



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION  
LEGISLATION COMMITTEE

**Reference: Workplace Relations Amendment (Agreement Validation) Bill 2004**

THURSDAY, 25 NOVEMBER 2004

MELBOURNE

BY AUTHORITY OF THE SENATE



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**SENATE**  
**EMPLOYMENT, WORKPLACE RELATIONS, AND EDUCATION LEGISLATION**  
**COMMITTEE**

**Thursday, 25 November 2004**

**Members:** Senator Barnett (*Acting Chair*), Senators Johnston, Marshall, Stott Despoja, Tierney and Wong

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

**Participating members:** Senators Abetz, Bartlett, Boswell, Buckland, Carr, Chapman, Cherry, Colbeck, Jacinta Collins, Coonan, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Fifield, Forshaw, Harradine, Humphries, Hutchins, Knowles, Lightfoot, Ludwig, Mackay, Mason, McGauran, Nettle, O'Brien, Payne, Robert Ray, Santoro, Sherry, Stephens, Watson and Webber

**Senators in attendance:** Senators Barnett, Marshall and Murray

**Terms of reference for the inquiry:**

Workplace Relations Amendment (Agreement Validation) Bill 2004

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**Committee met at 12.14 p.m.****HARMER, Mr Michael Daniel, Solicitor/Managing Partner, Harmers Workplace Lawyers acting for Suncorp-Metway Ltd****JOHNSTONE, Mr Peter Stuart, Group Executive, Human Resources, Projects and Central Services, Suncorp-Metway Ltd****MATHER, Ms Sue, General Manager, Human Resources, Suncorp-Metway Ltd**

**ACTING CHAIR**—I declare open this inquiry into the [Workplace Relations Amendment \(Agreement Validation\) Bill 2004](#). On 18 November 2004 the Senate referred the bill to the Senate Employment, Workplace Relations and Education Legislation Committee for inquiry. The committee is due to report on 29 November. The bill, which is considered urgent, is intended to remove any uncertainty about the validity of workplace agreements entered into between companies and their employees under the terms of the Workplace Relations Act. This uncertainty arises from a ruling of the High Court handed down on 2 September 2004 in the Electrolux case. The ruling is that industrial action will not be protected if it is in support of claims that would be considered outside the employment relationship.

In response to concerns expressed by both industry and unions that the High Court ruling may invalidate agreements which have been genuinely negotiated within the spirit and the letter of the Workplace Relations Act, the government has with this bill moved to ensure that certified agreements and AWAs approved or varied before 2 September 2004 will be valid. That includes matters in agreements that are incidental or ancillary to the employment relationship.

I remind all witnesses that in giving evidence they are protected by parliamentary privilege. Parliamentary privilege gives special rights and immunities to senators and members and those who appear before its committees. Parliament must function without obstruction and people must be able to give evidence to its committees without prejudice to themselves. Any act by any person which disadvantages a witness as a result of evidence given before the Senate or any its committees is treated as a breach of privilege. I welcome any observers to this public hearing. I welcome our first witnesses from Suncorp-Metway Ltd. The committee prefers to take evidence in public. It will consider any request for all or part of the evidence to be given in camera. The committee has before it submission No. 4. Are there any changes or additions you wish to make?

**Mr Johnstone**—No.

**ACTING CHAIR**—I invite you to make a brief opening statement before we begin our questions.

**Mr Johnstone**—Good morning. Thank you for providing Suncorp with the opportunity to present at this inquiry today. Suncorp is a top 25 Australian listed company with more than 8,000 staff working across the country in all states and territories except the Northern Territory in banking, insurance and wealth management. I wish to present a case for the Senate to consider amending the Workplace Relations Amendment (Agreement Validation) Bill 2004 to encompass organisations which had finalised their agreements at the time of the Electrolux High Court decision and are awaiting certification. We are one company with

4,000 affected employees across the country and we understand that there at least 100—and potentially 200 to 300—organisations in similar circumstances. We have an exhibit that we could table at the end of my address if you wish and Mr Harmer could comment on those statistics.

In my presentation this morning, I would like to provide a brief outline of the following: firstly, our concern regarding the extent of the bill and our rationale for wanting the bill expanded to include companies awaiting certification; secondly, our extensive agreement development process; and thirdly, the consequences of Suncorp being excluded from the new legislation. Finally, I would like to table what we believe is a simple solution to counter the unintended circumstances which Suncorp now faces following the High Court decision and the amending bill, which does not incorporate an organisation in our circumstances.

Suncorp is seeking extension of the Workplace Relations Amendment (Agreement Validation) Bill to cover agreements negotiated with employees prior to the Electrolux High Court decision and currently awaiting certification by the Industrial Relations Commission. Suncorp supports the underlying principles of the bill as they will provide relief to large numbers of employees, unions and employers by ensuring the integrity of their collectively negotiated agreements. However, the bill merely seeks to address the integrity of existing certified agreements and fails to address the concerns of many employers and employees who had consulted extensively over agreements prior to the Electrolux decision.

At the time of the High Court decision on 2 September, Suncorp was in the final, ‘cooling off’ stage of a highly consultative six-month process involving 4,000 staff in all states and territories of Australia except the Northern Territory. We had circulated the final agreement to more than 4,000 employees at the time of the Electrolux decision and, of those who subsequently voted on that agreement, 88 per cent voted in favour of it.

The agreement, approved by our staff and developed in good faith under the law and the prevailing environment of the time—that is, the final iteration of the agreement—was circulated to staff on 23 August, 10 days prior to the Electrolux decision. Any suggestion that we could have withdrawn the agreement after 2 September and made changes based on the Electrolux decision is rejected by Suncorp for two reasons. Firstly, the final iteration of the Suncorp agreement was in the hands of the 4,000 staff I referred to earlier 10 days before the decision and it would have been disruptive and inappropriate to nullify and pull that agreement back after staff teams had worked on it for some six months. Secondly, following the High Court decision of 2 September, and still today, the ramifications of that decision are not clear—that is, it is not known which clauses in our agreement should now be excluded.

A small number of commission rulings on agreements since the High Court decision are starting to provide some illumination on what the commission considers to be a non-pertaining clause. But we would still not have been able to, and still cannot, clearly identify the non-pertaining clauses which must be withdrawn from the agreement. We have an exhibit which clearly demonstrates the extent of the uncertainty which exists and, if you wish, I will ask Michael Harmer to brief you on this at the conclusion of my address. For these reasons, we are sincere in our belief that the agreements negotiated now and awaiting certification should be captured in the new agreement validation legislation.

I would like to now briefly touch on the process that Suncorp went through in the development of the agreement. The agreement was developed using a structure unique to Suncorp which insures very comprehensive and objective consultation by employee representatives. Employees nominate and select representatives for the agreement development team and the communications team. This commenced in May 2004. Those teams were provided with very extensive training and they then undertook a very extensive consultative process which involved 1,275 face-to-face meetings with staff around the nation and also provided other feedback mechanisms.

The agreement went through a number of iterations and there was full consultation with every iteration. The final agreement was distributed, as I said earlier, on 23 August—some 10 days before the High Court decision—and then further information sessions were held with staff prior to a secret ballot which took place between 1 and 13 October 2004. Sixty-six per cent of the staff affected by the certified agreement actually participated in the vote and 88 per cent voted yes. We believe this is a reflection of the high level of staff involvement and the level of consultation.

The agreement is more than just an industrial agreement; it is an important part of Suncorp's relationship with its staff. If the bill goes ahead as is, Suncorp and our employees face the prospect of being technically denied certification of the agreement because of the Electrolux decision. We propose tomorrow in the commission to strongly contend that we should not be declined certification. We cannot, however, guarantee that outcome for the benefit of the business and its employees. If the commission tomorrow is minded to decline certification, we will seek an adjournment and place reliance on the amendments to the bill which we are seeking.

If declined certification, we would need to redevelop the agreement and conduct a new ballot, which is a lengthy and resource-intensive process—some six to eight weeks of consultation and then a vote involving more than 4,000 staff. This will have significant implications in terms of cost, resourcing and, importantly, our good working relationship with our staff—the staff of a top 25 company operating right around Australia and the largest listed company in Queensland.

Certification of the agreement is critical to the approval of remuneration increases and additional benefits for our staff. At this point there is no certainty that we would have an agreement by Christmas, which means that bonuses and pay increases provided for in the agreement would not be made. Staff will be significantly disadvantaged by delay to the certification of their agreement, as will the organisation. I do not believe that the exclusion of the Suncorp agreement would be consistent with the spirit and intent of the bill that is currently under consideration by the Senate. Accordingly, I urge the Senate and this committee to amend the proposed bill now so that it will provide certainty and protection for those who have progressed agreements to the final stages and are awaiting certification. Harmers lawyers have provided advice and drafted a simple amendment to the bill which would provide for the validation of the Suncorp agreement.

On behalf of Suncorp, I would like to thank the committee for hearing our concerns and I urge your careful consideration of this matter. The Suncorp team is hopeful that you will move to extend the bill to afford protection to the many thousands of employees who are

awaiting certification of their agreement. Even if Suncorp were successful in gaining certification tomorrow, the suggested amendments will provide relief for many other businesses and their employees. Sue, Michael and I would be happy to answer questions. Chairman, perhaps now would be an appropriate time to table the exhibits we have.

**ACTING CHAIR**—That is appreciated. It is agreed that we will proceed with that tabling. Mr Johnstone, you indicated that Mr Harmer might wish to make a contribution. Mr Harmer, do you wish to do that now?

**Mr Harmer**—If it pleases the members of the committee, yes, it would be convenient if I could briefly speak to these exhibits once they are tabled.

**ACTING CHAIR**—Sure.

**Mr Harmer**—There are two exhibits that we would seek to go to. I will hand up the first one, which goes to some statistical information. I refer to the particular exhibit from Suncorp-Metway Ltd, which, as you will see at the bottom, is headed ‘Statistics with respect to applications for certification’. Turning the page, the committee will observe that the exhibit contains a summary of inquiries made by our firm with the records unit of the Australian Industrial Registry of the federal Australian Industrial Relations Commission in Melbourne, supplemented by statistical data—which we must express our appreciation for—from the Department of Employment and Workplace Relations, which we understand will also address the committee later in the day.

The significance of the first exhibit is that, as the committee will observe, we have broken into two the categories of applications for new agreements under the various sections of the act. The first category is an 81-day period after 2 September, which is the date of the High Court decision, and the second category, importantly, is an 81-day period before the handing down of that decision. What members of the committee will observe this that, whilst we do not know the outcome of approximately 250 of those applications, at least 100 applications before the federal commission have not yet been progressed. Certainly all of those businesses and their employees are in a similar category to Suncorp—that is, prior to the decision, they concluded their agreement, filed it and do not have an outcome.

In relation to the category of those persons or entities who filed applications for certification of agreements after 2 September, what we would observe is this. We have come up with 581 by reference to the registry, and there is actually a larger number reported by the department later in the paper. Suncorp itself was in its final 14-day period prior to its vote at the time the decision came down; it then finally lodged its application in late October. We do not know the exact number of other businesses who would be in a similar circumstance, but there is that 14-day period, there is then a vote and thereafter, under the act, there are 21 days in which to lodge one’s application. Accordingly, a not insignificant percentage of those who have lodged applications even after 2 September, we would respectfully contend, may well be in a similar circumstance. It is for that reason that we say there are at least in excess of 100 businesses, potentially running into several hundred, in a similar circumstance. We have annexed material provided by the department which merely lists the application numbers and the status of all of those agreements lodged after the decision was handed down. Unless there are any questions, that is all we intended to establish with that particular exhibit.

**ACTING CHAIR**—Did you have another exhibit?

**Mr Harmer**—Yes, we did. I will hand up this second exhibit separately because it is somewhat bulky, and I apologise for that. I apologise in advance for burdening members of the committee with so much paper.

**ACTING CHAIR**—We are used to this amount of paper; it is always a burden.

**Mr Harmer**—The second exhibit, which is merely headed ‘Electrolux issues’, contains a brief summary of its contents on the opening page. If you turn one page into the exhibit you will see there is an index. If members of the committee will bear with me, I will very briefly flick through this exhibit—I will not go to it in any detail at all. It is tabled to demonstrate the uncertainty which exists at this point in time as to those matters which the federal commission considers do or do not pertain properly to the relationship and are therefore capable or not capable of being certified.

The committee will observe that the first table, at tab A, sets out a number of areas addressed by clauses in agreements, and we have listed the decision of the commission. If we take the first one, on change in consultation, the committee will observe that there have been two decisions finding that area certifiable and one finding it not certifiable. In the next area, of contractors’ labour hire, the committee will observe there is an array of different outcomes, either certifiable or not certifiable, depending upon the specific nuances of the clause. The committee will observe that there is a large number of areas that have been addressed where there are decisions of the commission going one way or the other. If we could take the analysis a bit further, at tab B—

**ACTING CHAIR**—Are you happy to take questions on the way through this exhibit, or do you want to wait until the end?

**Mr Harmer**—If the committee pleases, perhaps I will get to the end, just to summarise what is there, and then I will be happy to take questions. At tab B there is a drill down into the labour hire area where we have actually gone into the specific details of a clause and noted the complexity involved in some of the decisions, finding labour hire in contracting either certifiable or not certifiable. The committee, on reading the exhibit, will observe a considerable degree of uncertainty arising from the area and a great deal of complexity, with respect.

Tab C deals not with the substantive categorisation or characterisation of clauses but the process that one would have to go to if knocked back by the commission—whether you have to go back to a vote or not. The committee will observe that there is a conflict within the commission at the moment whereby the proper view, in our respectful view, has been expressed by Vice President Ross in the leading Ballantyne case but at least one member of the commission is strongly advocating the view that there is no need to go back to a fresh ballot. So there is even conflict on process.

At tab D, we have listed in tab 1 all the clauses that have been impacted by the Electrolux decision and we have correlated all of those clauses to pages of a very detailed table which lists the clause and the extract from the decision dealing with it. I would ask members of the committee to note the extensive number of agreement clauses that have been impacted. If you go through that list, of some four pages, it is a most comprehensive list of clauses that have

been impacted to date. And at tab 2 you will see an extensive table, running to some hundred pages, listing all the clauses that have been impacted and the reasoning of the commission member as to why they were either pertaining or not pertaining. Again, there is a great deal of inconsistency demonstrated, as we have tried to summarise in the earlier tables.

Finally, we have merely attached the decisions—some 13 decisions of the commission—that make up that conflicting series of complex and inconsistent approaches to matters pertaining. All that we say arises from that is that it is very difficult not only for Suncorp or persons advising employers and businesses but even for persons who, after the decision of the High Court, have tied up agreements and could be bringing them up and finding that, lo and behold, they are rejected. This particular amendment we are seeking is important for those people who, without any notice at all of this complexity or this issue, are genuinely tied up in agreement. If it pleases the committee, I have probably said too much.

**Senator MARSHALL**—Mr Harmer, I think you have probably saved the Parliamentary Library months of work with that exhibit. I thank you for that. It will be very useful.

**ACTING CHAIR**—Thank you, Mr Harmer, for the comments and remarks in your comprehensive introduction, and the comprehensive exhibits as well. I am sure the department and many others will have an interest in that, so I thank you. We can now move to questions.

**Senator MARSHALL**—You briefly described the development process. I understand your agreement is an LK agreement.

**Ms Mather**—That is right.

**Senator MARSHALL**—So you were not influenced by what some might call the evil bullying tactics of a trade union?

**Mr Johnstone**—I would not say it like that. The agreement was developed with a direct relationship with our staff, so it was by our staff, for the staff. We did, however, consult with the union. There was communication from the FSU to our staff, through flyers and in the normal way.

**Senator MARSHALL**—The point I am going to come to—and maybe I will assist you with that—is that you willingly negotiated and willingly agreed with the clauses you are now concerned have been made invalid by Electrolux.

**Mr Johnstone**—Yes.

**Senator MARSHALL**—And you really want to be in a position to be able to negotiate with your staff, come to an agreement and have that agreement registered as a certified agreement.

**Ms Mather**—Yes.

**Mr Johnstone**—To have the agreement that we have reached with our staff certified by the commission, yes.

**Ms Mather**—I think it is worth noting that the union have in fact sought to be bound by our agreement, so they are not indicating to us any objections based on the Electrolux decision and potential pertaining clauses.

**Mr Harmer**—The two unions involved, the FSU and the ASU, have both formally applied to be bound.

**Senator MARSHALL**—Yes, but you are saying that the bulk of the negotiations was done through what you call staff development teams.

**Ms Mather**—Yes, that is right.

**Senator MARSHALL**—What clauses do you think may be invalid?

**Mr Harmer**—Three broad categories of clauses are of concern. One relates to the area of salary sacrifice. Members of the committee may or may not be aware that there has already been a decision, by Senior Deputy President O'Callaghan of the commission, to the effect that broad salary sacrifice clauses which put aspects of the salary sacrifice in the hands of third parties do not sufficiently pertain. We have a clause which closely correlates to that decision, and that causes us some concern, although it is a most beneficial clause and very flexible and available to the staff concerned. The second category relates to clauses which are of benefit to the families of staff. There are provisions which provide, for example, that members of staff who are the primary care givers for their young children can get access to forms of domestic support. They can get payments for a home nappy service and a whole range of things which relate to support for their family rather than for the staff member. Again, there is a decision of the commission indicating that that is arguably outside a matter pertaining, notwithstanding its extremely beneficial nature. The final category relates to aspects of payroll deduction and, again, involvement of third parties in payroll deduction. They are the broad categories. There are other aspects which could be questionable. We contend they should all be certified, but some decisions of the commission, although inconsistent, speak otherwise.

**Senator MARSHALL**—Mr Johnstone indicated that you wanted to preserve the integrity of your agreement and you say that your proposed amendment would do that. But it would not, would it? All that would happen is that you might get your agreement validated, but all the clauses that you think may be a problem with Electrolux now—and others which may develop in time—would be unenforceable. So how does that actually give you an agreement with any integrity?

**Mr Harmer**—The clauses concerned constitute an extremely small percentage of the totality of the agreement, and we are happy to table the agreement to demonstrate that. What we have sought to do is not to automatically have it validated. We have sought to give the commission the discretion to assess, based upon the number of clauses which have to drop out and the impact on the agreement, whether through undertakings or whatever—and the first aspect of our amendment says, 'If the commission is satisfied by undertakings.' For example, Suncorp has contended that it will execute a deed poll—enforceable, in replicating as best we can enforcement under the act—to ensure that those aspects of the agreement which are not then formally enforceable under the act and are fairly minor in the whole scheme of the agreement would nevertheless be enforceable by individual staff members.

**Senator MARSHALL**—That begs the question: why do you not just do that?

**Mr Harmer**—We can certainly do that in relation to those specific clauses, but the problem is the notion of throwing out the baby with the bathwater: that is, for the sake of some very minor clauses within the scheme of the whole agreement, the entire agreement is

going to be rejected and the whole six-month process—across 4,000 staff and over 1,000 staff meetings—is going to have to be replicated to come up with another agreement. What we are saying is: that is unjust, inappropriate and contrary to the spirit and intent of this amendment; what we should be able to do is reassure the commission that we will provide enforcement for these ancillary provisions and take the 99 per cent of the agreement which is not troubled by Electrolux—and not have to go back around and do the same, whole thing again and defer all these benefits for all these staff members.

**Senator MARSHALL**—How would an individual staff member enforce part of the agreement against—what did you say you were—one of the top 25 companies in Australia? How does an individual do that under your proposal?

**Mr Harmer**—The staff members have access through the dispute settlement provision. Under section 170LW of the act, Suncorp is committing to accept arbitration by the federal commission on any grievance by any individual staff member.

**Senator MARSHALL**—That is for matters that relate to the certified agreement.

**Mr Harmer**—That is for the enforcement of the agreement. But we—and this is the reason for the undertakings provision—would be undertaking that we would accept recommendations on those nonpertaining matters. So there would be an option either to take civil law proceedings to enforce the deed poll or, alternatively, we would commit upfront under 111AA of the act, which states that the commission has jurisdiction to make recommendations to enforce, if you like, a disputed outcome across the parties.

