



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS
LEGISLATION COMMITTEE

ESTIMATES

(Budget Estimates)

TUESDAY, 2 JUNE 2009

CANBERRA

BY AUTHORITY OF THE SENATE

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

Tuesday, 2 June 2009

Members: Senator Marshall (*Chair*), Senator Humphries (*Deputy Chair*), Senators Bilyk, Cash, Jacinta Collins and Hanson-Young

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Colbeck, Coonan, Cormann, Crossin, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Heffernan, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Abetz, Brandis, Bilyk, Cameron, Cash, Jacinta Collins, Crossin, Fisher, Humphries, Marshall, Mason, Ronaldson, Ryan and Xenophon

Committee met at 9.00 am

EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO

In Attendance

Consideration resumed from 1 June 2009

Senator Ludwig, Minister for Human Services

Department of Education, Employment and Workplace Relations

Cross Portfolio

Ms Lisa Paul, Secretary

Mr Robert Griew, Associate Secretary

Mr Michael Manthorpe, Deputy Secretary

Dr Michele Bruniges, Deputy Secretary

Mr Bill Burmester, Deputy Secretary

Ms Malisa Golightly, Deputy Secretary

Mr Graham Carters, Deputy Secretary

Mr John Kovacic, Deputy Secretary

Mr Ewen McDonald, Deputy Secretary

Mr Craig Storen, Chief Finance Officer and Group Manager, Finance Group

Mr George Kriz, Chief Legal Officer and Group Manager Procurement, Legal, Investigations and Procurement Group

Mr Jeremy O'Sullivan, General Counsel and Group Manager Investigations, Legal, Investigations and Procurement Group

Mr Glen Casson, Acting Branch Manager, Internal Audit Group

Ms Margaret Pearce, Group Manager, Parliamentary and Communications Group

Mr David Pattie, Branch Manager, Internal Capability and Support Branch, Parliamentary and Communications Group

Mr Brant Trim, Branch Manager, Communications Delivery Branch, Parliamentary and Communications Group

Mr Ben Johnson, Group Manager, People Group

Ms Sue Saunders, Branch Manager, People Services Branch, People Group

Ms Chris Silk, Branch Manager, Remuneration and Performance, People Group

Mr Ben Wyers, Branch Manager, Capability Development and Agility Branch, People Group

Ms Robyn Kingston, Group Manager, Delivery and Network Group

Ms Helen Skrzeczek, Group Manager, Applications Systems Group

Ms Gillian Mitchell, Branch Manager, Building the Education Taskforce

Outcome 4—Employment and Strategic Policy

Ms Lisa Paul, Secretary

Ms Malisa Golightly, Deputy Secretary

Mr Graham Carters, Deputy Secretary

Ms Marsha Milliken, Group Manager, Income Support and Stakeholder Group

Ms Janine Pitt, Group Manager, Job Seeker Support Group

Ms Jo Caldwell, Group Manager, General Employment Services Group

Mr Stephen Moore, Group Manager, Employment Systems Group

Mr Tony Waslin, Group Manager, Specialist Employment Services Group

Ms Jennifer Chadwick, Branch Manager, Disability Employment Policy and Performance, Specialist Employment Services Group

Ms Sharon Stuart, Branch Manager, Disability Employment Services Branch, Specialist Employment Services Group

Mr Derek Pigram, Branch Manager, Employment Pathways Branch, Specialist Employment Services Group

Ms Dianne Fletcher, Group Manager, Employment Purchasing Group

Mr Darren Hooper, Branch Manager, Tender Team 2009, Employment Purchasing Group

Mr Matt Davies, Acting Group Manager, Strategic Policy Group

Ms Margaret Kidd, Group Manager, Employment Reform Taskforce

Mr Ali Jalayer, Branch Manager, Employment Services Operational Policy, Employment Reform Taskforce Group

Ms Louise McSorley, Branch Manager, Migration, Employment Reform Taskforce Group

Dr Alison Morehead, Group Manager, Social Inclusion and Participation Group

Ms Stephanie Bennett, Branch Manager, Social Inclusion, Social Inclusion and Participation Group

Ms Sharon Rose, Branch Manager, Participation Policy, Social Inclusion and Participation Group

Ms Robyn Shannon, Branch Manager, Income Support Policy, Social Inclusion and Participation Group

Ms Jody Hamilton, Acting Group Manager, Indigenous Group

Mr Shane Hoffman, Branch Manager, Indigenous Policy, Indigenous Group

Ms Jo Wood, Branch Manager, Innovation and Partnerships, Indigenous Group
Ms Julie Polson, Branch Manager, Strategic Support, Indigenous Group
Mr John Baker, Acting Branch Manager, Indigenous Implementation Strategy, Indigenous Group
Ms Trish Mercer, Group Manager, Research Analysis and Evaluation Group
Mr Malcolm Greening, Branch Manager, Economic, Labour Market and Educational Analysis, Research Analysis and Evaluation Group
Mr Ivan Neville, Branch Manager, Economic, Labour Supply and Skills, Research Analysis and Evaluation Group
Mr Justin Griffin, Branch Manager, Evaluation and Program Performance, Research Analysis and Evaluation Group
Mr Scott Matheson, Branch Manager, Research, Research Analysis and Evaluation Group
Mr Paul Balnaves, Branch Manager, Research, Research Analysis and Evaluation Group

Outcome 5—More Productive and Safer Workplaces

Ms Lisa Paul, Secretary
Mr John Kovacic, Deputy Secretary
Ms Michelle Baxter, Group Manager, Safety and Entitlements Group
Ms Terasa Cremer, Acting Branch Manager, Office of the Federal Safety Commissioner, Safety and Entitlements Group
Ms Kylie Dore, Acting Branch Manager, Employee Entitlements Branch, Safety and Entitlements Group
Ms Michelle Boundy, Director, Safety and Compensation Policy Branch, Safety and Entitlements Group
Mr Michael Maynard, Group Manager, Workplace Relations Implementation Group
Ms Jody Anderson, Branch Manager, Private Sector Branch, Workplace Relations Implementation Group
Ms Helen Bull, Branch Manager, Private Sector Branch, Workplace Relations Implementation Group
Mr Jeff Willing, Branch Manager, Building Industry Branch, Workplace Relations Implementation Group
Ms Sandra Parker, Group Manager, Workplace Relations Policy Group
Ms Colette Shelley, Branch Manager, Bargaining and Industry Framework Branch, Workplace Relations Policy Group
Mr Mark Roddam, Branch Manager, Wages Policy and Economic Analysis Branch, Workplace Relations Policy Group
Mr Stewart Thomas, Branch Manager, Strategic Coordination Branch, Workplace Relations Policy Group
Ms Natalie James, Chief Counsel, Workplace Relations Legal Group
Ms Elen Perdikogiannis, Branch Manager, Bargaining and Coverage Branch, Workplace Relations Legal Group
Mr David Bohn, Branch Manager, Safety Net Branch, Workplace Relations Legal Group
Mr Henry Lis, Acting Branch Manager, Institutions, OHS and Workers Compensation Branch, Workplace Relations Legal Group

Mr Peter Cully, Branch Manager, Termination, Building, Organisations and Dispute Settlement Branch, Workplace Relations Legal Group

Mr Rex Hoy, Group Manager, Safe Work Australia

Ms Amanda Grey, Branch Manager, Strategic Enabling Services Branch, Safe Work Australia

Mr Drew Wagner, Branch Manager, Regulations, Safe Work Australia

Dr Peta Miller, Director, OHS and Workers Compensation Policy, Safe Work Australia

Australian Industrial Registry

Mr Dennis Mihelyi, Acting Chief Financial Officer, Australian Industrial Registry

Mr Terry Nassios, General Manager, Statutory Services, Australian Industrial Registry

Mrs Joanne Fenwick, Acting Chief Financial Officer, Australian Industrial Registry

Comcare

Mr Martin Dolan, Chief Executive Officer, Comcare

Mr Steve Kibble, Deputy Chief Executive Officer, Comcare

Australian Fair Pay Commission

Ms Jennifer Taylor, Director, Australian Fair Pay Commission Secretariat

Workplace Ombudsman

Mr Nicholas Wilson, Workplace Ombudsman, Workplace Ombudsman

Mr Leigh Johns, Chief Counsel, Legal and Advice, Workplace Ombudsman

Mr Michael Campbell, Executive Director, External Affairs Branch, Workplace Ombudsman

Mr Mark Scully, Chief Financial Officer, Finance Branch, Workplace Ombudsman

Mr Steve Ronson, General Manager, South West, Field Operations Branch, Workplace Ombudsman

Workplace Authority

Ms Penny Weir, Acting Director, Workplace Authority

Ms Joanne Major, General Manager, Agreements and Strategy, Workplace Authority

Mr Mark Shapter, Acting Chief Financial Officer, Workplace Authority

Ms Lesley Butt, Acting Head of Corporate, Workplace Authority

Australian Building and Construction Commission

The Hon. John Lloyd, Commissioner, Australian Building and Construction Commissioner

Mr John Draffin, Assistant Commissioner Operations, Australian Building and Construction Commissioner

Mr Ross Dalglish, Deputy Commissioner Legal, Australian Building and Construction Commissioner

Ms Heather Hausler, Assistant Commissioner Corporate, Australian Building and Construction Commissioner

Mr Ken Morgan, Deputy Chief Financial Officer, Australian Building and Construction Commissioner

CHAIR (Senator Marshall)—I declare open this public hearing of the Senate Education, Employment and Workplace Relations Legislation Committee. The Senate has referred to the committee the particulars of proposed expenditure for 2009-10 and related documents for the Education and Employment and Workplace Relations portfolios. The committee must report

to the Senate on 23 June 2009 and it has set Friday, 31 July 2009 as the date by which answers to questions on notice are to be returned.

Under standing order 26, the committee must take all evidence in public session. This includes answers to questions on notice. Officers and senators are familiar with the rules of the Senate governing estimates hearings. If you need assistance, the secretariat has copies of the rules. I particularly draw the attention of witnesses to an order of the Senate of 13 May 2009 specifying the process by which a claim of public interest immunity should be raised, which I now incorporate into *Hansard*.

The document read as follows—

Order of the Senate—Public interest immunity claims That the Senate—

(a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;

(b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;

(c) orders that the following operate as an order of continuing effect:

(1) If:

(a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and

(b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee, the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

(2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.

(3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.

(4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.

(5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.

(6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

(7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).

(8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

(d) requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.

(Agreed to 13 May 2009.)

(Extract, Journals of the Senate, 13 May 2009, p.1941)

I ask those in the public areas, those giving evidence to the committee and senators to switch their mobile phones either to either or off.

The committee will begin today's proceedings with Comcare and then we will follow the order set out in the circulated program. Proceedings will be suspended for breaks as indicated on the program. I welcome again Senator the Hon. J Ludwig, Minister representing the Minister for Education and Minister for Employment and Workplace Relations; and the CEO of Comcare, Mr Martin Dolan; and other officers of the departments.

[9.01 am]

Comcare

CHAIR—Minister or Mr Dolan, would you like to make an opening statement?

Senator Ludwig—No, thank you, Chair.

CHAIR—On that basis we will proceed to questions, and I call Senator Humphries.

Senator HUMPHRIES—Thank you, gentlemen, for your appearance today. The review into the operations of Comcare that was announced in December 2007—can you give us an update on where that stands and what its expected arrival date is, please.

Mr Dolan—We understand that the report of the review, which was undertaken principally by the Department of Education, Employment and Workplace Relations, is with the government, and the government is preparing a response.

Senator HUMPHRIES—Can you tell me when it was delivered to the government.

Mr Dolan—My understanding is that it was in August last year.

Senator HUMPHRIES—All right. When you say 'government', I assume that is to the Minister for Employment and Workplace Relations?

Mr Dolan—So I would understand, Senator.

Senator HUMPHRIES—Who did you say had undertaken the review?

Mr Dolan—The department.

Senator HUMPHRIES—So it was an entirely internal operation?

Mr Dolan—I understand the department used the services of some consultants, and there was a period where a range of public submissions to the review were sought.

Senator HUMPHRIES—Are we able to know the names of the consultants who were employed to do this?

Senator Ludwig—As I understand it, Comcare can provide the information, but if it is a departmental review it may be that the questions are better directed to the department under the relevant output. But I am happy for Comcare to provide as much information as they can and have available for you.

Senator HUMPHRIES—I might ask the department when they come before us—whoever can provide it; I do not care who provides it. If whoever has access to the information could provide it, that would be good.

Mr Dolan—Senator, my understanding is that Mr Martin Fry of Taylor Fry, Consulting Actuaries, was one of the consultants to the review, as well as two academic specialists in occupational health and safety, whose names I cannot recall.

Mr Kibble—The two academics were Professor Quinlan and Professor Richard Johnstone.

Senator HUMPHRIES—Where are they from?

Mr Kibble—One is from the University of New South Wales and the other one is from the University of Queensland.

Senator HUMPHRIES—Which is from which?

Mr Kibble—Richard Johnstone is from Queensland.

Senator HUMPHRIES—You said, Mr Dolan, that there was some public consultation undertaken in respect of the review. Can you tell us a bit about the form that that took?

Mr Dolan—There was a request for public submissions over a period and my recollection is that over 70 submissions were made, most of which were published on the department's website. In a small number of cases, there was a request not to publish them.

Senator HUMPHRIES—When did those submissions close?

Mr Kibble—From memory, it was around April or May 2008.

Senator HUMPHRIES—In respect of the terms of reference for the review, were there any parameters for the review that were publicly stated? For example, was it pitched on the basis that the review should attempt to accomplish changes to the Comcare structure or arrangement on a cost-neutral basis so as to save money or so as to achieve certain objectives not achieved at the present time?

Mr Dolan—I think we are getting into territory that is probably moving away from Comcare and into the department's responsibility. The way we would have characterised the terms of reference which were published is that the purpose of the review was to establish whether the Comcare scheme was an appropriate scheme for national firms to self-insure for workers compensation and whether the occupational health and safety arrangements managed

by Comcare were equally suitable for those national firms and their self-insurance arrangements.

Senator HUMPHRIES—Can you explain to me—I am not familiar with how self-insurance works—how Comcare is involved in a self-insurance arrangement and, at the present time, who is eligible under these arrangements to self-insure?

Mr Dolan—Under the Safety, Rehabilitation and Compensation Act a company that is in competition with an existing or former Commonwealth authority can be declared eligible by the Minister for Employment and Workplace Relations for a licence for what is called, in shorthand, self-insurance. It is in fact a licence to accept and to manage workers compensation claims in accordance with the Safety, Rehabilitation and Compensation Act. The applications of potential licensees are considered by the Safety, Rehabilitation and Compensation Commission, which is constituted under the Safety, Rehabilitation and Compensation Act. Those applications are either accepted or rejected. If they are accepted then that firm has a licence to manage workers compensation claims from its own resources.

Senator HUMPHRIES—What is the advantage of this arrangement as far as firms are concerned?

Mr Dolan—What the firms that participate in the Comcare scheme tell us is that they see a substantial advantage in having a consistent scheme across Australia when their operations are across Australia.

Senator HUMPHRIES—Are firms that self-insure in this sense able to reinsure? Do they have a way of hedging their liabilities under such an arrangement?

Mr Dolan—The direct aim is to make them bear the costs so that they can get the financial signals from the costs of injury. To support that we in the commission actually require that they have substantial bank guarantees to make sure that their liabilities can be met if there are any financial difficulties. There is a small reinsurance amount, but the main aim is that the liabilities very clearly rest with the relevant firm.

Senator HUMPHRIES—Why is such a scheme limited at the present time to firms that are in competition with Commonwealth entities?

Mr Dolan—That is a provision of the Safety, Rehabilitation and Compensation Act.

Senator HUMPHRIES—I am looking for what the original reason might have been for such a provision. Why should anyone not be able to self-insure?

Mr Dolan—I am not sure that is territory I can necessarily comment on.

Senator Ludwig—It sounds like a policy issue that both the previous government and this government have held. But, if you are asking for a debate about self-insurance, I can give you as an example the experience in Queensland, where it was self-insured for a while under a previous government; I think it was a Liberal-National coalition government. There are many reasons for not going down the path of self-insurance; we can certainly bring those forward and provide them to you. You can think of one: if you take out all the good self-insurers, because they may be white collar and less prone to have accidents or incidents in their

workplace, so that the cost of insurance then drops to where you only have the harder industries—the building industries and some others—then the cost is spread around a much smaller pool, and therefore you find that the insurance rates may be higher in that area as a consequence. The argument against that, of course, is that that might then drive those industries to improve their occupational health and safety outcomes.

I think they can work hand in hand but, if you work on actuarial schemes, the experience tells you that workers compensation requires a larger pool. If you allow self-insurance only of those who are cherry-picked out then with the remainder, in terms of actuarial issues, it becomes difficult to maintain their premiums at a reasonable rate to ensure that people, particularly in small business, can afford to pay the premiums. So you might actually create a circumstance where small business find that (a) they cannot self-insure and (b) they rely on the statutory workers compensation scheme, but the premiums have risen because, of course, the base has dropped. I can go into it in greater detail, but that is from my own knowledge from a previous career in this area. Certainly the experience tells me that self-insurance is not necessarily the answer. Improved occupational health and safety and improved ability for workers comp to deal with and work with industries, to lower premiums and to then provide for benefits are much better outcomes.

Senator HUMPHRIES—Minister, you reveal a side of yourself that I had not suspected was there. This deep knowledge of insurance impresses me. Thank you for giving us that very erudite dissertation on that subject. Is the fact that self-insurance has been suspended while this review is underway an indication that, perhaps, that concept might be reconsidered under the review?

Senator Ludwig—The difficulty is that my knowledge about what the current review is and where it is heading is a bit limited, but I can take that on notice and try to find an answer. If we can provide it today, I will do so; if not, I will take it on notice and consult the minister about the direction in which they are heading. I am really talking about my own personal experience with workers compensation in Queensland and the difficulties and challenges around self-insurance. You can appreciate that it is one of those areas where there are arguments for and against it. By and large, the reality is about maintaining occupational health and safety improvements that ensure that there are reasonable premiums, that small business can pay those premiums and that, actuarially, a workers compensation scheme can meet its particular outlays and also provide reasonable benefits for those people who are insured by it. With all of that, what we are really talking about is not so much the structure that you use but the outcomes that you should provide. But I will see what I can find for you today.

Senator HUMPHRIES—Thank you. I wonder if you might take on notice as well providing some advice from the government about when it expects to be able to announce a position on this review.

Senator Ludwig—Yes, I will.

Senator HUMPHRIES—Thank you very much. One of the objectives of Comcare is the harmonisation of national occupational health and safety legislation, although it is referred to in the PBS as an issue initiated by COAG. It is described here in these terms:

As the Commonwealth's OHS regulator, it is anticipated that Comcare will be an early adopter of any agreed legislative changes.

What role is Comcare actually playing in this harmonisation exercise at the present time?

Mr Dolan—We are working with the other occupational health and safety regulators to understand where harmonised occupational health and safety is likely to go and therefore what we as regulators will need to do to give effect to it in the future. The actual work on trying to bring about the harmonisation of occupational health and safety is with Safe Work Australia.

Senator HUMPHRIES—So they are actually doing the work on the harmonisation and you are working with them to provide input?

Mr Dolan—Yes.

Senator Ludwig—My recollection is that there was a bill—the Safe Work Australia Bill 2008—that failed to pass without coalition support and which would have assisted in the harmonisation. It was a matter that was being drawn together by the states and territories to provide a framework. However, the process did not find favour with the Liberals. If you have reconsidered your view, we could always bring the bill back.

Senator HUMPHRIES—I am merely seeking information to educate our view of where we should head with this in the future. Perhaps you could be persuasive on these subjects and turn us around from our ignorance! Where does the harmonisation exercise that is going on at the moment stand? What work has being done to date and how much work is yet to be done?

Mr Kibble—There was an expert panel which provided advice to the Deputy Prime Minister about what the shape of the model OHS laws might look like. There was consultation about that and then, last month, the Workplace Relations Ministers' Council agreed on the policy outcomes of a policy response to the recommendations of that expert panel report. The situation now, as Mr Dolan indicated, is that Safe Work Australia will take that policy agreement on the shape of the model laws and develop an exposure draft bill for release later this year. That exposure draft will go out for public consultation again with the endgame subject to all those processes going through. The Workplace Relations Ministers' Council will at some stage, later this year or early next year, endorse model OHS laws for adoption and enactment by each of the jurisdictions around Australia.

Senator HUMPHRIES—Can you give us some idea of what particular areas of OHS laws are most diverse and most in need of harmonisation at the present time?

Mr Dolan—It is a matter more broadly for Safe Work Australia, but perhaps from a Comcare perspective we can mention some of the areas that have been emphasised in the policy. The question of the level of penalty for breaches of occupational health and safety legislation was a particular area. Others were the best way to describe and manage the duties that relate to occupational health and safety; what sorts of duties an employer or someone in control of a workplace or activity might have, to get some harmonisation there; the role of health and safety representatives in the system and how best that is given effect; and the

approach generally that inspectorates should take in terms of the system. Mr Kibble may recall one or two others.

Mr Kibble—They were the main areas, yes.

Senator HUMPHRIES—As part of that process of harmonisation, obviously there is a fairly direct impact on Australian businesses, particularly those which operate in more than one jurisdiction and have to deal with different OH&S regimes in different places. Has there been a role for business in consultation about the direction of this harmonisation exercise?

Mr Dolan—Again, Senator, this is starting to move away from Comcare's direct territory and into that of Safe Work Australia and, I suppose, government more broadly. There has been a level of consultation but we understand from some public comment that both business and unions do not necessarily feel that it has been as extensive as they would have liked.

Senator HUMPHRIES—Sorry?

Mr Dolan—I am only saying that I have read public comment that would lead me to the view that elements of business and of the unions do not feel, from their point of view, that consultation has been as extensive as they would like.

Senator HUMPHRIES—We will pursue that in another context.

Senator Ludwig—Some of it may be directed to the department when it is here. It seems to me that this committee does not have the department with the agencies. In other committees I have been on in the past—and I do not want to trouble the course that you take in this committee—we generally might have had the department in the same output as the agency so that if there were questions that could be directed to the portfolio agency then they could respond to it. It makes it a bit easier for the committee as well, I think, although I am not suggesting we adopt that practice. But you can save those questions, I suspect, and direct them to the department later when they are here in that particular output.

CHAIR—We will not accept any criticisms about the efficiency of the running of this committee, thank you, Senator Ludwig!

Senator Ludwig—I was trying to not rap it, in fact, in that style of comment. I talked about the practice in other committees.

Senator HUMPHRIES—The chair is chastened by your tongue lashing, Minister!

Senator Ludwig—Clearly!

Senator HUMPHRIES—Actually, in situations like this I think it would be a good idea to have the department at the table as well, but that is a matter that we can talk about at another time behind closed doors. This committee does not review Safe Work Australia. Do you know which committee actually does overview Safe Work Australia?

Mr Kibble—Currently, they are part of the Department of Education, Employment and Workplace Relations.

Senator HUMPHRIES—Safe Work Australia is?

Mr Kibble—Yes.

Senator HUMPHRIES—I did not know that we could call them. They have not been on our list before.

Mr Kibble—They are a new body. They have only been established in the last two months or so. Their functions were previously handled by the Australian Safety and Compensation Council, but the Deputy Prime Minister has established Safe Work Australia, in an administrative sense, in the last couple of months.

Senator Ludwig—That is why I did not want to volunteer any more information, in case of being chastened by the chair again!

Senator HUMPHRIES—I do not think we can constructively get them to appear this time, but we should think about putting them on the agenda for next time. If they are an agency in our portfolio, we should certainly have the chance of calling them, I suppose. Thank you for that enlightenment. I will just go back to the review into Comcare. Is this related to the review that I understand has been undertaken into aspects of Commonwealth government employees' workers compensation? I am not sure if that is through the Safety, Rehabilitation and Compensation Act or some other vehicle, but I understand the government has been reviewing that act with respect to workers compensation arrangements for Commonwealth employees. I raise that particularly in the context of claims for journeys to and from work, which you will recall were previously covered by workers compensation arrangements and were removed under the previous government. Are you able to give me any information about where that review stands?

Mr Dolan—I am not aware of any separate review. The question of coverage or removal of coverage of journey claims under the SRC Act was one of the terms of reference of the review of the Comcare scheme that we were talking about earlier.

Senator HUMPHRIES—Okay. I assume that is the same one, then.

Mr Dolan—Yes, I am not aware of any other review.

Senator HUMPHRIES—The minister spoke about a road to Damascus type experience before. There might be one coming down the line in that respect, Minister.

Senator Ludwig—I can certainly see if there is any further information we can provide for you. I do understand the area, but I will not contribute to the discussion today.

Senator HUMPHRIES—Discretion is the better part of valour! A very wise policy. Thank you, Minister. There is also reference in the PBS to the role of Comcare in respect of the Commonwealth's common-law liabilities for asbestos compensation. Can you give me some idea of where those liabilities stand at the present time? In other words, are there any outstanding claims against the Commonwealth for damage resulting from the use of asbestos?

Mr Dolan—There are a number of claims currently before the courts, and the best estimation we have is that there will be a considerable number in the future. It is very hard to entirely predict what that might be, but the estimate is that there probably exists something of the order of \$700 million or \$800 million worth of liabilities into the future.

Senator HUMPHRIES—That is represented by approximately how many claims or actions?

Mr Dolan—I would have to take that on notice, Senator. As you can understand, given the slow onset of asbestos diseases and so on, it is quite a complex and problematic actuarial calculation to work out what the future may be. But we can give you details of claims in the course of a year to give you some sense of the current pattern and some of the figures that drive that estimate of likely future liabilities.

Senator HUMPHRIES—I would appreciate that information if I could have it. Would it be fair to assume that the number of claims today is lower than 10 years ago?

Mr Dolan—No, the debate in Australia at the moment is more generally as to when the incidence of asbestos-related injury will reach its peak. There are differing views, but there is certainly a consensus that it has not yet reached its peak. Sometime in the next five to 10 years is the most likely.

Senator HUMPHRIES—I hope you can answer this question: are you aware of whether asbestos has now been removed from all Commonwealth assets?

Mr Dolan—I should answer your question in two parts, because there are two circumstances we need to cover. The first is about asbestos in actual use, which has been banned in Australia with very limited exceptions since 2004. There were some limited exceptions for defence-related use, and the Defence Force continues to use asbestos in parts for its F111 aircraft, its Hawk trainer and its Caribou aircraft. The exemption that allows that activity expires at the end of next year, 2010.

There is no current position about removal of asbestos in situ in various forms in buildings and other places. Some evidence would indicate that, all things being equal, asbestos in situ is best left undisturbed but kept under close observation. There is a lot of that around Australia, as you are aware, but the government has banned any use or employment of asbestos in construction and other works since 2004.

CHAIR—Do we know where all the asbestos is? Has there been an audit done of Commonwealth assets to determine where it is in situ?

Mr Dolan—My view would be that there is not a comprehensive, and certainly not a central, register of where all in situ asbestos is. When we look at the systems of various organisations for identifying it, we find, by and large, that they are reasonably aware of where asbestos may be in situ in their property holdings and so on. It varies. For example, in a complex estate like that run by Defence, they are still working on trying to confirm that all asbestos has been identified.

