for some years, particularly focusing on the construction sector. But this is a provision that the government has designed to provide more balance. Perhaps it is not absolutely necessary but it is obviously there to protect the interests of employees based on the concern that you are raising.

CHAIR—Thank you very much.

[11.49 a.m.]

MERRYFULL, Ms Diane Cheryl, Assistant Secretary, Legal Policy Branch (2), Workplace Relations Legal Group, Department of Employment and Workplace Relations

PARKER, Ms Sandra, Assistant Secretary, Strategic Policy Branch—Policy Group, Department of Employment and Workplace Relations

SMYTHE, Mr James, Chief Counsel, Workplace Relations Legal Group, Department of Employment and Workplace Relations

CHAIR—I welcome representatives of the Department of Employment and Workplace Relations. The committee has before it submission No. 6. Are there any changes you wish to make?

Mr Smythe—No.

CHAIR—The committee prefers all evidence to be given in public, but if you wish to give evidence in any other way then please let the committee know. Do you wish to make an opening statement?

Mr Smythe—Yes. I thank the committee for inviting the department to appear before the hearing and for the opportunity to make an opening statement. The committee is considering four bills, each of which addresses different areas for reform of the Workplace Relations Act 1996: the first is to improve the current system of dispute notification finding, the second is to continue the process of award simplification, the third is to clarify the circumstances in which protected action can be taken and provide the Industrial Relations Commission with more power to deal with circumstances where the capacity to take protected industrial action should be temporarily suspended, and the fourth is about improving the mechanisms for agreement making.

I would like to make a few brief comments on some of the submissions made by other witnesses before this inquiry. The Workplace Relations Amendment (Award Simplification) Bill 2002 aims to continue the process of award simplification which commenced with the Workplace Relations and Other Legislation Amendment Act 1996. One of the main criticisms of the bill appears to be in relation to the removal of skill based career paths from the list of allowable award matters. Some of the submissions suggest that this will mean that the skills base of Australia will be eroded. The government's position is this: the focus of the workplace relations system is now on enterprises and workplaces with agreement making being the main form of determining pay and conditions. The role of awards has changed to one of providing a fair minimum safety net.

Consistent with this change to the shape of the system, the government considers that matters associated with training and education are generally best dealt with by agreement between employers and employees at the workplace level. By allowing employers and employees to respond quickly to changing skills needs and to develop training and education arrangements that meet the particular needs and circumstances of their workplace rather than being tied to the one-size-fits-all industry based arrangement prescribed in awards, the government believes that skills formation will be boosted. The government believes that

awards should neither prescribe the training programs that employees need to undertake to obtain these skills and qualifications nor regulate the training regimes under which training is delivered. The formal vocational and educational systems run by the states and territories will be unaffected by the change. The government believes that training and education matters are best dealt with by the formal state and territory systems and supplemented by agreement between employers and employees at the workplace level through workplace agreements rather than being duplicated in awards.

I turn to the Workplace Relations Amendment (Better Bargaining) Bill 2003. This bill makes a number of changes to bargaining for collective agreements under the Workplace Relations Act. There are two categories of amendments. The first category proposes to clarify the operation of certain provisions of the Workplace Relations Act. These amendments are the government's response to decisions made by the Federal Court or the Industrial Relations Commission that the government considers are contrary to the principle object of the act. These changes ensure that protected industrial action is only available to support bargaining within the agreement making framework set down by the act.

The second category of amendments provides the commission with a new discretion to order a temporary suspension of bargaining periods. The first of these suspensions is a cooling-off period designed to facilitate the parties resolving matters at issue. The second of these measures is to provide for third-party applications for suspensions. These third-party applications will be available to third parties who are directly affected by protected industrial action and who are suffering significant harm. Such parties currently have no direct remedy.

Some submissions by witnesses to this inquiry suggest that the measures contained in these bills undermine the bargaining power of employees. For example, the ACTU submits at paragraph 92 of its submission that the provisions in the bill that enable the commission to order a cooling off period would remove employees' bargaining strength. This assertion overlooks a number of aspects of the amendments. Firstly, suspension for cooling off is only temporary. Protected action can recommence at the end of the suspension period. Secondly, both employers and employees can benefit from cooling off periods. Thirdly, the commission, in considering whether or not to exercise its discretion to order a temporary suspension, must have regard to whether suspending the bargaining period would be beneficial to the negotiating parties because it would assist resolving the matters at issue. The thrust of the amendment is to facilitate bargaining, not to remove bargaining strength.

The ACTU also asserts at paragraph 96 of its submission that the bill will 'allow anybody claiming to be affected by protected industrial action to seek a suspension of the bargaining period and facilitate the involvement of ideologues, mischief-makers and busybodies'. This overstates the scope of the measures that are proposed. Only a third party who is directly affected by the action may apply for a suspension. The commission may grant a suspension only where the commission considers that the action is threatening to cause significant harm to that person. The commission has a discretion as to whether it will suspend the bargaining period.

The ACTU also asserts at paragraph 118 that proposed amendments to section 170MM in the bill will prevent unions campaigning for improved conditions throughout an industry or throughout the work force. This is also an overstatement of the proposed changes. The

amendments to section 170MM prevent protected industrial action being taken in concert with employees who will not be covered by the same agreement. The amendments do not prevent bargaining, they do not prevent campaigns; they are aimed at protected industrial action. They do not prevent unions from making the same claim against a number of employees. They merely ensure that access to protected action reflects the principal object of the act that bargaining occur at the workplace level.