**Senator MARSHALL**—That is the process, but how does an individual practically do that?

**Mr Harmer**—The individual can do that either through the FSU or the ASU, if they are members—

**Senator MARSHALL**—So the unions would do it for them?

**Mr Harmer**—Or individually they can raise a grievance and there is a step by step process that ultimately can lead to a hearing before the commission. I would note also that there is a staff association, which is funded, and an employee assistance program, which is also funded—to provide counselling, assistance and even advocacy services to employees, if they do not access a union to go through that grievance process.

**Senator MARSHALL**—What did this whole process of agreement development cost you? Are you able to put a ballpark figure on that? There seem to have been an enormous number of meetings and an enormous amount of resources.

**Mr Johnstone**—Do we have an actual figure on that?

**Ms Mather**—I have not actually got a figure. I guess a comment to make there is that it is a small cost in terms of making sure that the process has a quality outcome—not just in the development of the agreement itself but also in our people's view of the consultative process that they have been entitled to participate in. I do not have a figure to hand, but it did involve a considerable number of the people in my division going out and meeting with staff to make sure that they understood the existing agreement and had an opportunity to provide feedback on the agreement. They collected that feedback and it was utilised by our employee

development team in considering all of the issues and suggesting the process of putting the stages of the new agreement together for their consideration.

**Senator MARSHALL**—It must have been a significant cost. What I am getting at is that, if you need to go through the process again, it will not—given the guts of it are still there—cost as much as it did last time, but redoing it is still going to involve a considerable cost, isn't it?

**Ms Mather**—Yes, and our process would oblige us to go out and talk to people through the agreement development team once again. So, yes, it would.

**Senator MARSHALL**—You talked about nuances of clauses, and it seems that the way some clauses are written determines whether they can be interpreted as pertaining or not—and I might as well roll my second question into my first one: regarding the clauses you are concerned about, is it your view that they are matters that pertain to the employment of your staff?

**Mr Johnstone**—I will let Michael back me up on this, but they are certainly matters that go to the relationship we have with our staff, even if they are not technically part of the employment relationship—particularly those matters that Michael mentioned earlier. Also, I should add, the availability of discounted products and things like that are not core to the employment relationship but they are certainly part of the relationship with our staff.

**Senator MARSHALL**—So, if it were not for the Electrolux decision, you would very happily negotiate those issues with your staff, believing that they are matters that pertain to the employee-employer relationship?

**Ms Mather**—Yes, I think that is correct. The other point I would make there is the point that Peter mentioned in his opening statement—that we do not view the agreement as just a pure industrial instrument; it is very much about the culture that we are trying to establish in our organisation and with our people.

**Senator MARSHALL**—The culture itself is a relationship between the employer and employee.

**Ms Mather**—Sure.

**ACTING CHAIR**—With regard to your appearance at the Industrial Relations Commission tomorrow, you have been sounding a bit pessimistic about the chances. Is that the case or are you feeling more confident? You indicated to the committee those three examples where there was some doubt, and previous precedents have given you cause to believe that there was some question as to whether they did or did not pertain to the employment relationship. Can you indicate to us a little more clearly how you will be arguing the case tomorrow and what your level of confidence is about whether or not it will get up tomorrow? Can you give any further details in terms of salary sacrifice, for example—which is not unusual in modern industrial relations arrangements—and in terms of benefiting family members of staff? That does not seem to be overly unusual. You mentioned, I think, payroll deductions. I am not an expert in this field. Can you give any further reasons as to why you are confident or why you are pessimistic on those three grounds?

**Mr Johnstone**—I will perhaps start and then I will ask Michael to go into the detail. I said in my opening address that we will be arguing strongly for certification tomorrow. If we get the sense that the commissioner is of a mind not to certify, we will seek an adjournment. Our level of confidence has certainly increased over the last few days. I am assuming it is fair to mention that there was another matter we had before the commission earlier this week and Vice President Lawler indicated—and he stressed provisionally—that he was of a mind to proceed to certification. You might like to refine those words. But that is tomorrow, and what may happen between now and tomorrow I am not sure. That is why I made the point also that, even if we were successful tomorrow, we are suggesting—and the exhibits I think will support this, on analysis—that there are other organisations that would benefit from the amendment that we are seeking.

**ACTING CHAIR**—But for you, that would be suitable—and you would be happy with that, if it were certified?

**Mr Johnstone**—We would be ecstatic.

**ACTING CHAIR**—You would be, indeed.

**Senator MARSHALL**—But, even if it is certified, as Electrolux develops—because the decision itself was not very helpful with respect to what does or does not pertain, except for one specific example—down the track you may find yourself with invalid clauses. Given the timing of your certification, wouldn't that put the validation of your whole agreement in jeopardy? A bill in itself will not validate your agreement, even if it is certified tomorrow.

**Mr Harmer**—I will step back and address how we are going to handle tomorrow. We are awaiting confirmation from two unions, the FSU and the ASU, who are going to seek leave to intervene, as to whether they will formally oppose certification. We understand that the FSU intends to oppose, but we do not currently understand that either union will raise Electrolux issues. We could be wrong on that. We have had provisional indication from the commission that it does not intend to raise issues itself. On that basis, our approach will be to argue strongly that we do not have Electrolux clauses that should be rejected—or, to the extent that we do, they are not such that they would result in a rejection of certification—because they go to either ancillary or machinery issues—or, to the extent that we are wrong in that, there should not be a requirement for a further ballot, because the impact on the agreement is not sufficiently significant. We have to acknowledge there that the authorities are against us, but that would be our point.

We will be perfectly up front with the commission in saying that we have been promoting an amendment that may open up an alternative path and we will be asking the commission for an indication of whether its provisional view is going to be upheld. If the commission, in light of submissions from the unions or otherwise, is minded to indicate that it will not be proceeding to certification, we are currently minded to seek an adjournment to see the outcome and reap the benefit of this legislation, should it be passed.

The amendment we have sought seeks to take agreements in our circumstances that were finalised in a consultation sense—and issued formally, by way of notice under the act, as at the date of the decision—and to say that no aspect of the application made or their certification would be later subject to question. So, certainly, if we utilised the amendment we

have sought, it would give us all the benefit that the legislation will otherwise give to those agreements in place at the time. That is what we are seeking, but you are quite right, Senator: if we do succeed tomorrow and it is subsequently found that there is some basis to challenge our agreement, there will be a vulnerability there. I cannot put it any higher than that.

**Senator MARSHALL**—Do you want to go back to my earlier question in relation to those three points?

**Mr Johnstone**—In relation to the types of clauses which the chairman was saying that on the face of it would appear to be very close to the employer-employee relationship.

**Mr Harmer**—I could answer that by taking one specific example: salary sacrifice. We have a clause in our agreement that relates to salary sacrifice for the purposes of, for example, increased superannuation. There is a decision of the commission that said that that is fine, because superannuation is closely related to the employment relationship. Our clause goes further and says that employees can flexibly make arrangements for a whole range of other benefits—cars and this, that and the other—based on salary sacrifice and flexible packaging arrangements. It says that they are responsible for making those arrangements with third parties and that we will just shoot off the money. There is a decision of Senior Deputy President O’Callaghan that takes a similar clause and says: ‘That’s out.’ That specific decision is currently subject to appeal before the full bench. That hearing will be on 20 and 21 December. The appeal before the full bench will determine the outcome for a whole range of clauses that have been dealt with. That is a brief illustration of the sort of uncertainty that we are facing. Whilst we will be doing our damndest to get the matter certified, if I can put it that way, we have to acknowledge that there is considerable uncertainty about those sorts of clauses.

I agree on the family issue. I would say that on balance the commission’s decisions would favour that getting up, although there has certainly been a question raised about whether the benefit goes to a family member rather than directly to the employee, and we are in that category. They are all clauses that I would say have been longstanding parts of Suncorp custom and practice. They are embodied in policies and they are there in the business, but technically, under this decision, they could cause this massive process to be totally jettisoned and have to be repeated.

**ACTING CHAIR**—Have you had any feedback from your industry associations or any other industry bodies about your proposal?

**Mr Johnstone**—No. We have not consulted on this one with, for instance, the ABA. There are only two industry bodies, the ABA and the Insurance Council of Australia, and we have not consulted with them.

**ACTING CHAIR**—Just to clarify, you said that there were a number of other employers and employees affected in the same way as you. The first exhibit goes to supporting that view. Based on your analysis presented in that exhibit, are there 100-plus employers in a similar position to you?

**Mr Harmer**—What we say is that we have identified 100-plus agreements which were filed before the decision came down. So they must be agreements which were put together and finalised without knowledge of the decision. The commission’s registry records indicate

that of those agreements at least 100 are still waiting to be progressed. We do not know the exact number of agreements in our exact circumstance which had not been lodged but which had gone out under the final notice under the act for a vote. We suspect that there must be many hundreds more but we cannot give an accurate figure. That is why we have said 200 to 300. We have based that on our own experience of timing of lodgment and the number of agreements identified as being lodged immediately after the decision and leading up to today.

**ACTING CHAIR**—Just going back to your original comment, Mr Johnstone, about your support for the underlying principles of the legislation, in your view how important is it for this legislation to be enacted quickly to remove the uncertainty flowing from the Electrolux decision?

**Mr Johnstone**—The importance of the legislation and the amendment that we are suggesting from a time point of view is quite critical because we are coming up to Christmas. We would like to make payments to our staff. I think we are scheduled, if we have certification, on 17 December. So it is time critical.

**ACTING CHAIR**—So we are talking weeks, not months.

**Mr Johnstone**—Absolutely.

**Senator MARSHALL**—It occurs to me after what you have just said, and from the tone of your submission, that you would rather an amendment to the underpinning act, the Workplace Relations Act, to enable employers and employees to agree on issues to which they agree so that they could get on with it.

**Mr Johnstone**—Yes, I would have to support that proposition, by whichever means they may be negotiated with the assistance or without the assistance of third parties.

**ACTING CHAIR**—Just to follow up on that, it gets back to the law, doesn't it, as to what pertains and what does not pertain? To have that response is somewhat hypothetical in relation to the law. Mr Harmer, do you wish to respond to that comment?

**Mr Harmer**—All I would say is that, notwithstanding the comment, it has to be remembered that the amendment we have sought is very specific and tailored to address the law as impacted by the High Court decision. It is contained in that it seeks to take a formal point under the act and, with agreements having reached that point, to draw a line. Thereafter, it gives the commission a basis to very carefully progress decisions to see if they can go through, notwithstanding that they do not have matters pertaining. So the amendment we have sought and we are specifically addressing is very much within the law and the scope of what the amending legislation is seeking to achieve, as we see it, notwithstanding that wider agreements would be beneficial.

**ACTING CHAIR**—Thank you very much for appearing today and for your comprehensive submission.

**Proceedings suspended from 12.59 p.m. to 1.34 p.m.**

**ROBERTS, Mr Tom, Senior National Legal Officer, Construction, Forestry, Mining and Energy Union**

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

**ACTING CHAIR**—Welcome.

**Mr Sutton**—We appear before you today to speak to our submission. I also indicate that, as well as the construction division, the mining and energy division of the CFMEU associates itself with the submission.

**ACTING CHAIR**—The committee has before it your submission, submission No. 5. Are there any changes or additions at this stage?

**Mr Sutton**—No.

**ACTING CHAIR**—The committee prefers to take evidence in public, and it will consider any request for all or part of the evidence to be given in camera. I invite you to make a brief opening statement before we begin questions.

**Mr Sutton**—I thank the committee for the opportunity to speak to you today. There are two major problems, in our view, with the central idea of partial validation advanced in this legislation. Firstly, it continues the climate of uncertainty that prevails, and, arguably, the proposition of partial validation exacerbates that climate of uncertainty. Secondly, the type of legislative intervention contemplated here alters the bargain struck between the agreed parties. It undoes their agreement and reconstitutes the deal according to the government's view. It is far from clear that this approach is constitutional. Next, we are greatly concerned at the failure in this legislation to move to validate the hitherto protected action that may have accompanied the process of the bargaining parties striking their deal. To allow action that the parties and the supervising tribunals took to be protected and lawful to be retrospectively ruled unprotected and unlawful, and therefore subject to harsh penalties, is to stand by and permit a grave injustice to be perpetrated.

As to the construction industry in particular, we are facing unique circumstances that shape our attitude to this mooted legislation. To some extent—perhaps to a large extent—this legislation is being rushed into the parliament in order to obviate a move by construction unions, including our own, and a large number of employers from the construction industry to move to bed down our current arrangements in advance of new, draconian, extremely bureaucratic and interventionist legislation that the government has said it will introduce into the parliament after 1 July next year.

A Senate committee, constituted reasonably similarly to this one, last year and in the early part of this year took extensive evidence around Australia on the legislation of which I speak, known as the building industry improvement act. That committee drew very firm conclusions about the dangers and injustices that would be perpetrated across the construction and related industries if that legislation ever became law. We know from our dialogue with our employers—and, indeed, our valued long-term relationships with the established builders and subcontractors of our industry—that they crave certainty and stability in our industry. The

partial validation proposed here, motivated as it is by narrow anti-union sentiments, will be of no real use to anyone in the construction industry or indeed more broadly across all industry in our country. We urge the committee to reject the legislation as presently constituted. My colleague Mr Roberts is going to give some brief comments on the other submissions you have before you.

**Mr Roberts**—The principal object of the Workplace Relations Act is to provide a framework of rights and responsibilities for employers and employees and their organisations which supports fair and effective agreement making. I think one of the key reasons that this committee and legislators in general need to be a little bit cautious in their dealings with a bill of this kind is that we are not considering legislation that concerns the framework for bargaining but legislation where the parliament are deciding the content of enterprise agreements for themselves.

This morning you heard some evidence from Suncorp-Metway in relation to this bill. I think there is much to be drawn from that kind of submission. The Suncorp submission is not exclusively in relation to a transitional problem that employers have in dealing with legislation of this kind. The underlying concern of the Suncorp example is that, aside from all the costs and inconvenience of having to go through the processes of potentially putting their agreement to their work force again, if they are forced to remove what might be seen as objectionable provisions from their agreement which has already been voted on and approved by some 4,000 employees, they have no guarantee that those same 4,000 employees will approve their agreement in a different form. In other words, they will approve the parts that do pertain and they will make other arrangements for the parts that do not. Suncorp employees have voted on a package which is their agreement, and they have approved it overwhelmingly. But there is no guarantee that that would be the case if that agreement were to be treated in the same way as all existing agreements will be treated under this bill.

There would be less to criticise in this bill if it could be regarded as merely a benign attempt to validate the totality of a bargain. But, as I have said, this bill proposes to re-create bargains in completely different terms. It is also not benign legislation for the reasons that Mr Sutton has outlined this afternoon—that is, part of the stated rationale for this legislation is to give employers in our industry a strategic advantage in the bargaining process.

Indeed, the AiG submission raises the spectre of pattern bargaining as a reason why agreements should not be renegotiated in the construction industry. They are effectively saying that the government should, by legislation, stop fresh negotiations because unions might engage in pattern bargaining and they might succeed with their objectives in bargaining. In that case, the legislation suits their, not the unions', interests. It is a little bit difficult to point the finger at unions, as the government have, and accuse unions of being opportunistic or taking advantage of uncertainty, when those kinds of submissions are made by employers. That is the nature of enterprise bargaining system that we have.

The second feature of the AiG submission is that they obviously support the bill in its present form, but they do not directly address the issue of validating industrial action that has preceded existing agreements. By implication, I believe, the AiG are saying that they do not support the legislative validation of industrial action. In that event, they are saying that they are prepared to accept that the government rewrite the terms of current agreements, and they

are also prepared to accept the fact that employees and unions—and, for that matter, employers that have taken industrial action—may find themselves confronted with legal liability for the action that they have taken, notwithstanding that their agreement has been made valid by legislation.

The Department of Employment and Workplace Relations make exactly the same point. They acknowledge that there was considerable uncertainty about the operation of section 170LI. They say that twice in their submission. But they say that it is reasonable that the parties must have known that, when they took industrial action, because there were divergent views, they took and accepted the risk that their action would not be protected. The ACTU's response to that is the complete answer to that kind of submission—that is, the view that the unions took during the negotiation of these existing agreements was a view that found favour with three members of the full Federal Court. It was not an extravagant view. It was a view that was reasonably open to people. To have agreements validated without the prospect of having the industrial action that preceded them validated is extremely unfair, in our view.

The other point I would make about the department's submissions is that they construct an argument that really there are only inconsistencies at the margins that are emerging about the true application of these provisions of the act and that in fact, over time, the courts will settle the interpretation and things will be smoothed over again. The fact of the matter is that the inconsistencies that are there and that are being litigated at the moment are a direct product of the fact that employers generally have seized the Electrolux decision as an opportunity to reargue the question of what does and does not pertain and what can and cannot be included in an enterprise agreement—and they are rearguing that precisely because they believe they are arguing it in a new political climate. They are taking the opportunity to run those arguments particularly with respect to clauses that relate to trade unions.

Secondly, the department says—and I do not believe it is correct to say—that the parties to existing agreements are not themselves in a position to take remedial action. That is just not the case, because it is open to the parties under the present legislation to take steps, if they wish, to terminate their existing agreements and have them recertified and therefore made valid under the act. ACCI, like AiG, make reference to the validation of industrial action, so the same point applies to them. They also make the point at paragraph 75 of their submission that the reason the government should not consider validating non-pertaining matters—in other words, validating the agreements in their entirety—is that it would be unfair and that it would cause disputes. But all the submissions, including ACCI's own submission, acknowledge that there is nothing stopping the parties from negotiating agreements with respect to matters whether they pertain or do not pertain, so we think that the ACCI have really identified a nonissue and a nonproblem. I will conclude my remarks there.

**ACTING CHAIR**—Thank you, Mr Roberts and Mr Sutton. We will have some questions now.

**Senator MURRAY**—Mr Sutton, you do not argue that the act should develop a specific and exhaustive list of what does pertain to the employment relationship, do you?

**Mr Sutton**—No.

**Senator MURRAY**—So you support the system whereby, with items which have been negotiated, it is up to the Industrial Relations Commission to determine whether they should be certified or not—it is the commission who should make the conclusion?

**Mr Sutton**—We would take the view that the uncertainty that has been created ought to be completely put to bed by validating the agreements that have been certified, whatever the content that the parties reached, given the new swing, if you like, in the High Court—the new law that has been handed down that can guide the parties in future deals and future negotiations. But at the very least, if we are talking validation, it is clear from our submission that we believe partial validation does not assist anybody in particular and that there ought to be full validation of the agreements up to the point of the Electrolux decision.

**Senator MURRAY**—What I am looking for, really, is an answer which guides me as to the future, not the present. Much of the discussion you have put to us today concerns the present—in other words, agreements which are either operative or on foot—and argues that the integrity or sanctity of those agreements should be maintained. My view is this: if you do not have an exhaustive list of what pertains to the employment relationship and you stick with the principle that the Industrial Relations Commission shall determine that based on the agreement that is reached by the two parties, then that will always apply and you will always have the opportunity for the IRC decision to be contested in the courts all the way up to the High Court. So we could see the same thing going on in five or 10 years time. It seems to me that there are three alternatives to that. One is that you do what you are proposing—namely, any agreement that has been certified exists to the end of its life and then any new agreement would have to pay attention to the decision of the High Court or whichever court. The second option is to go the government's route, which says they will only adjust the legislation to make it definitive when an area of uncertainty emerges. The third option may be to establish a principle that in the event of any certified agreement having its clauses declared invalid that that will never render the entire agreement invalid, unless it is a substantive issue. In other words, you are laying down a judicial principle which would allow courts to knock off particular agreements without threatening the agreement as a whole—which has been the major concern. Do you think there might be more than those three options before us if we think long term?