Senator HUMPHRIES—Some years ago the Commonwealth government engineered a scheme in the ACT where it removed asbestos not only from what were then ACT Housing Trust properties that were effectively run by the Commonwealth but even from other, privately owned, housing, in the Territory. That scheme took three or four years to complete at least. There was in place at that time—this is more than 20 years ago—a policy by the Commonwealth to actually remove asbestos from housing that it had an interest in. I do not

know that the Commonwealth has a lot of interest in housing anymore, except possibly through the Defence Housing Authority. Are you aware of a policy of removal of asbestos on a proactive basis from Commonwealth-owned assets such as housing or office buildings?

Mr Dolan—I am not aware of any general policy, no.

Senator HUMPHRIES—Does the Australian Government Solicitor handle the legal actions that are currently on foot in the courts for asbestos claims?

Mr Dolan—Our asbestos legal unit has a number of qualified solicitors. With them, we work with a range of law firms to manage the actions. These include the Australian Government Solicitor but also private sector firms.

Senator HUMPHRIES—Are there also claims against the Commonwealth at the present time for damages relating to the use or the presence of toxic dust? There was an inquiry into this a few years ago by a Senate committee. By toxic dust, I am referring to things like wood dust, fine particles from sandblasting and things like that.

Senator Ludwig—It depends on the product you use in sandblasting. I think in most of Australia it is banned if it has silica content of more than five per cent, because it is the silica which is under sandblasting that causes the detriment. If it is ilmanite or another product then, unless medical knowledge has changed, you do not have the same problems. So you can sandblast with ilmanite but not with free silica.

Mr Dolan—It is probably easier to answer your question in two parts. As the workers compensation authority for the Commonwealth, we do from time-to-time see claims for injuries as a result of exposure to various forms of dust, and we have certainly accepted claims for that sort of injury. We could, if you wish, show you the information we have on accepted claims in that area. Our responsibility for the management of common-law asbestos claims against the Commonwealth does not extend to other dust diseases, so I do not have access to that information about common-law claims and how they have been handled.

Senator HUMPHRIES—Which claims does Comcare have an interest in? Is it only those relating to asbestos?

Mr Dolan—Essentially our responsibility is for those relating to asbestos or personal injury as a result of the Commonwealth's activities. If there are common-law claims in relation to exposure to other dust then they would be handled by individual agencies and departments. For exposure as an employee of the Commonwealth, we would handle the workers compensation claims that would go with that.

Senator HUMPHRIES—Could I have a breakdown on the types of claims that you are currently handling—as in claims relating to asbestos and other sorts of toxic dust.

Mr Dolan—We could take that on notice. I am afraid I do not have it with me.

Senator HUMPHRIES—Yes, of course. I understand that. Just going back to that issue of self-insurance, how many companies at the moment are authorised to self-insure?

Mr Kibble—Twenty-nine.

Senator HUMPHRIES—That is not very many at all.

CHAIR—Could you provide the committee with a list of those companies.

Mr Kibble—Yes, certainly.

Senator HUMPHRIES—I think that is all I have for Comcare.

Senator CASH—I want to raise an issue that I have, but it is in relation to the intergovernmental agreement and this may not be the appropriate place to raise it. I will put it on the table, and please direct me if it should go elsewhere. It is in relation to the definition of ‘consensus’ in the intergovernmental agreement for regulatory operational reform in the OSH area, which I have downloaded from the internet, that is used throughout the agreement. If you look at, say, clause 5.2 it states:

Where WRMC agrees to the proposed model OHS Act by consensus, it becomes the agreed model.

That is mirrored in clause 5.3.3. In relation to the regulations it refers to consensus. Then when you go to the definitions at the back of the document, in terms of a voting procedure, it states:

... decisions will be made by a two thirds majority of votes of the voting Members present and voting, but decisions on the model OHS legislation will be made by a two thirds majority of the votes of voting Members present and voting and a majority of the votes of all voting Members who represent the Commonwealth, States and Territories.

My question is: what is actually meant by ‘consensus’? Is it total agreement or is it the two-thirds rule?

Mr Dolan—I probably should have intervened earlier, Senator, and said that I am unable to comment. I suppose the only thing that I can usefully say is that it is an intergovernmental agreement and it is probably the ministers who have the best idea of what is meant by ‘consensus’ in that agreement.

Senator Ludwig—I will take that on notice and see if we can find a solution to that.

Senator CASH—I appreciate that. Thank you, Minister.

CHAIR—Just to clarify the issue that was raised earlier about Safe Work Australia, my understanding is that officers from the Australian Safety and Compensation Council will be here as part of outcome 5. As has been explained, they transferred to, or formed, Safe Work Australia, and they will definitely be appearing in the additional estimates as a separate agency at that time.

Mr Dolan, can you explain to me why, for people who have a permanent injury and are on a permanent payment, a five per cent superannuation deduction is being made from their payments?

Mr Dolan—The structure of the Safety, Rehabilitation and Compensation Act is such that there is a statutory calculation of the level of benefit payable to someone who has also been in receipt of a lump sum superannuation payment or an ongoing superannuation payment. The calculation that is sitting in the legislation, in section 21 of the legislation, includes a calculation of a five per cent reduction to arrive at the amount of compensation paid. It is not

a deduction per se; it is more a mathematical or arithmetical basis for arriving at a compensation amount.

CHAIR—How does that sit with the objective of the act, as I understand it, to provide 70 per cent of your pre-injury earning capacity. If it is the objective of the act to provide 70 per cent of pre-injury earnings, and a mathematical formula includes a notional five per cent superannuation deduction which gets you, at some point, less than 70 per cent, I fail to understand how those two things can be reconciled.

Mr Dolan—The act is constructed on the basis of the approach that has been taken with defined benefit superannuation schemes by the Commonwealth where there was a standing deduction during the course of employment to contribute to superannuation. I am not sure I can add much more than that. From the point of view of Comcare, our role is to take what is in the legislation and convert that into a compensation amount for individual claimants. More than that, we are starting to get into policy territory.

CHAIR—In relation to self insurers then, if someone in the same circumstances is injured to incapacity, what will they get? Will they get a superannuation deduction as well?

Mr Dolan—If they have had a lump sum superannuation payout or if they continue to receive superannuation benefits then yes, the same thing will apply.

CHAIR—Even though they would not be in a defined benefit scheme?

Mr Dolan—That is correct.

CHAIR—So where would their superannuation deduction go? Would that go into their superannuation account?

Mr Dolan—The point I have been trying to make—obviously not as well as I might—is that there is no deduction per se. There is a calculation of a benefit that involves a five cent figure. So there is no amount to deduct. There is a process for arriving at a calculated amount.

CHAIR—We will come back to that, then. Does that formula get you to 70 per cent of pre-injury earnings?

Mr Dolan—The formula is intended—and, as you are probably more aware than me, there is considerable controversy over this—to take account of the income available from superannuation and from workers compensation and to arrive at a figure that constitutes 70 per cent of former earnings. Depending on—

CHAIR—So the objective of the act really should have said 70 per cent of what you had left after you have had your superannuation deduction. That would have removed all doubt then, wouldn't it?

Mr Dolan—I hesitate, given that it is such a complex area, to say that that by itself would remove all the doubt but certainly it is one way of expressing what we understand was the original intent of the legislation.

CHAIR—I am still unclear on how this might be dealt with. We assume that most of the self-insurers will have accumulation superannuation funds?

Mr Dolan—Yes.

CHAIR—So that is paid on top of the wage?

Mr Dolan—Yes.

CHAIR—But they are still bound by the same objective of 70 per cent of pre-injury earnings for people who are completely incapacitated. Is that correct?

Mr Dolan—They are bound by the same provisions of the act, yes.

CHAIR—So they would get 70 per cent of their pre-injury earnings?

Mr Dolan—That is the way it should operate. I have not—

CHAIR—Would they then get superannuation paid on top of that? It certainly would not be deducted—let us say there is the nine per cent guarantee.

Mr Dolan—The provision of the act that we are talking about take as the starting point that there has been a superannuation payout either on an ongoing pension basis or as a lump sum. Then it tries to make an appropriate adjustment to account for that income in arriving at what was intended to be a 70 per cent figure. That is the way it should work.

CHAIR—It is not actually a superannuation payout for self-insurers, because if you are completely incapacitated then they are required to continue paying people to meet the 70 per cent of their pre-injury earnings.

Mr Dolan—That is correct.

CHAIR—So it is not actually part of superannuation, a self-insurer just has to make that money up themselves. It is 70 per cent of their pre-injury earnings, not 70 per cent less a superannuation deduction. To me it seems that people are being discriminated against merely because of the fact that they are a public servant as opposed to the way people would be treated if they were a self-insurer under the same scheme.

Mr Dolan—I am just working the various elements of it through in my head, because, as you know, it is quite a complicated provision of the act. Would it be useful if we were to give you a more considered and written response to your question—which is, as I understand it: is there a differential impact of the act in terms of superannuation on public servants as opposed to employees of the self-insurers?

CHAIR—Yes, I am happy for you to do that, but it is a little bit broader than that because it is also: what are your pre-injury earnings after you have been fully incapacitated? It certainly does go to the issue of how the superannuation is treated at the time.

Mr Dolan—Yes.

CHAIR—If you would do that, I would appreciate it. Thank you. There being no further questions for Comcare, I thank you for your appearance before the estimates appearing today.

[9.49 am]

Australian Fair Pay Commission Secretariat

CHAIR—The next agency we will deal with is the Australian Fair Pay Commission Secretariat.

Senator HUMPHRIES—I assume this will be the last time we will be seeing you in this role, Ms Taylor?

Ms Taylor—It will be the last time, yes.

Senator HUMPHRIES—What is the progress report on the award modernisation process?

Ms Taylor—That is a matter for the in Australian Industrial Registry. They are doing the award modernisation process and not the Australian Fair Pay Commission.

Senator HUMPHRIES—Okay. I am in the wrong place. I do not have any questions for you at all.

Ms Taylor—Thank you, Senator.

Senator HUMPHRIES—I could make some up if you want me to.

CHAIR—What can you tell us about the transition into the Fair Work Australia organisation?

Ms Taylor—The Australian Fair Pay Commission and the Fair Pay Commission Secretariat cease on 31 July 2009. The secretariat transitions into Fair Work Australia to assist the minimum wage panel in their minimum wage reviews.

CHAIR—Is there a departmental task force in place to manage that?

Ms Taylor—Yes.

CHAIR—Does that impact upon where you reside? Is that going to result in efficiencies in terms of building and accommodation?

Ms Taylor—It may in the longer term. That is a question that will be resolved in the longer term but certainly in the short term we will remain where we are, so I understand.

CHAIR—There being no further questions, I thank you for your appearance before the committee today. We will now call the Australian Industrial Registry.

[9.52 am]

Australian Industrial Registry

CHAIR—Would you like to make an opening statement to the committee?

Mr Nassios—No.

Senator HUMPHRIES—Can you tell me what the progress is with the award modernisation exercise?

Mr Nassios—It depends on the amount of detail that you are after. The award modernisation program has been a four-stage program. The first two stages in which modern awards were created was completed in April. We are currently in the third stage of the four-

stage process. Those exposure drafts have been published and in a week's time the closing date for lodging written submissions on those exposure drafts will take place.

Senator HUMPHRIES—Next Wednesday did you say?

Mr Nassios—Yes, and then you have some hearings in respect of those stage 3 exposure drafts which will occur on the 22-26 June.

Senator HUMPHRIES—Is this before the commission?

Mr Nassios—Yes. All of the award modernisation program will still occur before the commission even post 1 July. At the moment there is also a period in which submissions are being sought for transitional arrangements for modern awards. I unfortunately appear to have misplaced my paper as to exactly when that finishes but my memory of that is approximately mid-July.

Senator HUMPHRIES—What is it that finishes in mid-July? Is it the hearing process?

Mr Nassios—It is the transitional process of what happens from the current awards to ultimately moving to the modern awards.

Senator HUMPHRIES—So when you say the transition process, you mean that the people at the end of that period in July have fully transitioned to the new arrangements?

Mr Nassios—On 1 January 2010, when this is intended to finish, the legislation provides a period of up to five years to transition to whatever awards people are currently under, be they state awards or federal awards, to get to the modern award. That process of how you will move from your current award to the modern award is the process I am talking about in terms of transition.

Senator HUMPHRIES—So you are saying that the architecture of the transition will be set down by July of this year for a process that will actually potentially conclude five years or more from now?

Mr Nassios—Well, it is a possibility. That is what the legislation talks of—a five-year period. I do not know the outcome but I guess that is what the legislation does speak of.

Senator HUMPHRIES—There is presumably provision to modify that architecture in the space of that five years if the particular arrangements that are entered into appear not to make sense or not to achieve their objective?

Mr Nassios—The Fair Work Act provides for a review of the entire modern award process, yes.

Senator HUMPHRIES—Over what time frame?

Mr Nassios—I think the first one is in two years time. It is mandatory. It is two years from 1 January 2010.

Senator HUMPHRIES—I am trying to identify the extent to which this transition phase will pick up and identify the sorts of issues that have been raised now, as I am sure you are aware, by a large number of enterprises around Australia with respect to what they believe is the damaging effect of award harmonisation processes on their businesses. So in terms of

those sorts of issues—I am thinking, for example, of newsagents who are raising some serious issues, and I am sure you have some acquaintance with those—how would what is happening in this phase until July address the sorts of concerns that they are raising about the effect of award modernisation?

Mr Nassios—I would expect that, as part of this process, some sort of mechanism to meet some of those concerns will be addressed. I do not know the outcome of it. I simply cannot speak for the commission itself but certainly I would expect that this process would determine the outcome of many of those concerns.

Senator HUMPHRIES—We have the hearings into the new modernised awards going on before the commission and the effect of those decisions may not, in some cases, be completed until five years from now, although some may presumably be completed sooner than that. Is that correct?

Mr Nassios—I do not know the outcome. The best I could explain is that under the terms of the legislation at the moment there is a window of five years in which this transitional process can take place. I cannot answer as to whether it will or will not be within five years. I do not know the answer to that question.

Senator HUMPHRIES—But it has to be within five years, doesn't it?

Mr Nassios—That is correct.

Senator HUMPHRIES—That is the end point of the exercise; the legislation says that the exercise has to be completed within five years. But it is five years from when?

Mr Nassios—From 1 January 2010.

Senator HUMPHRIES—So by 1 January 2015 all these modern awards should be in place; is that the theory?

Mr Nassios—The modern awards will be in place on 1 January 2010 but whether there will be some sort of transitional arrangements as part of those awards is what I am referring to.

Senator HUMPHRIES—So the full final form of the modern awards should be completed by 1 January 2015?

Mr Nassios—Yes.

Senator HUMPHRIES—Which agency is best able to answer questions about the progress with the design of particular awards? Is that the commission itself?

Mr Nassios—It depends what your question is. We would be the best place, but—

Senator HUMPHRIES—All right. You say there are hearings going on into particular awards?

Mr Nassios—Correct.

Senator HUMPHRIES—The commission has a deadline of the end of this year to complete that process?

Mr Nassios—Correct.

Senator HUMPHRIES—For what period does it expect that hearings into that will continue?

Mr Nassios—I have a timetable if you would like me to publish it.

Senator HUMPHRIES—Yes.

Mr Nassios—It depends on what stage we are talking about. It has been broken up into four stages and the first two stages are completed. The third stage is what is taking place at the moment. For the fourth stage we will have what is called a ‘pre-drafting consultation’ commencing on 4 August. On 25 September you will have the publication of those stage 4 modern awards. In the midst of that process, you expect to—

Senator HUMPHRIES—Sorry, what date in September?

Mr Nassios—25 September.

Senator HUMPHRIES—Please continue with that timetable.

Mr Nassios—By 4 September, it is expected that stage 3 modern awards will be finalised. The next date I have is 16 October. That will be the closing date for the written comments for the stage 4 exposure drafts. Then there will be hearings about those stage 4 awards from 26 October to 30 October. At this stage it is intended to finalise the stage 4 modern awards on 4 December.

Senator HUMPHRIES—So 26 October to 30 October are the hearings in the stage 4 awards?

Mr Nassios—Correct.

Senator HUMPHRIES—And what happens after that?

Mr Nassios—On 4 December we finalise the awards. That is the stage 4 awards.

Senator HUMPHRIES—How many awards are there likely to be in stage 4?

Mr Nassios—You will have to bear with me on that one. I can indicate that there will be 16 industries that will be looked at as part of stage 4. I do not know if I can come up with a figure for how many awards that may comprise at this stage.

Senator HUMPHRIES—Is it fair to say that the exercise is designed around trying to create one award for each industry?

Mr Nassios—As a general rule.

Senator HUMPHRIES—Is that too general?

Mr Nassios—It is probably a bit too general, but certainly you would not be too far from that.

Senator HUMPHRIES—Do we know, at this point, how many awards we are collapsing into those potentially 16 awards?

Mr Nassios—I do not think I have the figures with me.

Senator HUMPHRIES—Does the commission or the registry have a website where they record progress with this exercise?

Mr Nassios—Yes, on the AIRC website. I would certainly hope all of this information is on that website.

Senator HUMPHRIES—It is airc.gov.au?

Mr Nassios—Correct. There is a link to award modernisation itself and it provides the sort of detail that I think you are seeking.

Senator HUMPHRIES—I have expressed this view in a previous hearing. I am still really surprised that so much important work can be done in such a short space of time. It seems like an incredible exercise in collapsing awards that have presumably been around for decades in some cases, with many large and complex provisions, into so-called simplified awards. The thought in my mind is that collapsing all of these conditions into a single set of awards is going to hide a multitude of sins which are not going to become apparent until the phasing-in of the award process over five years. That is when the pain will start to be evident. But that is more of a comment than a question. How many industries are covered by stage 3?

Mr Nassios—I think the figure is 39.

Senator HUMPHRIES—Have you already had some hearings into this process?

Mr Nassios—Correct.

Senator HUMPHRIES—For each of those hearings into a particular industry, typically how many parties are appearing in front of the commission to make submissions?

Mr Nassios—I would not know the answer to that. I would have to take that on notice.

Senator HUMPHRIES—Secretariat, are we hearing separately from the commission today?

Mr Nassios—Well, we are the secretariat, I suppose, in that sense, but I just do not know off the top of my head.

Senator HUMPHRIES—You are the only person who can answer the question, I suppose, so if you could take that on notice?

Mr Nassios—Yes, I will take it on notice.

CHAIR—I suspect the department would be in a position to answer that question anyway because they are monitoring the whole process.

Senator HUMPHRIES—I would just express some surprise that the commission secretariat cannot tell us what sorts of things are happening at commission hearings, that is all.

Mr Nassios—In terms of numbers, I just do not keep that keen an interest, I have to say, in terms of who appears in each hearing. I just would not know the answer.

Senator Ludwig—One of the challenges in this area is that there would be multiple hearings going on at various locations throughout Australia as we speak. It is a busy process.

There are many disciplines in it and there are many awards to modernise. The registrar's role is not to coordinate that activity because the commission can do that work. It is the registrar's role to be clearly distinct from that; they do not necessarily take an opportunity to use their spare time to monitor holistically but they are intimately involved in the process. I think it is probably more accurate to say that, Mr Nassios?

Mr Nassios—It is probably better than saying I do not have a keen interest; that is correct, yes.

Senator HUMPHRIES—I have heard the opinion expressed by some business representative organisations that the hearing process is somewhat unsatisfactory in that submissions are made to the commission, evidence is heard and then draft awards appear which substantially fail to take on board what those particular parties feel are important points. There is then no opportunity to refine or revise that process of putting those kinds of award provisions in place. What arrangements do you feel are in place that could address those sorts of concerns?

Mr Nassios—I can only speak on behalf of the registry. Our role is in essence to facilitate whatever the consultation process is. The consultation process has been determined by the President in consultation with several other parties. I cannot address those issues.

Senator HUMPHRIES—Looking at the portfolio budget statements, part of the process of disposing of the AIRC is that it be rolled into Fair Work Australia. I see that staffing for the commission for this financial year is 233. That rolls over in the next financial year into one, and that is the registrar's position. I assume that is your position?

Mr Nassios—I am only acting, so it will not be mine. It will be the registrar though, as you say.

Senator HUMPHRIES—So the staff of Fair Work Australia would service the registrar while that final six months of work is going on into the typing up of the award process?

Mr Nassios—Correct. There is provision in the act for an agreement to be reached between the registrar and the general manager of Fair Work Australia to provide administrative support, yes.

Senator HUMPHRIES—Do all of those 233 present staff automatically become employees of Fair Work Australia?

Mr Nassios—Yes.

Senator HUMPHRIES—So everyone is transitioned to some role in the organisation?

Mr Nassios—Correct.

Senator HUMPHRIES—I am looking at the KPIs for the commission in this final stage of its work. It specifies that

- The modern awards are to be simple to understand and easy to apply, reduce the regulatory burden on business and together with legislated employment standards, provide a fair minimum safety net of enforceable terms and conditions of employment for employees while promoting flexible modern work practices and collective enterprise bargaining.

I do not see any reference in there to awards not disadvantaging either employers or employees. Yet this is a commitment that the minister made when she was discussing the exercise in award modernisation. Given that the minister has made that commitment, why is it not part of the outcomes strategy that you specify?

Mr Nassios—That program is largely derived from the objectives of part 10 of the current act. I have to say to you that I cannot recall if the specific issue you have raised is actually in the objectives there. I would think that the program is sufficiently broad enough to take that into account.

Senator HUMPHRIES—So are you saying that it is the intention of the award modernisation process, or the work that the Australian Industrial Relations Commission is undertaking to achieve award modernisation, that the outcome should not disadvantage either employers or employees?

Mr Nassios—The objectives are in line with the objects in part 10 as well as the award modernisation request which has come from the Deputy Prime Minister. I have that with me if you would like, I could have a look at it. I cannot recall whether that is specifically in there but if you can just bear with me for a moment. The consolidated version of that award modernisation request says that the creation of modern awards in clause (2)(c) is not intended to disadvantage employees and increase costs for employers.

Senator HUMPHRIES—Where do those words appear?

Mr Nassios—In the award modernisation request from the Deputy Prime Minister, which initiates the award modernisation process.

Senator HUMPHRIES—That is a request from her. I do not understand why that then would not translate into an outcome that you indicate in the budget papers. That is the indication to the parliament of what you are trying to achieve. In a sense, the request from the minister to you is a communication between her and you. These documents are the ones that explain to the parliament what it is you are trying to achieve and I do not understand why that fairly key objective does not appear in the outcomes that you specify for yourselves.

Senator Ludwig—This was a matter that was canvassed extensively during the passage of the Fair Work Bill, if I recall correctly. The position that the minister has articulated a number of times is that the direction under 576C(4) is a direction under the Workplace Relations Act 1996 until the transitional bill is passed and then it will change. But at that point, which is to be read in conjunction with part 10A of the act, it then sets out the objects and it includes that phrase, ‘that the minister has taken this path as the way to communicate that to the commission.’ If you think of the structure of the legislation, it is designed also to be used for other directions as well as to assist the way the minister requests the commission to operate. The commission is independent in this and therefore it is about making sure that we have a mechanism to provide those requests to the commission, and they clearly articulate what they are. They also go to a range of others as well, which is to the aim of the award modernisation process—to create a comprehensive set of modern awards. They must be simple to understand and easy to apply. It goes through ad seriatim the way the minister would request that the president deal with all of those issues. Of course, the operative area that you are interested in

today, the creation of modern awards, is not intended to result in high-income employees being covered by modern awards—which is also a commitment that the minister had given—or to increase costs for employers, as you have heard, and a range of others. That is the particular mechanism that has been chosen by the minister to operate in.

Senator HUMPHRIES—There is a distinction between a request and a requirement—that is, she may request that an award not disadvantage an employee or add further costs to an employer. But it is perfectly conceivable that, in some cases, such an objective will be impossible to achieve. If you change the nature or the structure of an award, you may have to affect one or other of those factors, or possibly both. I assume that an award which in fact did that would not be in breach of any requirements imposed on the commission in the exercise of conducting this process.

Senator Ludwig—These are also matters that were canvassed during the committee stage of the bill. I think it is difficult to hypothesise what may or may not happen. The commission will hear the evidence from the parties and will make a determination based on the information they have at hand about modernising awards. They will also have the request in front of them. I am confident that the commission will get it right and they will be able to modernise awards.

Senator HUMPHRIES—But what is right?

Senator Ludwig—The point I am making is that you cannot say in advance of what that position is.

Senator HUMPHRIES—With respect, the minister has tried to do that. The minister has said she wants the outcome to be one that does not disadvantage employees or add further cost to employers.

Senator Ludwig—What she said is that the award modernisation request is to be read in conjunction with part 10A of the act. It sets out the objects and it sets out the request pursuant to section 576C(1) of the Workplace Relations Act, and it requests the president, in undertaking award modernisation, to act in accordance with this request. It is not unusual to put that format down in that way. In fact, the system is designed to point the commission in that particular direction. It also sets out a range of other circumstances. This is different from the question you asked which was the case of a scenario which might provide for ‘choice’, but that may not arise. That is why it is difficult to say with any degree of confidence, and I am certainly not inviting the registrar to speculate on hypothetical questions. I think it is always fraught with danger to do that. We can only set out the facts as they currently exist. If you have an example, we can deal with that. Ultimately, the point I was making is that the commission is empowered to take that request and to make decisions about award modernisation.

Senator HUMPHRIES—Yes, we are traversing issues covered in the debate on the bill, that is true.

Senator Ludwig—Which is now an act.

Senator HUMPHRIES—Indeed, it is. But I am correct in saying that that request or the expression of hope on the part of the minister that the award modernisation process proceed without disadvantaging employees or adding costs to employers is not built into the act, and it is not built into the act for the obvious reason that it is, in a large number of cases, impossible to achieve. It is a logical inconsistency.

Senator Ludwig—It does form part of the legislation.

Senator HUMPHRIES—In what way?

Senator Ludwig—It is a request pursuant to 576.

Senator HUMPHRIES—The request is pursuant but those two terms do not fall within the act.

Senator Ludwig—They do in the framework of the legislation. I think I have had this debate with the senator before, so it is a little repetitive. If you think of delegated legislation, if you think of an act, it is and does fall within that ambit. It is not correct to say it is not part of the act; it is part of the act. It is a request made pursuant to the legislation. It is not a request made in the ether. It is certainly a matter that is directed to the Industrial Relations Commission to be cognisant of, so much so that there is a provision which directs them to it and that the request is made pursuant to that.

Senator HUMPHRIES—Okay.

Senator Ludwig—We may choose to disagree there.

Senator HUMPHRIES—Yes, we may. Just to get you on the record, can you tell me whether you expect the award modernisation process to be completed in a way which in fact does not disadvantage any employee or add costs to any employer?

Senator Ludwig—I will reiterate what I said in the committee stage—that is, there is a request pursuant to section 576C(4) where the minister requests that the president of the Industrial Relations Commission undertake award modernisation in accordance with this request. Of course, it sets out a range of circumstances which includes that the creation of modern awards is not intended to (c) disadvantage employees or (d) increase costs for employers. That is the extent of the provision, and for me to speculate any further than that would be outside my knowledge. I can seek to get additional information from the department, if there are matters that they can add.

Senator HUMPHRIES—We will wait with interest how this extraordinary task is to be accomplished

Senator FISHER—It would have been a good idea to legislate the promise, would it not?

Senator HUMPHRIES—It would indeed, but it does not seem to have happened.