The SDA submitted at pages 5 and 6 of its submission that arbitration should be available after bargaining periods have been forcibly terminated under the proposed mechanisms in the Workplace Relations Amendment (Better Bargaining) Bill 2003 for cooling off periods and third party suspensions. However, the measures in the better bargaining bill enable the commission to suspend, not terminate, bargaining periods. Protected action becomes available again once the suspension comes to an end. It would be inappropriate to pre-empt any solution the parties may reach themselves by proceeding directly to arbitration. In the case of cooling off periods it would defeat the purpose of the suspension, which is to provide for a cooling off period, during which the parties can discuss points at issue without ongoing industrial action. Arbitrated outcomes are, in the government's view, undesirable and should be a last resort, available only in the most serious circumstances. The SDA's submission also argues that awards, agreements and industrial action should not be limited to matters pertaining to the employment relationship.

The government's position on that is as follows: since 1904 the Commonwealth's workplace relations legislation has used the phrase 'matters pertaining to the employment relationship' as a basis for characterising its industrial instruments. This reflects the fact that it is appropriate that the scope of these instruments is limited to matters directly relevant to the employment relationship. The government considers that it would be inappropriate for enforceable instruments under the Workplace Relations Act to include matters which do not relate to the employment relationship. Importantly, protected action is available to support bargaining within this framework. If protected industrial action were available for matters other than those pertaining to the employment relationship, an almost unlimited range of claims could be the subject of protected action. For example, parties could take protected action to force an employer not to sell a product such as coal for less than a certain price or to force an employer or an employee to contribute to a political party or to force employees to buy the employer's product or invest in the employer or to enforce employers to curtail investment or development for political, social or environmental reasons. The government does not believe it is appropriate that protected action should be available for those sorts of issues.

The AEU asserts at page 3 of its submission that the proposed amendment to section 170MN 'is an unwarranted intrusion into democratic rights'. The broad immunity from protected action is available only for the purpose of bargaining for a new certified agreement. The trade-off for this broad immunity is that once the agreement is reached the parties are prohibited from taking industrial action. The Workplace Relations Act requires that all agreements contain dispute resolution procedures to enable the process for settling disputes that arise during the course of the agreement. It is through these dispute settling procedures that disputes should be settled during the life of the agreement, not through industrial action.

The department's submission lists cases of where industrial action has been taken during the course of an existing certified agreement, often in breach of dispute resolution clauses. The government considers that this is not appropriate.

The AEU also raises the example of where a single item certified agreement is made covering only one aspect of employment, with the remaining terms and conditions of employment governed by a state award. The AEU is concerned that the amendment to section 170MN would then prevent broader negotiations on other matters during the course of that agreement. A key element of the principal object of the Workplace Relations Act is to facilitate workplace level bargaining. The system encourages the parties to make comprehensive agreements rather than selectively relying on a mixture of agreements and awards. This amendment is consistent with that object.

I will turn briefly to the award simplification bill. A key reform in this bill is that it strengthens the Employment Advocate's enforcement powers to enable the Employment Advocate to recover shortfalls in entitlement on behalf of employees. Currently employees must make their own recovery action. This award simplification bill also enables an AWA to take effect from the time it is signed, and provides employees with the right to withdraw from an AWA during a cooling off period. It also provides for extended agreements, which are certified agreements that may operate for up to five years rather than the current maximum of three years. These agreements are subject to additional requirements to ensure employees are not disadvantaged.

The award simplification bill makes a number of minor amendments to the certification process to prevent technical requirements from causing undue delays. The bill also limits the ability of organisations to become involved in variations, terminations or extensions of agreements that have been negotiated directly between an employer and its employees, unless an employee has requested that involvement. In relation to this bill, the ACTU implies at paragraph 170 that extended agreements are intended only to operate for agreements negotiated directly with employees. This is clearly not the case. Extended agreements may be made with the union under section 170LJ. Many unions may welcome the opportunity to lock in beneficial terms and conditions of employment over a longer period.

The department has noted that the SDA is not opposed in principle to extended agreements, but the SDA notes that a number of protections should be available. We think that the protections sought by the SDA are contained in the extended agreement proposal. This proposal enables any party to the agreement to seek a reassessment of the agreement against the no disadvantage test, and that reassessment is done by the commission and can be sought at any time after the agreement has been running for three years. If, at that point, the agreement is found not to pass the no disadvantage test, there is then a three-month period during which the agreement may be varied to enable it to meet the no disadvantage test. The SDA suggested that an agreement should terminate within a very short period of time after such a finding on reassessment.

Under the proposal, the agreement will not terminate after three months but it will be deemed to have reached its nominal expiry date. This is appropriate because it has the effect that the parties remain free to bargain for a replacement agreement but the agreement remains in place until it is replaced, in the same way as a lapsed agreement presently does. If the

agreement were to terminate, the parties would be covered by an even older agreement or perhaps even by the award which, in all likelihood, would contain lower rates of pay than are in the more recent extended agreement. The SDA asserts at page 31 of its submission that the award simplification bill removes the automatic process for a hearing for certification of agreements and claims this is a retrograde step. But we would like to point out that there is no existing requirement for the commission to hold a hearing to certify an agreement, although it generally does. The procedures in the award simplification bill would enable a party to request a hearing and, provided there are reasonable grounds for holding a hearing, a hearing will occur.