**Mr Sutton**—I think there probably are. I think the fact that this is all being rushed, for reasons we have already commented on, means that not enough attention is being paid to other options. If I could comment on your third option, naturally it is something we would like to think more about. But my instant reaction is that it would seem to me the problem in that third proposition might be identifying what is 'substantive' and what is not 'substantive'. That might be the difficulty. Equally, on the idea of an exhaustive list, obviously I can see the merits of what you are saying in trying to head off having the goalposts move all the time, but again you do run into this problem when you try to define things completely and create exhaustive lists that you invariably leave things out and off the list and it does not necessarily nail the whole problem down.

**Senator MURRAY**—As an experienced negotiator, is it a danger that you may have the development of a negotiating style which results in two agreement streams—namely, a narrower certified agreement and a common-law agreement—which might have all those

items which would not pertain to the employment relationship but which the two parties might agree to? Is there a problem with that developing?

**Mr Sutton**—That is an absolutely highly probable outcome where industrial law and industrial outcomes take a different shape and form to meet the real desire of the parties. I think it will just take a different form and, to some extent, it might be even more unmanageable because it is going to be largely outside the realms of the established industrial tribunals and the established mechanisms to deal with these matters.

**Senator MURRAY**—Doesn't the government's bill open up matters as an easy way of accommodating this issue?

**Mr Sutton**—Except that it takes trade unions in a direction that we have historically not been for the last 100 years; it is certainly a direction in which the government wants to take us, by my perception—that is, towards the common-law system. When there are disputes about common-law agreements, where are those disputes fought out? They are fought out in common-law courts and supreme courts, and unions have to obtain hired guns and fork out huge money to lawyers et cetera. This is instead of matters routinely being dealt with in the traditional way that was laid down in 1904 in the Conciliation and Arbitration Act, where we went along and an umpire sorted these matters out free from enormous litigation. The government probably would not mind that much if the disputation ends up in the common-law courts, but I do not see that as a productive way for the employers, the employees or the unions, because the common-law courts are traditionally so slow, cumbersome and costly. It is not a conducive route to quickly settle an industrial dispute.

**Senator MURRAY**—It seems to me that the government's mind—and I am not speaking for the government, nor do I know its mind—is not made up in this area. One option is to have a narrowly defined certified agreement stream with an exhaustive list of specific matters and to parallel that with a common-law stream which would allow you to add in anything else which you thought pertinent to that particular work site and employer. It certainly has not wanted to say that anything can be part of a certified agreement and that it is just up to the IRC to construe it in its broadest terms, but it has not yet gone to that exhaustive list. I would think there would be real dangers for you if it went to that exhaustive list, because then you would get a very narrow set of items and much of your relationship might in fact end up being at common law, which has the disadvantages you have spelt out.

**Mr Roberts**—If you are looking for a constructive suggestion for dealing with these kinds of issues into the future, I think the ACTU puts forward a very good suggestion at the end of its submission which, in my view, would make a lot of litigation that is starting to crop up now disappear. With a lot of that litigation, as I said in my opening remarks—and indeed with the Electrolux litigation itself—the central question in a lot of ways is: what is the role of the trade union in the employer-employee equation? I think employers are now starting to litigate because they can sense that there is an opportunity to start to pare back the legitimate role of trade unions in the content of certified agreements.

The ACTU's position is that the High Court, even in the Alcan decision, has acknowledged that the act does not go to the full extent that the Constitution permits in terms of what it allows to be in either awards or certified agreements, and it never has. But what the High

Court also said in *Alcan* was that any scheme of legislation that recognises the representative role of trade unions could conceivably allow industrial matters to include all those matters that relate to trade unions. The reality is that trade unions are no more than the representatives of employees. That is the capacity in which they operate. The ACTU's suggestion at the end of their submission is: 'Let's clarify that particular issue. If you're talking about amending what can and cannot pertain, let's make it explicit that matters can pertain to not just employer and employee relations but also their respective representative organisations.' That would make a lot of the litigation and uncertainty go away.

**Senator MURRAY**—Both of you have long experience in these matters. Do you think that perhaps the government's bill is taking an evolutionary approach—in other words, fixing an immediate problem which pertains to specific matters adjudicated by the High Court and watching how the market plays out, because the unions, the employer organisations and some employers are contesting the boundaries at law? Do you think that it is wise for the government, through this bill, just to fix the immediate problem and sit back and wait and watch to see how it is all going to work out?

**Mr Sutton**—I think I have made it clear that we do not regard that as a wise way to head. Partial validation is a recipe for future uncertainty and it is not what the employers want in my industry, in the construction industry. As I said, they crave stability and certainty. The goalposts are going to continually move under the kind of rushed legislation that, in our view, has not been thoroughly thought through.

**Senator MURRAY**—Mr Roberts, moving on to your industrial action remarks—and this is not intended as a rude question—is your fear that there will be legal action arising out of past industrial action a bit fanciful? I ask that because, at law, when industrial action has been taken—unless there are specific circumstances that you can tell the committee are different—generally speaking it relates to the fact that an agreement could not be reached and relates to substantive matters within the agreement. Industrial action would not have occurred with respect to just the one or two items that might be the subject of court action. Is it really likely that employers or employer organisations will seek to pin and punish unions or employees for taking industrial action for agreements which have been partially invalidated?

**Mr Roberts**—I think the point is that, whether it is fanciful or not and whether it happens or not, it is very easily fixed by legislation. We say: not only should the industrial action that preceded agreements be validated, if you like, but where action is taken and no agreement has been reached, but it is otherwise protected action, the parties should have the certainty that their action is not going to be litigated on down the track. It seems a bit unreasonable to ask that the legislation can say, 'Not only are we going to rewrite your agreement for you and tell you now what the enforceable parts of it are and what they aren't, notwithstanding that that is not what you voted on; we are not going to give you any guarantees that the way you got there was legitimate and something that cannot be reopened.' That is just not a reasonable response, and it is very easily rectified.

**Mr Sutton**—Particularly in a context where the union in question thought it was operating on all fours with the law, and the arbitral tribunal that was overseeing the process thought that the union was operating on all fours with the law—and how can they perceive otherwise; how can they know otherwise? It is retrospectivity at its worst to find out, somewhere down the

track, that the law has now changed so that what you thought, what the arbitration commission thought, your conduct two years prior—this fly!

**Senator MURRAY**—You've got to change your aftershave!

**Mr Sutton**—Maybe I should use more of it! It is retrospectivity at its worst for all the parties to find out, some years later, that what they were doing in good faith, in a bona fide sense, some years earlier—

**Senator MURRAY**—But there are no legal actions on foot in this area, are there?

**Mr Sutton**—I identify with what I took Mr Roberts to say: 'Yes, we concur that it is unlikely, but why would you even entertain that it could happen in any instance?' It is such a grave injustice to leave that issue hanging in the air. Naturally if there is a major fall-out between bargaining parties—a trade union and an employer—the employer suddenly may have a very powerful weapon if they had a dispute some years earlier and it is now ruled that that three-week strike was unlawful, unprotected action. It is a pretty powerful weapon for an employer to suddenly have, and very unjust, very unfair, in the circumstances.

**Senator MARSHALL**—Before I come to the subject of protected action too, I want to talk a little bit first about the way agreements are actually negotiated. I think what you are putting to us is that agreements are negotiated as a whole and voted on as a whole and then that is the entire bargain which people expect to have for the life of the agreement. That is the case, isn't it?

**Mr Sutton**—Yes.

**Senator MARSHALL**—Your argument, and just correct me if I am wrong, is that, if only parts of that agreement are now validated—it is difficult to go into every individual's mind to determine what value they may have placed on every individual item in the agreement—and therefore, if agreements or clauses fall out because they are not validated, you actually alter the bargain that was struck and the value that individuals have placed on it. Is that your position?

**Mr Sutton**—Indeed. Mr Roberts can add to this, but I know from my knowledge that Justice McHugh, in handing down his decision, went very much to this issue and said there would be a problem around the corner. It is all very well to determine that some clauses do not pertain, and it is all very well for the government to then say, 'We will validate the agreement, minus those particular clauses,' but that may well be unconstitutional, because for a third party to come along and declare or deem the way it construes the deal and the way it interprets the minds of the parties is a very strange set of arrangements, and it may well be found to be unlawful not too far down the track.

**Senator MARSHALL**—Suncorp-Metway, in their tabled documents, which you would not have a copy of, actually listed some hundreds of clauses that are now being questioned by the Electrolux decision. I guess the common view that has been expressed to me is that Electrolux really was about bargaining agents' fees. Really, there was no monetary value to the individuals concerned within the bargain, so what is the big deal? But it actually goes to, in Suncorp-Metway's instance, salary-sacrificing arrangements, benefits that were to be paid to the families of employees and a number of other areas in terms of payroll deduction

issues—of which there is substantial value and, again, the value may be assessed differently by each individual employee.

**Mr Sutton**—In the absence of some of those elements you may not have a deal.

**Senator MARSHALL**—Yes, and I think that is an important point. I also want to talk to you about the validation of industrial action. Have you read the department's submission?

**Mr Roberts**—My colleague has.

**Mr Sutton**—I have.

**Senator MARSHALL**—In their submission, at 1.29, they said:

While some decisions of courts and the Commission may have suggested that non-pertaining matters could be included in agreements, parties taking industrial action could not have reasonably thought there was no risk involved in taking industrial action in respect of matters that do not pertain to the employment relationship.

I just want you to confirm my understanding that it was not just the decisions of some courts—and the commissions may have suggested this—that indicated that it was possible. I thought you mentioned in your opening remarks that there were a number of Federal Court judges that actually took that view.

**Mr Roberts**—The full Federal Court before the High Court took that view. That is the point.

**Senator MARSHALL**—So, when the department says that parties taking industrial action—and by that I guess they mean individual members as well—could not have reasonably thought there was no risk, in the instances, and they are probably rare instances, where members of your union were taking protected industrial action or what you thought at the time was protected, did any members stand up and say, 'Look, I have been following decisions of the Federal Court and Industrial Relations Commission very closely and I actually disagree with those decisions that were made by the Federal Court judges and I think there is some real risk for us taking protected industrial action under these circumstances'?

**Mr Roberts**—Of course not. This raises the whole problem that you have with protected industrial action generally, which is that no-one is certain whether it is protected or not. There are that many complications attached to whether or not it is protected, and there have been that many arguments and court decisions about particular circumstances and whether action is protected. The only way it is ever resolved is at the end of the day when it is all over or well advanced and the courts make some pronouncement about it. Sure, everyone knows there is a risk, but everyone knows there is a risk every time you take industrial action, because there are no guarantees that your action is going to be protected. We just do not think it is right that the department says, 'They must have known there was some risk that this action would not be protected because there was this debate going on in the ether of the tribunals, and therefore they have to wear the consequences.' That just compounds the problem of protected industrial action generally.

**Mr Sutton**—The bargaining mechanism has been a lot more heavily prescribed in recent years with many changes to the Workplace Relations Act, and most unions, including our

own, have sought to adhere to the prescriptions and that is what we thought we were doing, adhering to the prescriptions as best we understood them.

**Senator MARSHALL**—There have been prosecutions on the basis of technicalities that led to a breach of protected action. I think I can recall one case where the company was incorrectly named on the notice of protected action, industrial action did take place consequently and that technicality actually made the industrial action illegal and a prosecution resulted. I cannot recall the name.

**Mr Roberts**—Yes, there has been a case. Indeed, when serious industrial action has been taken, it is a very common thing, particularly in interlocutory proceedings, that the employer will take technical issue with whether or not the industrial action is protected. That is one of the weapons they have to try to defuse protected action taking place at all. There has been a tonne of case law on all those sort of technical issues.

**Mr Sutton**—The AMWU were prosecuted by the Building Industry Task Force and were fined \$2,000 because they had the employer's name generally right but they did not have the exact name. As you know, it can make the world of a difference whether you have the exact name; near enough is not good enough. In that instance they were fined \$2,000 for that error.

**ACTING CHAIR**—In your opening comments, Mr Sutton and Mr Roberts, I think you indicated quite clearly that in your view it was the Australian government's intention to rewrite these agreements. I wanted to draw your attention to the second reading speech, which makes it very clear that that is not the intention of the government. I draw your attention to the words in the speech, which says:

The Bill will ensure the validity of certified agreements and Australian Workplace Agreements (AWAs) which were certified, approved or varied under the Workplace Relations Act prior to the High Court's ruling in Electrolux.

It goes on to say:

The Bill will provide that where an agreement was certified, approved or varied prior to 2 September 2004 but contains matters that do not pertain to the employment relationship, these matters will not be considered to affect the validity of the agreement's certification, approval or variation.

So, rather than rewriting the agreement, the intention is to provide certainty and validate those agreements that were entered into prior to that time.

Mr Sutton, you indicated that the legislation was rushed legislation. There is a view that has been put to our committee that it is actually very important that the legislation be introduced and passed as soon as possible. Suncorp-Metway indicated to us just this morning that they are talking about weeks, not months. Indeed, they were talking about their amendment but as well the bill in terms of getting it passed. So they indicated that it was a priority and it was an urgent matter.

I want to ask you about the purpose for your attempts to renegotiate these agreements. There is evidence on foot in the AiG submission and in the public arena that the ETU also has indicated its intention to renegotiate thousands of construction industry agreements. Can you advise us what is your intent and the purpose behind such efforts to renegotiate that? A lot of people would see, or a view would be put, that it is quite damaging, it creates uncertainty rather than certainty and the flow-on effects are serious and adverse.

**Mr Sutton**—You have raised three matters there. Certainly, in relation to the first, we hold strongly to the view that the government's partial validation does not create certainty and does definitely interfere with the substance of the deal that the parties struck, because the government is not proposing to validate everything that the parties thought appropriate prior to Electrolux. The government is saying that deals can be validated provided the matters pertain. Of course, the High Court is now reading that issue very narrowly. Other courts have to take note of the High Court. The goalposts are going to move constantly. Suncorp-Metway has apparently—I have not seen it—produced a long list of matters that may well not pertain. So I do not know how anyone can advance the proposition that the government's partial validation creates certainty or how anyone can advance the idea that it does not interfere with the substance of what the parties themselves wished. After all, the rhetoric we have been getting for the 8½ years of this government is that it does not wish third-party intervention into the substance of the relationships between the direct parties at the workplace. It seems to me that it does interfere: it does say to the parties what they can and cannot have in their agreements.

The second matter I will admit I have forgotten, but I will come to the third. I certainly recall your third question, and we can come back to your second. Certainly my organisation, as I indicated earlier, is in a unique position where we have been singled out, along with the other construction unions, to be on the receiving end of a new piece of legislation that is approximately 200 pages long and full of draconian provisions that do many things. One of those things is to significantly alter the kind of enterprise bargaining that will be possible in the construction industry as compared to other industries. We will have a much more restrictive set of rights and a much more restrictive regime in which we can go out and bargain to achieve enterprise agreements. The government have indicated, with the election result and having control of the Senate, that they intend to bring that legislation in post 1 July next year, and that will have a significant impact on the capacity of the construction unions to bargain for agreements in our industry. Being apprised of that knowledge, we have to sum up the circumstances we are in. And, indeed, the employers are also making an assessment of the circumstances they are in.

**ACTING CHAIR**—What is their assessment, from the feedback you have had so far?

**Mr Sutton**—The feedback I have is that the employers in our industry have been doing extremely well in recent years—the industry is booming—and people do not particularly want to be sidetracked into some crazy ideological fight with trade unions. I can think of one employer in the west who is a bit motivated that way, but I think you will find that all of the established players in the industry have got order books that are full and they have got three, four or five years of work ahead of them. They do not want to be sidetracked by conflict not of their making. They do not want to be sidetracked with some bureaucratic nightmare—this 200-page bill, with more bureaucracy than you can poke a stick at. They are really not much interested in it. The one thing that they say time and time again in my dialogue with them is that they want certainty, they want stability. That is what they want.

**ACTING CHAIR**—Are they taking up your desire to renegotiate the agreements with any enthusiasm?

**Mr Sutton**—It is early days. We are talking to those employers and we will see what eventuates. I know what is motivating them: they are motivated by getting on and doing business. From our point of view, we clearly see the political and industrial environment that the government is placing in front of us and our members. We have a very large membership, and we want to try to protect and preserve the standards we have been able to win for those members. We have to make an assessment of how we best protect and preserve those standards.

We are certainly not contemplating any kind of major claims or new claims or anything of that sort; we are interested in preserving the conditions that we have won and in getting on and working in a harmonious relationship. Most of these big building companies and big subcontracting companies are ones that we have had long-term relationships with. We know them very well and they know us very well. We all want to get on and do the business, basically.

**ACTING CHAIR**—So you are renegotiating on the basis of your view of what may or may not happen next year, in July or whatever?

**Mr Sutton**—I think anyone in my position or anyone in the position of the construction unions would take the minister's words seriously. The minister has been very blunt about what he sees ahead for the construction unions and the kind of legislation that he is advising he is going to introduce.

**ACTING CHAIR**—So you have an agreement on foot—the terms and conditions are set and it has all been agreed—and you want to sort of discard that and start again? I am just asking you whether the reason for that is based on what you think might happen at some stage in the future.

**Mr Sutton**—I would only be repeating myself by saying that we have been told that post 1 July next year there will be a very different legal regime in existence in the construction industry in which we can bargain for new agreements. There will be a much more restrictive set of rights. I do not know if you are familiar with it, but the capacity to bargain is all laid out in the Building and Construction Industry Improvement Bill and it is a very restrictive capacity for trade unions in the construction industry to bargain. I think if you were in our shoes you would take note of what the minister is advising he is going to introduce.

**ACTING CHAIR**—Does the ACTU support your action?

**Mr Sutton**—Action?

**ACTING CHAIR**—Attempts to renegotiate the agreements.

**Mr Sutton**—I do not know; you would have to ask the ACTU. But, as I said, at this time there is no mooted or pending action. Indeed, at law we could not take action. We are dialoguing with our employers and I am hopeful—I could not put it higher than that—that a very large number of the agreements may be reconstituted in the period ahead.

**ACTING CHAIR**—Over what period? Are we talking months?

**Mr Sutton**—I do not know; it is hypothetical.

**ACTING CHAIR**—You indicated that in your view the bill was unconstitutional. Do you have any legal advice to that effect?

**Mr Sutton**—I have seen one QC's view on that. That QC is very active in this area. That QC has probably been more active than any other QC and has a view that it may well be unconstitutional.

**ACTING CHAIR**—Can you share that with the committee or table that advice?

**Mr Sutton**—There was a seminar a couple of weeks ago at which that lawyer was kind enough to present a paper. I am sure we could probably get that paper to you.

**ACTING CHAIR**—Are you happy to share his name with us? Or do you want to check that with him or her first?

**Mr Sutton**—Yes, I probably ought to do that.

**ACTING CHAIR**—Okay. But your view is that there is valid advice to say that it is unconstitutional?

**Mr Sutton**—That is one lawyer who has been very active and prominent in this area, on the whole Electrolux issue, who has a view that this business of coming along and telling the parties what can validly constitute their deal may not hold up at the end of the day. What was your second point—would you like to remind me?

**ACTING CHAIR**—It was really a comment: that you had indicated the legislation was being rushed, but there is a preponderance of views that have been made to the committee and elsewhere in the public arena that it is actually urgent and is required quickly. I think you were putting it in a disparaging way, saying it was rushed legislation.

**Mr Sutton**—I have in mind words from Mr Andrews, the minister, who said he was moved or motivated in large measure by the activities of the ETU in Victoria and the construction unions in general. I took his words at face value to mean that that was something that he was going to move in on quickly and nip in the bud. I took those to be his sentiments.

**ACTING CHAIR**—Thank you for that. His views are set out in the second reading speech, which I am sure you have seen.

**Mr Sutton**—Sure.

**ACTING CHAIR**—We are a bit tight on time. I appreciate your response and thank you for it.

**Mr Sutton**—Thank you.

**Mr Roberts**—Thank you.

[2.25 p.m.]