Senator FISHER—Disappointingly.

CHAIR—Bizarre.

Senator HUMPHRIES—It is bizarre.

Senator FISHER—Well said, Chair.

CHAIR—This is not the time for debate. It is bizarre because you have been running this line now for six months. You know it is not true. You deliberately mislead. You continually try to put it on the record, as if putting it on the record a number of times makes it any truer.

Senator FISHER—What is not true?

CHAIR—We are not going to have the debate because this is not the time for debate. We have debated it ad nauseam in the chamber. If you want to have the debate again, let us have it in the chamber and not at Senate estimates. This is a time for asking questions of the agencies and departments.

Senator FISHER—Good, let's do it.

CHAIR—If there are no further questions, we will take a short suspension.

Proceedings suspended from 10.22 am to 10.53 am

Workplace Ombudsman

CHAIR—I welcome to these estimates hearings the Workplace Ombudsman. Thank you, Mr Wilson. Welcome to you and your officers.

Mr Wilson—Thank you.

CHAIR—Do you have any opening remarks you would like to make to the committee?

Mr Wilson—No, we do not.

CHAIR—Thank you. Then we will move to questions. Senator Humphries?

Senator HUMPHRIES—I do not think I have any questions for this agency, thank you, Mr Chairman.

CHAIR—All right. Thank you for your appearance before the Senate committee today.

Senator HUMPHRIES—Actually, I think Senator Abetz has some questions for them. Would you be kind enough to allow me to ring Senator Abetz's office and see if he is available?

CHAIR—Yes, we will take a short suspension until 11 o'clock.

Senator HUMPHRIES—Oh, I spoke too soon. Here is Senator Abetz.

CHAIR—We will cancel that order.

Senator Ludwig—We were waiting for you, Senator Abetz. We were not going to let them go until you arrived.

Senator ABETZ—All right. This does put me on the spot! I walked in to ascertain what time I might be able to get on, and as you can see I have all my folders in front of me.

Senator Ludwig—Do you require a short break while you gather your folder?

Senator ABETZ—That would be very kind, Minister.

CHAIR—We will go back to my original plan of taking a short suspension until 11 o'clock.

Proceedings suspended from 10.54 am to 11.01 am

CHAIR—The committee will now resume with questions for the Workplace Ombudsman.

Senator ABETZ—I understand that as yet nobody has asked questions of the Workplace Ombudsman; is that correct?

CHAIR—Yes.

Senator ABETZ—Excellent, so I will not be traversing ground that others have trodden. Can we be told—and if you need to take it on notice I understand—how much money has been collected by way of unpaid wages, if I can use that term, to date but not paid out to claimants?

Mr Johns—We will have to take that on notice. There are times when employers pay the underpaid moneys directly to us and we hold them on trust under current arrangements and then we seek to find the relevant employees and provide them with the money.

Senator ABETZ—That is right, and what I am trying to figure out is the number that you have not found. Could you let us know how much money has been held in trust for 12 months or more?

Mr Scully—We currently have around \$860,000 held on trust and that relates to about 2,500 employees. I would have to take on notice your other question about how much we have held for 12 months. I do not have that information.

Senator ABETZ—If it is not too much work and your systems allow you, can you tell us how much has been held for 12 months or more, six months or more, and three months or more? If you cannot get one of those, that is fine. I think you understand the drift of my questioning.

CHAIR—What would happen if you could not find the employees to which the money is owed?

Mr Wilson—We go to quite extensive lengths to recover money for workers who are not at their previous address and things of that nature. We have quite an active campaign through our client services centre in Adelaide to make sure that happens, but, inevitably in a country the size of Australia, people who move can be difficult to track down.

Senator ABETZ—The tax office can find people overseas to make payments to, so if you were to liaise with them they may be of assistance. I do not expect you to comment on that.

Mr Wilson—Indeed. Our staff launched as a pilot yesterday an account through the social networking site Facebook to try to locate people who might have Facebook accounts but are not necessarily contactable through other means. We are going to be running a trial over a short period to see whether that can flush out more people who are owed money.

Senator ABETZ—Who has got that fun job in the department?

Mr Wilson—Our client services centre—

Senator ABETZ—Just joking—I do not need an answer. However, if you could provide us with the outcome of that initiative next time round, that would be of interest.

CHAIR—We know there are a lot of lost superannuation accounts and we suspect some of them will never, ever be claimed, and I am just wondering what the legal situation is with you. Do you hold that money for ever, or is there a period of time when it just disappears and goes into consolidated revenue?

Mr Scully—Under the current legislation, it is held on trust ongoing, in perpetuity. But with the new legislation there has been a clause included which indicates that that money is paid into consolidated revenue in the first instance. But there is another provision that enables the money to be paid to any claimant once that claimant is identified and their credentials are ascertained.

CHAIR—So there is no statutory time limit for making that claim.

Mr Scully—No, not at the moment.

CHAIR—Thank you.

Senator ABETZ—Mr Wilson, can you indicate to us how many small businesses with whom you have an engagement in relation to insufficient payment of wages? Take that notice if necessary.

Mr Wilson—I would be happy to take it on notice. Unfortunately, there may be some difficulty in us being able to give you a precise answer. When we track information and complaints made to us from workers about their underpayment status or when we conduct audits, we do not necessarily collect information about the size of the workplace. Although maybe without huge amounts of precision, we could have a stab at trying to give you some information about the scale of the organisations we are dealing with.

Senator ABETZ—I would also ask how many businesses, and then if you are able to break that down into cohorts that would be good. Would it be your experience that in general terms—and I acknowledge that this is a general question—it was small businesses that were more likely to misunderstand their obligations, without putting any value judgement on it, in relation to payment of wages? That is as opposed to, say, the larger companies in Australia—for example, big companies that are in the news like Holden or Ford. Is that a fair assessment—that it is usually the small businesses rather than those that have their own HR departments?

Mr Wilson—That certainly would be consistent with the information that we have. To come to one part of the question, as at the end of April we had 4,602 matters on hand. That is a pretty normal position for us to have at any particular time—to have about 4,000 or so complaints. Anecdotally, most of those would be not large business, if I can put it that way. But we may have some information we can give to you about the scale of businesses. Very typically, we find that underpayments come about as a result of either lack of knowledge about conditions which may be paid to people or, alternatively, lack of current information. We can endeavour to provide a response to that question.

Senator ABETZ—Thank you for that. I return to a matter that I have canvassed on a number of occasions here, and that is the Healey matter in Tasmania. I am just wondering why a copy of the signatory page cannot be provided, as I have requested.

Mr Wilson—I will ask Mr Campbell to take that question.

Senator ABETZ—I refer to question No. 1481, parliamentary question on notice question 1.

Mr Campbell—In responding to your question, which we have taken on notice a number of times, we have said no to providing you with a copy of that signature page. I understand that, possibly at the last estimates sitting, you produced a copy of the document which we recovered under a notice to produce, which was made available to the Senate at that point. So we have not reproduced it following your request.

CHAIR—I take it from what was just said that it is not disputed that the signature page that was produced by Senator Abetz is in fact the signature page. Is that what you are saying?

Senator ABETZ—That is what I am trying to get to.

Mr Campbell—Yes. I understood, Senator Abetz, that the document that you tabled at the last estimates was a document that had been provided to you.

Senator ABETZ—I did not table anything at the last estimates, did I?

Mr Campbell—I do not have a copy with me that I can provide to you at the moment.

Senator ABETZ—What is the difficulty in being provided with a copy just of the signatory page—or is there one?

Mr Campbell—I do not believe there is one. However, the documents were recovered through our notice to produce process, so I just need to check that it is appropriate that we can provide that material through this committee.

Senator ABETZ—I am wondering whether that signatory page would disclose the signature of the complainant.

Mr Campbell—I can certainly talk to that issue.

Senator ABETZ—Yes. And does it?

Mr Campbell—There is a signature on the page. Through our investigations we focused our resources on addressing the underpayments that arose. There were never any AWAs actually lodged by Ms Healey or the company.

Senator ABETZ—That is right. That is undisputed. But it goes to the culpability of the employer and that which was put to the court. For the sake of this I am willing to acknowledge that what was put to the court was done in good faith. But the suggestion was that the complainant had said she had never seen the AWA. There was not an AWA because it was not registered.

Mr Campbell—Yes.

Senator ABETZ—I am not sure that it necessarily got passed on in the court proceedings that she had nevertheless signed a document setting out rates of pay. If she had signed that document and that is what she was paid—I think there is no dispute that she was paid according to that document—albeit because it was not lodged, she was underpaid. But I think

that does go to the issue of culpability and the strength of comment made by His Honour in passing penalty.

Senator Ludwig—It would not be undisputed, though, that you could not contract out of the award the agreement that applied. That would not be undisputed by you. Sorry to come into this—I am not familiar with it. I am just trying to ascertain that when you talk about culpability—

Senator ABETZ—If I may assist, Minister, the suggestion was that the complainant said words to the effect that she had not seen the document, and yet her signature, it would appear, appears on it.

Mr Campbell—Yes.

Senator Ludwig—I understand that.

Senator ABETZ—When she said, ‘Look, I never saw such a document,’ nobody from the ombudsman’s office, in the investigation stage, flicked the document to her and said, ‘Hey, lady, is this your signature? And, if so, is this the document that was attached to it?’ Because that step was not taken and her statement was taken at face value and, as I understand it, presented to the court, that then caused some issues. I acknowledge that the business owner was represented and I will not comment on her legal advice and how that was discussed in court. What I am solely concentrating on is the role of the Workplace Ombudsman in being a model litigant and ensuring that the statement of facts being put to the court is in fact robust. I accept that there was no intention to mislead the court, but I want to check up on the robustness of these matters with the investigations.

Some would say I had been around the courts for too long so it was just as well I went to the Senate. But I fully accept there are always two sides to a story. I fully accept that. I think on behalf of this matter, it is worth while pursuing the detail as to whether the employee signed a document, and I think we are agreed that a signature in the employee space appears on the document. We are agreed on that?

Mr Campbell—Yes. But we have not made inquiries as to the validity of that signature or whether or not that signature is in fact the employee’s.

Senator ABETZ—You focused on that but then when a statement of facts was put to the court and statements—and somebody will assist me as to what was actually—

Mr Campbell—In the statement of agreed facts there were eight agreed breaches; there were 254 breaches of the award by the company.

Senator ABETZ—Here we go. In the answer to EW631-09 it says the claimant has denied she signed ‘the’ AWA, and of course there was no AWA because it was not registered.

Mr Campbell—That is correct.

Senator ABETZ—Can I put this to you. Did you do an analysis as to whether, if that document had been registered, it would have passed as an AWA?

Mr Campbell—No, we did not.

Senator ABETZ—That, if I might suggest, is another very important matter that potentially in these matters should be put to the court. This was, as I understand it, under an Australian Hotels Association framework agreement that an employer in the normal course of business would be entitled to rely on in good faith—

Senator Ludwig—Wouldn't that be a matter for the defence?

Senator ABETZ—Sorry.

Senator Ludwig—Wouldn't that be a matter that the defence would have raised as a defence against?

Senator ABETZ—Minister, as I said—

Senator Ludwig—Sorry. I do not want to buy into this.

Senator ABETZ—That is why I previously said I did not want to reflect on defence counsel.

Senator Ludwig—I see.

Senator ABETZ—I draw the line in relation to that and solely concentrate on the role of the Workplace Ombudsman being a model litigant to ensure that everything that is put to the court does not paint the respondent in an unfair light.

Mr Campbell—I understand that.

Senator ABETZ—You did not undertake an analysis of the—what can I call it?—proposed AWA.

Mr Campbell—Yes.

Senator ABETZ—Yes, the proposed AWA. As I read it, if it had been registered, it would have ticked all the boxes and would have been approved.

Mr Campbell—I cannot go to that. But I would like to make the point that it is best not to take this one employee in isolation. She was one of 41 employees who was underpaid by the organisation and she was also one of the employees who had been offered AWAs that were not lodged. Now, as I said earlier—

Senator ABETZ—Yes, but if all of these AWAs had been lodged, as I understand it, under the Australian Hotels Association framework, they all would have been approved and there would not have been a problem. But for the oversight of lodgment—

Mr Campbell—Which is in itself a breach of the Workplace Relations Act.

Senator ABETZ—That is fully understood. But this one in fact started the investigation and was, as I understand it, commented on in the media. See, the document appears to have been signed by the claimant. However, the claimant stated in an interview that, although she had been advised by the Theatre Royal—that is, the hotel—about her employment, she had not seen an AWA.

Mr Wilson—Senator, if I may. I have a slight difficulty with these questions. If I can ask the chair for some guidance on this. The matter has been to court. It has been the subject of

some evidence. It has been subject to a determination by a judge of the Federal Court. There has been a penalty awarded against the employer. That penalty, as I understand, has been paid. It appears that we are seeking to traverse some of the evidence, frankly.

Senator ABETZ—That is quite right because I am questioning the methodology of the Workplace Ombudsman. You and I, Mr Wilson, have been around long enough to know that just because certain things have been determined by a court it does not mean that, even many years later, these things are not potentially open for review. I am not suggesting that in this case. All I am seeking to canvass is the robustness and the methodology used by the Workplace Ombudsman and then how that information is provided to the court. If I can give some gratuitous advice: when the complainant said that she had not seen an AWA, I would have objected at that time if I were the defence counsel, and said, ‘Well, here is a document with a signature on it; this is a bit over the top, Mr Prosecutor.’ But that did not happen. As a model litigant, I am suggesting that the Workplace Ombudsman should have been more careful in the way the statement of facts was presented to the court, because it may have given the misapprehension when told that she had not seen an AWA. It would have been very helpful, potentially, for the judge—and sure, this is speculation—if he had known that there was a signed document and if that signed document had been lodged, there would have been no breach of the law. The only breach was the non-registration which then led to all the penalties for back pay. That it was signed by the employee puts it into a completely different framework for the judge. If it were registered, all the boxes would have been ticked. Instead, the employee claims that she had never seen an AWA. Yet, you people knew that a signature appeared on a document purporting to be an AWA.

Mr Wilson—Before I ask Mr Johns to reply, I should make clear that the role of the Workplace Ombudsman is not to make judgments about whether AWAs are capable of passage under the legislation applying at that time. The Workplace Authority would have had responsibility for that. I need to make that clear. I ask Mr Johns to speak about the issue of model litigant.

Mr Johns—It is certainly my view that, in this matter, we have absolutely complied with our obligations as a model litigant. This matter proceeded by way of an agreed statement of facts. The way we bring about those agreed statement of facts is that we consult with the respondent in the matter prior to the penalty hearing. We engage in alternative dispute resolution to narrow the issues in dispute between the parties. It might be that in our first draft of an agreed statement of facts there is something in there that the respondent disagrees with. We always hear from them as to what corrections they would like made to the agreed statement of facts. I was not involved in the drafting of this one, but, to the extent that the ultimate agreed statement of facts went up to the federal court with an error in it, it would be the responsibility of all the parties. We certainly would have, and did in this case, provide the respondent with an opportunity to indicate what—if anything—was incorrect in the agreed statement of facts that were put before the court.

Senator ABETZ—All right. If there is a known misstatement in an agreed statement of facts, would that be in breach of your role as a model litigant to allow that statement of facts, with an error in it, to knowingly go to the bench?

Mr Johns—There was nothing in the agreed statement of facts that was known to us to be incorrect, that had been told to us by the respondent that was incorrect with them having been provided with the opportunity to correct the draft agreed statement of facts prior to it being submitted to the court.

Senator ABETZ—But I think you would admit that questions were not asked of one of the complainants in relation to her signature and her claim that she had not seen an AWA. In fairness, I think, even if defence counsel overlooked this matter, that is not an issue for us to consider. I accept Mr Wilson's point, and that is why I make no allegation that this was deliberate in any way, shape or form. If I need to I will say that again and put that on the record again.

What I am concerned about is the robustness beforehand to ensure that the statements that do go to the court—even if defence counsel agrees to it—are in fact correct. It seems that in this case, for the statement to go to the court—even if it is by way of agreement with defence counsel that the complainant had not seen the document—it is passing strange that the complainant's signature actually appears on the document. If that was known to the Workplace Ombudsman, I find it passing strange that that misstatement—accidental or whatever—was allowed to go to the bench and that the actual document signed by the complainant was not put to her when she asserted she had never seen an AWA. With great respect, I would have thought that any investigating officer who was on top of the brief and the information that was obtained would have said, 'Just hang on a moment. Here is a document. Is this your signature? If this is your signature, how do you make the claim that you haven't seen the document before?' That is the point I am making.

I would like to think that, despite the robust defence being put out, practices will be improved and these sorts of things might be checked on in the future. I accept that we cannot unscramble this egg. I am sure we all want to see justice done, but we also need to ensure that the Workplace Ombudsman's task in this is—and I was going to say 'squeaky clean'; but that is wrong—robust. I accept that there was no malice in this in any way, shape or form, but I would like to think—even if we do not say so at the Senate estimates table—that there is an acknowledgement that practices can be improved.

CHAIR—Before you move on: that was a very long question, and I will give Mr Johns an opportunity to respond.

Mr Johns—I am not sure there was a question, Senator.

Senator Ludwig—There might have been an inflection at the end.

CHAIR—Do you want to respond to anything that Senator Abetz has put?

Mr Johns—No.

Senator ABETZ—And I understand that. You have kindly given us the information on the amounts of money paid by Ms Healey. We are agreed that all moneys were paid prior to the filing of proceedings, are we?

Mr Campbell—That is correct—two weeks before the filing of proceedings in the Federal Court.

Senator ABETZ—Do you accept that, in calculating the amounts outstanding, they came into the respondent in dribs and drabs—that you worked out the amount for a certain number of employees and then another batch of employees and another batch of employees?

Mr Campbell—Yes.

Senator ABETZ—And she made three payments?

Mr Campbell—That is correct.

Senator ABETZ—Is it correct that those three payments were made in response to the batch of employees that were sorted out on each occasion?

Mr Campbell—It is partially correct. The respondent in this matter made the first payment six months after the issues were raised with her in the first instance. So that is some period of time. But, yes, there were payments made to the first group of employees six months after the date.

Senator ABETZ—And you would agree with me that there was quite a difficulty in ascertaining the exact payments, because the first calculations by the Workplace Ombudsman were challenged by her and the Workplace Ombudsman went away, recalculated the figures and came back to Ms Healey with a different figure? That is correct too, is it not?

Mr Campbell—That is correct.

Senator ABETZ—So why would we seek to blame her for this six-month delay? This is part of the concern I have, that we are so easy and free about saying that this particular respondent took six months after the first complaint was made to pay the full amount. When the Workplace Ombudsman, in working it out, made errors, the respondent went back to the Workplace Ombudsman, and the Workplace Ombudsman accepted the error. So why don't you tell us the date on which everything was finally agreed between the respondent and the Workplace Ombudsman? How much time elapsed between when the final figure was agreed and the actual payment was made? It was substantially less than six months, I would suggest.

CHAIR—You can respond to all that as well as giving us the date, if you so desire.

Mr Campbell—Senator, I am aware that the final breach notice was issued to Ms Healey for underpayment of all 44 employees in May 2007—on 18 May, to be precise. I would expect that, between 17 January, when the first breach notice was issued to Ms Healey, and her subsequent discussions with our office to amend the breach notice, as there was an error made, which we are open about—and we would expect a respondent to have an opportunity to respond to any notice we issue; it is a—

Senator ABETZ—So it was between 18 May and 13 September. That cuts the time down by one-third, doesn't it? That only makes it four months, rather than six months.

Mr Campbell—Yes, Senator, but there was a fair bit of discussion between our office and Ms Healey and her representatives between January and May about settling the underpayment amount.

Senator ABETZ—Yes, but it is interesting that the Workplace Ombudsman officers themselves had difficulties calculating the actual amounts due and owing, and yet took a fairly

harsh approach to the employer. But we would agree that a payment was made on 4 June in relation to three employees?

Mr Campbell—That is correct.

Senator ABETZ—So that was within roughly a fortnight of the final date of 18 May.

Mr Campbell—That is correct.

Senator ABETZ—And then, in rough terms, a month later, a further payment was made. I am not sure how much that would be—

Mr Campbell—Senator, I can assist you there—

Senator ABETZ—I would imagine it would have been about \$8,000, wouldn't it?

Mr Campbell—The first payment?

Senator ABETZ—The first payment would have been about \$3½ thousand; is that right?

Mr Campbell—Yes, that is about right. I do have the figures somewhere; I just need a moment to find them.

Senator ABETZ—All right.

Mr Campbell—Yes, it was about \$3,000 in the first instance.

Senator ABETZ—Yes. And the second one?

Mr Campbell—The second one was \$9,000.

Senator ABETZ—About \$9,000?

Mr Campbell—Yes.

Senator ABETZ—All right, I thought—

Mr Campbell—I can double-check. I do not have a total with me, or a calculator, unfortunately.

Senator ABETZ—Whatever—but the majority was paid by 11 July and then a further amount of about \$6,000 was paid on 13 September.

Mr Campbell—That is right: a total of \$18,000 in underpayments.

Senator ABETZ—Yes. And then, after the respondent had made all these payments, when were proceedings filed—a fortnight later, weren't they?

Mr Campbell—It was 27 September 2007.

Senator ABETZ—Yes, a fortnight after all payments had been made.

Mr Campbell—That is correct.

Senator ABETZ—We do not see that as being co-operative, a small business paying a fairly large sum of money in these sorts of instalments?

Mr Campbell—The respondent in this matter was cooperative to some extent. There are a number of matters on the record about that. The judge certainly believed that she was cooperative. However, it certainly took a great deal of effort on our part for Ms Healey to

make good the underpayments. Initially, there was a large amount of correspondence to our office to the effect that making good the underpayments would admit liability and therefore she was unwilling to do so. Now, that is not an overly cooperative approach, we would say. However, the court did make a discount in its penalty for the cooperation shown by Ms Healey in making good the underpayments.

Senator ABETZ—Tell me, with the moneys that have been paid over, have all the payments been paid out to the workers?

Mr Campbell—To date, 23 of the employees have received their outstanding entitlements. We have made efforts by telephone, email and mail to—

Senator ABETZ—And soon Facebook—

Mr Campbell—And soon Facebook—to search out these employees and make sure that—

Senator ABETZ—How many?

Mr Campbell—Twenty-three have now received their entitlements.

Senator ABETZ—Twenty-three out of 41?

Mr Campbell—Yes, leaving 18 employees—

Senator ABETZ—Eighteen still to be paid. Do we know how much money that represents for the 18 employees?

Mr Campbell—I got the updated figures on the number of employees but I do not have that as a dollar value. I can take that on notice.

Senator ABETZ—When that money sits in your trust account does it earn interest?

Mr Campbell—I doubt that it does. If it does it does not come to us.

Senator ABETZ—In that case, should it accrue to the employee or does Mr Tanner get it?

Mr Campbell—I do not have the answer to that question.

Senator ABETZ—Could you take that on notice.

Mr Scully—It does not accrue to the benefit of the employee. It sits as part of the consolidated revenue and therefore the Commonwealth.

Senator ABETZ—It goes to consolidated revenue. So Mr Tanner does get the benefit of it.

Senator Ludwig—I do not think Mr Tanner gets the benefit!

Senator ABETZ—This is a regime that, I accept, we set up, but I do think that it might be worth while to have a look at the issue that if an employee has been underpaid then surely any interest earned on that, as a public policy consideration, ought to go to the employee rather than into consolidated revenue. But I accept that it was a regime we set up and therefore—

Senator Ludwig—I will take that on notice. I understand that you are not criticising your previous legislation in that comment but making a legitimate—

Senator ABETZ—I am expressing a question about it and, Senator Ludwig, you know me well enough to acknowledge that the Howard government, whilst very good, was not perfect.

This is potentially another example. Albeit I do not remember you complaining about the fact that workers were being ripped off to the benefit of whoever our finance minister was—the good Senator Nick Minchin.

Senator Ludwig—I was going to go on to say that I was not taking it in that vein and that I will take it on notice. Also, we will have a look at what the current provision provides for with the new Fair Work Australia.

Senator JACINTA COLLINS—I have one further question on this matter. In relation to the respondent in this case, when did she rectify the ongoing payments for ongoing employees?

Mr Campbell—I would need to take that on notice. I cannot recall if the Theatre Royale is still operating or whether or not it is still under an active investigation. That is not to say that I would not answer your question because of that, but I would need to go back to our office and assess that.

Senator ABETZ—She sold the premises shortly thereafter. New owners are operating it.

Senator JACINTA COLLINS—Okay.

CHAIR—In terms of the proposed AWAs, Senator Abetz indicated that these were form proposals set out by one of the employer organisations—I think you said the Hotels Association.

Mr Campbell—The Australian Hotels Association.

CHAIR—Were you aware of that?

Mr Campbell—I cannot speak to whether or not they were AHA model AWAs or not, but I am certainly aware that AHA was involved in the discussions between our office and—

CHAIR—I do not dispute what Senator Abetz has put to the committee, and he suggested that was the case. How many breaches did you say there were of the award?

Mr Campbell—We identified 254 individual breaches of the award of eight different terms of the award.

CHAIR—The award was, until Work Choices, the minimum legal amount that an employee could be paid?

Mr Campbell—In that hotel, yes.

CHAIR—And, because these proposed AWAs had not been exercised properly, the legal minimum was still the award.

Mr Campbell—That is absolutely correct.

CHAIR—If they had have been exercised properly it would have been quite legal for all of those people—and the 254 breaches. So these AWAs reduced the minimum legal payment prior to Work Choices of all those workers?

Mr Campbell—I could not answer that because we have not run the assessment of the AWAs.

CHAIR—Given that these were, as Senator Abetz has told us, for standard AWAs across the board in the hotels industry in Tasmania, do you have any idea of how many employees would have had their wages reduced by these AWAs?

Mr Campbell—No, I do not have that information.

Mr Campbell—Do you know how many might have had their conditions reduced as a result of those AWAs?

Mr Campbell—No, but, in this circumstance, the fortunate outcome was that the award did apply and we were able to recover the money for those employees. I also think it is important to make the point that while we did not investigate the breaches of the failure to lodge the AWAs, we do take such matters very seriously and we have prosecuted employers for failing to lodge AWAs in accordance with the Workplace Relations Act, and the courts have responded by imposing penalties as large as \$170,000. While that particular case was appealed, it nonetheless shows that we do take it seriously, and so do the courts.

CHAIR—Did you ask any of the employees why they were so eager and willing to sign a proposed AWA that reduced their wages and conditions?

Mr Campbell—I do not believe that question was put to the employees. The arrangements at the hotel, as explained or highlighted by Justice Marshall in his decision, were ‘random’ to use his term. The wages appeared random in their application. So I cannot talk to how their instruments were constructed or what the approach of the employer was to make any payments available to them.

CHAIR—Given that AWAs could be offered on a take-it-or-leave-it basis, is it fair to assume that the employees did not want to reduce their wages and conditions?

Mr Campbell—I could not answer that.

CHAIR—I know that you cannot.

Senator FISHER—We have now had some months of the so-called global financial crisis. Are you able to reflect on the number of employees who come to your organisation seeking help, in particular the number of employees, and pass a view as to the volume of those approaches, bearing in mind the onset of what we now call, colloquially, the global financial crisis?

Mr Wilson—Thank you for that question. There was some questioning at the previous estimates hearing on that subject as well.