The AEU also raises concerns about the simplifying agreement making bill's proposed amendments about hearings for agreement certifications, and suggests that 'false or misleading' information may be relied upon by the commission unless there is a hearing to consider that information. If an employee or a union who has the right to be bound to an agreement believes that false or misleading information has been put to the commission in relation to certification, that party can request a hearing. The provisions enable the commission to hold a hearing where there are reasonable grounds to do so. In our view, claims of misleading information being put to the commission would result in the commission finding that there are reasonable grounds to hold a hearing.

Senator JACINTA COLLINS—How many workers rely on federal awards alone, as opposed to registered individual or collective agreements, for their terms and conditions of employment?

Mr Smythe—I think the figure is around 20 per cent.

Ms Parker—We will need to find that, Senator. Can we come back to that?

Ms Merryfull—About 19.7 per cent is probably the accurate figure. But that relates to people whose terms and conditions are determined by awards, and I understand that that includes state awards as well as federal awards.

Senator JACINTA COLLINS—I am seeking to understand federal awards.

Ms Merryfull—My understanding is that the ABS data that is available does not differentiate between state awards and federal awards.

Senator JACINTA COLLINS—What about the last workplace survey? I know that it is pretty dated now, but what would that have told us?

Mr Smythe—Perhaps we could have a look at it and get back to you as soon as we can.

Senator JACINTA COLLINS—At paragraph 1.97 of your submission, you say:

Overly complex and restrictive awards hinder agreement making at individual workplaces and can act as a barrier to continued employment growth.

We had a discussion about this earlier with ACCI. What evidence do you have to support that statement?

Mr Smythe—I will take the first part of your question first. Obviously, the more complicated the award is the more difficult the process of adjudging an agreement using the no disadvantage test becomes, so the process of agreement making is made more complex if

awards are more complex. In terms of evidence about employment growth, I will have to ask my policy colleague if she has a comment on that.

Ms Parker—I do not at the moment, I am sorry. I am still trying to find the bit about awards.

Mr Smythe—Perhaps we could take that question on notice.

Senator MARSHALL—I just want to clarify something about the first part of your answer, Mr Smythe. Are you saying that the overly complex and restrictive nature of awards, if we accept that, means that it is too difficult for the commission to make a determination using the no disadvantage test?

Mr Smythe—Nothing is too difficult for the commission.

Senator MARSHALL—Then I do not understand your response to that question.

Mr Smythe—The more complicated the award is the more complicated the process of determining whether the agreement meets the no disadvantage test becomes. The more individual items there are in the award the more things there are for the commission to check off in determining whether the no disadvantage test has been met.

Senator MARSHALL—So who is this a problem for? Is it a problem for the commission?

Mr Smythe—It is a problem for the commission, but the proposition you put to me was: is it too difficult for the commission? My answer was no, it is not too difficult for the commission, but it makes the process more complicated—not just for the commission but also for the parties who have to front up to the commission and convince it that the no disadvantage test has been met.

Ms Parker—Senator Collins, on your question about awards, the information I have is that, as at May 2002, one employee in five—or 20 per cent of employees—was solely reliant on awards. In small business, award reliance was one in four employees. Does that answer your question or was it broader than that?

Senator JACINTA COLLINS—No, it does not deal with the federal versus state issue.

Ms Merryfull—The AWIRS survey, of course, is about nine years out of date, and there has been quite a lot of movement into the agreement making stream since then. But we can extract what per cent there was in AWIRS nine years ago, if that would assist you, and provide it to you.

Senator JACINTA COLLINS—I am also interested in what transition there has been.

Ms Merryfull—Do you mean the transition from awards to agreement making?

Senator JACINTA COLLINS—Whether there has been any shift in the proportion of the work force solely award reliant as opposed to those who are now within agreements.

Ms Parker—We can get you some information over time. Do you have a particular period in view?

Senator JACINTA COLLINS—Probably the relevant trend for enterprise bargaining would be the period.

Mr Smythe—Are you not also interested in over award payment issues? When you say solely reliant, do you mean when there is no other federal industrial instrument that would cover them?

Senator JACINTA COLLINS—Yes. Going back to the role of overly complex and restrictive awards, the discussion earlier was that it is often argued that one of the inducements for going into enterprise bargaining is to avoid complex awards. In fact the benefit of encouraging an enterprise onto an enterprise bargaining agreement is that you can make the award more flexible. I am a bit bewildered that now the argument is being used at both ends, which is: awards are too complex; therefore we have to change them but, at the same time, the object in the act is to try and facilitate more people into enterprise bargains.

Mr Smythe—I think the government's position is that enterprise bargains can be whatever the parties want them to be. If they want them to be simple, they can be simple; if they want them to be complex, they can be complex. It is their choice whereas with awards they have no choice. Awards are imposed upon them. The government's belief is that awards should constitute a fair but basic safety net and should be relatively transparent, relatively easy to understand and measure in terms of considering whether a certified agreement, be it complex or simple, measures up in terms of the latest advantage test.

Senator JACINTA COLLINS—When we talk about a basic safety net as opposed to a safety net, how do you respond to concerns such as those of the AiG that they would prefer to have a more comprehensive safety net?

Mr Smythe—The government's policy is that safety nets should be a basic minimum set of entitlements.

Senator JACINTA COLLINS—How are we to regard that basic minimum? Is that the H.R. Nicholls Society basic minimum, the Jeff Kennett basic minimum or something a bit more generous and fairer than the basic minimum?