**PIPER, Mr Timothy Charles Henry, Director, Victoria, Australian Industry Group**

**STEWART, Mr Leigh Grange, National Advocate—Industrial Relations, Australian Industry Group**

**ACTING CHAIR**—Welcome. The committee prefers all evidence to be given in public. It will consider any request for all or part of the evidence to be given in camera. The committee has before it your submission, No. 6. Are there any changes or additions you wish to make?

**Mr Piper**—We have no changes or additions to the submission itself, although obviously we would like to comment on it.

**ACTING CHAIR**—Thank you. We look forward to that. I now invite you to make your opening comments.

**Mr Piper**—Ai Group welcomes the opportunity to express its views to the committee on the [Workplace Relations Amendment \(Agreement Validation\) Bill 2004](#). Ai Group strongly supports the bill. It is a sensible and practical piece of legislation which deserves the support of all political parties. Whenever we are dealing with our members—whether we are looking at industrial relations issues, other legislative changes or, indeed, suggesting changes to government policy—the overriding factor for our members and for businesses in general is to be given certainty. Without certainty there is unease, and businesses are obviously unable to move forward. Businesses in Australia now want to have a definite and certain position with regard to the Electrolux case, allowing them to act with clarity and with a definitive position.

It is important that the bill is passed without delay, given speculation that the High Court's Electrolux decision may have led to existing enterprise agreements which contain matters that extend beyond the employment relationship becoming invalid. The bill will clear this issue up and create certainty for the parties, as we mentioned earlier. Some unions have already sought to exploit the uncertainty and embarked upon industrial relations campaigns to renegotiate existing certified agreements. We do not believe such exploitation to be in the interests of the economy or the ongoing relationship between companies and their employees. I seek to table a letter sent to electrical contractors by the Electrical Trades Union.

**ACTING CHAIR**—Will someone move that that be tabled?

**Senator MARSHALL**—I so move.

**ACTING CHAIR**—That is agreed to. It can now be tabled.

**Mr Piper**—This letter clearly shows that the Electrical Trades Union is taking advantage of the uncertainty that has been created and is attempting to renegotiate agreements well prior to their intended completion date. This bill will not allow such renegotiations to occur. It will put both employers and employees in the position they expected to be in with regard to their employment conditions. That is fundamentally the correct approach to ensure certainty and consistency for all parties. It is in the interests of both employers and employees that existing enterprise agreements remain valid and enforceable.

If an agreement is held not to be valid a number of difficulties could arise. I will ask our national advocate, Leigh Stewart, to elucidate on a number of these points following my comments in relation to them. From the most basic position, the terms of such an agreement—for example, in relation to wage rates or overaward conditions of employment for the employees—will not be enforceable if this bill is not enacted. Although there may be a potential of enforceability at common law, obviously at common law anything turns on the facts of each individual case, therefore again creating unreasonable uncertainty. It therefore introduces the prospect of potential further litigation, created because implied terms and specific performance of a contract will be relied on. As we know, such issues can often create dissension and different points of view. Such potential is not in the interests of any party, particularly when both parties had already considered the matter to be finalised.

There is also the risk of the employees or, in fact, the employer bound by the agreement taking protected industrial action during the life of the agreement. If there is no agreement on foot, protected action which under other circumstances would not be allowed becomes acceptable.

If the bill is not enacted, the Australian Industrial Relations Commission will not have the power to settle disputes which arise during the life of an agreement as the commission derives its dispute-settling powers from the avoidance of disputes procedure in the agreement. As I understand it, the commission could only conciliate, not arbitrate, without an agreement being valid. This again undermines the intentions of the parties. Further, for agreements which are inconsistent with awards or state laws, the employer may be found to have breached those awards or laws. Indeed, if an AWA or EB has more flexible hours within it than the award might allow—say, working until 1 a.m. rather than to midnight on an afternoon shift—then the employer may be found to have technically breached that award.

Appropriately, the bill does not validate clauses in agreements which do not pertain to the employment relationship. Such clauses should never have been included in the agreements in the first place as they are inconsistent with the Workplace Relations Act and a long line of High Court decisions—of which the Electrolux case is only the latest. Quite sensibly the bill also does not endeavour to define what is or is not a matter that pertains to the employment relationship. To do so would be almost impossible. This issue is best left to the AIRC and relevant courts to determine, consistent with the High Court's Electrolux decision.

AiG urges all political parties to support the passage of the bill without delay in the interests of Australian employers and employees. Industrial action due to uncertainty about the agreements must be actively discouraged, and that is what this bill would do. Employers would not be subjected to protected action during the intended life of the enterprise agreements, a factor which both the High Court and the agreements themselves originally intended. And shouldn't employees also be able to feel certain that those issues which really affect their personal employment relationships will be retained? We believe this bill delivers a fair and just outcome for all concerned.

**ACTING CHAIR**—Thank you. Mr Stewart, do you wish to make any opening remarks?

**Mr Stewart**—My remarks go more to some of the issues that have been raised by Mr Piper—in particular, that this is a sensible and practical piece of legislation. I want to explore

and elucidate some of the difficulties we see if the bill were not to be passed. Firstly, wages and conditions of employment are struck as part of a package of arrangements between employers and employees at the workplace level and are then certified by the Industrial Relations Commission to make them legally enforceable under the Workplace Relations Act. We say that the removal of that enforceability, however, does not diminish the intent of the parties to be bound by those wages and conditions as struck. If the enterprise bargaining agreement is removed then the federal award minima that underpinned that original agreement would still remain. However, as Mr Piper indicated, it may be possible in certain circumstances for a claim under common law to be made if an employer were to remove or cease such payments under an enterprise agreement and revert to the award minima. In such circumstances we say that the bill provides security for those employers and employees as it would continue to provide those terms and conditions as struck and remove the possibility of any further litigation on those matters.

I also want to touch upon the issue of exposure to protected industrial action. The industrial parties who negotiate terms and conditions under an enterprise agreement should not then be exposed to a new round of enterprise bargaining and the potential that industrial action may occur. As Mr Piper has indicated, some unions have sought to exploit that uncertainty regarding the validity of existing agreements and have already embarked upon industrial campaigns through the serving of initiation of bargaining periods. We say that this bill would remove the need for any industry-wide bargaining and invalidate any potential protected industrial action that unions may seek to take. As we know, as recently as 2003 some unions have embarked upon a concerted bargaining round, as in the campaign of that year, and the outcome of those bargaining rounds has been the making of tens of thousands of agreements. Employers agreed to provide wages and conditions of employment in the knowledge that in return for those they would receive a maximum three years of immunity from further bargaining and/or protected industrial action.

We say that this bill will ensure that those employers who made agreement to provide wages will then receive their industrial harmony and that those arrangements will not be disturbed. Mr Piper touched upon the dispute settlement provisions or powers of the Industrial Relations Commission. Even if invalidated, we say the parties will continue in more or less all cases to abide by the bargain that has been struck between the parties. In the normal course, if the parties have a grievance or a dispute in relation to those terms and conditions then they take the matter to the Industrial Relations Commission for either conciliation or, where they have provided so in their agreement, arbitration. We say that this bill will maintain the ability of the Industrial Relations Commission to act as the industrial umpire and to continue to settle disputes and grievances between the parties over those matters which do pertain to the employment relationship within their agreement. Finally, we say that, when we consider the uncertainty and the disputation that have occurred in previous industry-wide bargaining rounds, it is important that this bill be passed to ensure that these matters in dispute can be settled by the industrial umpire.

**Senator MARSHALL**—The Electrolux decision, as I understood it, did in fact say that if an agreement contains clauses that do not pertain to the employee-employer relationship then the whole agreement is invalid. Wasn't that the consequence of the decision?

**Mr Stewart**—That is correct. That was the thrust of the decision.

**Senator MARSHALL**—You put to us your tabled document from the ETU, saying that they were exploiting the position. They actually simply say that. Wouldn't you expect any union, faced with their agreements becoming invalid, to seek to negotiate replacement ones?

**Mr Stewart**—It would depend on the terms and conditions upon which they seek to renew those. If they were to go further than the bargain that had been struck between them in the last bargaining round then it is possible that an employer could be faced with an ambit claim far in excess of the original deal that was struck, with the intention of three years being the length of that enterprise agreement.

**Senator MARSHALL**—But you are happy to put to us that we should pass this bill and only validate part of the overall agreement that had already been struck. How do you reconcile those two positions?

**Mr Stewart**—We would reconcile it on the basis that it provides certainty in respect of those matters that do pertain and that it is intended to be a transitional arrangement so that those matters that do pertain can continue to be enforceable up until their nominal expiry date.

**Senator MARSHALL**—So you can tell me the matters that do and do not pertain?

**Mr Piper**—Under the circumstances it would mean, then, that there is compliance with the High Court in terms of the matters that do pertain to the employment relationship.

**Senator MARSHALL**—I thought earlier in your submission you said it would be incredibly difficult for the High Court to create a list and that those decisions are best left to the Industrial Relations Commission. But we already know—and I think it was included in your submission—there are conflicting positions with respect to that. So how does that provide the certainty?

**Mr Piper**—The certainty is there because most of the circumstances where issues pertain to the employment contract are reasonably well known.

**Senator MARSHALL**—That is disputed, of course.

**Mr Piper**—It is disputed, but we say it is so. And it also creates the opportunity for the parties to have conciliation and/or arbitration through the commission for those areas not considered to pertain to the employment relationship.

**Senator MARSHALL**—Wouldn't better certainty be provided by validating the whole of the agreement that was struck between the parties?

**Mr Stewart**—To do so would provide an outcome inconsistent with the High Court decision.

**Senator MARSHALL**—But you want us to legislate to have a position inconsistent with the High Court decision. We have already determined that the High Court said that if the agreement includes clauses that do not pertain then the whole agreement is invalid. You support us legislating to overturn part of the High Court decision but not the other part. So what is wrong with a position of validating the whole agreement to provide certainty?

**Mr Piper**—We obviously want that certainty to remain within the relationship and what pertains to the employment relationship.

**Senator MARSHALL**—So you would not oppose that proposition?

**Mr Piper**—No, we do not, but obviously what we do want to do is follow the High Court's decision under those circumstances because we took the action—

**Senator MARSHALL**—Then you should not be supporting this bill. You cannot have it both ways, surely?

**Mr Piper**—With due respect, I do not think that we are trying to have it both ways. In fact, it was the Ai Group that took this issue to the High Court. We sought the decision because we recognised the problems that were inherent in the clauses in the Electrolux enterprise bargain. We are only trying to make sure that the High Court decision as it stands is going to be introduced into a bill. Those issues which are not pertaining to the relationship could still be considered and utilised by both parties, but they would not be part of the instrument.

**Senator MARSHALL**—I will just clarify because I thought you answered yes to this question before. I do want to be clear. If this proposed legislation was amended to validate the whole of agreements that have been struck, that would provide certainty and you would not oppose that as a proposition?

**Mr Piper**—As I understand your question, we would oppose that position. We would want to see this bill allowing just those issues pertaining to the employment relationship to be introduced.

**Senator MARSHALL**—But doesn't that undermine the bargain that has been struck?

**Mr Piper**—The bargain has been struck in a number of different ways, as we know. The bargain is invariably struck for the employees in relation to their conditions, wages and other terms that affect them personally. The High Court found that that was what the enterprise agreement should be related to. The High Court did not find that the agreement should be related to issues that are not pertaining to that employment relationship.

**Senator MURRAY**—I will turn to page 2 of your submission and your three dot points summarising three main effects of the High Court's decision. The first dot point says:

A provision which does not pertain to the relationship between an employer and its employees cannot be part of a log of claims which is the subject of protected action;

But, of course, you can have a log of claims which is not subject to protected action, can't you?

**Mr Piper**—Yes, you can.

**Senator MURRAY**—The second dot point says:

A certified agreement which contains any provision (other than ancillary, incidental or machinery provisions) that does not pertain to the relationship between an employer and its employees cannot be certified;

But that refers to items and definitions arising from the Workplace Relations Act. For instance, the relationship is a relationship under the Workplace Relations Act. It is perfectly possible to have an agreement between employees and employers relating to anything; it is just that it is a common-law agreement. That is correct, isn't it?

**Mr Piper**—Yes.

**Senator MURRAY**—So nothing is ruled out if an employer and the employees wish to agree on something. Anything can be included; it just cannot be included as a certified agreement. That is correct, isn't it?

**Mr Piper**—That is correct.

**Senator MURRAY**—The third dot point says:

A bargaining agent's fee clause, similar to the ones sought by the unions at Electrolux, is not a matter which pertains to the relationship between an employer and its employees.

Once again, the relationship referred to is one under the Workplace Relations Act and in terms of a certified agreement. It is perfectly possible at common law, isn't it, to have an agreement for a bargaining fee to apply?

**Mr Piper**—Yes—provided the agreement was reached between the parties, you can have a common-law agreement.

**Mr Stewart**—I think all of the three dot points you have referred to there are obviously in accordance with the High Court's interpretation of section 170LI of the act. It is the definition of 'relationship' which pertains to the employment relationship under the act and the legislative structure.

**Senator MURRAY**—The point you would recognise that I am driving at is that nothing is effectively excluded in an arrangement between employers and their employees—they can come to any agreement that they like; it is just that those that they wish to have certified and to receive the protections and advantages of the Workplace Relations Act are more confined. That is accurate, isn't it?

**Mr Piper**—We would be surprised if that did not occur in many circumstances, particularly where you have arrangements that are already afoot.

**Senator MURRAY**—So the idea that there is an agreement in existence—that an employer agreed with, say, a union that a bargaining fee might apply for an agreement which is already in operation—and that they would suddenly stop that performance midstream seems unlikely. It seems to me more likely they would carry on with it as a common-law obligation for the term of the original agreement. Is that so or not?

**Mr Piper**—The indications that we have been given by our members are exactly as you have said—that the agreements they have are going to be maintained, whether as part of a protected certified agreement or whether as part of a common-law agreement that is simply reached between the two parties. We would suspect that it would continue afoot, irrespective of whether it is part of the certified agreement or not. It simply makes sense to do that.

**Senator MURRAY**—Were you here during Mr Sutton's evidence?

**Mr Piper**—Part of it.

**Senator MURRAY**—It seems to me he made a very telling point. He said that the economic circumstances are such that there is great pressure on both employers and employees to just get on with the job—there are order books to fill and jobs to be completed and so forth—and he indicated that he thought that employers did not want their lives disrupted by midagreement change. That circumstance I think would reinforce our discussion;

namely, somebody with a bargaining fee in a certified agreement agreed to a year ago will carry on with it until the end of the three years just as a common-law codicil to the certified agreement, which will be validated through this bill. Is that a reasonable assumption of mine?

**Mr Piper**—It is a reasonable assumption. Our employers are forced at the moment to look at certified agreements every three years. They take a considerable amount of time and huge resources. You have heard from Suncorp-Metway this morning, I am sure that was one of the issues they were mentioning—the amount of resources it took in order to develop an EBA for themselves. It is the same with most large—or small—organisations: they simply do not want to go through these negotiations any more often than they have to. So once every three years is much better than having to reconsider the situation. It would open up issues that they would not necessarily want to open up again. So what you say is quite within what most employers would be adopting.

**Senator MURRAY**—That line of thinking led me to an earlier line of questioning, which I put to Mr Sutton, and that was that I have greater concern for the future and not the present because there will be circumstances where matters which can go to a certified agreement will be more confined. It is not yet clear how much they will be confined, but they will be more confined than they have been in the past. The question for both the government and the parliament must be whether at some stage it is desirable to go to a number of options, a couple of which I enumerated. One of them would be to have an exhaustive list so that you have a clear development of a certified agreement within defined parameters. Anything else you wanted outside of that would be a common-law agreement—and there would be costs and practical complications to that, I guess. The second option is perhaps to consider some time in the future just saying that any employment relationship ruled out by court action would not invalidate an agreement unless it was a substantive matter which went to the heart of the agreement. That would avoid the constant uncertainty which might threaten an entire agreement when a court decision is made on just one clause. I want to ask you about your views as to the future. Are you fans of the exhaustive-list approach? How do you respond to the kind of framework I have given you?

**Mr Stewart**—We are already seeing a number of decisions, both from members of the commission and from Justice French from the Federal Court, where they are starting to explore what is and what is not a matter that pertains to the employment relationship. We would envisage that that list would continue to be developed and defined through the more judicial processes of case law as opposed to the need for a definitive list within the legislation. Given the relatively recent handing down of the High Court decision, we would think that that list would continue to develop through those decisions as they come out of the commission and the Federal Court.

**Senator MURRAY**—Do you have short pockets?

**Mr Piper**—Yes.

**Senator MURRAY**—Surely it is not in your or the union's interests—both of you having short pockets relative to those of some big corporations—to carry on this definitional process through the courts. Wouldn't it be better for the legislature to make it a little clearer for you?

**Mr Piper**—I guess the concern is that trying to get that clarity would create considerable difficulties. I think it is going to be difficult to cut it off, draw a line in the sand and say, ‘That is the final position you can have, and everything else has to be dealt with in a different manner.’ Perhaps the clarity that you are talking about would be a preferred circumstance, but I imagine that it needs to be a dynamic piece of legislation and that things would have to be changed at different times when they arose, and they continue to arise. It is difficult to draw a line in the sand in respect of what would or would not be included, just as it is with what we are looking at at the moment.

**Senator MURRAY**—Do you fear the practical consequences of this environment—that we are going to get employer negotiations with employees which will result in two agreements, a certified agreement and a common-law agreement? Does that pose dangers and concerns for you?

**Mr Stewart**—That is a risk. However, in its own way, that happens already on issues which do not normally find their way into enterprise agreements.

**Senator MURRAY**—Formally or informally?

**Mr Stewart**—Informally.

**Senator MURRAY**—So it is not a memorandum of understanding?

**Mr Stewart**—It is not a codicil to an enterprise agreement or anything.

**Senator MURRAY**—Is it kind of handshake stuff?

**Mr Stewart**—I would imagine that that would be proliferated throughout industry on a range of matters specific to that enterprise. It is hard to look forward and see the scenario that I think you are referring to where you would have formal common-law arrangements as attachments to, or separate from, an enterprise agreement. We do not have any experience of that at present.

**Senator MURRAY**—Take a bargaining fee as an example. Let us make the maths easy. Assume that a factory or construction site with 1,000 workers would have a bargaining fee of \$200 for the life of the agreement. You can see straightaway that that is a very substantial sum of money and you would probably expect that it would be confirmed in writing rather than with a handshake agreement on something much more minor. Can’t you see that developing?

**Mr Piper**—I think that sort of thing is likely. You will have two sets of agreements, if you like—one that is protected and one that is not. As to the impact of that, at least it leaves more bargaining between the parties and the employees have their part of the deal certified, agreed and protected. The second part of it is something that would be more likely to be negotiated between the unions and the company.

**ACTING CHAIR**—In the remaining time, I will ask a few questions. In your submission you make reference to the Electrical Trades Union letter of 29 October 2004, where they write to their 1,200 electrical contractors. You have tabled that letter, and you have also made reference to the CFMEU efforts to renegotiate various agreements prior to the Electrolux decision. Earlier today we heard from the CFMEU, who indicated that they believe this was in the best interests of their members, the economy and the country. I am seeking your views, firstly, as to whether employers are wishing to embrace such a renegotiation effort on behalf

of the CFMEU, the ETU and any other unions. Secondly, you say that this is counterproductive and a damaging experience. I want you to flesh that out and advise to what extent that renegotiating effort is counterproductive and damaging.

**Mr Piper**—In answer to your first question, employers generally do not wish to renegotiate agreements where they believed they had three years on foot—where they believed that they had three years of industrial peace and harmony and that that would be able to be maintained. The idea, therefore, of introducing renegotiations part way through that agreement is simply abhorrent in many circumstances. It takes time and resources, not to mention the angst that these agreements require. For companies with many work sites, it takes an inordinate amount of time to put together something such as this, and to reintroduce it after 18 months is something that they certainly would not have been considering and they would not have been taking the cost factor into account either. So I would not believe there would be any companies—or certainly very few—that would be wanting to renegotiate their agreement at this stage.