Senator FISHER—There was.

Mr Wilson—We did the numbers. The information I have got is that between 1 July 2008 and 30 April 2009 the Workplace Ombudsman recorded 1,497 breaches relating to termination. This included breaches covering notice, payment in lieu of notice, redundancy pay and severance pay. In the same period in the previous financial year, that was 1,094. It was a 37 per cent increase in the 2008-09 financial year. That accords with the anecdotal view that I formed at the last Senate estimates hearing, which was that in some respects the nature of our work had changed a bit over the past three months and this data appears to verify that.

People are coming to us more about matters relating to their termination. The fact that there is a 37 per cent increase I do not think can necessarily be extrapolated beyond the fact that it is simply an increase in our workload, because the total number of complaints that we have got over that July 2008 to April 2009 period is a little bit more than we had in the previous period but not substantially more. What I was trying to record at the last Senate estimates hearing was that the volume of the work has not necessarily increased but the nature of the work certainly has changed.

Senator FISHER—I do not quite follow your reasoning. Are you able to provide the committee with a copy of those figures?

Mr Wilson—Certainly.

Senator FISHER—It might make it easier to ask questions about it.

Mr Wilson—There is no confidential information, as far as I can see, so I am happy to table the information. I think it is consistent with what we have done previously.

Senator FISHER—If the increase is 37 per cent, once I see your actual figures it will probably answer the question. Are they simply approaches to the Workplace Ombudsman by employees or are those approaches that have realised or resulted in some sort of an investigation by the Workplace Ombudsman?

Obviously there is difference. You will have people approaching you who think they have been done wrong by or simply want to ask questions and the particular inquiry may go nowhere. Nonetheless, it is still an approach to your organisation about a person who is concerned about their job prospects or their pay, or about an imminent dismissal. Are the figures you have just cited encompassing those sorts of inquiries?

Mr Wilson—The figures we are referring to—the table you will see is the statistical form of claims received and claims investigate and claims finalised and many other bits and pieces as well. The information I referred to about the termination breaches is where we have received the initial complaint, have done something with it and have established that there is a breach of some kind. That breach may be over a whole series of things, as I said, including insufficient payment in lieu of notice and insufficient redundancy pay. Certainly there is a normative judgment taken by the inspector that there has been a breach.

Senator FISHER—So the increase to which you refer is in the number of breaches.

Mr Wilson—The increase is certainly in the number of breaches. Year on year the total matter of things we looked at is a bit more than the previous year but not substantially more. The portion of those relating to termination certainly is a lot more. That is consistent, as I said, with what we were picking up in the early part of the year.

Senator FISHER—Do you track—I am sure you do—information about the volume of inquiries that your organisation receives at first port of call, be it email, telephone or web?

Mr Wilson—Mr Johns might be able to elaborate on that.

Mr Johns—Sorry, Senator—would you ask the question again?

Senator FISHER—Does your organisation track information about the volume of inquiries you get at what may be your first incoming port of call, be it by telephone to one of your officers, by verbal approach to one of your officers, be it by email or be it by web?

Mr Johns—Yes, Senator, we do track all inquiries and complaints which are made with the Workplace Ombudsman. If I can go back specifically to your question about redundancy issues, I can inform the Senate committee that between the first—

Senator FISHER—Sorry, Mr Johns—I was momentarily distracted. Can you say that answer again.

Mr Johns—Certainly, Senator. We do track all telephone and email inquiries and complaints which are made with the Workplace Ombudsman and we record those figures. To go back to your earlier question about redundancy, between 1 February this year and 30 April our client service centre received 845 telephone inquiries from the general public relating to redundancy queries, which is an average of 65 inquiries a week. They fall into two categories. The first is both employees and employers making queries about the applicable redundancy entitlements to be paid and we refer those matters to the workplace information line. The second category of inquiries come from employees who have been made redundant and want to query the quantum of the redundancy that has been made to them.

Senator FISHER—What would be your observation about the number of those inquiries comparing that 845 with the same data—apples with apples—for the preceding year?

Mr Johns—I would have to take that on notice.

Senator FISHER—Would you please?

Mr Johns—Yes.

Mr Campbell—I might be able to assist there. The client service centre was not operating during the same period of the last financial year. Therefore, we do not keep a record of the number of telephone calls or their content or need for that period. The documents I have just tabled will provide you with some input as to the comparative data that Nick has just given you and also the data about the number of telephone calls and the purpose of those calls as well.

Senator FISHER—Are you able to give any anecdotal reflection as to trends in respect of the 845 inquiries? What about queries about redundancy from employers and employees in this year versus the previous year—are you able to give an impression whether they are more, less, trending up?

Mr Campbell—With respect to the telephone calls we could not make that anecdotal statement, but certainly as Nick pointed out earlier the—

Senator FISHER—There is not really any issue about how the inquiries or contacts come to you, it may be by any communication medium at all. What would the officers' impression be?

Mr Johns—I think the evidence of Mr Wilson was that although the overall quantum of claims is not increasing, the mix of claims is changing such that there are more inquiries

presently about redundancy entitlements and the like as opposed to other inquiries. It might be that, during this particular economic cycle, people are more asking questions about redundancy than about underpayments or about other entitlements which they might have.

Senator FISHER—It is not necessarily easy to differentiate or to separate. It is not necessarily clear whether a claim about underpayment is discrete from a claim in respect of actual or threatened or feared redundancy is it?

Mr Johns—That is right. Many of the claims that we receive might have multiple aspects to them. There might be an underpayment claim relating to the period of time that they were in employment and there might be an element that is related to post their employment. We do not then differentiate as to which one. It is an underpayment claim whether it is in relation to wages or to redundancy. We do however record in our system whether or not—if I can put it this way—the substantive nature of the inquiry is one relating to termination or wages and conditions. Now with a redundancy matter it could fall into either and I am told that that is why towards the end of last year or early this year our client service centre decided to track individually the notion of redundancies.

Senator FISHER—Okay. So your figures are necessarily rubbery to take into account the vagaries that you have just outlined. That rubberiness would be greater would it not in respect of the volume that you characterise simply as contacts that might not necessarily eventuate in an investigation? You will be accepting the say so of the person who contacts you in that instance.

Mr Johns—Yes, that is right.

Senator FISHER—Thank you very much.

CHAIR—On the complaints area, do you have people ringing up to find out how they can escape their AWA and get back onto proper wages and conditions?

Senator FISHER—So they can have a new one, chair.

CHAIR—No, I did not say that. What did you think I said, Senator Fisher? Let me repeat the question: do you get people ringing up to inquire how they can escape from their AWAs?

Mr Johns—I am instructed that we do not record that information. Ordinarily we would refer those types of complaints to the Workplace Infoline.

CHAIR—Okay. Would you provide assistance to people who want to get off their AWA and move onto proper wages and conditions?

Senator HUMPHRIES—There is an assumption in that question.

Senator JACINTA COLLINS—I think we have had lots of questions with assumptions today.

CHAIR—This is true. I guess the previous line of questioning was not an assumption. We are talking about an industry model AWA that undercut the award in multiple areas. They are the people that are most commonly on AWAs apart from DEEWA as it used to be, they were the second highest user, I think, of AWAs.

Mr Johns—Our workplace inspectors would not give advice about how to terminate an AWA.

CHAIR—Thank you.

Senator HUMPHRIES—I want to ask you about some of your key performance indicators. You propose to operate national and state campaigns each year—four national campaigns and two state campaigns. What would the form of those campaigns be?

Mr Johns—This year we have already conducted four national campaigns. We conducted one in road transport, one in the hospital industry and one in relation to food services, and we also conducted a workplace rights week between 20 and 24 April this year. We have since also commenced a campaign in the national hair and beauty industry. They are our national campaigns. In addition to that, there have been 28 state based or local initiatives in relation to target audits and the like.

With the hospitality campaign, we worked very closely with the Australian Hotels Association. They worked with their members before we went out and conducted our audits. It was an excellent example of us working in partnership with the community we seek to regulate and company-producing that public value around education in a workplace relations space.

Senator HUMPHRIES—Do these campaigns typically involve television or radio advertising?

Mr Johns—They are field audits, as opposed to advertising campaigns. We do however distribute information packs—some 46,000 in the course of our campaigns this financial year. Through this body of work, we have recovered some \$4.6 million for workers.

CHAIR—Can you remind me of the percentage of employers encountered who were ripping off their employees?

Mr Johns—I do not quite understand the statistic you are looking for.

CHAIR—I thought we found that, when you did that audit, something like 42 per cent of employers were ripping off their employees?

Mr Campbell—In the process of the hospitality campaign, we completed 571 audits and recovered \$700,000 for 2,171 workers. I do not have the number of employers that was recovered fro, but I could get that information for you.

CHAIR—All right.

Senator HUMPHRIES—Where there is a deficiency in wage payments, you obviously require the employer to meet that deficiency?

Mr Campbell—That is right.

Senator HUMPHRIES—Where there are other conditions which have not been met—such as the provision of statutory holiday requirements and things like that—how do you obtain reimbursement or compensation for the employee affected?

Mr Campbell—In the same manner as the underpayments. Where we identify a breach of any industrial instrument, we advise the employer in the first instance that there has been a problem. Whether or not that is a monetary entitlement or another obligation the employer might have to keep records for the employee or provide a payslip, in the first instance we give advice to them about how they could comply with their obligations—for example, to provide a payslip, to keep a record or to pay a certain rate. Through that process, we work with the employer to identify the length of the underpayment or any shortfall in holiday entitlement that might have been owed and then give that employer an opportunity to voluntarily comply with the problem we have identified.

Senator HUMPHRIES—What proportion of these audits that reveal some deficiency in the employer's practice lead to prosecutions?

Mr Campbell—We generally prosecute about 75 parties to the Workplace Relations Act per year. The vast majority last financial year was certainly employers. I do not have the exact data, but I know a small number of that did result from our targeted campaign work.

Senator HUMPHRIES—Only a small number?

Mr Campbell—Yes, only a small number. We could probably get that figure broken down for you, Senator. I would say that it would be in the vicinity of, say, five or 10.

Senator HUMPHRIES—So you see the auditing process has been more about just bringing people up to speed on their obligations rather than identifying rogue employers or—

Mr Campbell—Absolutely. We identify industries where we think there might be some compliance issues and we get that intelligence not only from the telephone calls we get but also through other parties in the industrial relations environment. We certainly write to large numbers of employers at the beginning of each audit and inform the relevant union or employer association that we intend to do an audit. We then pick a small number and actually go out to their workplaces and assess their compliance with the legislation.

I should note that not all of our auditing work or compliance work in the field is necessarily about checking the books. Certainly Workplace Rights Week was only about educating employers. It was about going into the workplace and saying: 'Are you aware of what your obligations are? Would you like some information on pay slips, employment records or any other matter that might be of concern to your business?' We visited in the order of 1,500 employers during the Workplace Rights Week conducted in April. There is a mix of compliance and educative focus in all of our audit work.

Senator HUMPHRIES—Can you comment on the level of understanding you think is out there by employers as to their obligations under the legislation? The figure that Senator Marshall quoted suggested there are a large number of people who are not aware of certain obligations that they have with respect to their employees.

CHAIR—Or there is another alternative: are aware but simply choose not to pay.

Senator HUMPHRIES—Yes, that is possible as well.

Senator FISHER—There is a deeper question: why are they not aware?

Senator HUMPHRIES—Answer all three questions, if you wish.

Mr Johns—If I might go back to Senator Marshall's question in relation to the hospitality campaign, there were 638 compliance audits conducted and 63 per cent of those were compliant and 36 per cent were found to be in breach of an obligation that was a part of the award.

CHAIR—Of the 36 per cent, are you aware how many were members of an employer organisation?

Mr Johns—No.

CHAIR—Is that a question you ask?

Mr Johns—No, it is not.

CHAIR—It is interesting—

Senator FISHER—Do you ask how many employees who contact you are members of unions?

CHAIR—I will give you the call when you seek it, Senator Fisher. It is interesting because employer organisations have told us in the past that they spend a lot of time and effort educating their members about their obligations. It was interesting in terms of education whether or not members of employer organisations are breaching their obligations.

Mr Johns—I think it would be fair to say in the hospitality campaign that, having worked with the relevant employers association on that matter, there was a very high level of compliance. It was an excellent example of us working in partnership with the industry to make sure that the message got further out into the community we seek to regulate.

CHAIR—It might be a question you consider asking in the future. Senator Fisher, were you seeking the call?

Senator FISHER—Thank you, Chair.

CHAIR—I think there were some more questions you were going to answer anyway—I think there is still one from Senator Humphries and Senator Fisher.

Senator FISHER—Mine might require only a yes/no answer so I will simply ask it: does your organisation ask employees who contact you with concerns about an alleged breach of their employment arrangements whether they are members of a union?

Mr Johns—No, we do not. We do ask whether they are aware their employer is a member of an employer association, for obvious reasons associated with responsiveness and determining what underlying industrial instrument might apply. I do not think we ask whether they are members of unions.

Mr Wilson—Without wishing to cut across Mr Johns, I am advised by our staff that, although we do not ask and record whether they are a member of a union, our claims form which is available in many places, including on the Internet, does ask whether they are a member of a union. That is not recorded.

Senator HUMPHRIES—A claims form for what?

Mr Wilson—When a person approaches the Workplace Ombudsman with the view that they have been underpaid we ask them to provide information about who they are and who their employer is. The more information we get, the better, frankly. If we can just get their name and address then that is great. There are a series of other questions and the request to attach pay slips and other employment records. It also does ask questions like whether you are a union member. Part of that is trying to work out the level of understanding of the person making the complaint.

Senator FISHER—What happens with respect to the complaint if the employee declines to fill in that box or answer yes or no?

Mr Wilson—The matter is still investigated. It makes no difference to our process.

Senator FISHER—So it does not change what your organisation does with the allegation?

Mr Wilson—No, but if you took an example of a worker who said that they were a member of the SDA or the LHMU and who was working in a hotel or shop, it may well be that there are legitimately some services which can be provided to them beyond those that we can undertake or which may, indeed, be done quicker than we can undertake to do them. So it is part of the collection of information which the inspector finds valuable in that first stage of the investigation.

Senator FISHER—Okay. A potential reminder of what should be some of the benefits of union membership for individual complainants, perhaps. Thank you

Senator HUMPHRIES—To come back to my question before, what would you describe as the overall level of comprehension—this is a very general question—by employers of their obligations under the suite of industrial laws that now apply to them?

Mr Johns—I think it is a difficult question to answer, Senator, on an overall basis. If you were to take the hospitality campaign as an example, you would have to say at least 63 per cent.

Senator HUMPHRIES—Do you mean that at least 63 per cent understand or that at least 63 per cent do not understand?

Mr Johns—I mean that at least 63 per cent understand. At least 63 per cent complied, so at least 63 per cent must understand.

Senator HUMPHRIES—That still leaves more than a third of employers who have some deficiency in their knowledge of what their obligations are.

Mr Johns—Well, it is either a deficiency in their knowledge or a deliberate breach.

Senator HUMPHRIES—Well, indeed. You would not suggest that most of that 37 per cent are typically people who are attempting to avoid their obligations?

Mr Johns—I would not. Our experience is that most employers try to do the right thing.

Senator HUMPHRIES—All right. During the hours that they are meant to be available, your contact centre services and your website would be available 99 per cent of the time in each case. Do you have some degree of redundancy at the present time when systems fail?

Mr Wilson—Senator, maybe if I can answer it this way: those KPIs are for the new, yet to be established Fair Work Ombudsman. With respect to the contact centre referred to there, it is about combining the client services centre, which the Workplace Ombudsman operates and also the contact centre that the Workplace Authority operates. The Workplace Authority contact centre is much larger, taking many hundreds of thousands of calls a year, whereas we take about 100,000 calls.

To come to the last part of your question about redundancy, I am certainly not able to talk about the management of the Workplace Authority contact centre, other than to say that they have some extremely good processes in place and that there is nothing I would know of from the Workplace Ombudsman's point of view which would indicate that those KPIs are not achievable.

Senator HUMPHRIES—Okay. Thank you very much.

[12.10 pm]

Workplace Authority

CHAIR—Welcome. Do you have any opening remarks you would like to make?

Ms Weir—No, thank you.

CHAIR—Welcome, Ms Weir, to your first estimates in charge.

Senator HUMPHRIES—And possibly your last, as well. It is a bit depressing seeing all these agencies in their final stages parading before us.

CHAIR—They are going on to bigger and better things.

Senator HUMPHRIES—Indeed. It is the staffing establishment of the authority to be entirely translated into the staff of Fair Work Australia?

Ms Weir—Yes, they are.

Senator HUMPHRIES—Are the staff presently on contracts or collective agreements?

Ms Weir—We have a number of staff on various instruments. I have the figures if you want the details.

Senator HUMPHRIES—Yes, please.

Ms Weir—As at 31 May our headcount was 586 staff. As at 31 May we had 104 employees on Workplace Authority AWAs, 11 employees on ex-OEA AWAs, 462 employees on collective agreements and nine SES on section 24 determinations.

Senator HUMPHRIES—What happens to those agreements when they move into Fair Work Australia? Do they continue on those same instruments?

Ms Weir—That is a matter for the new legislation, so I will ask Mr Kovacic to answer.

Mr Kovacic—The government has moved an amendment to the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, which is currently before the parliament, to effectively preserve the operation of existing statutory agreements, whether they are collective or individual, that apply to staff under the Workplace Relations Act in the

new institutions until new arrangements are put in place. So in essence, the existing arrangements will continue to operate until they are replaced by a new set of arrangements.

Senator HUMPHRIES—So there will be staff in Fair Work Australia who will be on AWAs?

Mr Kovacic—If there are still residual staff in terms of any of the bodies that are moved in.

Senator HUMPHRIES—Which there are.

Mr Kovacic—And they continue to be on AWAs. Those instruments will be preserved by virtue of the bill.

Senator HUMPHRIES—That is a bit ironic—but anyway.

Mr Kovacic—The government's position all the way along has been that existing instruments will continue to apply until their nominal expiry date, after which the provisions of other legislation will allow for either their termination or their replacement by a subsequent agreement. It is a consistent sort of policy approach that the government has adopted, and that is reflected in its approach to the amendments that I referred to a moment ago.

Senator HUMPHRIES—I want to ask about the ITEAs, which the authority is registering at the present time. Is 'registering' the right word? 'Lodging'?

Ms Weir—ITEAs which have been lodged with the authority.

Senator HUMPHRIES—Can you give me figures for how many have been lodged so far this calendar year?

Ms Weir—Yes. In line with arrangements at previous Senate estimates hearings we have a standard handout that I believe we have provided you with at the two previous hearings. I can have that distributed.

Senator HUMPHRIES—We would love to see it, thank you. These are the total number of ITEAs lodged with you since when?

Ms Major—The figure that you have at the top of the page there—the total as at 30 April—is actually a combined figure for ITEAs and collective agreements. Currently the majority of agreements that are being lodged are ITEAs but we have not provided a breakdown between ITEAs and collective agreements in this handout sheet.

Senator HUMPHRIES—Roughly, what proportion of that 127,000 would be ITEAs?

Ms Major—The majority would be ITEAs. We are averaging around 300 agreements a day, of which between 50 and 60 are collective agreements. If you average that out you are probably looking at 70 to 75 per cent ITEAs and the remainder collective agreements. I can provide you with the specific figures if you like. We can take that on notice.

Senator HUMPHRIES—Thank you. What is the average turnaround time between the agreements being lodged and being approved?

Ms Major—The performance indicator that we have within the portfolio budget statement is that where all information is available to us to do the assessment we have a turnaround time of 20 working days. That is our performance benchmark.

Senator HUMPHRIES—Of those 112,000 that have been lodged you have found 15,000 or so that are invalid?

Ms Major—Actually 127,000-odd have been lodged and 15,748 were found to be invalid agreements.

Senator HUMPHRIES—What was the predominant reason that they were found to be invalid?

Ms Major—The majority of that 15,000 happened in the very early days of the no disadvantage test and the main reason was not providing us with signed copies of the agreements. To provide a signed copy was a new change with Forward with Fairness.

Senator HUMPHRIES—The rate of invalidity is quite low at the moment?

Ms Major—It has dropped considerably. It is tapering right off.

Senator HUMPHRIES—When do ITEAs end? After what date can they no longer be lodged?

Ms Major—31 December 2009.

Senator HUMPHRIES—What is the maximum period an ITEA can last?

Ms Major—I do not know; I think I might have to take that on notice.

Mr Kovacic—I will have to confirm this later but I think they cannot have a nominal expiry date beyond 31 December this year, which reflects the transitional nature of instruments.

Senator HUMPHRIES—So you expect the numbers being lodged to diminish quite markedly in the next six months?

Ms Major—Yes, we will expect that.

Senator HUMPHRIES—Thank you.

CHAIR—Thank you for your appearance before the estimates hearings.

Proceedings suspended from 12.19 pm to 1.30 pm

Australian Building and Construction Commission

CHAIR—We will resume these estimates hearings with officers from the ABCC. Mr Lloyd, do you have an opening statement you wish to kick off with?

Mr Lloyd—No, I do not.

CHAIR—We will go straight to questions.

Senator BRANDIS—Mr Lloyd, can you or the appropriate officer please tell me: how many hours has Mr Murray Wilcox QC billed the department or any other agency of the government for his report on the ABCC?

Mr Lloyd—That would be a question not for us but for Mr Kovacic. He was not engaged by us; he was engaged by the minister and the department would answer that question.

Senator Ludwig—But your answer is zero?

Senator BRANDIS—Do you know the answer to my question?

Mr Lloyd—No, I do not.

Senator BRANDIS—To whom was the bill sent?

Mr Lloyd—To the department, I imagine, but you would have to ask them.

Senator BRANDIS—Do you know the answer, Senator Ludwig?

Senator Ludwig—No, I do not. Fairly clearly, Mr Lloyd does not.

Senator BRANDIS—Are there any officers from the department here?

Senator Ludwig—They are. What normally happens is—this was new to me too—

Senator BRANDIS—I am sorry, Minister.

Senator Ludwig—They are, and they are on immediately after the ABCC.

Senator BRANDIS—Where is Mr Kovacic?

Senator Ludwig—I am advised that I can provide an answer to your question.

Senator BRANDIS—That is why I asked you—in the hope that you might be able to.

Senator Ludwig—Someone may be able to help me. Mr Wilcox has invoiced the department for 594.5 hours work for the period from 27 June 2008 to 2 April 2009. I might guess your next question: what is the hourly rate?

Senator BRANDIS—No.

Senator Ludwig—That is helpful, then.

Senator BRANDIS—But I am getting there, thanks, Minister. Just hold on to that folder, because you might want to refer to it again. On this 594.5 hours of Mr Wilcox's time, have there been professional people other than Mr Wilcox associated with his inquiry whose time has been billed to the department in relation to this?

Senator Ludwig—What I was going to indicate before is that the unusual process in this committee is that the agencies do not appear with the outcomes, so what happens is that they go through the agencies first and, if there are questions in relation to the outcomes, they come afterwards in outcomes 4 and 5, I understand. So the questions would ordinarily be better directed to outcome 4 and/or 5 depending on which one it falls within, which I think will occur shortly after we have finished with Mr Lloyd. If you want to wait until then, I am sure the department officials will then be available to answer those questions. There are obviously departmental officials in the room, but it is more of a case waiting for the next outcome to come on. But I am totally in your hands.

Senator BRANDIS—Since we have already started with this and it is germane to the ABCC, let us just persist. Would you mind, Minister?

Senator Ludwig—No, I do not mind at all.

Senator BRANDIS—I was wondering if there were any other professional people who have sent accounts for billable time in relation to the Wilcox report.

Senator Ludwig—I will bring one of the departmental officials to the table and we will deal with it that way.

Senator BRANDIS—Thank you very much, Minister.

Mr Maynard—The answer to your question, Senator, is no.

Senator BRANDIS—So, in relation to the Wilcox inquiry, the only charges that we would expect to be billed to the government are Mr Wilcox's own time and his outlays—would that be right?

Mr Maynard—That is correct.

Senator BRANDIS—What about the cost of secretarial support for him? Is that absorbed by the department?

Mr Maynard—Yes, they were departmental officers and were absorbed by the department.

Senator BRANDIS—Are the costs of departmental staff allocated to Mr Wilcox accounted for anywhere or are they not accounted for?

Mr Kovacic—It would be part of the department's overall cost. We have not teased those out. I think at the last estimates hearing we actually indicated that a number of officials from the department were only working for a proportion of their time—

Senator BRANDIS—I remember asking about that.

Mr Kovacic—in supporting Mr Wilcox. We would not have any specific figures that would identify the costs associated with departmental employees.

Senator BRANDIS—You might take that on notice please, Mr Kovacic. But let me frame the question to be taken on notice a little more precisely. I would like to know how many departmental officers have worked with Mr Wilcox in relation to the production of his report, what their names are, how many hours each of them has spent working with Mr Wilcox on the matter, and what the cost to the department is in relation to each officer's time. When I say officers I do not just mean professional staff; I mean secretarial and support staff as well.

Mr Kovacic—Senator, there was a question we took on notice last time about the level of staff that were supporting Mr Wilcox. I think it was made clear by senators on the last occasion that they certainly were not interested in the names of the individuals. I think it is not normal practice. I would certainly seek some guidance from the committee on that particular issue. We can endeavour to provide the rest of the information that you have sought on notice, but I just really seek some guidance around the provision of names of individuals.

CHAIR—It is the usual practice of the committee that their level and responsibility description be provided but not the names.

Mr Kovacic—We have certainly provided that in response to a question on notice from the last estimates hearings and we are certainly prepared to update that again.

Senator BRANDIS—Well, Mr Kovacic, I am going to ask for the names. If the chairman overrules me I might ask him to point out what section of the relevance rules enable him to overrule me. If he does not overrule me you will provide me with the names, won't you?

CHAIR—Are you taking the question on notice?

Mr Kovacic—I am taking the question on notice.

CHAIR—The committee will consider it at a normal meeting.

Senator BRANDIS—All right. So you will take that on notice and unless advised by the chair otherwise, you will provide the names as well. Of course, I am sure the committee will consider that aspect in a timely fashion so that if it becomes unnecessary for you to do so as a result of the ruling of the committee, then obviously you will not have to. As to the rest of it, you will take it on notice. I did ask you, didn't I, in that omnibus question a few minutes ago what the cost per officer was in respect of their time?

Mr Kovacic—Yes, you did.

Senator BRANDIS—Thank you. In respect of Mr Wilcox's time, when did Mr Wilcox commence his work? Was it on 27 June?

Mr Kovacic—From memory, I think his appointment was announced by the Deputy Prime Minister on 22 May 2008, and I think he commenced work on 27 June.

Senator BRANDIS—He has billed you up to 2 April for 594.5 billable hours. What is his hourly rate?

Mr Maynard—It is \$550 per hour.

Senator BRANDIS—Does that include GST?

Mr Kovacic—Yes it does, Senator.

Senator BRANDIS—Has Mr Wilcox been engaged in this work since 2 April 2009?

Mr Maynard—No, Senator.

Senator BRANDIS—In Mr Wilcox's invoices, has he itemised the work that he has done?

Mr Maynard—He has itemised it to the extent that it is able to determine how many hours on any given day for the particular events that were on those days.

Senator BRANDIS—Has Mr Wilcox charged a separate fee for reading time?