Mr Smythe—The word 'fair' does continue to figure in the object of the act and in the considerations to be taken into account when formulating the safety net. The safety net is designed to be something that is fair and reasonable but is not, if you like, the highest common factor of current market rates in a particular industry; rather, it is about pay and conditions for the work that is being done.

Senator JACINTA COLLINS—Can you give us any guidance on what the bottom line is? We have got second bites here. We have got double dipping on the skills classification levels back from the 1996 simplification process. How many more rounds of simplification would the government envisage?

Mr Smythe—You would have to ask the government that. I am here to talk about this particular bill, but this particular bill reflects what the government presently believes is necessary to further streamline the award system.

Senator JACINTA COLLINS—But does it represent their bottom line or not?

Mr Smythe—I cannot answer that question.

Senator JACINTA COLLINS—You do not know?

Mr Smythe—It is not my job to talk about what the government's future policy might or might not be.

Senator JACINTA COLLINS—No, does their current policy indicate whether this is the bottom line? The answer is that you do not know or 'no'?

Mr Smythe—As far as I am aware, the government has not indicated any further award simplification past this bill.

Senator JACINTA COLLINS—Having raised the point, how many of the issues dealt with in the bill were actually addressed in 1996 and rejected by the Senate at that point?

Mr Smythe—I would have to take that question on notice. As a general comment, I do not believe that many, if any, of the issues that are specifically addressed in this bill and specifically excluded were addressed in the 1996 exercise. What has happened is that, in the award simplification process under the bill as it was passed in 1996, various types of award clauses have been continued by the commission, which the government may have thought in the way the earlier bill was constructed may not have continued to be allowable. So decisions that certain award clauses are allowable were perhaps not contemplated by the original exercise, and that is why there is a need to more clearly refine precisely what it is that is and is not allowable.

Senator JACINTA COLLINS—Would you put union picnic days into that class?

Mr Smythe—Probably. As you are aware, there was a bill a few years ago which was aimed at specifically excluding union picnic days. That bill was rejected by the Senate.

Senator JACINTA COLLINS—In how many states are union picnic days part of the 11 core public holidays regarded as such by the commission presently?

Mr Smythe—I do not know.

Ms Merryfull—I want to clarify what you are asking. Whether or not union picnic days are included is represented in a particular award rather than on a state-by-state basis, I would have thought. There are two jurisdictions that have legislated for union picnic days, as you know: the Northern Territory and the ACT. Can you clarify what you are asking?

Senator JACINTA COLLINS—In relation to the commission's test case standard on public holidays, my understanding is that a number of states have regarded one of those holidays as the union picnic day. I am seeking to clarify how many there might be.

Ms Merryfull—I had understood that a union picnic day is substituted for a state-specific holiday and it is done on an award-by-award basis, but I will check that for you and get back to you.

Senator JACINTA COLLINS—I am curious about how this provision would impact on that situation. I think some of the submissions have also raised concerns with how the provision in relation to public holidays would affect substitute public holidays around Christmas.

Mr Smythe—In relation to that last point, the explanatory memorandum for the bill indicates that it is not intended that this bill will prevent the substitution of another day for public holidays such as Christmas, which might fall on the weekend.

Senator JACINTA COLLINS—Turning now to the long service leave issue, who supports long service leave being made a non-allowable matter? Does anyone?

Mr Smythe—The government does.

Senator JACINTA COLLINS—Apart from the government.

Mr Smythe—I will have to take that on notice. I have not surveyed—

Senator JACINTA COLLINS—We have had AiG and ACCI here and neither of them are supporting it. We are wondering where it is coming from.

Mr Smythe—I will take that question on notice.

Senator JACINTA COLLINS—How many awards or workplaces would be affected? How many employees would have their entitlements reduced? In fact, the concern that ACCI raised with us this morning was: how many would have their entitlements improved? Has the government done any assessment?

Mr Smythe—What is the concern that ACCI raised?

Senator JACINTA COLLINS—The ACCI concern is that, if long service leave were made a non-allowable matter, some workplaces would fall back onto state legislation which is more favourable to the employees. Therefore they have a concern with this being removed as an allowable award matter. I am curious about whether any assessment has been made of the likely impact of long service leave being made a non-allowable matter.

Mr Smythe—I will have to take that question on notice. What you are asking for, effectively, is a table showing what the impact would be?

Senator JACINTA COLLINS—Yes. And, as we understand it, for some it would be a beneficial impact; for some it might be a negative impact—for employees and, vice versa, for employers. I will turn to jury service. Have state governments been consulted about the potential impact of removing jury service as an allowable matter?

Mr Smythe—Not that I am aware of.

Senator JACINTA COLLINS—Has any assessment been done of the potential impact?

Ms Merryfull—Only to the extent that there is a small number of awards, about one-third.

Senator JACINTA COLLINS—Is it a small number or is it one-third?

Ms Merryfull—One-third of awards currently provide for jury service, and jury service is also provided for in some agreements.

Senator JACINTA COLLINS—Just the number of awards or agreements does not necessarily indicate the potential impact. You would need to know which awards we were talking about and how many employees they cover.

Ms Merryfull—You would also need to know what the particular award said about what the make-up is and the difference. It would be quite a large exercise to go through and do that analysis.

Senator JACINTA COLLINS—Has this been canvassed with the Attorney-General's Department?