**Mr Stewart**—If I could add to that from my personal experience of being involved with companies in their bargaining rounds, often they make a prediction of what wages they can offer throughout the three-year period based upon their production schedules and based upon a three-year plan that they will embark upon for that period. To undermine that and to reopen a bargaining round would completely throw out that three-year business plan that they have embarked upon. It would put them in a position where they would be faced with a new, fresh ambit for a wage rate which could not be met in their current business cycle. The immediate feedback I am getting from our members is that they are very concerned about that possibility.

**ACTING CHAIR**—Can you give us a view about the timing of the legislation being passed? How important is it that it is passed quickly? There was a view put this morning, again by the CFMEU, that it is rushed legislation. In fact, they reject the legislation; they do not support it at all. How important is it that it is passed? Are we talking weeks or months? How much of a priority is it for your industry and your members?

**Mr Stewart**—We would see it as being of high priority. It will provide the certainty for moving forward that employers need. We do not see it as rushed legislation; we see it as a positive, proactive bill to address a need in industry, and we would encourage its passage as soon as possible.

**ACTING CHAIR**—Finally, we had a submission this morning from Suncorp-Metway about their concerns. They had an agreement, essentially, and it has not been certified prior to the due date of 2 September. Bearing in mind that they indicated to the committee this morning that they had not received feedback from the industry associations they are involved with, do you have any feedback you want to share with us on their proposition?

**Mr Piper**—I think the best situation is to say that we certainly empathise with where they are coming from. We recognise how much effort has gone into putting together an EBA such as they obviously have done over many different sites and, I imagine, a number of states. It will be for you to decide when and where a line in the sand can be drawn, but one must be drawn, obviously, and some parties are going to be prejudiced and disadvantaged as a result of that. It is a matter for you as to where you leave it with a company such as Suncorp-Metway.

**ACTING CHAIR**—Thank you to the AiG. I appreciate your input.

[3.01 p.m.]

**ANDERSON, Mr Peter Christian, Director, Workplace Policy, Australian Chamber of Commerce and Industry**

**HARRIS, Mr Christopher Lawrence, Senior Advisor, Workplace Relations, Australian Chamber of Commerce and Industry**

**ACTING CHAIR**—I welcome witnesses from the Australian Chamber of Commerce and Industry. The committee prefers all evidence to be given in public but the committee will consider any request for all or part of evidence to be given in camera. The committee has before it your submission, which is No. 3. Are there any changes or additions you wish to make?

**Mr Anderson**—No.

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

**Mr Anderson**—The Australian Chamber of Commerce and Industry appreciates the opportunity the committee has given it to appear and make submissions both in writing and orally on the Workplace Relations Amendment (Agreement Validation) Bill 2004. The chamber supports the bill. We support the bill and I can advise the committee that in the time available since the bill was introduced into the parliament the bill has been considered by the industrial staff of the chamber by a specific meeting of the industrial staff of the 36 employer organisations that comprise the chamber network, and we have developed the submission that is now before this committee as a collective position on behalf of the members of the chamber network.

**ACTING CHAIR**—Thank you.

**Mr Anderson**—The basis on which the chamber supports the bill is that it is a necessary legislative response to an important issue that has arisen following the High Court decision in the Electrolux case. The chamber supports the High Court's decision in the Electrolux case. We emphasise that our support for this bill, and the basis as we understand it on which the bill is being introduced into the parliament, is not because there is some deficiency in the High Court decision but because a consequence of the High Court decision is that there is a real and live issue as to whether or not agreements which were certified or approved under the Workplace Relations Act prior to the High Court's ruling were properly authorised or approved by the certifying or approving authorities.

Our submission to the committee is that there are very powerful reasons, having regard to the need for both industrial stability and the proper application of the operation of the Workplace Relations Act, for validity to be given to, or cloaked by, those agreements that were approved or certified prior to 2 September. It is not in the interests of a sensible and stable functioning system of workplace relations for the High Court decision to be used in a way that would invalidate agreements that have been entered into or, perhaps even more significantly from an industry point of view, would enable unions to assert new rounds of alleged protected industrial action which could also include new demands on employers beyond those which are currently contained in their certified agreements.

The High Court decision restored necessary and proper boundaries to the notion of protected action and it also applied the statute in the way that employers have understood it to be—that is, that industrial instruments made under the Workplace Relations Act needed to pertain to the employment relationship and, more specifically and in the words of the statute, to the relationship between employers and employees. This was not a new concept. This is a statutory concept that is of long standing in the Workplace Relations Act. The concept has been a feature of the provisions of the act that established an agreement-making system and that have governed the system since the provisions were established in 1993, then expanded upon in 1996.

While those agreement-making provisions draw on the definition under the act of an industrial dispute—and there is one form of agreement that does that—the definition also contains the same characterisation requirement. That is, an industrial dispute must be a matter that pertains to the relationship between employers and employees. So there is a long history of that concept being part of the Australian industrial system. It was not a concept devised by the High Court; it was a concept set out in the statute, which the High Court has properly applied.

In supporting the bill, we make the following specific point: there are two issues of potential uncertainty that arise. The bill deals with one of them; it does not deal with the other. For reasons I will explain, we support that approach. One issue of uncertainty is that of the validity of pre 2 September agreements. The bill deals with that issue. I have mentioned why it is proper to support that approach. The second issue of uncertainty is what precisely are ‘matters which pertain to the employment relationship’. The High Court does not list those matters. There is a series of decisions over a number of years that touch on those matters, decisions based on the jurisprudence of the courts and the commission and on the specific facts that were before the courts and the commission in those cases. The bill proposes for the commission and the courts to continue to deal with those issues.

In paragraph 43 of our submission we point the committee to a number of specific matters that have been before the commission since 2 September 2004 where the commission has dealt with agreements brought before it and made a variety of rulings as to whether or not the agreement is certifiable and, if not, why not. We understand that one of those matters—the Schefenacker Vision Systems agreement, an agreement between the company, the AWU and the AMWU—will be before a full bench of the commission, as the decision of the Senior Deputy President not to certify the agreement is the subject of an appeal.

There are several further matters that I want to mention to the committee in my opening statement. One is that the bill would cloak the validity of agreements with respect to clauses and provisions of agreements that pertain to the employment relationship but would not do so in respect of provisions of agreements that do not pertain. We agree with that position. It is consistent with the provisions of the act and with the decision of the High Court. It highlights the fact that parties who bring agreements before the commission for certification need to ensure that they are operating in compliance with the provisions of the act in regard to the content of their agreements. In this decision the High Court pointed to the fact that, under the Workplace Relations Act, it is not a mandatory requirement that all industrial agreements be submitted for certification. It has been the practice of industrial relations for quite some years

for parties, if they do not wish to register or have their agreement certified, to not do so. There have been plenty of agreements of that type which have never been brought before the commission but have still operated as matters between the parties.

The next matters I bring before the committee are those touched on in paragraphs 76, 77 and 79 of our submission, where we highlight the potential for three areas on which the committee might consider whether there needs to be any amendment to the bill. One issue is that, following any passage of amendments such as those proposed by the legislation, there will need to be a process by which the parties to the agreements that have been revalidated—or validated, as it were—identify which of the provisions in those agreements pertain and which of the provisions do not pertain to the employment relationship. We suggest that it may be appropriate for the legislature to give some direction to the parties as to doing so within a specified time frame so that, if there are any disputes or doubts about that happening, those matters can be brought before the commission for appropriate ruling.

The second issue by way of potential legislative amendment is to consider whether or not there ought to be a transitional provision in the terms of paragraph 79 of our submission with respect to any agreements that were voted on or approved prior to 2 September—prior to the High Court decision—but which were not lodged for certification until afterwards. I notice that one of the submissions before the committee on the Suncorp-Metway agreement relates to a circumstance very similar, although not identical, to one that I have postulated in our submission. It is very much the flavour of what we are trying to drive at in paragraph 79.

The third issue we raise is one whereby we wish to alert the committee—and, through the committee, the parliament—to the fact that there is always going to be some potential for uncertainty as a result of what may be regarded as ancillary machinery or incidental provisions that are included in certified agreements. We see from a number of the decisions of the commission that it is not just the issue of which matters pertain that is sometimes in dispute but also whether or not a particular provision is incidental or ancillary machinery. We make the point in our submission that this is a matter that needs to be monitored closely and may be a matter that at some future stage requires legislative consideration. That is our opening statement in support of the bill.

**ACTING CHAIR**—Thank you, Mr Anderson. Do you wish to say anything, Mr Harris?

**Mr Harris**—Not at this time.

**Senator MURRAY**—I want to talk to you about logs of claim and protected action. Logs of claims made which are the subject of protected action are one thing, but you can have logs of claims which are not the subject of protected action and would require a common-law approach. The question then arises whether, in disputation about an agreement, somebody could be fingered for having that disputation with respect to matters that did not fall validly under protected action. So I want to ask you about your experience of protected action. My understanding is that very seldom when protected action is taken is it taken with respect to a specific item of dispute. In other words, you do not have 20 or 30 items in your log of claims and have protected action and they say, ‘Well, that relates to item No. 28.’ You have protected action because you have not arrived at an agreement. Do I understand that correctly?

**Mr Anderson**—I think that by and large it is a correct understanding because in the real world, where there is a union seeking an agreement it is seeking more than one thing. It is very rare that a demand on an employer for an agreement is for a single issue agreement. What that means at a practical level is that multiple issues are included in a log of claims and, where a union seeks to exert economic power on the employer through protected action to pursue its bargaining claim, its notices of protected action are generally in respect to its claims as a whole.

**Senator MURRAY**—It is generalised, not specific.

**Mr Anderson**—Yes, it is generalised. There are exceptions to that. I think the matter in an earlier case that the Federal Court dealt with—the Emwest case—was about some protected action in respect of one matter, a redundancy provision, because that was a matter that was left over to be dealt with at a later date after an original agreement was entered into. So we cannot say that in every situation a union is taking protected action over a myriad of matters, but it is our experience that that is overwhelmingly the case and that it is what you would expect from the operation of the industrial system.

**Senator MURRAY**—That is right. The real world application of industrial agreements and disputation is that they are far more flexible, less legalistic and more practical and down-to-earth than one might think, judging by some of the profile cases. My point is this: it is clear to me that a log of claims which relates to a certified agreement and to protected action under the Workplace Relations Act 1996 is quite distinct from a log of claims which does not have protected action attached to it and would have to be resolved through a common-law agreement. But those two things could be run parallel in any negotiation. An employer might not be able to distinguish if the protected action is taken because they could not come to agreement on the non-pertaining relationship. So, if unions are adamant, for instance, about bargaining fees they can simply say that they want that to be agreed separately. If they are simultaneously negotiating a heap of other things validly under the certified agreement mechanism then that will all get mixed in and resolved between the two parties, as it is at present, do you agree?

**Mr Anderson**—Yes, I do. I think that you can pursue demands separately like that. What you need to do is to recognise that the right of protected action that is given by the workplace relations act is a very specific right, and one which is properly subject to important limitations because of the type of power that it gives—legal immunity from damages in respect of economic loss—and that can be very significant. What the act properly requires is for a party that seeks to assert that right to ensure that they are exercising that right only in matters that the act allows for. That means that if you are exercising that right in respect of an industrial instrument under the act then it has to be an industrial instrument that deals with employment matters; that is for the purpose of dealing with the relationship between employers and employees.

If you are seeking other things from the employer—if you as a union are seeking matters which relate to another cause which you think the employer should support, or you are seeking some other regulation of a third-party relationship—then there is no law, *prima facie*, against you doing that. But the law in the workplace relations act is very clear. That is, if they

are not matters that pertain to the employment relationship, you do not get the right to exercise protected action because it is for a very specific purpose.

**Senator MURRAY**—Except that the law can seldom determine that because in the announcement or declaration of protected action the union very seldom will say, ‘It is this particular item.’ That is true isn’t it?

**Mr Anderson**—That is right.

**Senator MURRAY**—That is why there has been so little court action about protected action. There have been almost no cases or punishments related to people breaching protected action, have there?

**Mr Anderson**—I would not say there have been hardly any. Many of the 127 orders relate to applications made where it is asserted that an alleged protected action is unprotected.

**Senator MURRAY**—Note that I used the word ‘punishments’.

**Mr Anderson**—I agree with what you are saying. I think the reason you do not get to the point of so-called punishment for unprotected action in very many cases is that, if the act is operating effectively, the granting of the section 127 orders in respect of unprotected action and any potential injunction that may be issued by Federal Court certainly are very powerful steps—or ought to be very powerful steps—to send a signal to the party that is acting unlawfully that they should stop acting unlawfully because of the potential consequences.

**Senator MURRAY**—From a long and close relationship, my judgment of the act is that in these circumstances it acts less as an aggressively definitive piece of statute and more as a set of rules by which you behave—and, again, the umpire says, ‘Stop, you are breaking the rules.’ Very few fines or jail sentences—I can think of none, frankly—have ever occurred with respect to breaching the protected action considerations. That is true, isn’t it?

**Mr Anderson**—By and large, that is true, and that is how the act should operate.

**Senator MURRAY**—In which case, the protected action arguments being raised with this committee could be considered by and large irrelevant because their only relevance is to how you ensure the validity of a certified agreement now and in the future—now, as affected by the High Court decision, and in the future in terms of other uncertainties relating to the employment relationship.

**Mr Anderson**—I am not familiar with all the arguments the committee may have heard this morning on the question, but I can certainly say that the act draws a clear link between protected action and the right to protected action, on the one hand, and the content of certified agreements, on the other. Protected action can only be taken in respect of matters which are capable of inclusion in certified agreements.

**Senator MURRAY**—But my point is that that is a nonsense response—and I do not mean that rudely—because, when you parallel those matters which you are raising under the certified stream and those matters which you are raising under the common-law stream, the union which takes protected action just puts those two together, and no courts will be able to separate those out unless the union has put them together.

**Mr Anderson**—You would have to sort them out if protected action is taken—

**Senator MURRAY**—How?

**Mr Anderson**—and there is an assertion by the employer that it is being taken in respect of matters which are not capable of being included in agreements. If the union is making claims at the same time against the employer in two different streams then it would not be possible to unravel.

**Senator MURRAY**—Yes, that is my point.

**Mr Anderson**—I accept that. That does not mean that it is inappropriate and wrong for the act to draw the linkage between protected action and the content of certified agreements.

**Senator MURRAY**—I accept that point. It comes back to my view that it makes the act very workable that the act does set down that distinction, but the way in which it allows the market to operate does not act as an unnecessarily restrictive mechanism. That is my reading of it over time.

**Mr Anderson**—I think in that situation, where you have got parallel logs—one which deals with matters that the act would lawfully permit to be protected action and one which deals with matters that the act would not—what you say is correct. In that situation a union would still need to be careful to the point where agreement may be settled with the employer in respect of the employment matters. Any further industrial action in respect of the non-employment demands a union was making would not be protected.

**Senator MURRAY**—Yes, I understand that.

**Senator MARSHALL**—I thank my parents every day of my life that they did not send me to law school! I do not claim to be an expert on the Electrolux decision and how it flows on, but I thought in your submission you said that it was a consequence of Electrolux that an entire agreement that may contain the invalid Electrolux clauses would be invalidated. But my understanding—and I thought that was confirmed by the AiG—was that the High Court specifically said that, if an agreement contains matters that do not pertain to the employment relationship, the whole of the agreement is invalid. Can you just clarify your understanding of that?

**Mr Anderson**—That latter position is as we understand it to be. Based on the High Court's decision, if an agreement contains matters that do not pertain to the employment relationship, the agreement had not been certified in accordance with the requirements of the act and could not have been an agreement that was capable of certification. That is why we refer in our submission to the fact that there is private legal advice, at least in the hands of some parties, that says that agreements of that character—the character containing both pertaining and non-pertaining matters which have been certified—are at least at risk of being void. There has been a court decision that has held that, but that is the underpinning basis of this legislation.

**Senator MARSHALL**—I just wanted to clarify that it was not a consequence of Electrolux; it was actually Electrolux.

**Mr Anderson**—No, it is not a consequence of Electrolux; it is the Electrolux decision.

**Senator MARSHALL**—I wrote that down. It is an important point for me. There was nothing wrong, after Electrolux, with unions that knew that they had clauses that did not pertain to the employer-employee relationship assuming that their whole agreements were

now invalid—correctly assuming, as I understand it, based on what you have just said—and seeking through the act to renegotiate agreements. There is nothing legally wrong with that, is there?

**Mr Anderson**—If their agreements were void or invalid then there is nothing wrong with that on the face of it. An example of the situation we now have is occurring in the electrical industry here in Victoria. The ETU is pursuing the renegotiation of agreements with some major electrical contractors, supposedly following the Electrolux decision. What the industry advises is that the ETU claims are not just for the certification of agreements that would comply with the act in the terms it was previously agreed without the non-pertaining matters, but a claim for new matters—a claim for wage increases, a claim for a training levy and the like. That is not just simply trying to deal with something as industrial parties, with the consequence of a High Court decision; that is actually saying, ‘Here’s the High Court decision. We think we can get something out of that decision that we did not have in the days before that decision—a new agreement with new provisions and entitlements in it.’

**Senator MARSHALL**—That may be right—I cannot go into their minds to determine the motivation—but they are doing nothing illegal, are they?

**Mr Anderson**—That would remain to be seen. That will depend entirely on whether or not those existing agreements are valid or not, or void.

**Senator MARSHALL**—I do not think there is much dispute that those agreements contain matters that do not pertain to the relationship. You are not arguing that.

**Mr Anderson**—I am not arguing that.

**Senator MARSHALL**—I would not have thought so.

**Mr Anderson**—I think that that is fairly clear. Whether a court would hold those agreements void or voidable and just how a court might deal with that in a technical legal way are speculative matters.

**Senator MARSHALL**—I have asked this question a couple of times, but I just want to clarify it. If unions have agreements which are void because of Electrolux, there is nothing wrong with them pursuing new agreements, regardless of your argument that somehow they should not have a right to start from scratch. In fact, they do have that right if they seek to; there is nothing illegal—

**Mr Anderson**—No, there is nothing wrong with those unions pursuing new agreements to reflect the terms of agreements they had previously entered into.

**Senator MARSHALL**—Yes, this is the point I am coming to. The employers and the employees reached a bargain and that formed an agreement in its totality. It is difficult or impossible to go into every individual’s mind to see what value they may have put on every individual clause, because people will put different values on them, but on balance a majority of people then agreed, through the processes set out in the act, and a bargain was struck. The High Court decision has said some of those clauses now cannot be in the agreement. If the purpose of this bill was to create some certainty and uphold the integrity of the agreements, why wouldn’t we legislate to validate the whole of the agreement rather than just part of it?

**Mr Anderson**—That is a very fair question and that is very much an issue that is appropriately discussed before this committee. I preface my answer by making this one point. The overwhelming position of employers and Australian industry following Electrolux was to indicate to the unions with which they deal and have had agreements that they will continue to honour the terms of those agreements, notwithstanding questions about validity. A very good example is one of the first agreements that came before the commission in the weeks following the Electrolux decision—the Franklins-SDA agreement before SDP Hamberger. It was identified in the proceedings that there was a provision in the agreement which was arguably not pertaining and the union and the company agreed to remove that from the agreement, to continue to apply that as a matter of obligation between themselves and to reach a private common-law agreement in those same terms to do that. The agreement was, therefore, resubmitted to the commission in terms which would unquestionably allow for its certification, and it was certified.

When one questions whether it is wrong for a union to reopen a negotiation, you also have to look at what the employer might be saying at that point. If the employer is trying to walk away from existing agreed positions then you quite rightly could say it is wrong to up the ante. If the employer is not walking away from existing obligations then I think you really have to ask why you are upping the ante by trying to renegotiate a new agreement.