Mr Maynard—I would have to check.

Senator BRANDIS—Just cutting to the chase, what I would like you to do please— and you will need to take this on notice—is simply to produce all the invoices, thank you.

Senator Ludwig—They may be commercial-in-confidence.

Senator BRANDIS—They will not be, Minister.

Senator Ludwig—We will take it on notice and have a look at it. I am just putting that caveat on it for the moment.

Senator BRANDIS—Minister, from my own experience the professional fees of counsel retained by the Commonwealth are always made a matter of public record. There is no element of commercial-in-confidence in relation to it. This man was retained by the Commonwealth to perform a task at a rate which is a matter of public record in respect of published terms of inquiry. He did that work; he has billed the Commonwealth as a consultant—indeed as a barrister—and his invoices are properly and routinely a matter of public record.

CHAIR—Notwithstanding, it has been taken on notice and the minister has made some extra comments. We can move on.

Senator BRANDIS—I do not see why we should have concealment about something as commonplace as this.

CHAIR—No-one has suggested that. It has been taken on notice.

Senator Ludwig—You are the only one who has suggested that.

Senator BRANDIS—Minister, you were the one who suggested that it may be commercial in confidence, which is nonsense.

Senator Ludwig—May. I do not know, and I am sure you do not know, what is in the receipts and documents. It is worth just putting that caveat on it. If they are as you have described them, I probably do not see any problem with it. But I have not seen them and, on that basis, I think it is worthwhile just articulating the caveat so that you cannot say no caveat was raised. You do seem to require caveats to be placed; otherwise you assume that none are there. So therefore I think it is incumbent upon me to raise the caveat.

Senator BRANDIS—You may think so, Minister. I am just assuming that the rules of relevance that have been recited by the chairman will be adhered to faithfully by the government and that its general approach of being a pro-disclosure government will also be seen to be something less than empty rhetoric. Mr Maynard or Mr Kovacic, what about costs beyond the \$550 per hour over about 600 hours? Perhaps you could work that out for me roughly in your head, Senator Cash, while I am asking these questions. Whatever costs have been absorbed by the department—concerning which you are going to come back to me when you provide the written answer to that question—have there been any other costs associated with the inquiry?

Mr Maynard—During part of the consultation processes it was necessary to hire some venues to conduct the consultations. There was also the production of a discussion paper and a report, and both of those items were costed. To limit the number of things going on notice, I advise you that Mr Wilcox's total fees were \$326,974. The cost of the production of the discussion paper was \$4,199.36. The cost of the production of the report was \$6,529.67. The advertising of the discussion paper—it was advertised in the major metros on two occasions—had a total price of \$26,110.89. Venue hire was \$2,648 and catering \$443.96.

Senator BRANDIS—What about outlays? I asked about outlays as well.

Mr Maynard—Senator, I have provided you with the detail I have. We can take the rest on notice.

Senator BRANDIS—So the figures you have given me are all the costs that you are able to inform the committee of today?

Mr Maynard—That is correct.

Senator BRANDIS—Thank you. So in addition to that there will be outlays and there will be the absorbed cost by the departmental officers. Presumably there will be transport and travel costs?

Mr Maynard—My apologies, Senator; you are quite correct. Travel costs are \$3,822.31.

Senator BRANDIS—Was Mr Wilcox given an allowance?

Mr Maynard—He was.

Senator BRANDIS—What was that?

Mr Maynard—Senator, I do not have that information at hand, but I can provide that to you on notice.

Senator BRANDIS—Thank you very much. Was this an allowance for overnight stays?

Mr Maynard—Yes.

Senator BRANDIS—How many overnight stays did Mr Wilcox claim the allowance for?

Mr Maynard—I will take that on notice.

Senator BRANDIS—Alright. Did Mr Wilcox work from his own chambers or did he work from premises provided by the Commonwealth?

Mr Maynard—He worked from his own premises.

Senator BRANDIS—What about the secretariat assisting him? Did they work out of the department?

Mr Maynard—Yes.

Senator BRANDIS—I see. So there will be no rental. We would not expect to find any rental cost?

Mr Maynard—No.

Senator BRANDIS—Are there any ongoing costs in relation to this inquiry or have all the costs now been fully incurred?

Mr Maynard—They have been fully met. We have no ongoing costs.

Senator BRANDIS—The recommendations of the Wilcox report, if adopted, would see a weakening of certain of the powers of the ABCC under its act. Can you identify for me please, Mr Lloyd, which particular powers will be affected were the recommendations of the Wilcox inquiry to be adopted?

Mr Lloyd—I would not want to get into the passing of judgement or a view on whether they are weakened or not.

Senator BRANDIS—Let me withdraw the word ‘weakened’ and substitute it with a less tendentious word, ‘altered’.

Mr Lloyd—One obvious prominent recommendation was that there be a retention of the power that we have to conduct compulsory examinations. However, the report recommended that there be different supervisory oversighting arrangements to the exercise of that power.

Senator BRANDIS—In what way?

Mr Lloyd—That before requiring someone to attend an examination, the matter would be considered and a notice issued as recommended by a senior member of the AAT.

Senator BRANDIS—That is a procedural step that is not in the current act?

Mr Lloyd—That is right. Also related to that power, he recommended that the Commonwealth Ombudsman, not the Fair Work Ombudsman, receive a video and a transcript of every examination so that he could be informed and review how the power was being exercised. Another recommendation was that the penalties which apply to contraventions in the building industry be set at the same level as those that will be found in the Fair Work Act. These are penalties in relation to unlawful industrial action, coercion, discrimination—those types of contraventions. And the penalties levels in the Fair Work Act are less than those that apply in the Building and Construction Industry Improvement Act.

Senator BRANDIS—How are they different?

Mr Lloyd—There are a number of them, but in essence the key summary would be that contraventions that under our current act for a body corporate are \$110,000 per contravention would be reduced to \$33,000.

Senator BRANDIS—So the penalties are reduced by two-thirds?

Mr Lloyd—That is right. He has recommended a similar adjustment of the penalties for individuals. They go from \$22,000 to \$6,600.

Senator BRANDIS—If the penalties are being reduced by two-thirds, presumably that is going to have an effect on their effectiveness as a deterrent to unlawful conduct.

Mr Lloyd—The report is there, it is to be considered by the government. I think I have to be very careful about proffering a view as to the impact of that.

Senator BRANDIS—I am not asking you to express a view on government policy. I am asking you to express a view, which I do not think you need to be a professional criminologist to express, on the likely effect on the prohibition of unlawful conduct if the penalties for that conduct were reduced by two-thirds.

Mr Lloyd—It would certainly follow that you would expect the penalties for the contraventions would be less. The impact on conduct, of course, is influenced by a number and a range of issues, including education and compliance activities as well as penalties, but certainly they are reduced. His recommendation is that there be a significant reduction.

Senator BRANDIS—So you would expect the effect on conduct of this reduction in the penalties by two-thirds to be noticeable?

Mr Lloyd—I think that with the impact on conduct, as I say, penalties are certainly one part of it.

Senator BRANDIS—That is the part I am interested in.

Mr Lloyd—Yes, but I think that to make a judgment on the impact on conduct there are a number of elements that you have to take into account, and how they all play out is hard to say.

Senator BRANDIS—Mr Lloyd, I take it you are not seriously suggesting that the reduction of the penalties by two-thirds will have no impact on conduct.

Mr Lloyd—What I am saying—and I will keep repeating it—is that I think that it recommends a reduction in the penalties.

Senator BRANDIS—Yes, we know that.

Mr Lloyd—But, as I keep saying, there are a number of factors that influence conduct in the industry. Prosecutions and penalties are one element, but there are other elements as well. I am not prepared to speculate as to the future.

Senator BRANDIS—It is not speculation, Mr Lloyd. We all know that conduct and the incidence of unlawful conduct are likely to be influenced by a range of factors. We all know that one of the influences on the propensity of individuals to engage in unlawful conduct is penalties and the level of penalties. If that were not the case then penalties would have no deterrent effect at all, and everybody knows that that is nonsense. So, just focusing on the impact on the deterrent effect of these penalties and allowing for the fact that, as you have rightly said, the penalties will not be the only factor that influences conduct—you do not need to say that again; I think we all understand that—it is inevitably the case that an alteration of the level in penalties is going to have some impact on their effectiveness as a deterrent, isn't it?

CHAIR—Nonetheless, you are not required to answer speculation.

Senator BRANDIS—Do not interrupt my question, Mr Chairman; you are supposed to be chairing this neutrally.

CHAIR—Do not be so—

Senator BRANDIS—Do not interrupt my question, Mr Chairman.

CHAIR—I will conduct the business of this committee in an orderly way. Mr Lloyd has already indicated in response to the same question that he does not want to speculate. While you can say you are not asking him to speculate, it is obvious to everyone in this room that that is exactly what you are asking him to do. I am simply reminding him that he is not required to speculate if he does not want to.

Senator BRANDIS—Mr Lloyd, would you answer my question now, please.

Mr Lloyd—I really have nothing to add to what I have answered.

Senator BRANDIS—I am asking you about something that you did not tell me about before, so you do have something to add. Mr Lloyd, allowing for the reservations you have

made, do you accept that the significant reduction of penalties, by two-thirds, is going to have some impact—which I am not asking you to quantify—on the effectiveness of those penalties as a deterrent?

Mr Lloyd—I am not prepared to speculate on that. What I am prepared to say is that obviously, if the maximum penalty is reduced by two-thirds of what it was previously, you would expect that the penalties which will be awarded would be less.

Senator BRANDIS—What effect will that have?

Mr Lloyd—As I say, it is difficult to judge. There are a number of factors which impact on conduct.

Senator BRANDIS—You have already told us that. I am not asking you about that. I am asking you about this one particular factor.

Mr Lloyd—You would expect the penalties would be less. There were penalties awarded just recently, even last week, which exceed the recommended maximum.

Senator BRANDIS—Go on, Mr Lloyd.

Mr Lloyd—I have finished.

Senator BRANDIS—I am still waiting for the answer, though. Will it have some effect, which I am not asking you to quantify, on the effectiveness of the penalties as a deterrent?

CHAIR—Mr Lloyd has already answered that.

Senator BRANDIS—Not in my opinion, Mr Chairman.

CHAIR—He has told you that he does not want to speculate about that. That is the answer to your question, Senator Brandis.

Senator BRANDIS—Mr Lloyd?

Mr Lloyd—I have nothing to add. I think I have answered all of your questions to the best of my ability.

Senator BRANDIS—Have you spent your professional career, Mr Lloyd, as a public servant?

Mr Lloyd—Yes, I have.

Senator BRANDIS—Has most of that professional career, or a substantial part of it, been in this field of public policy?

Mr Lloyd—Yes, it has.

Senator BRANDIS—And you are not in a position to offer a view to the committee on the deterrent effectiveness of penalties in the field of industrial law after all of your experience in the field? Is that what you are really telling this committee?

Mr Lloyd—No, Senator. I have views on that, but—

Senator Ludwig—He is not required to give you an opinion.

Mr Lloyd—In my role as the CEO of the organisation, I cannot afford to give you my opinions. I am prepared to answer questions about facts and about how we go about our business.

Senator BRANDIS—Mr Lloyd, you are an expert, so your opinions are a question of fact. That is the point. You know about this area of policy. You have a deep knowledge of this area of policy. The opinions you hold—

Senator CAMERON—It is not his opinions that he is here for.

CHAIR—Order! Order!

Senator BRANDIS—The opinions you hold are a question of fact; they are important and they are relevant.

Senator Ludwig—We are now bordering on the ridiculous.

CHAIR—And I agree.

Senator Ludwig—We seem to have launched from opinions into policy and back again. I understand the witness has answered the question.

CHAIR—That is right.

Senator BRANDIS—You have told us you have opinions on this matter, Mr Lloyd. Are you telling the committee that you are not prepared to inform the committee of your opinions?

CHAIR—Mr Lloyd has indicated to the committee that he does not want to speculate on that. You can ask the question and repackage it many, many different ways, but I think Mr Lloyd has now answered your question on a number of occasions.

Senator BRANDIS—Mr Chairman—

CHAIR—And if you have not got any new questions—

Senator BRANDIS—I do.

CHAIR—Well, then, move on, please.

Senator BRANDIS—Mr Lloyd, I want to focus on the evidence you just gave that you had views on this matter—and I am sure you do, on the basis of your long and deep knowledge of the area. I would like to know what your views are in relation to the effect upon conduct of reducing penalties for unlawful industrial conduct.

Senator Ludwig—Mr Lloyd is here to respond to questions in relation to the commission. I am not sure he is here to answer speculative views that he may hold about a range of matters that Senator Brandis may want to ask him. Senator Brandis, I am sure you will be able to pursue those in another forum, in another way. Here, Mr Lloyd has made himself available to answer questions in relation to the Australian Building and Construction Commission. If Senator Brandis does not have any questions in relation to that then we could move on, Chair.

CHAIR—Yes.

Senator BRANDIS—I have many, many questions.

CHAIR—Well, move on to them, please.

Senator BRANDIS—Mr Lloyd, I am interested in your views. You declined to answer my question earlier because you said it would be speculation. You then said that you had views about the matter. I am not asking you to speculate. I am asking your views—what are they, please?

CHAIR—Mr Lloyd has already told you that he does not feel that it is his position to offer those views. He has answered that question.

Senator BRANDIS—That is not an answer.

CHAIR—If you do not have any more questions—

Senator BRANDIS—Mr Chairman, would you please stop being so partisan?

Senator Ludwig—Senator, that is the same thing you raise every time: when you do not like the answer and you do not like the chair's ruling, you say, 'Stop being partisan.' Will you stop making comments that are irrelevant to the position that is being put. That seems to be your problem, Senator Brandis. There is no issue here. If you are not going to ask questions in relation to the commission, Chair, we should move on.

Senator BRANDIS—The witness, Minister, has told the parliament that he has views in relation to the matter about which I am asking—

Senator Ludwig—That does not mean that you can—

Senator BRANDIS—May I finish, please?

Senator Ludwig—I thought you had! I am sorry, Senator Brandis. My apology.

Senator JACINTA COLLINS—It's the never-ending story.

Senator BRANDIS—Senator Collins, I am speaking. The witness has told the parliament that he has views about a matter which are within his professional expertise that are directly relevant to the question I asked. My question is, 'What are those views?' I have not received an answer to that question.

CHAIR—I know what your question is, Senator Brandis, because you have asked it several times, but the witness has already answered it. If you do not have a new question, move forward.

Senator BRANDIS—What are your views, Mr Lloyd?

Senator Ludwig—We are now entering a phase of badgering the witness.

Senator BRANDIS—What are your views on this matter, within your professional expertise, Mr Lloyd?

Senator Ludwig—That is not a question in relation to the commission, Senator Brandis. I know you would like it to be, but it is not.

Senator BRANDIS—Your sensitivity on this matter is as a minister! You are entitled to be partisan because you are a minister. The chairman is not allowed to be partisan. Unfortunately, he is.

CHAIR—If there are no further questions, we will move forward. Do any other senators have—?

Senator BRANDIS—I have more questions, Mr Chairman.

CHAIR—Then move to them, because if you persist on this, I will seek the call from other senators, and if there are no new questions, we will then move on to the next outcome.

Senator BRANDIS—Mr Lloyd, can you recite to the committee, please, the extent of your experience in relation to matters of industrial policy and industrial law enforcement?

Mr Lloyd—Except for a short sojourn doing work for fire and emergency services for about six months, my whole career has been in industrial relations.

Senator BRANDIS—Please tell us about it.

Mr Lloyd—Most recently, I have been a sitting member of the Australian Industrial Relations Commission. Before that, I occupied the job that Mr Kovacic is now in, in the department. Prior to that, I was CEO of the Department of Labour Relations in WA, a position I commenced in 1996. Before that, I held a range of senior executive jobs for both the federal and state Labor governments in industrial relations.

Senator BRANDIS—Mr Lloyd, in relation to that part of your career, which you have told me involved being a member of the Industrial Relations Commission, in that capacity were there occasions on which you were required to impose penalties?

Senator Ludwig—That does not appear to be a question in relation to the Australian Building and Construction Commission. If there are not any questions in relation to the Australian Building and Construction Commission, may we move on, Chair? I know we could be entertained while Senator Brandis asks a range of questions about Mr Lloyd's previous career—

Senator JACINTA COLLINS—He thinks he is back in a court room.

Senator Ludwig—and I would be only too happy if Senator Brandis also asked me a range of questions about my previous career, but I do not think they are relevant to the estimates in the examination of the Australian Building and Construction Commission.

Senator BRANDIS—Mr Lloyd, what is the answer to my question, please?

Senator Ludwig—We have now gone to badgering the witness.

Senator JACINTA COLLINS—Point of order, Chair. I would like you to rule on this issue of relevance.

CHAIR—If a question about someone's background goes directly to the experience they bring to their role in the ABCC that is allowed. But I would ask that the question be a little more concise than 'Tell us about your employment history.'

Senator BRANDIS—You need to keep up with the evidence, Mr Chairman. We are dealing with a different question. The question I asked, which elicited the objection, is, 'Whether, in your capacity as a member of the Industrial Relations Commission, you were ever concerned with the imposition of penalties in relation to unlawful conduct.'

Mr Lloyd—No.

Senator BRANDIS—No?

Mr Lloyd—No.

Senator BRANDIS—As a member of the Industrial Relations Commission, were you ever required to consider unlawful conduct?

Mr Lloyd—Well, no. The enforcement of the Industrial Relations Act is in the hands of the Federal Court. The Industrial Relations Commission conducted cases in the sense that it sat and heard submissions about disputes, it made rulings and decisions, but the enforcement role is in the hands of the Federal Court.

Senator BRANDIS—Mr Lloyd, either in that capacity or at any other time in your career in this field, has it ever been your professional concern to be involved in the imposition or enforcement of penalties, or to consider the nature of and causes of unlawful industrial conduct? You are obliged to tell the truth, Mr Lloyd.

Mr Lloyd—Oh, yes—

Senator JACINTA COLLINS—Oh, for goodness sake. Chair, this is bordering on badgering.

Senator BRANDIS—What is the answer to my question, Mr Lloyd?

Mr Lloyd—Could you just repeat it, Senator?

Senator BRANDIS—Either in your capacity as a member of the Industrial Relations Commission or in any of the other roles that you have occupied in this area of policy, has it ever been your concern to be involved in the imposition or enforcement of penalties or to consider the causes of unlawful industrial conduct?

Mr Lloyd—In relation to the first part of the question which I think you said relates to the imposition of penalties, that has not been a role I can recollect ever having been involved in. The second part is much broader—it concerns the issues relating to unlawful industrial causes. That would have been involved in most of my roles through those years.

Senator BRANDIS—Sure.

Mr Lloyd—Industrial action is obviously integral to the work that you are often engaged in as a departmental official.

Senator BRANDIS—I would have expected that to be the answer, Mr Lloyd. Let us just focus on that aspect of your role, so that this question can be as focused as it may be. On the basis of that professional experience, what conclusions have you drawn about the relationship between penalties and unlawful conduct? Are penalties useful as a deterrent against unlawful conduct?

Mr Lloyd—It is a fairly basic proposition that penalties are part of a scheme of the law to ensure that the law is adhered to. That is fundamental, it seems.

Senator BRANDIS—I would have thought so, Mr Lloyd, which is why I was wondering why it has taken so long to get there. Given that, is the severity of penalties relevant to the occurrence or incidence of unlawful conduct?

Mr Lloyd—I would be reluctant to venture a view on that. My sense is that, in some cases, it would appear that penalties are relevant and have a direct impact, proportionally, to the level. My reading over the years is that that is not always apparent.

Senator BRANDIS—I am sure that is true, too, Mr Lloyd. Let us focus again on that part of your answer concerning those occasions where the levels of penalties do have an impact on the incidence of conduct. In those cases, what would you expect to be the effect on the incidence of conduct of a substantial reduction in penalties?

Mr Lloyd—I think we are coming back to what I answered before. It is one factor in the influencing of conduct and one factor only.

Senator BRANDIS—What effect does that one factor have?

Mr Lloyd—I feel that it is inappropriate to speculate on what the outcome of the impact would be.

Senator BRANDIS—The problem that I have, Mr Lloyd, is that, since you are expert in this field and you have views—as you have told us—anything you say about this matter is not speculation. You are an expert and you know about these things. Any more than it is not speculation for an expert diagnostician to arrive at a view about the cause of a disease, you, as an expert in this field, if you have views, are not speculating. You are telling us what your expert opinion is. So, it is perfectly appropriate for you to respond, Mr Lloyd.

CHAIR—Again, I just remind you that you are not required to speculate.

Senator BRANDIS—Please do not speculate; please tell us what your expert opinion is.

Mr Lloyd—Senator, my view is that the penalties are set by the parliament and the bills are introduced by the government. My role as the commissioner is to administer the act to the best of my ability, and I am of the view that it is not my position to speculate on the impact of a reduction in penalties.

Senator BRANDIS—Mr Lloyd, because I have to assume you are telling me the truth, it follows from what you have said that your views on this matter—this field in which you have worked for most of your professional life—are nothing but speculation. Is that right, Mr Lloyd?

CHAIR—All right, we are going to move on. Are you going to move on to another line of questioning?

Senator BRANDIS—I am going to move on to another topic.

CHAIR—Then do so.

Senator BRANDIS—But I would like the answer to that question, Mr Lloyd.

CHAIR—No. We have done this enough and you are not going to constantly repackage the same question, when Mr Lloyd has answered time and time again. So move on, Senator Brandis.

Senator BRANDIS—I have a point of order, Mr Chairman. It is plain to everyone who is present here that Mr Lloyd is evading the question. And you should, as chair, insist that a witness before the parliament answers the question.

Senator JACINTA COLLINS—On that point of order, it is plain to everyone here that this witness is being badgered. I think the chair has been far too generous and you should be called to order, Senator Brandis.

CHAIR—I think Mr Lloyd has been responsive. He has answered your questions, and that is all he is required to do. They have been answered—they have been asked and repackaged and re-asked and the answer is the same. If you have no other line of questioning—

Senator BRANDIS—I have many other lines of questioning.

CHAIR—Then move to them.

Senator BRANDIS—I can see I am going to get no further with Mr Lloyd, whose views are only speculation.

CHAIR—Nor are you getting any further with the chair.

Senator BRANDIS—Mr Lloyd, what other changes have been recommended by the Wilcox inquiry to the powers of the ABCC under its act?

Mr Lloyd—The third main change I would mention is that there are recommendations about the structure of the specialist division: that there be a director appointed to head it up and that that director implement policies, programs and priorities determined by an advisory board. The advisory board would comprise the Fair Work Ombudsman, the director and a number of part-time members.

Senator BRANDIS—Is that largely an administrative change?

Mr Lloyd—Yes.

Senator BRANDIS—As I said some time ago, I am mainly, indeed entirely, wanting you to focus on the effect on the powers of the ABCC. Whether you characterise that as a weakening of the powers, which plainly it is, or whether you do not want to adopt that word, we will just say ‘the effect’ on the powers of the ABCC.

Mr Lloyd—I think the main effect on the powers is, as I mentioned, the changed oversighting arrangements for the compulsory examination power. There is no other, I do not think. I am looking at the recommendations summary here and there seems to be no other major recommendation affecting the powers.

Senator BRANDIS—I have gone as far as I am being permitted to go by the chairman in asking you your views about the effect of the reduction by two-thirds of the penalties against illegal conduct. So let us turn to the procedural inhibitions which are now recommended to be introduced in relation to the requirement of attendance for examination. Can you just run us

through, Mr Lloyd, in your own words, the way you understand that were this recommendation to be adopted—that is, the interposition of the AAT in the process—what additional procedural steps that would involve.

Mr Lloyd—At the moment, the consideration of whether there are reasonable grounds to proceed with a compulsory interview is a decision taken by me and Mr Dalglish under the act. What the Wilcox report has recommended is that that decision be taken by a presidential member of the AAT.

Senator BRANDIS—So that is to be the first procedural step?

Mr Lloyd—Yes, there would be a submission of written material.

Senator BRANDIS—To whom? To the AAT?

Mr Lloyd—To the AAT, yes.

Senator BRANDIS—Yes, and what happens then?

Mr Lloyd—If the AAT thinks there are reasonable grounds, then a notice would be issued. The sense of the recommendations of Wilcox is that the examination would then proceed much as it does now. He has added one other recommendation which might impact on that. He has recommended that persons summoned for interview be paid reasonable expenses and any loss of wages.

Senator BRANDIS—So the first step in the new process, as it is envisaged, is an application to the AAT?

Mr Lloyd—Yes.

Senator BRANDIS—Is that an application on notice to the proposed examinee?

Mr Lloyd—I don't think so.

Senator BRANDIS—If you don't know, perhaps one of the other officers does. Yes, Mr Dalglish?

Mr Dalglish—My understanding is no.

Senator BRANDIS—So it is an ex parte application?

Mr Dalglish—Correct.

Senator BRANDIS—Is there a hearing, or is it to be disposed of on the papers?

Mr Dalglish—My understanding is that it will be in the nature of an application for a search warrant, for example, for a magistrate—

Senator BRANDIS—So somebody has to make what amounts to a complaint. Do they have to swear to that on oath?

Mr Dalglish—That level of detail is not referred to in Mr Wilcox's report.

Senator BRANDIS—All right. So the process resembles a search warrant. Is the test to be the same as for a search warrant?

Mr Dalglish—No, the test that Mr Wilcox recommends adopts some of the formulation from the BCII Act and adds some additional areas where there are thresholds to be achieved.

Senator BRANDIS—Some additional mandatory thresholds?

Mr Dalglish—Yes.

Senator BRANDIS—Could you run me through those, please? In fact, could you direct me to the pages of the Wilcox report which deal with it? If you know, just run me through them—these additional hurdles or mandatory thresholds, as you would call them. Just to make sure that we are not at cross-purposes, Mr Dalglish, we are talking about that procedural step involving an application to a presidential member of the AAT for an order. I am directing you to the question of what it is proposed to be required—what steps, tests or, to use your word, ‘thresholds’—to be satisfied under these recommendations. You have told me that there are additional thresholds. I would like you to tell me what the proposed additional ones are.

Mr Dalglish—If you look at recommendation 4 on page 76 of the report, it says:
... written material, which may include evidence on the basis of “information and belief”, that:
(a) the Building and Construction Division has commenced an investigation into a particular suspected contravention ...
That is an existing threshold.

Senator BRANDIS—Let us focus on the new ones please.

Mr Dalglish—The new ones are (c) and (d):

(c) it is likely to be important to the progress of the investigation that this information or evidence, or those documents, be obtained; and
(d) having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact upon the person of being required to do so, insofar as this is known, it is reasonable to require that person to attend before the Director or a Deputy Director ...
Those are the two. They are not in the legislation.

Senator BRANDIS—The proposal is that all four of (a), (b), (c) and (d) must be satisfied before the order by the presidential member of the AAT is made.

Mr Dalglish—That is their recommendation.

Senator BRANDIS—I just want to make sure that I am interpreting this correctly. These are not alternative criteria; these are accumulative criteria, each of which is mandatory to the appropriate level of satisfaction.

Mr Dalglish—That is correct.

Senator BRANDIS—What is the appropriate level of satisfaction? It says ‘satisfied’. Do we interpret that as meaning ‘reasonable satisfaction’—satisfied on the balance of probabilities? What is the test of satisfaction?