Ms Merryfull—Not that I am aware of.

Senator JACINTA COLLINS—So do we have any understanding of the potential impact on the judicial system?

Mr Smythe—I am not sure if I understand what you mean by an impact on the judicial system.

Senator JACINTA COLLINS—I mean the availability of people to do jury service.

Mr Smythe—People cannot avoid jury service; the issue would be whether the employers would be required to pay them while they attended jury service.

Senator JACINTA COLLINS—People can come up with quite a large number of excuses that would satisfy the potential exemptions from jury service, and if they are not going to have appropriate compensation in terms of income supplementation they are more likely to do that.

Mr Smythe—I am informed that, certainly in the ACT, that is not an excuse that is accepted. In fact, from personal experience I know that the excuses that can be proffered for failing to attend for jury service are not particularly broad and that it is quite difficult to get an exemption.

Senator JACINTA COLLINS—Your experience and mine obviously differ. I am not suggesting that someone would suggest their lack of income as the reason they are not attending; instead, they would ensure they satisfied one of the other criteria.

Mr Smythe—I think the federal government believes the responsibility for ensuring appropriate levels of remuneration for the attendance before courts rests with the governments responsible for those courts, which, for the most part, are the state governments.

Senator JACINTA COLLINS—And the Commonwealth.

Mr Smythe—Yes, and the Commonwealth, but it does not rest with employers.

Senator JACINTA COLLINS—But you have not had any dialogue with the states or the Commonwealth on that issue?

Mr Smythe—It is not a question of dialogue; the government simply believes that it should not be an imposition on employers.

Senator JACINTA COLLINS—Where has the government indicated that that is its view?

Mr Smythe—I am indicating it now, Senator.

Senator JACINTA COLLINS—Can you not direct me to anywhere where that has been expressed?

Mr Smythe—I will take that question on notice. I am certainly aware that that has been part of the dialogue we have had with successive ministers about the reasons for removing jury service as an allowable matter.

Senator JACINTA COLLINS—That it just should not be the employers' responsibility even though, historically, it has been for many years?

Mr Smythe—Correct.

Senator JACINTA COLLINS—I would be very curious to see whether that has ever been indicated in a policy or an election platform statement. I would like to talk about the conversion from one type of employment to another. The Australian Industry Group raised a concern about the potential impact on employers who transfer workers onto shiftwork. Do you have any response on that issue?

Ms Parker—What did they raise?

Senator JACINTA COLLINS—That, if this were not maintained as an allowable award matter, it would potentially impact on their ability to require that workers move from day shift to night shift, for instance, within their agreements or awards.

Ms Merryfull—I wonder if it means that or whether it means when you are moving from one type of employment—shiftwork is a type of employment; casual employment is a type of employment—in between the types of employment. The times of the shifts do not seem to me to be comprehended by types of employment.

Ms Parker—We have covered it off as full-time casual and part-time shiftwork in defining types of employment, rather than whether it is shift or otherwise. That is our understanding.

Ms Merryfull—But you were talking about between shifts.

Senator JACINTA COLLINS—In a sense it is between shifts. If someone is a regular full-time worker and their employer requires them to move to being an afternoon shift worker, how would that sit with removing ‘type of employment’ as envisaged here as an allowable award matter?

Mr Smythe—What would the award presently say?

Senator MARSHALL—The awards are all different, as you know. There are different circumstances and procedures across different industries.

Mr Smythe—I am trying to understand what the question is. What would the award do that, if that were taken away, would prevent the employer from taking the action to move someone from afternoon shift to evening shift?

Senator JACINTA COLLINS—There would not be a provision in the award any longer requiring that an employee move from one shift to another, which in some cases does occur.

Mr Smythe—Are you saying that an employer cannot move someone from one type of shift to another without an award provision that lets them do so?

Senator JACINTA COLLINS—The award provision, presumably, prescribes that they can, and you are suggesting that that prescription would be removed.

Mr Smythe—My understanding is that the award prescription usually regulates the circumstances in which they can. You do not need an award prescription to allow an employer to move a person from an evening shift to a night shift. In the absence of any provision the employer can do it.

Senator MARSHALL—So you are saying that under this proposal it would really be up to managerial discretion on how, when and how often people would be changing shifts, and it would not be regulated under the award.

Mr Smythe—It would not be regulated in the award; it would be open to employees and unions to have it regulated in agreements if they wish to.

Senator MARSHALL—Assume there is no agreement.

Mr Smythe—That would be an incentive to have an agreement.

Senator MARSHALL—Assume there is no agreement.

Mr Smythe—If there is no agreement then there would not be a regulation of it, that is correct.

Senator JACINTA COLLINS—So this would have the negative effect that AiG is envisaging—that is what you are confirming.

Mr Smythe—I am confirming that there would not be regulation of that sort of movement in the award.

Senator JACINTA COLLINS—The commission has inserted provisions in the metals award and the hospitality award that allow for conversion of long-term regular casuals to full-time or part-time employment. Are there any other federal awards which contain such provisions, beyond metals and hospitality?

Mr Smythe—I will have to take that on notice. I am aware that there has not been a lot of movement since that decision. I do not know whether there are other awards or not.

Senator JACINTA COLLINS—Are you aware of any problems with the application of these provisions?

Mr Smythe—No.

Senator JACINTA COLLINS—Does the department advise employers who engage long-term regular employees as casuals that there is a risk that a court or tribunal may find that these employees are not really casuals at all and may be entitled to the benefits of permanent employment, such as advice through Wageline and such?