**Senator MARSHALL**—So are you here today giving that undertaking on behalf of all of your members?

**Mr Anderson**—I can't. No, of course I can't.

**Senator MARSHALL**—The real world situation is that the vast majority of agreements and bargains struck are honoured by both sides overwhelmingly. You only need the processes of enforceability when one party does not honour their commitment, yet we have a situation where you are saying, 'Trust us anyway,' to the employees who are losing part of their bargain. Again, in the overwhelming number of cases, that will work, but when it does not work you do not then have the ability, because it is not in a certified agreement, to enforce it in any way.

**Mr Anderson**—I am not saying, 'Trust us, it will work.' I am giving evidence to the committee that that has been the practice. I am saying that the law should not just require a 'trust us' position. The law should be an amendment by and large in terms of this bill because that would say we are not going to just trust people to do what they previously had; we are going to cloak something with legal validity and give it enforceability.

**Senator MARSHALL**—Why would it not be appropriate to validate the whole agreement?

**Mr Anderson**—That is an important issue. In our submission, it is not appropriate to do that. We refer in our submission to paragraphs 70 to 75, which set out the arguments as to why it is not. There are two reasons. Firstly, if you did that you would be giving legislative sanction to provisions of a lawful agreement that contained non-pertaining matters. That is what you would be doing. You would be doing something which has never been permitted by Australian law—that is, for agreements under the Workplace Relations Act to contain non-pertaining matters you would be providing a category of agreement, at least for a window of

time, where those agreements would have been given a legislative decree or certification and would be enforceable in the courts, should they need to be enforced, in respect of clauses that both pertain and do not pertain. That is an extension of the law as to what should be in agreements. It has never been the parliament's intention that non-pertaining matters be within certified agreements. It has never been the way the courts have applied the law and it would be quite a perverse consequence of the High Court's decision—which said that you need to ensure that your agreements only contain pertaining matters—if, for the first time since we have had provisions relating to agreements in the Workplace Relations Act, we are allowing the act to recognise agreements that contain non-pertaining matters. That is the first reason.

The second reason is a more practical one—that is, you start to create anomalies in the practice of industrial relations. It would mean that with an agreement that was, say, entered into and certified in July or August this year, containing a non-pertaining matter, in that business that clause was an enforceable right under the Workplace Relations Act. Yet an agreement entered into today by a similar business down the road competing in the same industry would not be able to include such a provision in their agreement. What does that do? It means that the Workplace Relations Act operates differently in terms of what it says to one business and the employees of that business—'These are your rights and obligations and they are enforceable under the act'—compared with another business. I do not think that is a good approach because it creates two different rules with respect to what can lawfully be in agreements and enforced by businesses in the same industry.

There is a third reason for indicating that this is not the right approach—that is, there is an alternative; there is a practical, working alternative. It is what I said happened in the Franklins-SDA agreement. The parties, by applying commonsense, took from the agreement that was before the commission the provisions that did not pertain and entered into their own arrangement with respect to those provisions. That is not an unrealistic or unreasonable expectation for the parliament to put on the parties. As I have said in my evidence, that has been a feature of many industrial arrangements over many years where, for one reason or another, parties have not wanted the terms of their agreements to come out into the public arena or be generally known or have to be subject to a commission process. So there is an alternative. For those three reasons, this is not an appropriate approach.

**Senator MARSHALL**—Did you just say to me that it is not unreasonable that the parliament would actually put that expectation on the parties?

**Mr Anderson**—No. It is not unreasonable that the parliament would enact amendments that only validated pertaining matters. In doing that, the expectation on the parties would be that, if they still want legal enforceability to apply with respect to non-pertaining matters, they would take those non-pertaining matters and put them into their own private agreement.

**ACTING CHAIR**—At common law?

**Mr Anderson**—Yes, at common law, because those private agreements contain matters that do not relate to the employment relationship.

**Senator MARSHALL**—And you are saying we should have the expectation that that should happen?

**Mr Anderson**—That would be a consequence of enacting the bill in its current form. That is a reasonable consequence because it is a consequence which has occurred since Electrolux and is a consequence which occurred even before Electrolux when parties—

**Senator MARSHALL**—But we can only make things happen by legislation, so the natural step from where you are coming is that we need to legislate for that as well in the form of an amendment to this bill.

**Mr Anderson**—No. I think we are at cross-purposes. I am not saying that the parliament should obligate parties to do that. I am not saying that the parliament should say, ‘You must take your—

**Senator MARSHALL**—So it would be back to the trust-me approach?

**Mr Anderson**—No. I am saying that, if you want your agreement in respect of its non-pertaining matters to be an enforceable agreement, then you should go back and do the very thing that you had to do right at the start: ensure that the matter was the subject of a private agreement between you and the union or between the union and the employer, not a matter that was contained within an employment agreement that you submitted for certification.

**Senator MARSHALL**—Of course part of the difficulty—and I do not disagree with a lot of what you have said; I disagree with some of it—is that we will still not know for some time what are such matters and what are not such matters. As some of the other submissions have said, sometimes it is in the nuances. It can be the same result; it depends how it is worded. So the argument that we could have two standards in there does not necessarily follow because that is going to be a serious problem in the future. Suncorp-Metway actually produced a list of some hundreds of clauses which include benefits to families, salary-sacrifice arrangements and payroll deduction arrangements as all being matters not pertaining to the employee relationship. How long do you think it is going to take for the different tribunals and courts to determine what is and is not?

**Mr Anderson**—I do not think that we should think it is too difficult a process. In the Ballantyne matter, one of the agreements that went before the commission after 2 September, the ACTU’s submissions to the commission were that it is a relatively straightforward exercise to determine what are and are not pertaining matters. The ACTU correctly pointed to the fact that a series of jurisprudence cases about what are and are not pertaining matters have been developed, even in respect of the award system, because of the reliance on the definition of industrial dispute. So Vice President Ross, in his decision in Ballantyne, goes back to those earlier cases and says that in his view, with respect to provisions dealing with a trade union right of entry or trade union training leave, ‘There are previous authorities that say these are matters pertaining, and we will regard those as being legitimately within the certified agreement’.

I think that wherever the parliament characterises an instrument in some form there is always going to be some argument as to the outer boundaries of that. That is the very nature of characterising something with words in a statute. But I do not think we should think that this would be too difficult a process or too long a process. The commission is very likely to deal in a full bench way with the appeal in the Schefenacker matter. That contains quite a

number of provisions that would be the ones that are towards that outer boundary or perhaps over that outer boundary.

These are matters which are properly the subject of individual consideration. You have to look at the individual clauses. I think it would be almost impossible for the parliament to say that something is in or out, which is really the alternative, because, apart from looking at all the reasons as to whether or not parliament is the proper forum to consider all of those matters, you end up having to look at the content of the clause involved. What does the clause actually do? Who does it impose some obligations on? Whose relationship does it regulate? I think that, even if you wanted to go down the path of characterising something in a generic way, like right of entry or trade union training leave, you would still end up having to look at the clause to see whether the clause is about an employee's right to trade union training leave or the right of a person elected as a union delegate to trade union training.

**Senator MARSHALL**—Mr Anderson, I am well out of time and I am conscious that the chair has not had an opportunity to ask anything yet, so I had better end it there.

**ACTING CHAIR**—I would like to deal with a few matters and seek clarification again on the proposition that has been put to this committee that the government should validate agreements which include non-pertaining matters. You have responded comprehensively to date, but I will put another angle on it and seek your response. Would it not be retrospective legislation if the government did introduce such legislation which said that such agreements which included non-pertaining matters are then valid, because based on Electrolux and previous court decisions they are non-pertaining and invalid?

**Mr Anderson**—I agree. You would be retrospectively changing the law, not just retrospectively validating what the law would have validated, which is what the bill proposes to do. What does that mean? That means that all of the parties who have looked at the act and said, 'We are not going to put in our agreements non-pertaining matters' will find that some other business or some other union that did put non-pertaining matters into their agreement gets away with it. You are creating a circumstance where the provisions of the act have been changed in a substantive way. You are not conferring a validity simply in respect of something that the act would have permitted; you are conferring validity in respect of something that the act would not have permitted.

**ACTING CHAIR**—Exactly. So the consequences could be vast and chaotic in terms of opening up the door to further action and certainly inconsistencies. Certain agreements that have been made relate to just pertaining matters and some relate to both. It sounds very unfair to go down that track.

**Mr Anderson**—I think our submission points to the fact that you would create anomalies and inconsistencies if you were to do that, and that is a good reason why the parliament should not go down that path.

**ACTING CHAIR**—Let me try to quickly attend to three questions. Regarding the ETU and the CFMEU, where they want to renegotiate these agreements, you mentioned different purposes or different terms and conditions. Regarding the ETU, I think you mentioned increasing wages and introducing training levies. Do you have any more specific details with regard to the ETU's or the CFMEU's objectives in renegotiating these agreements?

**Mr Anderson**—The ETU has made it clear to the major contractors in Victoria that they are its their demands. I am told that today there is industrial action in support of those demands in the form of overtime bans.

**ACTING CHAIR**—Really? Whereabouts?

**Mr Anderson**—In Victoria. So it is not a theoretical matter. There is a claim out there, which is real and live, on contractors. It is not for the previous agreement to be adhered to; it is a claim for the previous agreement plus new claims.

**ACTING CHAIR**—So that is clearly distinct and they are additional to the previous terms and conditions?

**Mr Anderson**—These are additional claims being made on the Victorian electrical contracting industry.

**ACTING CHAIR**—Do you have any further evidence on the CFMEU or any other union efforts in this regard?

**Mr Anderson**—No, I cannot add to what has been said.

**ACTING CHAIR**—Just quickly on Suncorp-Metway, I have noted your point 79 about the transitional provisions. Did you want to flesh that out in any further detail or have you got any further evidence on how many agreements might be relevant to that transitional provision possibility that you have put forward?

**Mr Anderson**—We are talking about a relatively small number of agreements. Suncorp-Metway's circumstance is certainly one which should exercise the committee's mind. The type of transitional provision that we contemplated in paragraph 79 is quite capable of being slightly adjusted to pick up the factual example in Suncorp-Metway where the agreement had not actually been balloted on prior to 2 September but the process for balloting had been under way. In those circumstances, it would seem that a transitional provision is sensible simply to avoid the necessity to reballot in circumstances where it is hard to see that there is any prejudice to any of the parties from a transitional provision of that type.

**ACTING CHAIR**—Thank you. Finally, we have had a view that this legislation is rushed legislation. Do you have a view that it is required as a priority, before Christmas, in a matter of weeks, rather than leaving it until next year or months ahead?

**Mr Anderson**—It is a very high priority. This is not a theoretical problem; this is an actual issue. This is about people's rights and obligations, whether they have enforceable rights and obligations and whether or not industrial action or threats of industrial action are within the scope of Australian law. Those are matters that need to be dealt with by the parliament promptly.

**ACTING CHAIR**—Thank you.

**Proceedings suspended from 3.51 p.m. to 4.03 p.m.**

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

**ACTING CHAIR**—I welcome our next witness, from the ACTU. While the committee prefers all evidence to be given in public, it will consider any request for all or part of the evidence to be given in camera. The committee has before it your submission, No. 2. Are there any changes or additions?

**Ms Rubinstein**—No, there are not.

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

**Ms Rubinstein**—Thank you. The ACTU welcomes the opportunity to make a submission in what we understand to be a fairly compressed process. As you will understand from our submission, we see the key issue that has been thrown up by the Electrolux decision as one of uncertainty. The problem is that nobody is in a position to say what pertains and what does not pertain to the relationship of employers and employees to any particular agreement. The fact is that when the High Court or any court consider these issues they consider only the circumstances of the agreement and the particular provision that is before them. And, as highlighted in the submission, very similar provisions—with a few different words which make no practical difference to the implementation of that provision—have been held by the same senior deputy president of the commission to pertain in respect of one agreement and not to pertain in respect of another. Those two decisions, for example, were determined on the circumstances of those particular provisions.

The problem with uncertainty is not simply that people do not know whether a particular provision is enforceable or not. That may well be a problem, but it pales into complete insignificance against the problem that people do not know whether they have an agreement or not. That is a problem that the bill addresses only in part. The bill does validate agreements that were certified prior to 2 September to the extent of their pertaining matters. It does not deal with the issue of the non-pertaining matters. As I have said, nobody knows with any certainty, and cannot know with any certainty until the High Court has considered that particular agreement, whether or not those particular provisions are enforceable.

An even greater problem arises from the fact that, for agreements certified after 2 September—and quite a large number have already been certified—nobody knows whether or not those agreements have any effect in law. Even if a full bench of the commission makes determinations with regard to, for example, the Schefenacker agreement, in respect of which an appeal has been lodged, that may give guidance but it can do no more than that. There will be agreements about which we can have no certainty whatsoever and, if they are certified and if nobody appeals them—and by their nature that is likely; appeals against the certification of agreements are rare because somebody's interests have to be affected by that—then it is really open to an employer or, equally, a union at any point in the future to deny the existence of the agreement and proceed on that basis.

For that reason, the ACTU has asked the committee to look at the real issue on its merits, which is the question of whether there is any justification for restricting the matters that can be the subject of agreements. We argue and recommend that the restrictions in the act regarding matters that can be included in agreements should be removed or significantly

amended. In particular, we have recommended that, at least with regard to agreements but preferably in relation to industrial disputes as well, the requirement that they be restricted to matters pertaining to the employment relationship be removed or broadened to include matters that pertain to the relationship between unions and employers and between employer organisations and unions and so on. In particular, it should recognise that, where you have agreements between unions and employers, the parties to those agreements are unions and employers. It is an absurdity to argue that matters which concern their relationship with each other cannot be the subject of an agreement.

Another suggestion would be to amend the bill to at least validate agreements in their entirety up to some prospective date far enough in the future to allow for some certainty about these issues to emerge or, at the very least, to provide that past and future agreements are validated to the extent of pertaining matters even if non-pertaining matters, whatever they are, are severed from the agreement.

Of course that is analogous to what happens in findings of industrial disputes. If a union sends out a log of claims which contains matters that do not pertain to the employment relationship, when the commission makes a finding of dispute the finding is drafted to exclude those matters. It is reasonable to say, or it is at least practical to say, that non-pertaining matters are, in effect, not enforceable. Then it is up to anybody who wants to argue that something is not enforceable, or anybody who wishes to enforce it, to do that and that can be dealt with at that time. But to have a situation where it can happen accidentally—where a provision in an agreement is later held, perhaps after litigation a long time in the future, to then mean that there never was an agreement—I think is extremely impractical, extremely uncertain and a real difficulty for both employers, employees and unions in going forward.

Another option that would address the problem would be to take up the reasoning of the full court of the Federal Court in the Electrolux decision. That court held that the proper test to apply to an agreement was whether, taken as a whole, it pertained to the employment relationship, rather than looking at each term of that agreement in isolation. That would also be an approach which could be of assistance in creating the sort of certainty that is needed.

In addition, I would like to take up this issue of protected industrial action. The government has taken the view that it is not necessary, desirable or even practical to include in the bill validation of protected action or of action that was taken in the belief that it was protected but where one of the claims at issue was not pertaining to the employment relationship. The government said in the second reading speech that, although it has determined not to legislate in this way, it would have a dark view of employers who at this point sought to take legal action for past industrial action based on the Electrolux reasoning. In fact there are currently two cases that do involve legal action in relation to industrial action which occurred well before the Electrolux decision, and the pleadings in the proceedings have been amended to take account of the Electrolux decision. That is a very real problem which is being faced. I think an amendment to the legislation will be needed. I do not think I need to go to the legal and other aspects of the submission. I will finish there and answer any questions.

**Senator MARSHALL**—I think what you are proposing is something that I did not actually read in your submission. Are you suggesting to us that, because the process of determining what may or may not be valid will develop over time as the courts and tribunals

fix things up, any agreement that is certified ought to remain valid in its entirety? That is for the future; that is not just for now.

**Ms Rubinstein**—There are two issues. One is: should agreements that are reached between parties be enforceable unless they contain provisions that are contrary to public policy or involve criminality, fraud and that kind of thing? We would say that the answer to that is yes. It is difficult to see how an agreement between an employer and a union to deduct union dues—or health fund contributions for that matter—from the wages of the employees who authorise the employer to do that is contrary to public policy or ought not to be enforceable through the industrial relations system. I know that it is said that those matters can be agreed to and enforced at common law. We have a system of regulation of employment conditions of one sort or another because of the very difficulties of enforcing them through the common law. The old common law is based on a very different concept. It is essentially based on contract law. Just from a practical point of view, it does not work as far as employment law is concerned.

It is very difficult to look at the issues which may possibly be held not to pertain and say that, as a policy reason, they ought not to be available to be included in agreements between employers and employees. We would argue very strongly that, in respect of both past agreements and future agreements, the requirement or the restriction that agreements can take only those matters which, within a certain kind of reasoning of the High Court—which in itself is obscure, I think it is fair to say—can be the subject of an agreement between parties is really not defensible.

Having said that, we would also be saying that, at the very least, agreements past and future should be validated to the extent of the pertaining matters. Otherwise, the existence of a non-pertaining matter allows a party to the agreement to deny the existence of an agreement. That cannot be in anybody's interest. The government has recognised that it is not in anybody's interest for that to happen in relation to agreements certified prior to 2 September. I suspect that the only reason that this has come about is not from a desire for certainty for employers or employees but to prevent unions from denying the existence of an agreement for the purposes of renegotiating alternative agreements. But there is nothing in this legislation that would prevent an employer who was party to an agreement that was certified yesterday from denying in 2½ years time the existence of that agreement and litigating that. It does not deal with those problems going into the future. That is the problem with the provision in the legislation and the whole body of law that has developed around it.

**Senator MARSHALL**—I know that in the department's submission they go to protected industrial action, but you have raised it in your submission. In particular, you said:

The Government states in the Second Reading Speech, that:

*“Parties could not have reasonably expected that protected action was available to support claims for non-pertaining matters.”*

Then you went on to say:

Given that a Full Court of the Federal Court held that protected action could be taken in support of non-pertaining matters, it seems reasonable to the ACTU that unions adopted a similar view of the law.

That sounds very logical to me. The government also said in the second reading speech:

... it would be highly undesirable for parties to exploit uncertainty in relation to past industrial action by initiating or threatening legal action.

The CFMEU, in their submission this morning, indicated that the threat of initiating industrial action from past agreements—and I suspect there is no time limit—could be used as a very powerful bargaining tool in a new round of negotiations against either unions or individual employees, who are, I suspect, also party under the terms of law to industrial action. Can you comment on that process?

**Ms Rubinstein**—It is a possibility. The legal actions that I am aware of now were taken in one case last July and in another case in April. Although those legal actions in respect of the industrial action were on foot prior to Electrolux, as I said the pleadings have been amended. Subject to the statute of limitations, which on this sort of thing I think is three years—which fits in neatly with the negotiating cycle—there would be no barrier that I can see to an employer seeking to sue a union for damages in relation to unprotected action taken on an earlier occasion relying on Electrolux. I do not know whether they would succeed or not but the CFMEU recognises, as I am sure all of us do, that to ordinary people and ordinary workers the threat of that kind of legal action is very frightening indeed. It would be a very strong bargaining chip.

**Senator MURRAY**—In immigration bills before the parliament over the last few years the government has sought to limit the number of matters that can go all the way to the High Court and held that many of those matters should be dealt with as administrative law matters. Are you inclined to the view that certified agreements should be treated the same way—in other words, once certified by the Industrial Relations Commission, that is it; they apply for a number of years?

**Ms Rubinstein**—We cannot restrict access to the High Court. The Constitution allows people aggrieved by this kind of thing to go on the traditional writs to the High Court. That cannot be done in immigration either. You can place limits by doing a number of things, all of which have been done in the industrial relations area. There is certainly no right of further appeal on any legislated means, if you like, but that constitutional ability to go to the High Court cannot be removed. That means that if the allegation is that the commission acted outside its powers such that it did something that it did not have the power to do then an aggrieved party can go to the High Court, which will remit it back to the Federal Court or however they do it.

**Senator MURRAY**—The point of the immigration example is that, whilst there are aspects that you cannot restrict, there are other aspects that you can restrict and it may be possible to limit the appealable matters more than is done at the moment.