Mr Dalglish—It is not specified in the recommendation.

Senator BRANDIS—What do you understand it to mean, or do you not have a view about what it means?

Mr Dalglish—There is a provision in our legislation, in the BCII Act, which says, ‘if the ABC commissioner believes on reasonable grounds’ certain things—

Senator BRANDIS—That is in (b). Following through recommendation 4 on page 76, the overall requirement is that a presidential member of the AAT be satisfied about something. Then (b), which you tell me is an existing standard, says that there must be reasonable grounds for a particular belief.

Mr Dalglish—Yes.

Senator BRANDIS—What we do not have in Mr Wilcox’s recommendation is whether the qualifier ‘reasonable’ is to be read into the requirement of satisfaction. I think you were referring to an existing provision of the act but I am pointing out to you that the existence of reasonable grounds is already in one of the four cumulative matters about which the presidential member of the AAT’s relevant satisfaction is required.

Mr Dalglish—Correct.

Senator BRANDIS—So coming back to my question, what do you understand to be the level of satisfaction required on each of the other three matters? In (b) it has to be reasonable grounds and (a) is, I suppose, a question of fact but would be uncontroversial. But the two new ones are (c) and (d): ‘likely to be important to the progress of the investigation’. Must he be reasonably satisfied?

Mr Dalglish—They are the words that the recommendation uses.

Mr Kovacic—Perhaps I could assist?

Senator BRANDIS—Yes, Mr Kovacic.

Mr Kovacic—In terms of the report itself, Mr Wilcox is not explicit. However, at paragraph 6.23 of his report he indicates:

The President and Deputy Presidents of the AAT are all experienced lawyers and accustomed to balancing

considerations of public and private interest. They deal regularly, often at short notice, with applications for warrants and orders. There are presidential members resident in every State.

I think that is probably the extent of guidance that is included in the report.

Senator BRANDIS—Well, that is no guidance at all because that does not tell us what the standard is. All right, we seem to have established that—

Mr Kovacic—I might add too that the recommendations of Mr Wilcox are currently for the consideration of government and that there is a process of consultation that is underway in terms of informing government’s consideration of those recommendations. The report itself, as both Mr Dalglish and I have made clear, is silent in terms of what the sort of requirement

might be in terms of the AAT satisfying itself. I am not sure that there is a lot that can be added around that particular dimension of the recommendation.

Senator BRANDIS—Well, I am just wondering, Mr Kovacic; that is why I am asking these questions. To get back to you, Mr Dalgleish—assuming that we cannot take the appropriate test of the required standard of satisfaction issue any further—is it (c) and (d) that are the new thresholds?

Mr Dalgleish—Correct.

Senator BRANDIS—So (a) and (b) are already there?

Mr Dalgleish—In effect.

Senator BRANDIS—So, under the existing law—and, of course, under the existing law it is not a presidential member of the AAT who issues the order, is it? It is you or Mr Lloyd?

Mr Dalgleish—That is correct.

Senator BRANDIS—Right. You are not required to be satisfied—whatever the standard to which you are required to be satisfied is we will leave to one side—before you make an order that it is likely to be important to the progress of an investigation that the information or evidence or the relevant documents be obtained. So you have, under the existing law, a capacity to order an investigation if it satisfies criteria (a) and (b) which may, as we know, extend to circumstances in which you have a belief that unlawful conduct has occurred but it may not be the case that the investigation of a particular individual or the production of a particular set of documents is important to the investigation; it may be incidental. Is that right?

Mr Dalgleish—It is not a statutory requirement but if you are looking at a contribution that the witness is going to make you would not issue a notice unless there was some forensic purpose in it.

Senator BRANDIS—That is my very point. Of course you would not. But there is the additional hurdle that Mr Wilcox's report recommendation does not impose that test. It says that the relevant decision maker has to be satisfied that it is important to the investigation, which is plainly a much higher threshold than that it be relevant to the investigation. Do you see my point?

A decision maker who is given the task of considering criteria (a) and (b), which you tell me are the existing criteria, is not required as well to say that the particular documents or the examination of the particular person are important to the investigation; they may be relevant to the investigation, which is a lower threshold. So, as you yourself have said, these are additional thresholds. There will be cases, won't there, where an order for the production of documents or an order for the production of a particular individual—which would be appropriately the subject of an order under the existing act—would, because of the inclusion of this new and higher threshold, not be able to be made, were the recommendation to be adopted under the new act? Is that right, Mr Dalgleish?

Senator Ludwig—Chair, that is asking the witness to speculate.

Senator BRANDIS—No, it is not a speculation—

Senator Ludwig—Chair—

CHAIR—Yes, it is.

Senator BRANDIS—Well, let me make it perfectly plain that it is not a speculation. You understand what I am—

CHAIR—Just because you say it is not hardly changes it!

Senator BRANDIS—You understand, Mr Dalglish, as a person who applies this legislation—

Senator Jacinta Collins interjecting—

Senator BRANDIS—Do not worry about the barracking from the Labor Party—

CHAIR—No, there is no barracking. Mr Dalglish, I do not want you speculating on these matters.

Senator BRANDIS—And I do not want you to either, Mr Dalglish. Mr Dalglish, you understand as a person who is professionally involved in the application of the existing legislation that you have to be satisfied of certain requirements. You have directed the committee's attention, and through it, the parliament's attention, to this additional and higher threshold and, on the basis of your experience, as one of the people who actually apply the act, you understand, don't you, that if the additional, higher threshold—your words—of (c) were also a requirement, there may—

Senator Ludwig—Chair, we are again going into speculation.

Senator BRANDIS—I have not finished my question, Minister.

CHAIR—But it is already asking the witness to speculate.

Senator BRANDIS—Whenever you are trying to protect a witness from answering a question, you interrupt.

CHAIR—I am not. I am asking you not to ask the witnesses to speculate; that is all.

Senator BRANDIS—I have asked the witness not to speculate, Chair.

CHAIR—Just because you say, 'I'm asking you not to speculate,' and then go on to ask them to speculate does not mean you are not asking them to speculate.

Senator Ludwig—It is a novel way—

Senator BRANDIS—Let me give you an example—

Senator Ludwig—The gig is up, Senator Brandis. Everyone is awake to what you are doing.

CHAIR—You do not have to be a lawyer to understand plain English.

Senator BRANDIS—Let me give you an example, Mr Dalglish.

CHAIR—All right. So it is a new question?

Senator BRANDIS—No, it is the same question, but—

CHAIR—Well, if it is the same question, move on.

Senator BRANDIS—But I—

CHAIR—You are not going to ask people to speculate. I have been incredibly tolerant with you, Senator Brandis—

Senator BRANDIS—Mr Dalglish—

CHAIR—so move on.

Senator BRANDIS—I am not asking you to speculate; I am asking you to inform the parliament of the way in which you as the actual decision maker—the actual decision maker—under the existing legislation apply the test. Okay?

Mr Dalglish—Yes. When we look at the potential to issue a notice under section 52, we would consider where, forensically, that evidence fits into the evidentiary matrix.

Senator BRANDIS—Precisely. And, if it is relevant to the inquiry, then you would be satisfied—allowing for the fact that other criteria under the existing act are also satisfied?

Mr Dalglish—Well, I do not agree that just to be relevant is enough.

Senator BRANDIS—No, because there are other criteria.

Mr Dalglish—Because you can ask 65 people the same question and the answer would always be relevant, but it would not progress the investigation.

Senator JACINTA COLLINS—Senator Brandis is trying 65 times.

Senator BRANDIS—Don't worry about the barracking from the Labor Party, Mr Dalglish; just keep going with your answer.

Mr Dalglish—From a forensic litigator's point of view, you would issue a section 52 notice because you were forensically interested in that information. So you—

Senator BRANDIS—So that is the test you would apply?

Mr Dalglish—Well, yes.

Senator BRANDIS—Okay. That is fine.

Mr Lloyd—Senator, we go through a very thorough process now before we exercise the power. We mandate there has to be a statement in support considered by me and Mr Dalglish before a notice is issued. That statement in support comes from investigators and is signed off at a very senior level in the organisation. In addition, the legal officers of the organisation put out a judgement as well that there are reasonable grounds for a notice to be issued. It is quite a thorough process undertaken now.

Senator BRANDIS—Nobody has suggested that it is not. I am just interested in establishing the difference between the new higher threshold test and the test that you apply under the existing law. Mr Dalglish, notwithstanding the barracking from the Labor Party, has now told us the way in which the existing test is applied. It is as plain as can be that the interposition of this new element in (c), were that recommendation to be adopted, is a higher

test. Coming to (d), 'having regard to the nature and likely seriousness of the suspected contravention', I do not know that the word 'nature' adds a lot here, but the expression 'likely seriousness' certainly does, because that introduces into the process of reasoning required of the decision maker the notion—

Senator Ludwig—I am just trying to clarify this. Is the commission now being asked, about the recommendations, to proffer a view about those recommendations? The recommendations are currently before government. It would be speculation for the commission to speculate on those recommendations. If it is factual questions about the commission and its current operations, I am perfectly happy with that—if that is the question that is being asked. If it is not the question being asked, I question whether or not it is the appropriate body to raise the recommendations with. If you want to direct your questions about the recommendations to government, we will take those as they come.

CHAIR—I think that is the correct course of action.

Senator BRANDIS—I had not finished my question, so how can you possibly rule on an objection to a question you have not heard?

CHAIR—I just did.

Senator BRANDIS—I have not asked the question yet.

CHAIR—You were already well through your question and it was obvious to everyone in this room what you were doing.

Senator BRANDIS—Of course it is obvious to the Labor Party. That is why you want to repress the evidence. You do not want it to be revealed—

CHAIR—Move on to another subject, please.

Senator BRANDIS—All right. Now, Mr Dalglish or Mr Lloyd—

CHAIR—You are moving on to another subject?

Senator BRANDIS—I am dealing with another aspect of subrecommendation (i)(d).

CHAIR—You are not going to ask the officers to give opinions or to speculate, are you?

Senator BRANDIS—I am not going to be asking the officers to speculate, no.

CHAIR—Or give opinions.

Senator BRANDIS—The opinions of the officers may be relevant if they are within their area of professional expertise and their actual work.

Senator JACINTA COLLINS—Not to the budget estimates.

Senator BRANDIS—Yes, for the budget estimates.

Senator JACINTA COLLINS—No, not in relation to the Wilcox report.

Senator BRANDIS—Officers can be asked to express opinions but they may not be asked to express opinions on government policy. I am not asking any of the officers to express opinions on government policy.

CHAIR—Let's see how we go.

Senator BRANDIS—In relation to this phrase the 'likely seriousness of the suspected contravention', it was your evidence, wasn't it, Mr Dalglish, that this recommendation, were it to be adopted, would be a new element?

Mr Dalglish—It is not presently required in the statute.

Senator BRANDIS—Is it the fact that, in applying the test under the existing act, the likely seriousness of the suspected contravention is not a matter that you are required to take into account?

Mr Dalglish—We are not required as a matter of statute, but as a matter of practice you would not issue a notice in circumstances where what was being discussed was trivial.

Senator BRANDIS—I am sure you would not. Of course you would not.

Mr Dalglish—To have a notice issued, you brief counsel, you get the hearing room, you organise the transcript and you fly me around. You do not go to all that trouble if it is trivial.

Senator BRANDIS—I am sure that is right and I am sure the commission, under the existing act, would not go through this process in relation to trivial matters. It would only go through this process in relation to non-trivial matters. Is that what you are saying?

Mr Dalglish—Yes.

Senator BRANDIS—The point I am making to you and what I am asking you, drawing upon the fact of your existing practice and what Mr Wilcox's recommendations appear to mandate, is that there a distinction, isn't there, between a process of reasoning whereby you would make an order in relation to non-trivial contraventions and a requirement that mandates you to have regard to the likely seriousness of the contravention? In other words, the class of contraventions that are likely to be comprehended by those words is a smaller class than the class of contraventions you have identified as non-trivial.

Mr Dalglish—There is a problem—if I can say this—in looking at the recommendations of statute because, if you read that as a statute, having regard to the likely seriousness of the suspected contravention, by definition you are investigating a contravention that has already happened.

Senator BRANDIS—Sure.

Mr Dalglish—So, if I saw that wording in the legislation, I would be concerned that we might be talking about something in the future.

Senator BRANDIS—That is a fair point, Mr Dalglish. I am with you on that. But, given that so far as we know the government has not yet adopted this particular recommendation—it has not been translated into statutory language—but my questions are in relation to the recommendations themselves, this is the best indication of the proposed scheme that we have, which is why I am sticking to Mr Wilcox's words.

Senator Ludwig—It is a matter before government, as we have said, Senator Brandis. And I am not sure, Chair, how questioning the commission in relation to matters that are currently before government is relevant.

Senator BRANDIS—It is relevant, Minister, because these are questions about the Wilcox inquiry—and nobody has suggested for a moment that questions about the recommendations of the Wilcox inquiry are not relevant—to determine the extent to which, to use Mr Dalgleish's words, 'the higher thresholds' are going to produce outcomes and constrain industrial law enforcement in a way that it is not constrained or limited under the existing law. That is the relevance. It is central to what the ABCC does.

Senator Ludwig—I think you have moved into the area of speculating, quite frankly, Senator Brandis.

Senator BRANDIS—I am at pains to say, Minister, that I am not asking the officers to speculate. But the point I am making to you, Mr Dalgleish, is that under the way you apply the test as you have described it—in other words, the fact of the existing practice of the commission—to deal with non-trivial matters, the test proposed by Wilcox in subclause (d)—that is, to apply as an additional higher threshold a graduated standard delimited by the likely seriousness of the suspected contravention—may exclude non-trivial matters that are not currently excluded from your consideration. May it not?

CHAIR—Again, I think the minister is right on this matter. This is a report. It is before government. It is not in legislative form. And you are asking Mr Dalgleish to give an opinion on how it may look in its legislative form and then make a comparison on that. I think that is—

Senator BRANDIS—I am not asking him about the legislative form; I am asking about the way in which these words compare with the fact of the existing practice of the commission.

CHAIR—He has already made the point—I think, quite correctly—that it is a report and it is not in a statute form. He has already raised the difficulty of answering those questions in that form with you.

Senator JACINTA COLLINS—And this is speculating about matters that are—

Senator BRANDIS—Mr Dalgleish, the Labor Party can barrack all they want because they are embarrassed by this. I am trying to avoid—

Senator JACINTA COLLINS—What are we embarrassed about?

Senator BRANDIS—I am directing these questions to establishing the difference between the new tests that were recommended by Wilcox—

Senator Ludwig—There is the problem, Senator Brandis.

Senator JACINTA COLLINS—When we have a legislation inquiry you can call them as witnesses.

Senator Ludwig—They are recommendations before government.

Senator BRANDIS—I am trying to establish the difference between the new tests recommended by Wilcox and the practice of the commission.

Senator Ludwig—It is inappropriate to proceed in that way. You know that and the committee knows that.

Senator BRANDIS—You have told me what the fact of the existing practice of the commission is. What I am trying to do, Mr Dalglish, is to ask your expert opinion, as a person whose mind is directed to these issues as part of your daily work—so you speak not speculatively but as an expert. I am trying to find out the difference between the fact of the existing practice of the commission and the additional thresholds and tests recommended by Wilcox. Can you tell me what the difference, in effect, would be?

CHAIR—The difficulty is, whether you label Mr Dalglish as an expert or not, you are still asking him—

Senator BRANDIS—Mr Dalglish is an expert. He is one of the commissioners who apply this test on a frequent basis.

CHAIR—If you want to portray Mr Dalglish as an expert, I have no opinion on that. Whether you are asking Mr Dalglish as an expert or as a non-expert, you are asking him to speculate.

Senator BRANDIS—I am asking him not to speculate.

CHAIR—It makes no difference whether the person is an expert or not an expert. If you are asking them to speculate, you are asking them to speculate.

Senator BRANDIS—Mr President—Mr Chairman—you are so—

CHAIR—President! I have been elevated so quickly.

Senator BRANDIS—I had better not say what I was going to say. You are so slow on the uptake, Mr Chairman. The fact that Mr Dalglish is an expert, as appears to be acknowledged, means that for that very reason what he has to say about the application of tests in which he has expertise is not speculation.

CHAIR—I simply disagree with you, Senator Brandis.

Senator BRANDIS—He is advising the parliament through this committee—

CHAIR—I am not a lawyer and do not have to put up with this nonsense.

Senator BRANDIS—You sure aren't.

CHAIR—In this forum we do not have to put up with this nonsense. That is my ruling. Do you have further questions?

Senator BRANDIS—I have further questions.

CHAIR—Then move on.

Senator BRANDIS—I will. Mr Dalglish, what difference will it make to the application of this test if the decision maker has to have regard to the new criterion of the likely seriousness of the suspected convention?

CHAIR—Senator Brandis, if you are going to continue to ask people to speculate, I will simply go to another senator.

Senator BRANDIS—I am asking him not to speculate.

CHAIR—You just asked him to speculate on that. Move on without asking people to speculate.

Senator BRANDIS—Are you ruling that question out of order?

CHAIR—Yes, I am.

Senator JACINTA COLLINS—Yes, he has. Twice.

Senator BRANDIS—The Labor Party is certainly worried about this one.

CHAIR—No. Let us just be clear about this. You know very well, Senator Brandis, that there are processes and standards that the Senate committees adhere to—

Senator BRANDIS—Yes, including the neutrality of the chair.

CHAIR—You are the only one who does not. All I am doing is trying to keep good order. I am trying to keep you in check with the normal processes and guidelines.

Senator BRANDIS—You cannot even keep a straight face when you make these political speeches, Mr Chairman. Mr Dalglish—

CHAIR—You do not have the call.

Senator JACINTA COLLINS—I think we should suspend.

Senator BRANDIS—I move that we have a private meeting, please.

CHAIR—I will call a private meeting at the break. Senator Cameron has the call.

Senator BRANDIS—Point of order, Mr Chairman. I am in the middle of a series of questions.

CHAIR—You have constantly defied the chair. I have asked you to ask appropriate questions. You have refused to. I am going now to another senator.

Senator BRANDIS—Point of order, Mr Chairman.

CHAIR—What is your point of order, Senator Brandis?

Senator BRANDIS—I am proceeding to a different question. Having observed that I was prevented from asking the question that I had previously asked, I was moving to a different question.

Senator JACINTA COLLINS—You were asking for a meeting, as I recall.

CHAIR—So what is your point of order?

Senator BRANDIS—The point of order is that the basis upon which you ruled that you would withdraw the call from me was factually wrong.

CHAIR—I do not have to make rulings about who I call.

Senator BRANDIS—Point of order, Mr Chairman.

CHAIR—There was not a point of order last time. What is your point of order?

Senator BRANDIS—Are you now ruling that the opposition cannot pursue this line of questioning with these witnesses?

CHAIR—No. What I am ruling is that you cannot ask the witnesses to speculate. You have constantly done that. You have defied my rulings constantly.

Senator BRANDIS—Point of order, Mr Chair.

CHAIR—I am ruling on the last one. I am still unclear what your point of order is. What is your new one?

Senator BRANDIS—The point of order, Mr Chairman, is: you cannot possibly make that ruling when I have prefaced each question obediently to your ruling by asking the witness not to speculate.

CHAIR—We have addressed that many times. Senator Cameron, you have the call.

Senator CAMERON—Thanks. Mr Lloyd—

Senator BRANDIS—Point of order, Mr Chairman.

CHAIR—No. There are no more points of order, because you have not made one.

Senator BRANDIS—I have a point of order, Mr Chairman.

CHAIR—Senator Cameron, you have the call.

Senator CAMERON—Commissioner Lloyd, thank you. Is the Code Monitoring Group still in operation?

Mr Lloyd—Yes.

Senator CAMERON—Who is involved in the Code Monitoring Group?

Mr Lloyd—Assistant Commissioner Draffin is our representative.

Senator CAMERON—What other government representatives are there?

Mr Lloyd—Assistant Commissioner Draffin is assistant commissioner for operations.

CHAIR—Senator Cameron, we have another point of order.

Senator HUMPHRIES—I wonder if the committee could meet in private to discuss a matter to do with the conduct of the hearings.

CHAIR—The committee will at the break.

Senator BRANDIS—Point of order, Mr Chairman. If a member of the committee—and Senator Humphries is the deputy chair—calls for a private meeting then you must suspend and have the private meeting.

CHAIR—Which standing order is that, Senator Brandis?

Senator BRANDIS—I am just pointing out that that is—

CHAIR—Oh, I must because you think so.

Senator BRANDIS—Yes, you must.

Senator JACINTA COLLINS—You are not even a member of this committee, and you come in disrupting our conduct and reflecting poorly on the chair. Can we just continue?

CHAIR—If it is the rule and I am wrong, I will happily apologise. I do not think it is the rule. If you point me to the rule, I am happy to reconsider that. Senator Cameron?

Senator CAMERON—Thank you. Commissioner Lloyd—

Senator BRANDIS—Mr Chairman, are you—

CHAIR—Is this a point of order?

Senator BRANDIS—Yes, it is.

CHAIR—Another one.

Senator BRANDIS—You are now denying to Senator Humphries his request for an immediate private meeting on the basis that you are unaware of the rule that requires—

Senator JACINTA COLLINS—He did not ask for an immediate one; you did.

Senator BRANDIS—a private meeting when called for by a member of the committee?

CHAIR—Point me to the rule, Senator Brandis.

Senator BRANDIS—We have a secretary for that. Could you take advice, please, Mr Chairman, on the matter?

CHAIR—While the secretary is checking, Senator Cameron has the call.

Senator CAMERON—Thank you. Commissioner Lloyd, on the issue of the Code Monitoring Group, you have indicated it is still in operation.

Mr Lloyd—Yes.

Senator CAMERON—What government departments are still involved in this?

Mr Kovacic—Senator, perhaps I could take that one. The Code Monitoring Group is chaired by the Department of Education, Employment and Workplace Relations. It involves representatives from the Department of Finance and Deregulation, the Department of Defence, the Department of Infrastructure, Transport, Regional Development and Local Government, the Department of the Prime Minister and Cabinet, the Office of the Federal Safety Commissioner and the Office of the Australian Building and Construction Commissioner.

Senator CAMERON—What resources are put into this group by government organisations? What is the financial cost to government of this?

Mr Kovacic—We would have to take that on notice. The Department of Education, Employment and Workplace Relations provides secretariat support to the Code Monitoring Group, but we would have to take on notice the specifics of your question.

Senator CAMERON—Would you be the lead agency—if I could use the words loosely—on this and be able to get me the details for each agency and the costs for involvement in this?

Mr Kovacic—We could do our best. I am not entirely sure that we would be able to get it across all agencies, because it would vary depending on the nature of projects that they may have underway as well as the frequency of meetings of the Code Monitoring Group. But we will do our best.

Senator CAMERON—Thanks. Commissioner Lloyd, are you aware of a company called LU Simon?

Mr Lloyd—Yes, I am.

Senator CAMERON—Are you aware of a matter back on 19 July 2007, when the ABCC sought to revoke the federal entry permit of a Mr Adrian McLoughlin, a CFMEU organiser?

Mr Lloyd—I am aware we have had at least one case involving Mr McLoughlin and his permit.

Senator CAMERON—In relation to LU Simon, was LU Simon ever the subject of any discussions at the Code Monitoring Group prior to 19 July 2007?

Mr Lloyd—I am unaware of that.

Mr Kovacic—We would have to take that on notice.

Senator CAMERON—Was the ABCC aware that LU Simon may not have been code compliant back in 2007?

Mr Draffin—The ABCC has conducted a number of audits on LU Simon in respect of the code. Those matters have been reported through to the Code Monitoring Group.

Senator CAMERON—How many audits have you carried out on LU Simon?

Mr Draffin—I would have to take that on notice.

Senator CAMERON—Would it be more than the average?

Mr Draffin—Late last year, there were some inspections conducted on LU Simon, I think on three sites, but there may have been previous activity involving LU Simon.

Senator CAMERON—When did the activity start with LU Simon—the inspections and the close monitoring of LU Simon by the ABCC?

Mr Draffin—I would have to take that on notice.

Senator CAMERON—Mr Lloyd, are you aware that in the course of the proceedings before the Australian Industrial Relations Commission one of the directors, Mr Moschoyiannis, gave evidence by way of a character reference for Mr McLoughlin, the CFMEU organiser?

Mr Lloyd—That matter does ring a bell.

Senator CAMERON—Are you also aware that LU Simon worked on significant projects around the building industry in Victoria?

Mr Lloyd—Yes, a major builder in the state.

Senator CAMERON—A major builder?

Mr Lloyd—That is what I would describe them as.

Senator CAMERON—Who was not code compliant?

Mr Lloyd—Mr Draffin explained the audits, and the purpose and outcomes of those.

Senator CAMERON—I am coming to some correspondence that was sent to the company by Nigel Hadgkiss, the then deputy commissioner of operations. Are you aware of correspondence dated 19 July?

Mr Lloyd—No, I am not. It is not unusual for us to write to major builders on occasions, but that particular letter I do not specifically recall.

Senator CAMERON—Is it normal for the deputy commissioner of operations to deal directly with a code compliance issue on a one-on-one basis with a company?

Mr Lloyd—It is not unusual. We deal with a lot of matters and I would not think it is particularly unusual, no.

Senator CAMERON—In the correspondence dated 19 July, Mr Hadgkiss indicated that LU Simon had sought to participate in tenders going back to 30 March 2006 and that ABCC was aware of this and these issues were on the record. Can you tell me why nothing was done about LU Simon between March and July if you knew they were not code compliant, or you suspected that they were not code compliant?

Mr Draffin—I am not too sure of the first occasion that we had dealings with LU Simon in terms of their code compliance. As I said, I would have to take that on notice.

Senator CAMERON—I am just wondering why, after the officer of the company gave a character reference in the industrial commission on behalf of the organiser, he received correspondence from Nigel Hadgkiss saying that he would be recommending to the Code Monitoring Group that the company should not be allowed to participate in government tenders.

Mr Lloyd—It is difficult to speculate without us having the letter and the reasons behind it.

Senator CAMERON—Would I be right in thinking that as soon as this officer of the company gave evidence, even though you knew that they may not be code compliant, you then take steps to write to them and threaten them in terms of their compliance?

Mr Lloyd—I am not prepared to answer that. I do not have the letter. I will take this on notice, but it would be just speculation on my behalf.

Senator CAMERON—I do not want you to speculate. I ask you to take that on notice and go to the specific issues as to when you knew, or you suspected, that the company was not code compliant and why you only acted on that compliance issue after the officer gave evidence on behalf of a union organiser.

Mr Lloyd—We will take it on notice.

Senator CAMERON—You have been asked much about penalties in terms of the operation of the ABCC. Isn't it true that one of the other areas you have a brief on in the industry is productivity?

Mr Lloyd—Yes.

Senator CAMERON—Do you monitor productivity developments in the industry?

Mr Lloyd—Yes. As you know, I have called for two reports into the productivity performance of the industry.

Senator CAMERON—Are you aware of *The economic importance of the construction industry in Australia* report developed by Allen Consulting Group for the Australian Constructors Association?

Mr Lloyd—I am aware that they did produce a report, yes.

Senator CAMERON—The Allen Consulting Group is a reputable organisation to make judgements on some of these issues?

Mr Lloyd—They are a substantial organisation. If the Australian Constructors Association engaged them, my presumption is that they are.