Mr Smythe—I am not aware of any such advice being given. I am not sure I quite understand the proposition that you are putting. In what circumstances are you saying advice might be provided?

Senator JACINTA COLLINS—Through Wageline, for instance. Would employers seeking advice on how they structure their employment relations be advised that there is a potential risk that engaging casuals on a long-term and regular basis could ultimately lead to them having some rights with respect to permanency?

Mr Smythe—I am not aware of any general advice in that regard. If there were an award provision which converted casuals to permanent employees then I would hope that the Wageline adviser would draw the attention of the inquirer to that point.

Senator JACINTA COLLINS—Can you take on notice the issue of other awards and any examples of problems that the department might be aware of—other than the government's dislike for the commission's decision—that show any basis for the need for this change? The other implication that I am concerned about is that if this were not to be an allowable matter, were the government to follow, for instance, the advice of the IDC on work and family issues

that the commission should consider better rights for people on parental leave returning to part-time work, wouldn't this proposal prevent such a measure being acted on by the commission in awards?

Mr Smythe—It is certainly not the intention of this proposal to do that.

Senator JACINTA COLLINS—So the commissioner would still be able to, let us say, reach a test case decision which gave people returning from parental leave the right to move from full-time to part-time work?

Mr Smythe—It is not the intention of this amendment to prevent that from occurring.

Senator JACINTA COLLINS—But if conversion from one type of employment to another is not an allowable award matter, wouldn't that be the effect?

Mr Smythe—It may be that doing that would be essential to the operation of the provision which allowed for the parental leave.

Senator JACINTA COLLINS—Should we contemplate an exemption?

Mr Smythe—It is an issue that I am sure will be brought to the attention of the government. I can reiterate that it is not the intention to prevent that sort of movement in those circumstances.

Senator JACINTA COLLINS—But you accept that the way it is currently worded in the bill would have that impact.

Mr Smythe—No, all I am saying is that if it did have that impact that would be against the intention of the bill. It is not the intention of the bill to prevent movement from full time to part time on return from parental leave. I will have a look at the bill to see whether that is in fact the effect, and I will come back to you.

Senator JACINTA COLLINS—It does talk about conversion from one type of employment to another, which is far broader than preventing casuals moving to permanent.

Mr Smythe—Certainly, but there may be other parts of the Workplace Relations Act which would permit the movement of the type that you mention. I will examine that and provide you with advice.

Senator JACINTA COLLINS—Thank you. I will move on to the better bargaining bill. I understand your opening comments about this particular bill and that it relates to suspensions as opposed to terminations, but I think that is all by the bye given that the commission also has the power to terminate bargaining periods. Will the bill increase the capacity of the commission to resolve the issues in dispute between the parties to industrial action?

Mr Smythe—The bill does not in any way affect the commission's conciliation powers, so it does not inhibit the commission in any way from exercising conciliation at any time during a dispute.

Senator JACINTA COLLINS—What are the statistics on the use of protected industrial action? What proportion of protected industrial action is taken by employers as opposed to employees?

Mr Smythe—I do not have those figures at my fingertips.

Ms Parker—I have information here on industrial disputes, but we would need to have a look at it in terms of protected action. I can certainly tell you what the current strike rate is and those kinds of things, but not in terms of employers either. This just relates to employees.

Mr Smythe—I do not think the ABS figures differentiate between protected and unprotected industrial action, so I am not sure that there is information on the extent of protected industrial action. I think your question was more directed at the split-up between protected action by employers and employees. There is not very much protected industrial action by employers. It is a very small amount.

Senator JACINTA COLLINS—How many small businesses are currently covered by federal awards, using the less than 20 employees benchmark?

Ms Parker—Again, the figures do not differentiate between federal and state awards; they are just awards. That is what the ABS collects. I think that is because it is unreliable, in their experience. When they ask people whether they are covered by a state or federal award a lot of people do not know and say, ‘I’m just covered by an award.’ So they stopped collecting the figures because they are unreliable.

Senator JACINTA COLLINS—But there would be some small businesses that are covered by federal awards, whether they have union members or not, at the moment.

Mr Smythe—I would imagine so, but I do not know.

Senator JACINTA COLLINS—We have moved on to choice in award coverage. Wouldn’t the proposals here mean that different small businesses, even within the same state, will be covered by different rules—one group covered by federal awards and one group exempt from them?

Mr Smythe—That would be the outcome, yes.

Senator JACINTA COLLINS—Is there any proposal for employers currently covered by federal awards with no union members to remain as such or will they have an option to opt out?

Mr Smythe—Not in the bill.

Senator JACINTA COLLINS—It is not in there?

Mr Smythe—It is not in the bill.

Senator JACINTA COLLINS—How do you envisage the process of ascertaining whether there is union membership within a small business?

Mr Smythe—Perhaps my colleague could answer that but I think the bill does set out a process.

Senator JACINTA COLLINS—The bill does not completely. I presumed it was in the explanatory memorandum or somewhere else.

Mr Smythe—As I recall—as my colleague looks it up—the bill requires that each employer who is subject to a log of claims is required to indicate whether or not they employ fewer than 20 people. If they do not respond to that then they will be covered anyway, even if they have no members. They have to say if they do.