**Ms Rubinstein**—As far as I am aware, all the privative clauses are there. Electrolux in fact was not a case about the certification of an agreement; it was a case about industrial action. That goes through a different kind of route because of the issues to do with the way that industrial action is dealt with. I would be the first one to say that matters to do with industrial action should not go anywhere near the Federal Court, but it is not something that the government is likely to hear sympathetically. I am not the greatest lawyer in the land by any means, but my understanding is that the only way of appealing from a full bench of the

commission is on a question of law relating to the certification of an agreement to the High Court, which will then remit it back.

**Senator MURRAY**—However, the thrust of my question was not about your or my understanding of the law but about the attitude of the ACTU and whether you would prefer the law to be configured in such a way as to limit to the maximum the ways in which an agreement that has been approved by the IRC could be appealed.

**Ms Rubinstein**—I think that is right, but as I have said—

**Senator MURRAY**—All I wanted to know was whether that was your attitude. It is up to others to work out how that would be done.

**Ms Rubinstein**—It depends on what you are appealing on. I could never agree to curtail the right of any aggrieved person to take a matter on the grounds that power has been abused, which is really what the writs are about. That is what it means. I refer to the idea that somebody could not go to the highest court in the land when a tribunal, public servant or a lower court has acted capriciously, misunderstood the case entirely, acted without power or exceeded its power. These are the fundamentals. The ability to go to a court on those issues is fundamental. It is fundamental to our Constitution. My understanding of the current law is that that is the only way one can approach the High Court with these matters. Simply as a citizen, I could never agree to see those rights derogated. But if there were some other process by which these things could be resolved further down the chain and in a better way then certainly it is something one would look at very positively.

**Senator MURRAY**—That then means that the ACTU accepts the government's approach, because the government's approach is exactly that—that an agreement should be capable of being tested and, if that makes it uncertain, so be it. Those are the rights and opportunities available to those who wish to take that view.

**Ms Rubinstein**—I do not even think it is possible to do it any other way for the reasons that I have said. But, where there is uncertainty in the law, the way you deal with it is by fixing the law. There is not uncertainty because of the High Court; there is uncertainty because the words pertaining to the relationship between employees and their employer—in this case the employees covered by the agreement—are actually quite different words from those that apply to the definition of industrial dispute. Nobody knows what they mean. It is the law that should be changed.

**Senator MURRAY**—You argue that those should be removed—

**Ms Rubinstein**—Quite.

**Senator MURRAY**—but one of the reasons they were put in that framework was as a quid pro quo for an unprecedented exceptional protection, which is the protected action mechanism. Are you suggesting that if you were to move to a completely common-law approach that anything can be part of the agreement, in turn the government would say, 'If that's so, we'll drop protected action'? Are you arguing you want protected action but you do not want a constrained or confined situation so that the risk is then completely open-ended?

**Ms Rubinstein**—No, I do not think that is why the words were put in there. I think the words were put in there because they have been, in one form or another, part of the definition

of industrial dispute and have qualified the constitutional power in respect of industrial disputes since the year dot. The real question—the question that the High Court pointed out very clearly in the *Alcan* decision—was that the people who wrote the Constitution intended the commission to have the power to deal with anything that could be an industrial dispute, and the legislation, for whatever reason, actually wrote that down. They actually brought it down to be only about these matters. Perhaps they believed that an industrial dispute had to be about such matters, because there was some early thinking that that was the case.

The High Court has made it clear that the constitutional definition of industrial dispute is whatever the ordinary person would think an industrial dispute was actually about. There are some things that people would think you cannot have an industrial dispute about and some that you could. One would think that payroll deductions, bargaining fees and trade union training levies would be matters that the person in the street would think were industrial disputes. We say that there is a constitutional power. The government should legislate to the full extent of the constitutional power. It should do that in respect of the definitions of industrial dispute and awards, and agreement should follow on that. I do not think it was a carefully thought out *quid pro quo*; I think it was just there because it has always been there.

**Senator MURRAY**—But the Constitution does not say that you should have protected action. That is a decision of the Parliament of Australia. But, in giving protected action, the act also has limited the circumstances in which protected action applies, and it is limited in a very open manner—not in a confined manner at all—pertaining to the employment relationship. I would suspect it does not envisage returning to the days when the number of stripes in your ice-cream and so on might be a reason for disputation.

**Ms Rubinstein**—They might be, but it would be hard to see how, given the whole bargaining process that we have, it would be possible to take protected action around that kind of issue. The fact is that limitation has been in the act forever to qualify the notion of industrial dispute. Nobody sat down and thought, ‘We should limit this,’ or thought of it in that way, simply because the same words had been in section 4 forever.

I cannot see the logic that says you can take protected action because you want the employer to pay your private health insurance but you cannot take industrial action because you want the employer to deduct the private health insurance payments from your wages and pay them over to Medibank Private. There is no logic in that, because the High Court says that the former is related to remuneration like superannuation but the latter is not. Understand this: the High Court has said, and the High Court has considered all of this, that employer contributions to superannuation are a matter pertaining. That has been held; that is beyond doubt. What is in doubt is that you can have an agreement or an award that says that with your authorisation the employer can deduct your voluntary contributions from your after-tax income to get the government’s very generous co-contribution and pay that over to your super fund. That is the distinction that the High Court has made.

**Senator MURRAY**—Exactly: the High Court has made it—not the parliament.

**Ms Rubinstein**—No, the High Court has interpreted what the parliament has done, because what the parliament has done is put words into the legislation that for almost 100

years have been the subject of constant litigation because nobody knows what they mean, and different high courts at different times over 70 years have said that they mean different things.

**Senator MURRAY**—But the parliament has not said that you may not have an agreement on anything you like.

**Ms Rubinstein**—That is true.

**Senator MURRAY**—The common-law ability to have an agreement on any of the issues you have just mentioned is still there.

**Ms Rubinstein**—It is not enforceable.

**Senator MURRAY**—Of course it is enforceable; it is enforceable at common law.

**Ms Rubinstein**—Senator, I do not want to lecture you about using the common law to enforce employment contracts.

**Senator MURRAY**—But it is enforceable.

**Ms Rubinstein**—No. As I said, by and large, attempting to enforce employment contracts through common law has been ineffective. It is a very difficult process.

**Senator MURRAY**—Exactly, but it is enforceable.

**Ms Rubinstein**—I would be interested in how you believe you could get an enforceable contract about deduction of private health insurance from wages, given what contract requirements actually are. You have to have offer, consideration, all of these things, which are really complicated.

**Senator MURRAY**—I would be interested to know from you why it is not enforceable at law. I know why it is difficult to enforce—that is an entirely different question.

**Ms Rubinstein**—One of the problems has been lack of consideration. You might say that the consideration is the fact that they turn up for work, but you are then saying that these things do not pertain to the employment relationship. So lack of consideration has been one problem. A second problem has been that common-law employment contracts are terminable with a week's notice for ordinary workers. It is more for management, and that is why management has had success. Senior employers have had some success in this area but for ordinary workers the common-law position is that a contract is terminable with a week's notice with no reason being needed. So the employer can say, 'I will stop doing this at any time.' That unfortunately is certain. It is hard to see why parliament would persist with a position which says that you can have an agreement to pay health insurance but you cannot have an agreement to deduct the payments; it does not make any sense—

**Senator MURRAY**—Parliament has not said that.

**Ms Rubinstein**—and that is why we are seeking to have it changed.

**ACTING CHAIR**—I would like to ask a few brief questions, because we are a bit tight for time and we have the department coming up shortly.

**Ms Rubinstein**—I understand.

**ACTING CHAIR**—I want to clarify the position of the ACTU. We had the CFMEU earlier today, who asked the committee to reject the bill. They did not support the bill; they

opposed the bill. You have said in your submission at point 28 that the bill is of no assistance in addressing the problems created by the Electrolux decision. I am trying to ascertain the ACTU position. Do you want us to reject the bill? What is your position on the bill?

**Ms Rubinstein**—We want you to amend the bill in one of the ways we have set out in paragraph 29.

**ACTING CHAIR**—Do you want us to reject the bill if it is put up as is?

**Ms Rubinstein**—Having made these suggestions, I have to say we have not considered that the government would not consider them and the submissions and look to make some amendments. We would be astonished if the government proceeded with an unamended bill. If that were to be the case, we would of course have to consider it, but we have come here in a positive frame of mind.

**ACTING CHAIR**—Thank you. Do you support the actions of the CFMEU and the ETU? We heard earlier today that there is action from the ETU for example with regard to renegotiating the agreements. Do you support their action?

**Ms Rubinstein**—Like the government, I believe unions should act lawfully. If they are acting lawfully, it is not a matter of giving support or not. It is a matter for them.

**ACTING CHAIR**—So you do not condone or endorse it?

**Ms Rubinstein**—There is nothing to condone.

**ACTING CHAIR**—They are a member of your organisation.

**Ms Rubinstein**—If they are acting lawfully and that is what they have decided to do, it is not a question of endorsement. When you say you condone something that implies that you are agreeing to something that is wrong. It is not wrong. If what they are doing is lawful—that is, they have no agreement in place, they are without an agreement and they seek to take protected industrial action in order to negotiate a certified agreement and to protect their wages and conditions and they seek to reach agreement with their employers then that is a perfectly normal, lawful thing to do and one that nobody, including the government, could have any difficulties with, I would have thought.

**ACTING CHAIR**—We heard earlier today that the ETU is not just acting on the previous terms and conditions that they had agreed but also seeking further increases in wages and a training levy, so additional matters as distinct from the previous agreement. Do you think that is right or not right?

**Ms Rubinstein**—I am unaware of any law which says that if you do not have an agreement you are somehow limited, other than to pertaining matters, in what you can pursue in an agreement. I think a training levy is an excellent idea, given the problems there are with skilled labour in the industry.

**ACTING CHAIR**—We had a view put to us today that the bill is unconstitutional. What is your position?

**Ms Rubinstein**—I am aware of that view and that it has been put by a very senior barrister. I am not really in a position to comment. I think one of the problems with our Constitution and our High Court is that until the High Court makes a determination you can have no

possible idea. I think the argument goes to something like: they would not have made the agreement at all. But I have not seen the arguments set out in any detail and I am not really in a position to comment.

**ACTING CHAIR**—Thank you.

[4.41 p.m.]

**JAMES, Ms Natalie, Director, Bargaining and Industrial Action Section, Legal Policy Branch, Workplace Relations Legal Group, Department of Employment and Workplace Relations**

**O’SULLIVAN, Mr Jeremy Martin, Assistant Secretary, Legal Policy Branch, Workplace Relations Legal Group, Department of Employment and Workplace Relations**

**POINTON, Ms Miranda Elizabeth, Director, Strategic Policy Branch, Workplace Relations Policy Branch, Department of Employment and Workplace Relations**

**SMYTHE. Mr James Edward, Chief Counsel, Department of Employment and Workplace Relations**

**ACTING CHAIR**—I welcome the witnesses from the Department of Employment and Workplace Relations. The committee prefers all evidence to be given in public. It will consider any request for all or part of the evidence to be given in camera. The committee has before it submission No. 1. Are there any changes or additions?

**Mr Smythe**—No.

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

**Mr Smythe**—I thank the committee for inviting the department to appear at this hearing today and for the opportunity to make an opening statement. Before going to my script, I would like to read out section 170LI of the Workplace Relations Act. It is headed ‘Nature of agreement’. Its subheading is ‘Agreement regarding relationship between parties’. It reads:

(1) For an application to be made to the Commission under this Division, there must be an agreement, in writing, about matters pertaining to the relationship between:

(a) an employer who is a constitutional corporation or the Commonwealth; and

(b) all persons who, at any time when the agreement is in operation, are employed in a single business, or a part of a single business, of the employer and whose employment is subject to the agreement.

The purpose of reading that out is to demonstrate to the committee that the act sets out in relatively clear terms—for lawyers, I suppose—that agreements that attract the protections of the act have to be about matters pertaining to the relationship. That section became law on 31 December 1996, which is almost eight years ago.

The Workplace Relations Amendment Agreement Validation Bill 2004 is a straightforward bill containing very important but technical provisions. The purpose of the bill is to provide certainty to parties operating under agreements that may have been invalidly certified by the Industrial Relations Commission or approved by the Employment Advocate. The potential invalidity of agreements has been the focus of public discussion since the decision of the High Court in *Electrolux Home Products Pty Ltd against the Australian Workers Union and others*. This decision was handed down by the High Court on 2 September 2004. The High Court held that certified agreements made under the Workplace Relations Act must be about matters that pertain to the relationship between the employer making the agreement and its employees

in their roles as employer and employee. That is hardly a surprising finding given the words of the section of the act that I read out. A matter that does not pertain to this relationship maybe included if it is a machinery provision or if it is incidental or ancillary to the employment relationship.

As a result of the High Court decision, agreements that have already been certified that contain matters that do not pertain to the employment relationship may not be valid. While no court has made a ruling to this effect, the government considers that the consequences for parties relying on agreements that may potentially be invalid are serious and should be urgently addressed.

Some of the potential consequences are outlined at paragraph 1.9 of the department's submission. Parties to an agreement could exploit the potential invalidity of their agreements by refusing to honour the rights and obligations contained in the agreements. Some unions have suggested that they may use potential invalidity as a trigger to reopen negotiations with employers regarding their members' terms and conditions. We understand that some unions have already tried to take advantage of the uncertainty caused by the Electrolux decision by pressuring businesses to renegotiate agreements. The parties themselves are unable to take steps to validate agreements that have already been certified. This is why the government has taken steps to ensure that parties cannot take advantage of the uncertainty in this manner and that existing rights and obligations are clear and enforceable.

Some people making submissions to this inquiry have suggested that the bill should do more than address this uncertainty. They suggest that there is something inherently uncertain about the requirement that agreements must pertain to the employment relationship and that the test should be changed. The government considers that this is an overreaction to the Electrolux decision. The decision was not radical or groundbreaking and should not have come as a surprise. The Workplace Relations Act and its predecessors, the Industrial Relations Act 1988 and the Conciliation and Arbitration Act 1904, set the boundaries of the Commonwealth's workplace relations framework by reference to matters that pertain to the employment relationship. The phrase has been the subject of litigation over many years, resulting in many High Court and other precedents which are still relied upon by parties operating under the Workplace Relations Act. The High Court's decision in the Electrolux case is another of these precedents. The only part of the decision that is new is its confirmation that long established principles that have applied to awards also apply to certified agreements.

Since the Electrolux decision the commission has been declining to certify agreements containing non-pertaining matters. In some cases, the commission has found that certain matters clearly do not pertain based on established precedent. In other cases, whether a particular clause will pertain will depend on how it is drafted, how it operates within the broader scope of the agreement and the nature of the particular employment relationship the agreement will cover. These things are relevant to whether or not a particular clause might be a machinery provision or might be necessary or incidental to the employment relationship, even though it may not directly pertain.

As noted in our submission at paragraph 1.16, the recent decisions of the commission suggest the categories of matters that may not pertain are reasonably identifiable. The matters

that have been questioned are not core conditions of employment, such as pay or sick leave or recreation leave or penalty rates or hours of work or dispute resolution procedures. The questionable matters are those at the periphery of the relationship that usually seek to confer rights on a party external to the employment relationship; for example, clauses that regulate the use of contractors and clauses that provide for payroll deduction facilities. That later category was expressly ruled out by the High Court as far back as 25 years ago. If parties wish to avoid uncertainty about whether their agreement will be certified they should avoid putting these matters in their agreement.

The ACTU has said there have been inconsistent decisions from the commission about what does and does not pertain. While it is true that clauses about a particular matter have sometimes been certifiable and at other times have been rejected, this is by and large because of the way a particular clause has been drafted and the way the clause operates within the agreement as a whole. This is not an inconsistency but the commission doing its job and assessing the specific clause in the context of the particular employment relationship.

The ACTU has suggested that the scope of agreements and disputes should be broadened beyond matters that pertain to the employment relationship. This would overturn a long established principle maintained by successive governments. Successive governments have adopted and maintained definitions of industrial dispute and industrial matter that have been confined to matters that pertain to the employment relationships. These definitions have traditionally set the limits of the jurisdiction of the Australian Industrial Relations Commission and its predecessors and the instruments the commission can make. The same words used to set out the limits of an industrial dispute, which is the basis for award, have been used to set out the limits for certified agreements. Parliament adopted these words deliberately and with good reason. It wanted to maintain the traditional scope of industrial instruments made under the act. That is as much as I want to say at the moment but I think one of my colleagues might like to say a few words as well.

**Mr O'Sullivan**—In light of today's submissions it may be helpful to reinforce a key imperative of the bill, which is to address the urgent need to validate existing agreements to the extent that they are consistent with the requirements of the Workplace Relations Act. The committee has heard a number of submissions that the government should also, for example, remove the matters pertaining requirement or validate agreements irrespective of when they were certified, including the validation of non-pertaining matters. But the government does not consider the broader changes to the certified process are at all urgently required; hence this focused and minimalist legislative response. I think it is probably better to characterise it as focused and minimalist, rather than rushed.

**Senator MARSHALL**—Thank you, Mr Smythe, for reading out 170LI for us. So you can tell us what matters pertain and what matters do not?

**Mr Smythe**—No, that is the commission's job.

**Senator MARSHALL**—The commission has been certifying agreements, and we now find, as a result of Electrolux, that some of the clauses do not pertain. So the commission has not—

**Mr Smythe**—No. We find as a result of Electrolux that they should not have been certifying agreements that have matters that do not pertain. Electrolux did not go to whether a whole raft of provisions pertained or not. They simply said it is the commission's job to only certify agreements that contain matters pertaining to the employment relationship.

**Senator MARSHALL**—And they have been doing that.

**Mr Smythe**—Yes.

**Senator MARSHALL**—You then indicate in your submission that it really comes down to a matter of drafting in many instances.

**Mr Smythe**—Certainly sometimes clauses which, when drafted in a particular way and in a particular context may not pertain, may be drafted in such a way as to pertain.

**Senator MARSHALL**—If it has the same impact, what is the difference? Why does it make the matter pertain or not pertain just because it is drafted in a certain way?

**Mr Smythe**—If it is drafted in such a way as to make it clear that the clause has some benefits and some relevance to the employees and their obligations and rights, and to the employer, then it is likely to pertain, whereas if it is drafted in such a way as to simply make a bald statement which would appear to confer a right on a third party with no reference or relevance to the employees then it is less likely to pertain. That is the approach the commission appears to have taken. But, as I said, it is not my task to determine that; it is the task of the commission and the courts. The point that I would like to emphasise is that it seems to me that a lot has been made of this, as if there is a huge raft of core central conditions and nobody knows whether they pertain or they do not. The point which I would like to stress—and I have made it in the opening statement and I think we make it in our submission too—is that that is not the case. The non-pertaining matters tend to be a small group of matters at the periphery of the relationship. Most of what you would normally regard as employment conditions clearly pertain to the employment relationship.

**Senator MARSHALL**—But agreements are voted on as a whole package, aren't they? The act does not allow people to agree to certain clauses and not agree to others. They are required to vote on the agreement in its entirety.

**Mr Smythe**—The act requires that the agreement can only be about matters pertaining.

**Senator MARSHALL**—That was not the question I asked. The process for agreeing to agreements, from the employees' point of view, is that they have to vote on the whole agreement. They cannot selectively agree to some clauses and not agree to others, can they?

**Mr Smythe**—No, they cannot.

**Senator MARSHALL**—So they have to agree to the whole thing. How do you then go into every individual's mind to determine what value they put on some clauses and what value they put on others?

**Mr Smythe**—You don't.

**Senator MARSHALL**—You said to us that matters that do not pertain are very peripheral and no-one should worry about them, but certainly—

**Mr Smythe**—I do not recall using the words 'no-one should worry about them.'

**Senator MARSHALL**—What did you say?

**Mr Smythe**—I said they are peripheral. I said they are not the core terms and conditions. The point that I was getting to was: if you want to make sure that your agreement is going to be certifiable then you make sure that the matters you put in your agreement are just the standard terms and conditions. If you want to put in things at the periphery which may not pertain, then you take the risk that the commission will say to you, ‘That can’t be certified.’