Senator CAMERON—Can you enlighten me how the ABCC measures multifactor productivity in the industry?

Mr Lloyd—We do not particularly measure multifactor productivity. I know it has been referred to in the reports we got from Econtech. They discussed various measures of productivity—multifactor productivity, labour productivity et cetera. I cannot off the top of my head give you the details and the measurement of multifactor productivity.

Senator CAMERON—The reports that you engaged Econtech to do on your behalf to allegedly analyse the effectiveness of the ABCC said that productivity in the building and construction industry had increased by 9.4 per cent, the CPI had been reduced by 1.2 per cent simply because of the ABCC and GDP had increased by 1.5 per cent. The Allen Consulting Group do not see anything like that in the industry. They have indicated that the multifactor productivity in the industry basically follows productivity improvements in the rest of the economy. Why is there such a difference from this reputable organisation analysing as an independent source from the ABCC? Why is there such a difference in terms of your reports?

Mr Lloyd—I recollect that the Allen Consulting Group finding—and it is reported in the latest Econtech report—was that there was a gain in non-residential construction industry multifactor productivity of 12.2 per cent in the five years to 2007. You mentioned the CPI and the GDP. The Econtech econometric modelling found that the CPI was 1.2 per cent lower than it otherwise would have been and GDP was estimated to be 1.5 per cent higher than it otherwise would have been.

Senator CAMERON—I do not think anyone other than the ABCC and Econtech actually defend that position anywhere. In fact, all I have seen since then have been academic critiques of that and critiques from the Hon. Murray Wilcox QC in his report. So you are really on your

own in this economic miracle that the ABCC, under your assertions, has delivered, aren't you?

Mr Lloyd—I do not agree with that.

Senator BRANDIS—Chairman, why aren't you ruling that question out of order on the basis that it is asking the witness to express an opinion of the kind—

Senator CAMERON—I am not asking for an opinion; I am just saying that he is isolated in his views.

CHAIR—Don't interrupt unless you have a point of order, Senator Brandis.

Senator BRANDIS—Mr Chairman, on a point of order: if you were to show integrity consistently with your earlier rulings concerning me, you would rule that question out of order as it is inviting speculation or the expression of a view, which is impermissible. If you are going to rule my point of order out of order, as no doubt you will, I require you to state reasons, Mr Chairman.

CHAIR—You can require anything you like—

Senator BRANDIS—Yes, I can.

CHAIR—But, good on you.

Senator CAMERON—I hope I am not making such a botch of it as you think Senator Brandis is!

Senator BRANDIS—Chair, have you ruled on the point of order?

CHAIR—You told me that undoubtedly I would rule against it and I do not want to disappoint you.

Senator BRANDIS—Have you? May I inquire as to the grounds for your ruling, Mr Chairman?

CHAIR—No.

Senator BRANDIS—Why are questions asking speculation from government senators permissible—

CHAIR—I will listen carefully to the questions.

Senator CAMERON—Justice Wilcox—

Senator Ludwig—Sorry, Senator Cameron, I was just making sure you were not asking speculative questions because if you were I will raise the objection!

Senator CAMERON—Justice Wilcox has asked for hard evidence of the assertions that you made in that report and basically says that you failed to provide any hard evidence to back up your report. He also went on to indicate that after his call for hard evidence the only people who brought supposedly hard evidence were the John Holland Group and all of the assumptions in both your evidence and John Holland's evidence was highly questionable. Do you have any comment on that?

Mr Lloyd—He did not ask us for hard evidence. He asked for those who were going to respond to his inquiry and I decided not to make written submissions to the inquiry; I thought it was inappropriate in my role as the ABCC to do so. I recognise that Econtech made submissions on the productivity issue as did some academics, as you mentioned. As to John Holland and where he has come down, that is a view that he might have but others obviously have different views.

Senator CAMERON—Given that you have got a statutory responsibility in productivity, do you have any experts from productivity within the ABCC?

Mr Lloyd—No, we do not.

Senator CAMERON—You do not have any experts? Are they all enforcement people that you have got?

Mr Lloyd—No, we have a range of people in the various roles—the investigations roles, in legal, in communications.

Senator CAMERON—But not on productivity?

Mr Lloyd—No, we do not have an economic analysis group. That is why I went out and got Econtech to do the studies.

Senator CAMERON—Even though the assumptions that they have in their report are nonsense. Do you accept that?

Mr Lloyd—I do not accept that.

Senator CAMERON—We have gone through this before.

Mr Lloyd—Yes, we have.

Senator Ludwig—I recall that.

Senator CAMERON—You recall that. Well, I would like to see some hard evidence from the ABCC. Could you take on notice to come back to me once again on the criticism from Justice Wilcox, the criticism in the report I just mentioned and my criticism—

Senator Ludwig—Chair, as I understand it the response from Mr Lloyd in relation to the Wilcox report was that he did not make a submission.

Senator CAMERON—I am not going there.

Senator Ludwig—I am just making sure that you are not. The question that you are now asking and the earlier question you asked was whether or not Mr Lloyd had any productivity specialists. That was also a 'no'. The question you are now asking, as I understand it—I may not have been as attentive as Senator Brandis—is for him to take on notice a range of questions that go to, it seems, the report itself. I think the earlier two questions rule that out.

Senator CAMERON—The Allen Consulting Group report specifically, and the criticism from Justice Wilcox in relation to the assertions that were made by the ABCC in relation—

Senator Ludwig—Perhaps you could just ask it again in fairness to the witness.

Senator CAMERON—Can you take this on notice. Can you give me some advice as to the critique by the Allen Consulting Group in terms of the ABCC's approach and why the Allen Consulting Group have productivity outcomes so vastly different from the Econtech report that you commissioned and paid for. Also, can you provide me with your views on notice in relation to Justice Wilcox's argument that there is no hard evidence from the ABCC on the claims that you make publicly about your contribution to increased productivity in the industry.

Mr Lloyd—It is inappropriate for me to pass comment on the Wilcox report findings and observations when the matter is under consideration by the government. I have given my views confidentially to the government. It would be inappropriate for me, when the matter is under consideration, to engage in a public debate about the Wilcox report, which is about my office.

Senator BRANDIS—Point of order, Mr Chairman. Senator Cameron's question, I submit to you, is a perfectly proper question and that objection is not a proper objection. It is similar to objections taken to answering my questions, which you, with respect, erroneously upheld, but if you apply the procedural rules of the Senate and the custom and practice of this committee, it is perfectly proper for senators to ask witnesses their views on matters relevant to the estimates, as long as they do not ask them to express opinions about government policy. Given that Senator Ludwig, on behalf of the government, has advised the committee that the government is considering the matter, so no policy has yet been arrived at, it is perfectly appropriate for Senator Cameron or me, or any senator, to ask this witness his views about a report to the government.

CHAIR—But not on the basis that Mr Lloyd is being asked to speculate on any of those issues.

Senator BRANDIS—He is not being asked to speculate.

CHAIR—I am not so sure.

Senator CAMERON—I am not asking him to speculate.

Senator BRANDIS—He is not being asked to speculate by Senator Cameron any more than he was being asked to speculate by me.

CHAIR—Unfortunately, I was distracted somewhat when Senator Cameron asked his question. I will ask him to ask it again and then we will have a more considered view.

Senator CAMERON—I am simply asking the ABCC to provide me their comments—not their speculation—on the view by Justice Wilcox that building industry labour productivity over the last few years has increased but by only a modest increase. I think that is a reasonable request. Also I would like to get some view on the other work that has been done by Allen Consulting Group, which also reflects a similar view to Justice Wilcox and is so far at odds with the Econtech report, funded by the ABCC, that it brings into real doubt the validity of the Econtech report. I would just be asking for you to take on notice my request for your analysis of why your report and these other analyses are so different.

CHAIR—You are asking Mr Lloyd to take it on notice?

Senator CAMERON—Yes.

Senator JACINTA COLLINS—In relation to ABCC's previous analysis.

Senator CAMERON—Yes.

Senator JACINTA COLLINS—That is relevant.

Senator Ludwig—I might say I still think the question relates to asking Mr Lloyd to express views about those recommendations, which I do not think—

Senator CAMERON—No, I am not asking about the recommendations.

Senator Ludwig—The report itself then. On that basis, I am not inconsistent; I am maintaining that it is not a matter that Mr Lloyd should respond to in relation to his views. He can answer questions in relation to the commission, he can answer questions in relation to the operation of the commission and a range of other budget related matters which I am sure we could go to. So far as there is a question in amongst it all, I think that question is outside—

CHAIR—Mr Lloyd has demonstrated quite a good working knowledge on what should be acceptable and what should not be acceptable in these Senate hearings. Senator Cameron has asked him to take it on notice. I am happy that Mr Lloyd takes that on notice and answers the question insofar as it complies with his knowledge and understanding of the way that the Senate works at estimates.

Senator BRANDIS—So you are not ruling that question out of order? You are saying it is a proper question and may be taken on notice.

CHAIR—I am indicating I think there may be some elements of that question that can be answered and there may be some elements, when it is looked at in print in front of Mr Lloyd, that may not be able to be answered.

Senator BRANDIS—Unless you rule out of order, it is in order. I would submit to you that it is in order. The minister is quite right: the question in the form in which it was put to Mr Lloyd by Senator Cameron—although the subject matter was different—was, in form, substantially the type of question that I was asking of Mr Lloyd and Mr Dalglish that you ruled out of order. I submit that all those types of questions—that is, questions that ask for the views of these people who have professional expertise and knowledge in this field which is relevant to the agency under examination—are all admissible.

CHAIR—Thank you for your submission.

Senator CAMERON—Can I put this position—

CHAIR—Do you want to put a submission as well?

Senator CAMERON—My submission, yes, on the point of order. I am not asking for the ABCC's view. I am asking them to look at the analysis that has been made of their econometric modelling by Econtech, and to provide the committee with details as to why the outcome of the Econtech modelling is so at odds with other modelling and analysis that has been done in the industry. It is not an opinion; it is about the facts and the underpinning to the econometric modelling that has been taken by two different consulting groups. I think that is a

fair and reasonable question. It is not about opinion, it is not about speculation; it is about where do these differ and why.

CHAIR—Mr Lloyd, are you happy to take it on notice, based on what I said earlier?

Mr Lloyd—Yes.

Senator CAMERON—Mr Lloyd, one of the roles that you have adopted over the previous period is to survey your clients?

Mr Lloyd—Yes.

Senator CAMERON—In 2009-10, you targeted a number of clients. That survey of clients you say gives 75 per cent of clients as satisfied or highly satisfied. Are you aware of that?

Mr Lloyd—Were you referring to an annual report, Senator?

Senator CAMERON—It is the 2009-10 report, I understand.

Mr Lloyd—I know we answered a question on notice on this last time.

Senator CAMERON—I am going back to it now. I think it may be under 'Deliverables', page 343. I do not have that document with me but that is where my reference comes from.

Mr Lloyd—Yes, I see it is in the budget statement.

Senator CAMERON—It stated that 75 per cent of surveyed clients are satisfied or highly satisfied.

Mr Lloyd—That is the target for this year and next year.

Senator CAMERON—What is a 'client'?

Mr Lloyd—A client is a person or organisation that deals with the ABCC.

Senator CAMERON—Is an employee of a company a client?

Mr Lloyd—Could be.

Senator CAMERON—Is a union a client?

Mr Lloyd—Could be.

Senator CAMERON—Were any unions or employees surveyed as part of your sample?

Mr Lloyd—Yes, they were last time. We gave you an answer to your question on notice on that.

Senator CAMERON—I am just wondering where you are up to now. You have done it again since then, haven't you?

Mr Lloyd—No, we have not done the survey for the current year. We will wait until the year ends.

Senator CAMERON—I will place these questions on notice again. How large is the sample of clients surveyed and how are they selected? Can you provide the committee with the full survey methodology? In relation to the target of 75 per cent of industry participants

being satisfied or highly satisfied, how is an industry participant defined? Is each employee in the industry considered an industry participant? If employees are not directly surveyed, are there union representatives surveyed? If so, do they indicate satisfaction or dissatisfaction? Can you disaggregate business responses to responses from employees and unions in the industry? If so, can you provide those disaggregated outcomes to the committee?

Mr Lloyd—Yes, I will take that on notice, Senator.

Senator CAMERON—I think that finishes my questions.

Senator BRANDIS—By the way, Chair, the rule I was referring to before was parliamentary privilege rule 1 subrule 9, which does not give you a discretion to delay a private meeting as you have done. Anyway, let us go back to where we left off with Mr Lloyd and Mr Dalglish. Just to remind ourselves where we were through this long process of trying to get some answers, you have told me, Mr Dalglish or Mr Lloyd—I cannot remember which of the two you it was—that recommendations (c) and (d) introduce new thresholds and these are higher thresholds. These are matters to which you do not turn your mind at the moment as you have told me?

Mr Dalglish—No, these are new statutory tests.

Senator BRANDIS—What are the thresholds?

Mr Dalglish—In the existing statute, those tests (c) and (d) do not exist. But, in the course of us applying the existing tests and issuing a notice, we will look at the forensic importance of the evidence to be obtained and we will look at the seriousness or otherwise of the contravention in the sense that we would not go through this process for a trivial matter.

Senator BRANDIS—Sure. That is fine. I am just trying to bring us back to where the discussion was left in abeyance. We know from your evidence that (c) and (d) are new thresholds. But, in answer to my questions, when I have invited you to compare the existing process of reasoning which you engage in with what would be required were these recommendations in this language to take statutory form, you have told me in relation to (c) in your earlier evidence that, at the moment, you would have to be satisfied that the matter was forensically relevant.

There are three elements of (d). One is the nature and likely seriousness of the suspected contravention. The next element of (d) is any alternative method of obtaining the information and (c) is the likely impact upon the person being required to do so. We have not got to the second and third of the three elements of (d). In relation to the first of the three elements of (d), that is the likely seriousness of the suspected contravention, you have told me that at the moment, applying the existing tests, you would only have regard to non-trivial matters. You would not have regard to trivial matters. Turning to the next element, which is any alternative method of obtaining information, the existence or non-existence of an alternative method of requiring information is not a matter which, when you apply the tests under the existing statute, you are required to turn your mind to?

Mr Dalglish—That is correct.

Senator BRANDIS—Thank you. In relation to the last of the three elements in (d), the likely impact upon the person being inquired into, when you turn your mind to the application of the tests under the existing statute, that is not a matter that you are required to turn your mind to either, is it ?

Mr Dagleish—That is correct.

Senator BRANDIS—Help me here please, Mr Dagleish. Your determinations to require an examination or require the production of evidence under the existing statute are judicially reviewable are they not?

Mr Dagleish—Yes, there has been one decision by His Honour Mr Justice Marshall in respect of the issuing of a notice.

Senator BRANDIS—So he decided that it was judicially reviewable.

Mr Dagleish—Yes.

Senator BRANDIS—So you would know, as a decision maker exercising a statutory function against stated statutory criteria, that for a decision maker to have regard to irrelevant considerations is a ground for having the decision set aside. You would be aware of that; it is an ordinary principle of administrative law.

Mr Dagleish—Yes, or to make it for an improper purpose, for example.

Senator BRANDIS—There are several, but I just want to concentrate on that one. Having regard to irrelevant criteria is one of the several grounds where an administrative decision maker may fall into an error of law. You are aware of that rule.

Mr Dagleish—Correct.

Senator BRANDIS—So these matters, you have told me, that you are not required to have regard to under the existing statute but you would be required to have regard to were the Wilcox recommendations to be adopted, transform matters that are irrelevant to matters that are relevant.

Mr Dagleish—No, I do not agree with that. The seriousness or otherwise of a suspected contravention is a matter that—

Senator BRANDIS—Sorry, Mr Dagleish: I have to stop you there. Because of the argument with the chair and the barracking by Labor senators, the evidence in relation to (c) and the evidence in relation to the first of the three elements of (d) did not perhaps come out as clearly as it might have done, but your answers in relation to the second and third elements of (d) were unambiguous and specific.

Senator JACINTA COLLINS—Could you allow the witness to answer the question, please.

Senator BRANDIS—I am confining myself—

Senator JACINTA COLLINS—We do not care for your explanation. We are asking to hear the witness answer the question.

Senator BRANDIS—I am confining myself. We know that when you are in trouble, Senator Collins, you start barracking.

Senator JACINTA COLLINS—We know you are confined.

Senator BRANDIS—I am confining myself to the answers you have just given me, Mr Dalglish, when you agreed with me that the second element of (d), that is, the availability of alternative methods of obtaining information, and the third element of (d), that is, the likely impact on the person concerned, are not matters which you are required to turn your mind to, and I am raising this issue of error of law having regard to irrelevant considerations.

Mr Dalglish—But they are not irrelevant considerations. There is a difference between what is an irrelevant consideration and what is something that you are required as a matter of statute to take into account. We take these things into account. We are not required to by statute—

Senator BRANDIS—Do you always do so?

Mr Dalglish—We need to look at each one. If you look at the alternative means of obtaining information, evidence or documents, we would always look at that, because we only use the section 52 power as a last resort. I will always look at the statement in support to see that the witness has been asked to provide a statement and has declined to do so. That is something that is invariable.

Senator BRANDIS—I will come back to that, but just to complete this—

Mr Dalglish—But it is not required by the statute—

Senator BRANDIS—That is right.

Mr Dalglish—Which was your question.

Senator BRANDIS—That is right. I will come back to that, but before I do: going to the last matter, what about the likely impact on the person concerned? Do you always take that into account? Or if you have a clear-cut case which satisfies the existing statutory criteria of matters to be taken into account or about which—to use the language of the statute—you have to be satisfied, will you ever, or will you always take into account, as well as the statutory criteria, the likely impact on the person concerned?

Mr Dalglish—If you say an individual case, the answer is no. Generally you are not going to put somebody through this process unnecessarily if it is not an important aspect of an important investigation. So from that point of view you will generally take that into account.

Senator BRANDIS—Mr Dalglish, as I understand you, what you have told me—and correct me if I am wrong—is that those matters are factored into your decision making on the criteria of whether or not it is an important matter to be taken into account or whether it is, I think you said, an important investigation, not an independent and self-sufficient criterion. Do you understand the distinction?

Mr Dalglish—Yes, I do.

Senator BRANDIS—Am I right in understanding your earlier answer?

Mr Dalglish—Yes.

Senator BRANDIS—What I am at pains to point out to you is that, whereas in being satisfied as to the matters about which you are required to be satisfied under the existing act, you may factor into your process of reasoning and reaching those conclusions the other matters that you have mentioned, and under these recommendations they are additional and self-sufficient matters. Do you see my point?

Mr Dalglish—I do. If you were applying statutory criteria, you have to rigidly insist—

Senator BRANDIS—Did you say ‘rigidly’—‘you have to rigidly insist’?

Mr Dalglish—You have to rigidly apply what each statutory test is—

Senator BRANDIS—Yes, exactly.

Mr Dalglish—for the issue of the notice to be valid.

Senator BRANDIS—Exactly. My point is that, by requiring what are not currently rigid statutory criteria as additional separate self-sufficient rigid statutory criteria, what these recommendations would do were they to be enacted in this form of words, would be to make it more difficult in a given case for a decision maker to reach the appropriate level of satisfaction, for the simple reason that there are—to use your words—new rigid statutory criteria here that are not rigid statutory criteria under the existing law. Do you see my point? Is that right?

Mr Dalglish—Whether it is more difficult or not will depend on the individual case, but one thing you would have to do is to have it as a heading in this supporting documents each particular criteria.

Senator BRANDIS—Exactly.

Mr Dalglish—And you will have to address each particular criteria.

Senator BRANDIS—At the moment there are two—(a) and (b). Under the Wilcox recommendations, there would in fact be six. There would be (a) and (b), which is the same, and there would be (c) and there would be the three different criteria set out in (d). So you have gone from applying three rigid statutory criteria to six rigid statutory criteria. Instead of being required to be satisfied about two things, the decision maker is required to be satisfied about six things, isn't he?

Mr Dalglish—There is a qualification on the sixth one because it says ‘the likely impact on the person’—whatever that means—‘insofar as this is known’. So it is not quite as—

Senator BRANDIS—Well, let it be assumed that it is known. If it is known, there are six and, if it is not known or cannot be known, there are five. Is that right, Mr Lloyd?

Mr Lloyd—As Mr Dalglish said, if that eventuates as the requirements of the legislation, there would be additional legislative requirements to what is done now. But, as we keep saying, the process we do now is very thorough and in fact covers most of those items.

Senator BRANDIS—Mr Lloyd, I am sure it is very thorough, but I am sure anyone can understand that there is the world of difference between a statute which says, ‘Before you can

be satisfied about something, you have to'—to use layman's language—'tick six boxes' and a statute which says, 'Before you can be satisfied about something, you only need to tick two boxes,' even though the statute says that, in ticking the two boxes, it may be relevant to have regard to matters that, under the proposed changes, are now separate stand-alone criteria for the additional four boxes. Do you see my point?

Mr Lloyd—Yes.

Senator BRANDIS—So that is the way it will work. We transfer discretionary matters that go to the two existing statutory criteria into, to use your words, Mr Dalglish, 'rigid statutory requirements' and therefore translate two requirements to six. Is that right?

Mr Dalglish—Each of which will have to be specifically addressed in the application.

Senator BRANDIS—Yes, that is my point.

Mr Lloyd—I think you said, rather than that they were rigid requirements, that they were requirements you had to deal with rigidly.

Senator BRANDIS—That's fine. I think it amounts to the same thing. That is very helpful. Thank you very much for that. I am going to move on to another matter. How many investigations does the ABCC currently have underway, please?

Mr Draffin—I can answer that question for you, if you just bear with me a second. We currently have 65.

Senator BRANDIS—You will need to take this on notice, but can you tell me, please, the date upon which each of those investigations began and—I am trying to put this as precisely as I can—the stage which each of those investigations has reached. Does that explain with sufficient clarity what I am after?

Mr Draffin—We will endeavour to do that.

Senator BRANDIS—Can you break the current 65 investigations down by state and territory, please?

Mr Draffin—There are currently 33 in Victoria—

Senator BRANDIS—The heartland of industrial conflict—that is where you come from, Senator Marshall, isn't it? There are 33 in Victoria?

CHAIR—Yes, it is where I come from, Senator Brandis.

Mr Draffin—There are 14 in New South Wales, 12 in Western Australia and six in Queensland. That comes to 65.

Senator BRANDIS—None in South Australia, the territories or Tasmania?

Mr Draffin—No, not currently.

Senator BRANDIS—How many investigations has the ABCC brought to a conclusion in the last 12 months?

Mr Draffin—We can answer that: 103.

Senator BRANDIS—Of the 65 investigations that are currently underway, how many were commenced within the last 12 months?

Mr Draffin—I would have to take that on notice.

Senator BRANDIS—Please do. I wonder if, to help me progress these questions, you might be able to give me just a rough estimate. I will not hold you to it, of course, but can you give me just a rough estimate of what proportion of the 65 have been commenced within the last 12 months?

Mr Draffin—In the last fortnight?

CHAIR—In the last 12 months.

Senator BRANDIS—Was it more than half?

Mr Draffin—I would really have to take that on notice. It would be a substantial number, but I would have to do some research to supply an accurate figure.

Senator BRANDIS—If you do not feel comfortable answering, that is fine. You will probably need to take the next few questions on notice. What is the longest running current investigation of the 65 currently underway? Which investigation was the earliest to be commenced?

Mr Draffin—Again, I would have to take that on notice.

Senator BRANDIS—And the date on which it was commenced.

Mr Draffin—Yes.

Senator BRANDIS—Of the 103 investigations completed in the last 12 months, which was the longest running of those investigations? In other words, which was the earliest to be completed? Of the 103 investigations commenced in the last 12 months, what was the average length of those 103 investigations?

Mr Lloyd—One hundred and three is the figure which we have finalised in the last 12 months.

Senator BRANDIS—Finalised? I think I have been using the word ‘completed’. Is there a difference between ‘completed’ and ‘finalised’?

Mr Lloyd—No.

Senator BRANDIS—Let me explore that for a second, Mr Lloyd. When we say ‘completed’ or ‘finalised’—and I am using those two words interchangeably—I assume we mean finalised in every manner, either as a result of being abandoned or not pursued to prosecution. What other ways are investigations finalised?

Mr Lloyd—I think there are two elements: they are closed or they proceed to prosecution.

Senator BRANDIS—Of the 103 investigations finalised last year, how many were, as you say, abandoned, and how many proceeded to prosecution?

Mr Draffin—Again, I will have to take that on notice.

Senator BRANDIS—Were there more abandoned than proceeded to prosecution?

Mr Draffin—Certainly more would have been completed without proceeding to prosecution.

Senator BRANDIS—Without proceeding to prosecution?

Mr Draffin—Yes.

Senator BRANDIS—Within that category, are there some that are resolved in a conciliatory or consensual fashion, and others that are just abandoned for want of evidence, or for some other reason, that persuades you just not to pursue the matter?

Mr Draffin—It could be for both reasons.

Senator BRANDIS—Are there other reasons why investigations are not proceeded with?

Mr Draffin—Invariably they do not proceed because we lack evidence. It might not proceed to prosecution because the matter is not deemed to be serious enough.

Senator BRANDIS—So that is a kind of discretionary abandonment, is it?

Mr Draffin—Yes.

Senator BRANDIS—There are four things then: there are those that are finalised because they proceed to prosecution; there are those that are finalised because they are abandoned for want of evidence; there are those that are abandoned, because, in the exercise of your discretion, you just deem them to be not sufficiently important to pursue; and then there are those that come to a conclusion because there is a consensual resolution of some fashion between antagonistic parties. Is that right?

Mr Draffin—Yes, that would be right.

Senator BRANDIS—Are there any other categories that we have not thought of?

Mr Draffin—I do not think so.

Senator BRANDIS—I would like you to disaggregate the 103 investigations between those four subcategories. I imagine that it is possible, though unlikely, that there may be overlapping categories.

Mr Draffin—There would be, that is correct.

Senator BRANDIS—Can you express where there are overlapping categories as well?

Mr Draffin—Yes.

Senator BRANDIS—Of the 65 current investigations, have prosecutions been commenced in any of them?

Mr Draffin—No. Those 65 are current investigations and have not yet proceeded to a prosecution.

Senator BRANDIS—Do you define the point at which the investigation terminates by the commencement of a prosecution as the point at which the brief is delivered to the DPP and the DPP decides to prosecute?

Mr Draffin—No, that point is when the brief is referred to our internal legal people.

Senator BRANDIS—How many briefs are there at the moment with your internal legal people for prosecution?

Mr Dagleish—I will have to take the precise figure on notice. It fluctuates from time to time, but at any given time it is about 30.

Senator BRANDIS—About 30?

Mr Dagleish—That is before prosecutions.

Senator BRANDIS—To use Mr Draffin's words, the brief has been sent to your internal legal people?

Mr Dagleish—That is right, and it is for consideration as to whether or not a prosecution should be instituted.

Senator BRANDIS—By the way, what is the next step?

Mr Dagleish—If the internal lawyer takes the view that there is, in his or her opinion, reasonable prospects of success for a prosecution he will then brief counsel direct.

Senator BRANDIS—Right.