Ms Merryfull—Then they would put their statement before the commission. The explanatory memorandum says that, absent any other evidence, that would be sufficient. The explanatory memorandum explicitly says:

The Commission would accept the employer's statement as prima facie evidence that they are a small business employer unless evidence to the contrary was provided.

The explanatory memorandum notes that the notice is intended to contain a warning that providing false or misleading information is a criminal offence, which it is of course under the Criminal Code. The explanatory memorandum goes on to say:

Where evidence that contradicts the employer's assertion is provided, the Commission must weigh up whether it accepts that the employer fits the definition of a small business.

Senator JACINTA COLLINS—We are dealing with the definition of small business here. My query is more in relation to whether that business involves union membership and how that is meant to be demonstrated. Proposed section 101B(3) of the bill says:

The Commission must not, in relation to the making of any findings under section 101 in relation to that dispute, determine that a notified employer, who informed the Commission under subsection (2) that the employer employed less than 20 people on the service day, is a party to that dispute unless:

... ..

(b) the Commission is satisfied that the employer employs a member of that organisation.

What process is envisaged for the commission to become satisfied?

Ms Merryfull—As the ex mem says, it is envisaged that the commission would give a list of those employers who had asserted that they are a small business and should not be covered to the organisation that is attempting to rope in. It will be up to the organisation to say that the employer has a union member. Then there is a process of certificate by the registrar to protect the identity of that member.

Senator JACINTA COLLINS—So it is incumbent on the association to demonstrate that they have at least one member in each of the small businesses on the list?

Ms Merryfull—Yes.

Senator JACINTA COLLINS—Can that still be done in a way which guarantees privacy of the union members, albeit that in the real world an employer in a small business who believes that he does not employ any union members and then is told by the commission that he does will probably eventually work it out anyway?

Ms Merryfull—As you know, there is an extensive framework of information provision in the act to deal with situations that may occur in a range of situations, not just in this one.

Senator JACINTA COLLINS—Has the department done any assessment of the implications of going down this path in terms of the traditional way in which our system has regarded the role of employee associations and their status within the federal system as being related to their potential membership rather than their actual membership? An association standing under the act is with respect to their potential membership not actual membership. This is a fairly significant change being proposed here for small businesses.

Mr Smythe—The answer to your question is no.

Senator JACINTA COLLINS—At paragraph 3.19 of your submission, in relation to the Workplace Relations Amendment (Choice in Award Coverage) Bill 2004, it says:

... The measures in the ... Bill will protect businesses and their employees from unwanted third party interference and allow small business to choose the most appropriate industrial instruments for their business.

This is, in a sense, another new concept: to allow employers to choose which minimum award provisions should apply to them. Why are we proposing that this should be a choice available only to small businesses?

Mr Smythe—The government believes that small business warrants that level of protection. It is treating small business differently from other businesses.

Senator MARSHALL—Why can employees not make that same decision?

Mr Smythe—Employees are not running the small business. Within Commonwealth legislation it is not unusual for small businesses to be treated differently from other businesses. That sort of differentiation appears in a number of bills, and I think we mentioned them in a submission.

Ms Merryfull—Yes.

Mr Smythe—Quite simply, this sort of industrial regulation is another area where the government believes small business warrants differential treatment.

Senator JACINTA COLLINS—I think this is the first time that membership of a union has ever been contemplated—that it matters whether you are employed by small business as opposed to a larger business. This is the first time I have ever come across that concept.

Mr Smythe—Is that a question?

Senator JACINTA COLLINS—You are saying that there are lots of areas where the size of the business is taken into account in federal legislation. I say back to you that this is the first time I have ever heard of union membership being relevant in those considerations.

Mr Smythe—I am sorry, but I do not understand the question.

Senator JACINTA COLLINS—I am saying to you that, unless you can advise me to the contrary, this is very unusual.

Mr Smythe—This does not prevent people who work in small businesses from being union members, if that is what you are putting to me.

Senator JACINTA COLLINS—They have to become union members if they want to achieve federal award coverage.

Mr Smythe—I do not understand the question. This does not purport to regulate whether or not employees of small businesses can belong to a union.

Senator JACINTA COLLINS—I am not suggesting that it does.

Mr Smythe—Well then, I am sorry but I do not understand what you are asking me.

Senator JACINTA COLLINS—It is ascribing to a small business one status as opposed to another based on whether they employ someone who is a union member. That is most unusual.

Ms Parker—How is it doing that, Senator?

Senator JACINTA COLLINS—I am talking about the potential status. It is saying that an employer who has less than 20 employees and no union members can be exempt from being roped into a federal award.

Mr Smythe—Yes, that is right.

Senator JACINTA COLLINS—So it is ascribing status to an employer on the basis of not only its size but also whether it engages someone who is a union member. This is most unusual. I would like you to tell me of some other area in federal jurisdiction where an entity is ascribed status on the basis of whether they engage a union member as opposed to a non-union member.

Mr Smythe—I will have to take that on notice.

Senator JACINTA COLLINS—While I am at it, I suppose I should ask you: how does that sit with the freedom of association principles? Has any assessment of that been done?

Mr Smythe—It is a piece of legislation. If the Commonwealth legislates to achieve a particular situation then that will be an exception to any freedom of association principle even if that were to apply.