**Senator MARSHALL**—Suncorp-Metway have some significant clauses in their agreement, which they are now concerned about, which certainly are not at the periphery. They go to salary sacrifice issues, payroll deduction issues—issues that actually go to remuneration.

**Mr Smythe**—If I could take that up, payroll deduction has been held by the High Court not to pertain for the last 25 years. Salary sacrifice is something I would regard as the periphery. The vast majority of people on the shop floor in factories do not have salary sacrificing arrangements. I think salary sacrificing is a peripheral issue.

**Senator MARSHALL**—Yes, you may. But other people have voted on agreements that include these matters and they may not. The point I am coming to is that by not validating the whole of the agreement you have actually changed the balance of what people agreed to in its entirety. People voted on a whole agreement. The changed agreement is of a lesser value to them. You can argue about how much less value it has to them, but that is problematic and involves going into every individual’s mind to determine that. But it must be of a lesser value to people if some clauses are taken out and not validated.

**Mr Smythe**—The government’s position is that it is validating what the act said could be an agreement in the first place.

**Senator MARSHALL**—Yes, I understand the government’s position. Thank you, I have no further questions.

**Senator MURRAY**—I want to take you back through a few steps because I am interested in getting the protected action argument out of the way; I think it is a red herring in this context—I should put that on the record. It is true, Mr Smythe, isn’t it, that the Constitution does not require there to be a Workplace Relations Act or any other act? The entire employment relationship could be operated under common-law jurisprudence and principles and the only constitutional provisions are those which require the adjudication and determination of matters to be within a certain framework, through the tribunal. That is true, isn’t it?

**Mr Smythe**—That is true.

**Senator MURRAY**—The parliaments of Australia—I think we are on our 41st now—have over time decided that it is in the interest of good government that there be specific employment law. It seems to me that there are two prime areas where great relief is to be had from normal common-law jurisprudence with respect to agreement making. One is the Trade Practices Act, which does not apply in many of its circumstances to the collective bargaining situation: it gives relief or an exemption. The other, of course, is protected action, where you

are able to strike and take action which harms others in a bargaining period. Is that a reasonable set of views for me to take?

**Mr Smythe**—Yes.

**Senator MURRAY**—My view is that a quid pro quo essentially exists whereby you give specific relief from what would otherwise be an uncomfortable legal situation under common law, and in return you restrict the circumstances under which such agreements can be made—in other words, that they shall pertain to specific matters.

**Mr Smythe**—That is a reasonable proposition.

**Senator MURRAY**—The parliament has not come to an overly restrictive view. It has not defined in either an exhaustive or inexhaustive manner what the employment relationship is. It has left that open to the commission to determine based on jurisprudence and past practice. And, of course, it has not interfered with the common-law ability to have an agreement on whatever you like so long as it is lawful. That is correct too, isn't it?

**Mr Smythe**—That is correct.

**Senator MURRAY**—There is no change in the government view, is there? There is no intention of producing an inexhaustive list or an exhaustive list or of restraining common law or doing anything other than continuing the current policy, which I think you deliberately spelt out had been in practice for at least eight years.

**Mr Smythe**—It is certainly the policy that underpins the act. I am not in a position to comment on what the government's future intention might be.

**Senator MURRAY**—No, but the policy in this bill does not change that.

**Mr Smythe**—No, it does not; that is correct.

**Senator MURRAY**—Is there any way in which the determination of what matters should apply to the employment relationship could be improved? Has the Industrial Relations Commission ever conducted a test case, for instance, or developed a set of principles or a pro forma agreement, or have they in any way tried to make it a little clearer?

**Mr Smythe**—Not that I am aware of. But, as I said in my opening statement, the issues about what pertains have been litigated for a long time. Ms Rubinstein also alluded to this but our views diverge a little on what that means. My view is that 100-odd years of litigation have settled a pretty reasonable core, so that most parties operating in the industrial arena—unions, employers and lawyers working in that area—know for the most part the things that pertain. The Electrolux decision has excited a little bit of interest about a few matters at the periphery. But, for the most part, 100 years of litigation have given the parties a pretty good idea of what pertains and what does not.

**Senator MURRAY**—It may be requiring you to speculate beyond where you would like to go, but I will ask you: do you think that a test case approach or the development of principles or better guidelines by the Industrial Relations Commission or indeed any action by the department could improve certainty in any of these areas?

**Mr Smythe**—Perhaps I could answer the question this way: I think it is inevitable that the commission will conduct a test case, and I imagine that will occur before too much more time passes.

**Senator MURRAY**—It is open to the government, isn't it, to ask them to initiate a test case?

**Mr Smythe**—We could certainly make representations on that score, but I suspect that will not be necessary. I would imagine that before much longer there will be a test case.

**Senator MURRAY**—I understood the way in which Ms Rubinstein was putting her evidence but, just for the record, those matters which she said were not approved under a certified agreement can certainly be approved in a common-law agreement between the parties, can't they?

**Mr Smythe**—I imagine there are a number of ways in which, at common-law, non-certifiable matters of agreement between parties could be made enforceable under deed arrangements or deed poll arrangements. My colleague Mr O'Sullivan might wish to expand on that.

**Mr O'Sullivan**—That is certainly the case, and indeed Suncorp-Metway suggested that was one avenue that they were exploring. Deed poll, of course, does not even require that second party, so it is a very useful and practical tool in that regard.

**Senator MURRAY**—Would you agree with my judgment that, accepting that there can be great difficulties at times, even an oral agreement at common law is enforceable at law?

**Mr O'Sullivan**—There is no question that an oral agreement is just as enforceable as a written agreement; that is well settled. Of course, evidentiary issues may be a problem, and that is why for a long time we have put things down in writing. The common law probably gets a bit of a bad rap, actually. For contract there is a more well-settled precedent base than even the workplace relations context. So it is a pretty useful tool, and deed polls have been around for 1,000 years.

**Senator MURRAY**—Accepting that the circumstances of each individual agreement and the matters within that agreement can produce difficulties in pursuing that law—and that is easily accepted—there is nothing in a certified agreement between the parties or in a common-law agreement with the parties which is excluded from enforceability through the courts?

**Mr O'Sullivan**—I think that is probably right. It is always difficult to think up every possible hypothetical situation that might make me think again, but as a general proposition that is probably right.

**Senator MURRAY**—We are then left with the agreements which are operating now or may be agreed in future. Those agreements can be certified and common law or just certified or just common law. If future agreements exclude matters such as the bargaining fees matter in the Electrolux case, it is perfectly possible for an employer and employees to have a memorandum of understanding, which is enforceable at law, that bargaining fees shall apply in that workplace?

**Mr Smythe**—I have to qualify the response to that a little bit. As you would be aware, the parliament passed legislation last year relating to compulsory union fees which would have the effect that some of the bargaining service fees would not be enforceable because they have been specifically prohibited by sections of the Workplace Relations Act.

**Senator MURRAY**—Let me be specific. What I meant was a bargaining agent's fee. The bargaining agent's fee, as I understand it, is not automatically excluded.

**Mr Smythe**—Yes, there would be some forms of bargaining agent fees which would be enforceable.

**Senator MURRAY**—We are then left with certified agreements which apply now and may have non-pertaining matters but where those non-pertaining matters could operate at common law and continue in the manner outlined in the AiG evidence. One thing is unclear for me, though, in all of this. What would the negative consequences and the grounds be for simply stating that, where the Industrial Relations Commission had formed the view that they did pertain to the employment relationship and a court had overturned them, agreements which were previously certified could simply stand until they ran out? That is a maximum of three years, as we know.

**Mr Smythe**—I think the problem is that, prior to the initial Electrolux decision of Justice Merkel, the Industrial Relations Commission actually did not turn its mind to whether all of the provisions of an agreement pertained or not. It simply certified them. So you could not say with any certainty that the commission had looked at an agreement and come to any conclusion one way or the other.

**Senator MURRAY**—Has it ever explained why it did not do so? It is required under the act to do so.

**Mr Smythe**—There is not a clear rationale for it. There have been decisions where some members of the commission thought that the wording of section 170LI just meant that most of the matters needed to pertain so that the agreement pertained when characterised as a whole. It did not matter if some did not. One suspects that the matter just was not raised in the certification proceedings.

**Senator MURRAY**—That does not answer one part of my question, which is the negative consequences part. We have heard from AiG that most employers that they have been in contact with—of course, they cannot speak for the whole community of businesses—will continue to honour the agreements, regardless of whether they are valid within the certified agreement or not, for the term of the original agreement. What are the negative consequences of the government saying that that should apply to everyone?

**Mr O'Sullivan**—Some of those consequences were, of course, identified by Mr Anderson. I think they have some force. You may have inconsistent and at-odds agreements where some had their agreements certified before others, and having different approaches to that is undesirable.

**Senator MURRAY**—But that has often happened. Parliaments have often said that something is vague or hazy and might be wrong but they will let a lease, a contract or whatever stand for a period and provide a transitional arrangement and so on. Now that is not

necessary with certified agreements, in my view, because you are talking about only a three-year cycle.

**Mr Smythe**—I suppose the difficulty that I am having articulating the negative consequences is because the department is not sure that there are a large number of important clauses in this category that are going to come up.

**Senator MURRAY**—So surely that means you just validate whatever is there.

**Mr Smythe**—The idea that the government put forward is that the government is just validating what the act always said in very plain and simple language that you are able to put into an agreement. It could seem a little anomalous to say that, despite the fact that the act clearly said you can have an agreement about matters pertaining, we will validate matters that not pertaining. It is just a question of consistency.

**Senator MURRAY**—I do not mind the approach taken by government at all from the perspective that it means pretty well the sets of agreements and marketplace arrangements will continue as before, except the unions are saying that is all very well closing off the renegotiation of certified agreements for them but it does not close off employers agitating that agreements were actually unlawful and therefore they will not abide by them. AiG has said that there is not much to fear in that area but—

**Mr O’Sullivan**—Again the remedy is pretty easy, as noted in evidence given by Suncorp—‘We undertake to honour, by way of a common-law deed poll, those parts of the agreement that should not have been in.’ Governments are naturally reluctant to validate invalid or unlawful applications of approval processes.

**Senator MURRAY**—But you know as well as I do that they have done that in the past. They have decided that supplier agreements, leases affected by native title changes and that sort of thing should stand for the duration of those contracts or agreements. That is a kind of practical, pragmatic way of dealing with it because otherwise you disturb arrangements too fundamentally. I am just perplexed as to why they did not just say, ‘It applies to whatever is certified now, and for the rest it cannot apply.’

**Mr O’Sullivan**—It is even I guess a reluctance to reward extremely risky behaviour. As Mr Smythe did say, that provision has been in the act for eight years now. One at-odds decision should not necessarily have given people the green light—

**Senator MURRAY**—Except that the employers are going to reward that risky behaviour through common-law fulfilment of their original agreement, according to AiG. If the employers were all saying, ‘This was outrageous. It was done under duress. We never agreed to it. Thank God for that decision,’ and none of them were going to comply with the existing agreements then that would be one thing, but the direct evidence of AiG was that employers will do the right thing and stand by the agreements because the agreements were struck and the change will be from the new certified agreement round.

**Mr O’Sullivan**—It may be appropriate for parties to that agreement to do that but governments are appropriately reluctant to exercise their legislative authority to make lawful what was otherwise unlawful conduct, and there should be a reluctance to do that.

**Senator MURRAY**—Let me conclude in this way: you are not so much saying that there were obvious negative consequences; you have drawn up the bill in this way because you do not want to breach a principle as to the way in which these matters should be resolved.

**Mr Smythe**—What the government is doing with this bill is confirming what the original legislative intent was. As Mr O’Sullivan has just said—and I think Mr Anderson from the ACCI also said it—to go further would be to make lawful what was not intended to be lawful in the first place.

**Senator MURRAY**—Issues of principle.

**Mr Smythe**—Yes.

**ACTING CHAIR**—I want to take this a little further and nail it. In terms of the proposition that the government, or the parliament, should pass legislation to certify all agreements, whether they are pertaining or non-pertaining to the employment relationship, I asked the question earlier—and I would seek your response—as to whether that was actually retrospective changing of the law, bearing in mind that the bill was brought in in 1996 and set out clearly what it was related to and what it was not related to. Would that not be retrospective, in effect?

**Mr Smythe**—Yes. What the bill does do is confirm retrospectively, in a sense, what was always intended. But if you went further you would, in your words, be retrospectively changing the intent of the law.

**ACTING CHAIR**—In terms of an agreement that has both matters pertaining and matters non-pertaining, your view is that that agreement is invalid?

**Mr Smythe**—I am not sure it is my position to have a view on that. What I can say is that the High Court indicated in the Electrolux case that the commission did not have jurisdiction to certify agreements that contained non-pertaining matters. It flows from that that where the commission has in the past done so it would be pretty obvious that they are not properly certified and therefore invalid.

**ACTING CHAIR**—Is there a view that those matters non-pertaining should be, or could be, excised from the agreement, and those remaining parts certifiable?

**Mr Smythe**—Can you repeat the question?

**ACTING CHAIR**—Would it be appropriate for those matters that are not pertaining to be effectively excised from the agreement?

**Mr Smythe**—I think the problem with that is that it would involve a fairly complex bureaucratic process. The bill does not attempt to identify the matters in past agreements that are non-pertaining. It just says, ‘If in the past the commission certified agreements that contained non-pertaining matters then to the extent that the agreements have pertaining matters in them they are valid to that extent and they continue to exist.’ If you wanted to go through a process of excising non-pertaining matters it would involve examining all those agreements, making decisions about what did and did not pertain, and excising them, which would probably be a fairly resource intensive and time consuming process.

**ACTING CHAIR**—Turning to a few other matters: we had a view put to us by the CFMEU earlier today that the bill was unconstitutional and that they had seen legal advice to that effect. What is your response?

**Mr Smythe**—I will make a number of points on that. Firstly, before the department gives bills to the government for introduction into the parliament we have the Attorney-General's Department give them the once-over to ensure that they are constitutionally viable. We have done that with this bill, as with all others. Secondly, I note that the CFMEU did not tell us the basis on which there was this constitutional question, so I cannot really comment. Thirdly, I notice that the CFMEU mentioned that this advice was provided a couple of weeks ago. The bill was only publicly available from last Thursday, so presumably the advice was given without the benefit of the bill.

**ACTING CHAIR**—You had not seen the advice, you are not aware of the advice, and you are not aware of any other advice that says the bill is unconstitutional?

**Mr Smythe**—That is correct. I am aware that the Attorney-General's Department have given us the tick in terms of constitutionality.

**ACTING CHAIR**—With regard to the renegotiated efforts by the ETU and the CFMEU, I go firstly to the legality of those renegotiated arrangements, whether they are acting illegally or not. Are you familiar with those agreements?

**Mr Smythe**—I am not, Senator.

**ACTING CHAIR**—Can you say whether they have matters that are not pertaining—

**Mr Smythe**—I am sorry, Senator, but I am simply not familiar with the content of the agreements in question.

**ACTING CHAIR**—If they did not include non-pertaining matters—that is, they only included matters pertaining to the relationship—then those agreements would remain valid?

**Mr Smythe**—They would.

**ACTING CHAIR**—How would you describe the actions that hypothetically are taking place now to renegotiate those agreements?

**Mr Smythe**—It is difficult to be definitive because, as a result of the Emwest decision of the full Federal Court, it has been held that in some circumstances protected action may be available despite the fact that there is a valid certified agreement in place where the protected action is about matters that are not covered by the agreement. However, that is an unusual set of circumstances. As a general proposition, where there is a valid certified agreement in place it is not possible to take protected industrial action in pursuit of a new agreement.

**ACTING CHAIR**—Notwithstanding the legality issue that I have just raised, do you have a view as to whether, if they are seeking matters over and above the previous terms and conditions of their agreement, it is appropriate or fair or just or proper? Do you wish to share a comment on those actions? We have had comments from the AiG and the ACCI earlier that they are 'damaging' and adverse to the public interest.

**Mr Smythe**—Perhaps I could answer the question this way: if it were fair game for unions to rely on the invalidity of agreements flowing from non-pertaining matters to seek to

renegotiate new agreements, it might equally be fair game for employers say, ‘We are not going to afford you the pay increase you got as a result of this agreement because the agreement is invalid.’ It does not seem to be right for either side to rely on a technical invalidity.

**ACTING CHAIR**—Thank you. I do not know if you have had a chance to have a look at the Suncorp-Metway submission.

**Mr Smythe**—I have looked at it, yes.

**ACTING CHAIR**—Do you wish to respond to it, and in particular to the view that there could be some transitional arrangement where, if there were an agreement made prior to September and that was certified at a later time, that would be considered as appropriate?

**Mr Smythe**—As my colleague Mr O’Sullivan said, one of the primary motivating forces in this legislation has been speed. The bill was introduced on the second sitting day of the parliament’s resumption after the Electrolux decision and the government believes that it is quite important that that bill be passed during the current parliamentary sitting.

**ACTING CHAIR**—What does that mean—before Christmas?

**Mr Smythe**—Yes, next week or the week after. So the scope for additional amendments was considered by the government to be feasible only if they really are of enormous moment. Having said that—

**Senator MURRAY**—Or minor.

**Mr Smythe**—Or minor, or of practical effect. I suppose the Suncorp-Metway situation is a little curious, and I might ask my colleague Ms James to expand upon this. Any business or any employer negotiating an agreement that had got to this stage of the mandatory two-week consideration period at 2 September could be expected to have made its application to the commission sometime in October and could be expected to have already been before the commission or be about to come before the commission, as indeed Suncorp-Metway is tomorrow. We have some statistical information—it is not particularly tight—about the numbers of agreements that were at that stage at the time that Electrolux was handed down. Off the top my head I think there were 1,100 or so agreements in that category, about 700 of which have already been to the commission and the commission has either certified them or has said, ‘Go away and fix it up and come back.’ We would expect the remaining 400 to go to the commission and be dealt with within the next two to three weeks. Bearing in mind that this bill will not become law, even if passed within the next two or three weeks, until royal assent, which will take us till about mid- to late December, the practical view that we took was that it would be unlikely that this bill could rectify the situation of agreements such as Suncorp-Metway’s because they would have already gone to the commission and either been certified or refused and re-mediated before the bill comes into force.

**ACTING CHAIR**—What is the net effect of what you are saying?

**Mr Smythe**—To be perfectly blunt about it, if Suncorp-Metway or anyone else goes to the commission tomorrow and the commission says, ‘We’ll certify it,’ then they will not have a problem. If the commission says, ‘We won’t certify it; you have to go away and do this,’ then the bill will not help them either. The only way they could be helped would be if the

commission said, 'We'll adjourn it for a couple of months.' Our experience has been that not always but by and large the commission does not take into account passage of possible legislation, even if it is imminent. They tend to say, 'We'll deal with the law as it presently is; we can't be sure that the bill will be passed or passed as it is.' I am not saying the commission will do that. The commission has from time to time delayed matters to await the outcome of passage of bills through the parliament, but it is not a guarantee.

**ACTING CHAIR**—So you have not put your mind to the wording of any possible minor amendment that might be a transitional arrangement with ACCI?

**Mr Smythe**—Suncorp-Metway provided us with their draft provision. It would need to be massaged a little bit.

**ACTING CHAIR**—I draw your attention to the ACCI comment in their submission where they say the headings should refer to agreements made 'on or before 2 September' rather than 'before 2 September'. I think there was a minor administrative issue.

**Mr Smythe**—The heading was not consistent with the body of the legislation. It is not a technical legal defect; it would just look nicer if we fixed it.

**Mr O'Sullivan**—The Acts Interpretation Act makes it quite clear that the heading does not form part of the act, but your point is taken.

**ACTING CHAIR**—We are always trying to improve. Thank you very much for your patience and your time.

**Committee adjourned at 5.27 p.m.**