Senator JACINTA COLLINS—In a couple of places in your opening statement you referred to the SDA's submission. One element of that I was interested in was the cooling-off period for an AWA. I would like to check with you that I am following this correctly, because I have followed this issue since 1996 in relation to whether coercion applied to a new employee in relation to an AWA. If a new employee is advised that the position they are taking on requires that they accept an AWA, they commence employment and then change their mind within the proposed cooling-off period, how would that impact on their employment status? Can they be terminated, or would that be an unlawful termination?

Mr Smythe—To advise, in any hypothetical case, that it would or would not be unlawful is something that I would not be prepared to do. There are some principles. Courts have upheld that it is not duress—it is not a breach of the act—to require someone to sign an AWA to take up employment. Similarly, absent any other coercive forces, if someone were told that the only basis upon which they were going to be employed was an AWA and they took it on and then during the cooling-off period decided that they did not want it, I would imagine that they could be terminated.

Senator JACINTA COLLINS—So you think the SDA submission here is wrong? They are proposing that, with this cooling-off period being introduced, somebody could change their mind about accepting an AWA and then claim unlawful termination.

Mr Smythe—I would be surprised if that were the case, but I think Ms Merryfull has some comments she wishes to make.

Ms Merryfull—Obviously, it is not clear. The situation has not arisen yet because this is a change in the way AWAs will operate. I guess you could say that there are two possibilities. The first, as Mr Smythe said, is that it is a term and condition of a contract of employment, and if an employee does not want to take the AWA then that is their choice. I guess the other possibility is sort of as the SDA says, because if the person has commenced employment it is

different from if the AWA is made a condition of their employment. So if it is: 'Do you want an AWA?' 'Yes,' and they sign it and then actually start their employment, there might be a risk that the employer has disadvantaged that person on the basis of their entitlement to an industrial instrument. However, the person would not be able to access the unfair dismissal provisions, presumably because of the probationary period. So it is not clear. With regard to the SDA's assertions, it is not as black and white as that. There are a couple of possibilities there.

Senator JACINTA COLLINS—Have you sought any advice on those possibilities? I think it is quite critical because we are being asked to contemplate the introduction of a cooling-off period but we do not really know what its scope is. Is it going to affect employees on commencement, where the employer makes it clear that an AWA is a condition of employment? What about on commencement where that has not been made clear? What about where it is only applicable to current employees who are offered and take up an AWA? That is a fairly significant issue of scope of these provisions. Who is it envisaged they should apply to?

Ms Merryfull—In respect of their termination?

Senator JACINTA COLLINS—No, in respect of cooling off. There is no point having a cooling-off period if the consequence of utilising it is that you can be terminated with no redress.

Ms Merryfull—That has not happened.

Mr Smythe—In terms of the scenario you have painted, the only circumstance in which that might be possible would be where someone was a new employee to whom it was made completely clear that the only basis on which they were being employed was an AWA. In all other circumstances a change of mind during a cooling-off period would not justify termination of employment.

Senator JACINTA COLLINS—What are you saying in relation to that first case, where it has been made clear as a condition of employment? I should add that evidence we heard in Darwin seemed to suggest that the Employment Advocate was promoting that AWAs be promoted as a condition of employment. The Employment Advocate will have an opportunity to respond to that himself. I think it goes beyond his powers to even be making those sorts of assertions or recommendations. But I would still like that point clarified. If someone is engaged on an AWA, and the employer seeks to promote that it is a condition of their employment that they be on an AWA, is this cooling-off period at all relevant? Is the SDA right, in that employees might have some redress for unlawful termination? Or are they wrong, as Mr Smythe suggests, in that if the employer had made it clear that it was a condition of employment then the cooling-off period would not be relevant?

Mr Smythe—My view is, as I stated—

Senator JACINTA COLLINS—So you do not want to consider that further? You are staying with your original view? All right. We will see a new revision to AWAs, I suspect, where it is made clear in the covering letter, 'This AWA is a condition of your employment'. It was obviously wishful thinking by the SDA that something positive might be included in this collection of bills. How long on average does it currently take to approve an AWA?

Mr Smythe—I think it is 20 days, but one of my colleagues can confirm that for me.

Ms Merryfull—Yes, it is about 20 days.

Senator JACINTA COLLINS—Maybe I have asked this question; correct me if I am wrong. Paragraph 1.96 of the submission says that award simplification leads to ‘more productive workplaces’. Is there any evidence you can provide us with which supports that claim?

Mr Smythe—I thought we had already been through that with you.

Senator JACINTA COLLINS—No, it was a slightly different question.

Mr Smythe—I see, okay. In the event, we will take that question on notice.

Senator JACINTA COLLINS—It was in relation to the discussion we had earlier. It is related to the earlier question but the discussion we had earlier was related to the complexity of the award system and impact of that on productivity. But I am asking about the award simplification process itself. For instance, the ACCI were saying that feedback from their members is that they get productivity gains, but any broader evidence, any modelling et cetera is difficult to do to ascertain that factor: what gains are directly related to award simplification. I am curious about whether the department has done any work that narrows the gains down to the direct impact of award simplification.

Ms Parker—No, we do not. We have broad statistics on productivity, employment growth and economic growth—

Senator JACINTA COLLINS—Through a multitude of factors?

Ms Parker—Yes—through the enterprise bargaining system. We do not break it down to that specific point. It is very difficult to measure that sort of thing, as you can imagine.

Senator JACINTA COLLINS—That concludes my questions. Thank you.

CHAIR—I thank the officers for appearing. That concludes the inquiry into the workplace relations bills before this committee.

Committee adjourned at 12.53 p.m.