Mr Dagleish—We will get a written opinion from counsel as to whether or not we have reasonable prospects of success and, if so, on what contravention. If the counsel says there is not enough when we get the advice back that is the end of the matter. But if the counsel says there are reasonable prospects then it will come to the prosecutions committee, which consists of—

Senator BRANDIS—It is like an enforcement committee, is it? That is what it is called: the prosecutions committee?

Mr Dagleish—We will meet from time to time in accordance with when we have the counsel's opinions then we will make a decision as to whether we institute proceedings, having read those opinions.

Senator BRANDIS—I was wrong before, was I not? It does not go to the DPP. The prosecution is instituted internally by your agency?

Mr Dagleish—No. These are civil penalty proceedings instituted by an ABC inspector.

Senator BRANDIS—All right. I would also like to know if you could break up where the 30 or so current cases are in the system: those that are with your internal lawyer, those that are awaiting advice from counsel, those that are before your prosecutions committee and those in which prosecutions have actually commenced so that they are in being at the moment?

Mr Dagleish—Once the prosecution has actually commenced that is another category.

Senator BRANDIS—Another category. Let me ask you that question then: how many current prosecutions are there underway?

Mr Dagleish—At last count it was 26.

Senator BRANDIS—Twenty-six.

Mr Dagleish—Again, it will fluctuate from time to time as matters are completed and new matters come on.

Senator BRANDIS—When you say ‘at last count’, when was that?

Mr Draffin—Last week.

Mr Dagleish—The last executive meeting; last Tuesday.

Senator BRANDIS—Last Tuesday was 26 May, I think. So on 26 May there were 26 prosecutions currently underway?

Mr Dagleish—That is both courts and AIRC.

Senator BRANDIS—Okay. There were approximately 30 matters that were at the postinvestigation and preliminary to the commencement of the prosecution stage?

Mr Dagleish—Correct.

Senator BRANDIS—And there were 65 investigations underway?

Mr Dagleish—Yes, at an earlier stage.

Senator BRANDIS—At an earlier stage. It is perfectly clear to me. How many prosecutions were successfully completed in the last 12 months?

Mr Dagleish—I cannot tell you about the last 12 months but I can tell you—

Senator BRANDIS—Can you do it by calendar year?

Mr Dagleish—I can, but I would have to take that on notice.

Senator BRANDIS—Let’s take each of the last five calendar years—do you take these figures out by calendar year or fiscal year?

Mr Dagleish—The normal way we would do it would be fiscal year but the ABCC started on 1 October 2005. So it would be 1 October 2005 to 30 June 2007.

Senator BRANDIS—Let’s take these periods: the period from 1 October 2005 to 30 June 2006, from 1 July 2006 to 30 June 2007, from 1 July 2007 to 30 June 2008 and 1 July 2008 to 26 May 2009—the most recent reporting period you have. Can you perform the same exercise that I asked for in relation to that 103 figure, that is, in each of those years the number of investigations commenced, the number of investigations referred for prosecution, the number of prosecutions commenced and the number of prosecutions successfully completed?

Mr Dagleish—We will take that on notice.

Senator BRANDIS—You can take all those on notice?

Mr Dagleish—Yes. I do have some figures here about—

Senator BRANDIS—You might as well just read them quickly onto the record before we have afternoon tea, and then we will go on to something else afterwards.

Mr Dagleish—If you look at the proceedings commenced by the ABCC, as opposed to ones which were inherited from the task force, from 1 October 2005 to 1 May 2009 there have been 50 proceedings commenced. Out of the 25 of those which have been finalised there have

been 22 successful and three either discontinued or withdrawn. If you include the matters inherited from the Building Industry Taskforce, from 1 October 2005 to 1 May 2009 there would be 68 proceedings commenced in the courts and the AIRC. Forty-three of those have been finalised, 33 successful, four discontinued or withdrawn and six dismissed.

Senator BRANDIS—Thanks. Lastly, when we speak of ‘prosecutions successfully completed’, that includes where there has been a contested hearing and then there has been, in effect, a guilty plea, doesn’t it?

Mr Dagleish—Yes.

Senator BRANDIS—Can you also, again applying the same exercise, disaggregate in the successful prosecutions between those where there has been a contested hearing and those where there has been—and I know this is technically not the right word, but I think we know what we are talking about—a guilty plea.

Mr Dagleish—An admission of contravention.

Senator BRANDIS—Thank you.

Mr Dagleish—Sometimes agreement extends to what is an appropriate penalty and sometimes it does not.

Senator BRANDIS—Why don’t you give me that figure too—where there is an agreement as to contravention but not an agreement as to penalty, where there is an agreement as to both contravention and penalty and when either or both of those two matters are contested?

CHAIR—We are going to have a private meeting which may take a little while. Before we go, Senator Brandis said that privilege resolution No. 9 indicated that it was a requirement for me to call an immediate meeting if a senator disagreed with my ruling. That is not the case and I have been advised by the Clerk’s office that my ruling was correct.

Senator BRANDIS—If you read the words of subparagraph 9 onto the record you will see that (a) it gives you no discretion to delay a meeting and (b) it contemplates the meeting depending on the issue of the continuation of the questioning. So, if you have been advised to the contrary, the advice, with respect, is erroneous.

CHAIR—Nonetheless, I advise the committee that the clerk’s advice is that my ruling was great.

Proceedings suspended from 3.47 pm to 4.20 pm

CHAIR—I hope I can report to everybody that peace may have broken out. We will all try to work towards that. We will recommence with questions for the ABCC.

Senator CASH—Just picking up from where we left off, what are the alleged contraventions involved in the court proceedings that were referred to—which was the matters in total that the ABCC currently has before the courts?

Mr Dagleish—The 50 proceedings which were initiated by the ABCC—

Senator CASH—And that was in relation to the 33, 14, 12 and six that you outlined for Senator Brandis?

Mr Dagleish—No, they are the investigations.

Senator CASH—Sorry, can we go back to how many matters the ABCC currently has before the courts in total.

Mr Dagleish—The number of current matters is 26.

Senator CASH—What are the alleged contraventions involved in those particular court proceedings?

Mr Dagleish—I only have the figures in respect of the 50 proceedings that were initiated by the ABCC. I do not have the current proceedings.

Senator CASH—Okay. Are you able to take that question on notice?

Mr Dagleish—I can.

Senator CASH—Are you able to refer me to your website and would I be able to find what the matters are about there?

Mr Dagleish—Yes.

Senator CASH—Okay; thank you. But if you could take it on notice and provide the answer that would be appreciated.

Mr Dagleish—Certainly.

Senator CASH—In your role as commissioner, Mr Lloyd, you recently made a speech to the Ai Group in which you said that the conduct of the industry has continued to improve since 2005. Can you detail examples of how and why this is evident?

Mr Lloyd—One of the very compelling indicators of that is the drop in industrial disputation. A particularly good measure of comparing industrial disputation over time is working days lost per thousand employees, and that figure has decreased dramatically. The building and construction industry used to always be markedly above the all-industry average. In the last year or so it has now fallen down to either about the same as the all-industry figure or, in some quarters, a little bit below that.

Senator CASH—Mr Lloyd, could I just stop you there. When you say ‘above the all industry average’, what are the actual figures?

Mr Lloyd—They are in an ABS publication.

Senator CASH—Could you take it on notice to provide them?

Mr Lloyd—Yes.

Senator CASH—In terms of the working days lost per thousand employees, you say they have decreased dramatically. Could I ask you to quantify what ‘decreased dramatically’ means.

Mr Lloyd—Yes. I will take that on notice.

Senator CASH—Okay. Please continue. I am sorry I interrupted you.

Mr Lloyd—Other indicators are as follows. It is said to me quite often by contractors, people involved in the industry, that they find that they now have projects completed more frequently on budget and on time. Managers and site foremen in particular find that, compared to previous years, when industrial disputes—often about regular matters and superficial issues—needed a lot of attention, that is no longer a feature of running a building site. So they can devote much more time to managing the project, the subcontractors, and getting things done. They say that is a very welcome change.

Senator CASH—When you say that is no longer a feature of a building site, could you expand on that. What was the type of conduct you referred to?

Mr Lloyd—It was a feature of building sites that there was a regular pattern of industrial disputation, sometimes, as I said, over superficial matters and sometimes over more serious issues. They used to spend a lot of time dealing with those types of matters, whereas now they find that is much less a feature of their work.

Senator CASH—When you say that there were industrial disputes over superficial matters, what would be an example of a superficial matter?

Mr Lloyd—One that comes to mind is arguments about the weather, or it might have been about conditions on the site. Some of these matters might have been serious, but often we have been informed that some of these issues were not as serious as perhaps the people who complained about them made out.

Senator CASH—Please continue.

Mr Lloyd—In response to your initial question, I said that there had been an improvement in the conduct.

Senator CASH—The industry has continued to improve since 2005.

Mr Lloyd—Yes. I would say that in all the states except for Victoria and, to a lesser extent, Western Australia, we have seen an improvement in the conduct of the industry. There appears to be less unlawful conduct in those states. Unfortunately, that has not been the case in Victoria. In the other states, having been with the industry now since 2005, there has been an improvement in conduct.

Senator CASH—Mr Lloyd, is there a document that I could go to or that you could table that actually outlines in statistical terms those improvements and shows the statistical analysis?

Mr Lloyd—Certainly we can provide one on industrial disputation.

Senator CASH—Could you take it on notice to provide the committee with that information?

Mr Lloyd—Yes. As I said, I have no data on the management of sites as such. As for the change in unlawful conduct, some of the figures that Senator Brandis was asking for about trends in investigations and cases over the last few years will, I think, point to some of that. As Mr Draffin said, there are no investigations at the moment in South Australia, the territories and Tasmania.

Senator CASH—I will come back to Western Australia, but I will take you to something else that you said in that speech. You said that studies over the last three years have shown between a six per cent and a 13 per cent improvement in productivity. What is the effect of these improvements on the industry?

Mr Lloyd—Of course the biggest effect of the improvement in productivity is that projects are conducted on time and more efficiently. You would hope that as time goes on that would continue. Industry tells us—and we do not have figures for this—that it means that in tendering costs the factor for industrial disputation has been reduced to what it was some years ago. People have said to us that the actuaries and the people constructing tenders would allow perhaps 10 to 20 per cent of their costing for industrial disruption. The industry now tells us that those allowances are much less.

Senator CASH—In that quote you referred to studies over the last three years.

Mr Lloyd—Yes.

Senator CASH—What studies were you referring to and who undertook those studies?

Mr Lloyd—I was referring to the Econtech studies. We got two Econtech reports, and the MBA recently received a report for the latest year. They were the studies to which I was referring. In turn, the Econtech report summarises a number of other studies and the outcomes of those other studies.

Senator CASH—Are you able to provide the committee with a copy of those studies?

Mr Lloyd—We have on our website links to the Econtech report. I do not think we have links to the other studies.

Senator CASH—Could you could take on notice to perhaps look for the information?

Mr Lloyd—Yes.

Senator CASH—I know that in previous hearings criticism has been made of the Econtech reports. Could you take me through those criticisms and your response to them?

Mr Lloyd—I think Senator Cameron has touched on some of those today. There are different views from those reached by Econtech. But the latest Econtech report confirms what they found in previous reports—that is, that the ABCC and related industrial relations reforms have had an impact of markedly improving productivity. The findings from various data—there are those studies I mentioned; there are Rawlinsons survey data, which are very detailed statistical material about building costs; and also there is the ABS series—point to productivity increasing by between 6.2 and I think 13 per cent.

Senator CASH—It is 13 per cent, yes.

Mr Lloyd—That is not just one study; they are all pointing the same way. I think that is the interesting and quite compelling point from those studies.

Senator CASH—You referred to a second Econtech report. We referred to one at the last estimates hearings. Another one has come and superseded that one?

Mr Lloyd—Yes. The MBA, the Master Builders Association, requested Econtech—and it is now called Econtech KPMG—to do another report, which is in essence updating the two previous reports they did for us.

Senator CASH—You said that in Western Australia and in Victoria there had not been a decrease. Was it in industrial disputation? Are you able to outline to the committee why that is the case?

Mr Lloyd—It is very hard to fathom. The thing is that, on almost every measure of our data—investigations, cases before the court, the compulsory examinations—Victoria and Western Australia are overrepresented to quite a significant degree. Why that is, I am not too sure. But it is a fact on every measure we have, and I think the Wilcox report also recognised that feature.

Senator CASH—You also said in this speech that, ‘Education and information alone will not achieve lasting cultural change in the building and construction industry.’ What other mechanisms are needed to achieve cultural change within the industry?

Mr Lloyd—I think the other thing is you have to have strong laws and to make sure that those laws are effectively enforced. Therefore, you need a regulator with powers to ensure that conduct is lawful.

Senator CASH—You say ‘strong laws’. What do you mean by strong laws?

Mr Lloyd—I think you need industry specific laws. As the BCII Act is now, it has proved in my view to be effective in altering and improving the conduct of the industry. Education, information, advice and assistance are certainly part of it—and an important part of it—but my view is that the industry is so different from other industries that without strong laws and a strong regulator you would not have achieved the change in conduct that has been achieved.

Senator CASH—Earlier today with Senator Brandis you were canvassing recommendations of the Wilcox report, and one of them was that the penalties to be set were to be the same as those in the Fair Work Act. Will that have an impact on whether or not cultural change is achieved in the industry?

Mr Lloyd—I think that is a similar question to one that we debated at some length previously. There are a number of factors and features that influence conduct, and I am not prepared to speculate on the impact that the reduction in penalties alone would have on that.

Senator CASH—Okay. But you would say that under the current BCII Act there are strong laws?

Mr Lloyd—Yes.

Senator CASH—Turning now to the Westgate Bridge, what is the current status of the Westgate Bridge project and dispute action that has occurred there recently?

Mr Lloyd—I have to be very careful here, Senator. We have a current case before the Federal Court which is continuing. Therefore, I must be very careful what I say because the matter is before the court. What I can say is that John Holland has reached a settlement with the unions it was in dispute with and, I am advised, work has commenced.

Senator CASH—So John Holland has reached a settlement with the union?

Mr Lloyd—With the unions.

Senator CASH—Was that an out of court settlement?

Mr Lloyd—They had matters before the courts too. I think they have been discontinued as part of that settlement.

Senator CASH—When or thereabouts was the settlement reached?

Mr Lloyd—It would have been, I think, about two weeks ago. I do not know the precise date because we were not involved.

Senator CASH—How soon thereafter did work on the site actually commence?

Mr Lloyd—I am not sure. It would have been soon after.

Senator CASH—Can you give us an explanation of the developments on that site since you last appeared before the committee.

Mr Lloyd—Again, I have to be careful because the matter is before the court.

CHAIR—That is right. In such general terms, I think the question gives Mr Lloyd a serious problem. If you had something specific that you wanted to ask, he may be able to answer that, but we would have to play that by ear, I think.

Senator CASH—How about I move onto: has the ABCC launched any proceedings arising from the dispute on that site?

Mr Lloyd—Yes, we have.

Senator CASH—What proceedings have been launched?

Mr Dalglish—There are proceedings under section 38 of the BCII Act for unlawful industrial action and under section 44 alleging coercion. There are over a hundred contraventions alleged. There are over a hundred contraventions alleged in particulars of contravention and it is estimated that the hearing will last for four weeks early next year.

Senator CASH—The hearing will last for four weeks and commence early next year or into early next year.

Mr Dalglish—We think it I will be commencing in March of next year.

Senator CASH—Are you able to outline for the committee the nature of the alleged breaches of the BCII Act?

CHAIR—I think we may run into—

Mr Dalglish—It is no more than I have said at the moment. The nature of the allegations are under sections 38 and 44 of the BCII Act.

Senator CASH—And there were over 100 allegations.

Mr Dalglish—Correct.

Senator CASH—When did you launch those proceedings?

Mr Dagleish—On 6 February 2009.

Senator CASH—Can I ask against whom the proceedings have been launched?

Mr Dagleish—The AMWU, the CFMEU and a number of named individuals.

Senator CASH—Are you able to outline or give the names of those individuals?

Mr Dagleish—It is a matter of—

Senator CASH—I would have thought it would be a matter of public record if the proceedings have been commenced.

Mr Dagleish—Mr Powell.

Senator CASH—What was his first name?

Mr Dagleish—Sorry; I do not have that.

Senator CASH—That is fine.

Mr Dagleish—Mavro Matis—

CHAIR—I wonder if it would be easier if—

Senator CASH—Maybe the information could be provided to the committee.

CHAIR—That would probably be better.

Senator CASH—If that moves it along, I am happy for that to occur. Could you remind me of the current status of those proceedings? Is it that it is listed for hearing commencing in March 2010?

Mr Dagleish—It is not actually listed; it has been indicated by His Honour that that would be the likely hearing date.

Senator CASH—At what stage are you then in those proceedings?

Mr Dagleish—There is a timetable for filing a statement of claim and then a defence and a possible reply and then I think it comes back before the judge for further directions in October.

Senator CASH—To your knowledge, are the Victorian Police or other law enforcement agencies taking action as a result of the West Gate dispute?

Mr Dagleish—Yes.

Senator CASH—Can I ask what action you are aware of?

Mr Dagleish—I think those matters are yet to go before the courts. The first return date for the various prosecutions is not until next week.

Mr Lloyd—There was at times a considerable police presence at the site during some of the protests that were occurring as the dispute developed.

Senator CASH—Mr Lloyd, would you be able to take us through what the actual dispute was?

Mr Lloyd—We have to go very carefully. As I say, the matters are before the court. An amount of it is on the public record. I think there was a dispute about coverage at the site, the nature of the work and who covered it, and the agreements that were involved. It was about those types of issues and then that impacted on whether or not people were employed on the site. I think it is probably best not to go too much further than that.

CHAIR—I think it is appropriate to do just the broad coverage given that they are before the court.

Senator CASH—Did you say that there was a considerable police presence at the site as the dispute escalated.

Mr Lloyd—Yes. As the—

Senator CASH—When did that occur? What time frame are you talking about?

Mr Lloyd—It was probably in April—or perhaps into early May. There was picketing at the site.

Senator CASH—When you say ‘there was a considerable police presence’, what do you define as ‘considerable’?

Mr Lloyd—There were large numbers. There were reports in the media that there were perhaps 200 police involved.

Senator CASH—Are you able to comment on the potential penalties that are to be imposed under the BCII Act against those people who are named as defendants?

Mr Lloyd—No, that would be a matter for the courts.

Senator CASH—What are the penalties under the BCII Act for a breach of either section 38 or section 44?

Mr Lloyd—Maximum penalties are \$110,000 for a body corporate and \$22,000 for an individual.

Senator CASH—Is there any other penalty applicable under those sections?

Mr Lloyd—They are the maximum penalties, of course. What penalties the court chose to impose would be a matter for the court.

Senator CASH—But it is just a financial penalty? There is no other penalty?

Mr Lloyd—It is discretionary up to that amount.

Mr Dalglish—These are civil penalty proceedings; they are not criminal proceedings.

Senator CASH—I see, they are civil penalty proceedings. Turning to entry permits, I understand that the ABCC recently did a check of the entry permits required to be held by union officials when entering a worksite. Is that true?

Mr Lloyd—Yes, we did.

Senator CASH—When did you do that?

Mr Lloyd—Just in the last few weeks.

Senator CASH—What did that entail?

Mr Lloyd—It entailed checking which officials had a valid entry permit. You can access the AIRC website, enter the name of the official you might be interested in and that website will give you details about whether they have a valid current right of entry permit.

Senator CASH—Is that the way your officers conducted that particular check?

Mr Lloyd—Yes, to my knowledge.

Senator CASH—How many union officials did they check?

Mr Lloyd—I am not sure. The finding was that there were over 40 union officials in the industry across Australia who did not have a valid right of entry permit. We looked at three unions, as I understand.

Senator CASH—Which unions were they?

Mr Lloyd—They were the CFMEU, the CEPU and the AWU.

Senator CASH—Was there any particular reason that those three unions were chosen?

Mr Lloyd—They are the three unions that predominantly represent members in the industry. The AMWU also does, but it covers a lot of other industries as well, and we decided not to investigate that union.

Senator JACINTA COLLINS—Can I just clarify a point there. When you say that this audit looked at officials having valid permits, are you suggesting that all officials in those organisations should have one, that all who would be accessing sites should have one, or that all who had one should have maintained its validity? I am not clear on this.

Mr Lloyd—It is all people who enter sites—

Senator JACINTA COLLINS—How did you determine that?

Mr Lloyd—We determined that on the basis of both the office holders—officers and organisers—that the unions publicise on their websites and our own knowledge as to which organisers are active in entering sites in the industry.

Senator JACINTA COLLINS—So you were satisfied that your knowledge was sufficient to eliminate those office holders who would not be accessing sites?

Mr Lloyd—Yes. We did not do it—

Senator JACINTA COLLINS—Because of your own knowledge of those organisations or on some other basis?

Mr Lloyd—We did not do it centrally; we did it through each of our state offices. The officers in the state who are familiar with the organisers and officials who are active in the industry on the sites did the audit.

Senator JACINTA COLLINS—I will give you an example. For instance, many years ago I would have been listed on a union office's site as a social welfare officer. Would I have been counted in or out?

Mr Lloyd—I suspect you would be counted out. As I say, we did it on a state basis. We did not just do it centrally—we did it with the officers in the state knowing who is active and who is around.

Senator CASH—My understanding was that you did a check of the entry permits required to be held by union officials when entering a work site. What does the database that you checked actually contain?

Mr Lloyd—I have not looked at it for a while now, but there is a drop down menu, you enter the name of an individual and/or their union, and when you click on that it tells you the status of their permit. It might tell you they have a current one. I think it tells you when it was granted and when it expired, but I would have to check on that—it is some time since I have looked at it.

Senator CASH—Does the mere expiration of a permit mean that there is a breach?

Mr Lloyd—No. The breach occurs if the person purports to enter the site with their permit and they refuse to produce it. If they assert they are coming on because ‘I have got a permit’—

Senator CASH—Even if they do produce it, if it is an expired permit the breach is—

Mr Lloyd—Yes. So if they do not have a valid permit the person in charge of the building site is entitled to refuse them entry.

Senator CASH—What action will be taken as a result of the finding that 40 officials were deemed to not have up-to-date entry permits?

Mr Lloyd—I would hope that the unions would get their house in order and that the people who do regularly go onto building sites have their permits brought up to date. That would be the ideal outcome.

Senator CASH—What action will the ABCC be taking? You now have this information. What are you going to be doing going forward?

Mr Lloyd—We have advised the industry through what we call an email alert. We have a few thousand people involved on this distribution list. We have alerted them to the fact that this happens. Having a valid permit underpins the right of entry system and people should respect the law. If they are exercising the right of entry then they should have a valid permit.

Senator CASH—Are you able to table a copy of the email alert that the ABCC sent out?

Mr Lloyd—Yes, we can table it. It is on our website as well but certainly—

Senator CASH—Are you also able to provide the committee with a list of the 40 officials who were deemed to not have an up-to-date entry permit?

Mr Lloyd—I do not have that with me at the moment.

Senator CASH—But are you able to provide the committee with that information?

Mr Lloyd—We could do that.

Senator CASH—Have any of those officials who were deemed not to have up-to-date entry permits tried to enter work sites with their expired permits?

Mr Lloyd—I do not know. That may be the case but I frankly do not know. I cannot advise you now. Of course, another feature here is that a person is entitled to enter a site if they are invited on by the person who controls the site and on occasion that does happen. But at the same time, as I said, to formally gain entry they have to hold a valid federal permit, provide 24 hours written notice of entry, and show their permit and notice of entry on request. Of course, if they do not have a valid permit and a site controller asks for that, then they are obviously in breach.

Senator CASH—When you are providing the information as to the names of the 40 officials can you also please provide what union they belong to?

Mr Lloyd—Yes.

Senator CASH—Why did the ABCC undertake this check?

Mr Lloyd—It had come to our attention, just from the normal cut and thrust of our work, I think, that there were a number of officials who did not have valid permits. It surprised us, I suppose. So we decided it might be worthwhile to do a bit of a survey in order to see how widespread it was. I was, frankly, surprised by the number.

Senator CASH—Why do you say you were surprised by the number?

Mr Lloyd—I did not think it would be that many. I just thought the unions—and the unions in our industry are very aware of the law—would have their permit systems in better order.

Senator CASH—What is the procedure for obtaining a valid permit or, alternatively, once you have a permit, for ensuring that it is kept up to date?

Mr Lloyd—It is an application which is made to the registrar—I think this is the case; Mr Dalgleish might want to add to this. The registrar is required to assess whether they are a fit and proper person, and I think someone would probably be entitled to object to the granting of a permit if they had concerns about it. But, if the registrar is satisfied as such, the permit is issued for a period. And then I am not too sure whether they are reminded the period is running out, but anyhow an efficient union would obviously have procedures in place to ensure that when that time approaches another application is made to renew the permit.

Senator CASH—How important is that right-of-entry permit, then?

Mr Lloyd—It underpins, as I say, the system of right of entry. There are certain responsibilities and rights attached to the right of entry, and the permit system underpins them.

Senator CASH—Are you able to advise the committee how many potential breaches or breaches of the right-of-entry laws have actually occurred across Australia in the last 12 months?

Mr Draffin—Senator, I can help you with the answer to that. During the period from 1 July 2008 to 30 April 2009, the ABCC investigated a total of 113 breaches that related to the

right of entry. Now, they do not necessarily include just refusal to show a permit; they also include revocation of a permit, misrepresentation about the right of entry, failure to produce a permit for occupational health and safety reasons, a permit holder hindering or obstructing, a permit required for OH&S entry, and hindering or obstructing a permit holder. They make up 20 per cent of what the ABCC have investigated during that period.

Senator CASH—When you say you investigated 113 breaches, how many of those investigations were successful?

Mr Draffin—I would have to take that on notice.

Senator CASH—Would you please take that on notice. And can you do a comparison for me of the previous 12 months or the previous 10 months?

Mr Draffin—We will have to take that on notice. I think we can. It really depends on the database, but we will endeavour to do that.

Senator CASH—That would be greatly appreciated. You said that the 113 breaches in the period from 1 July 2008 to 30 April 2009 formed 20 per cent of the breaches that you investigated.

Mr Draffin—Correct.

Senator CASH—In terms of the 20 per cent, where does that figure sit?

Mr Draffin—During that period, the ABCC investigated 565 matters; 113 of those 565 related to right-of-entry issues, which translates to 20 per cent.

Senator CASH—Okay. Are you able to provide for the committee a breakdown in percentage terms of the rest of the 565 matters and what they actually relate to?

Mr Draffin—Yes. I can give you that now, if you wish.

Senator CASH—That would be fantastic, thank you.

Mr Draffin—Industrial action matters make up 31 per cent, or 174 of the total 565. I have already given you the figures for right of entry. There were 56 matters relating to freedom of association, which make up 10 per cent. There were 24 in number under strike pay, which make up four per cent. Breaches of the Workplace Relations Act—and they can include such things as breach of agreement, false statements about membership, and intimidation—make up 76 in number, or 13 per cent. Investigations under the Independent Contractors Act number 10, or two per cent. And there are eight criminal matters which relate to extortion or force, which ultimately would have been referred to state police forces, and they make up one per cent. There were breaches under the Trade Practices Act, which numbered 10, or two per cent in total. There was one taxation matter and other minor matters, which take it up to 565.

Senator JACINTA COLLINS—Senator Cash, while you are looking at what you will ask about next, can I ask a question while we are looking at the entry permit issue? Officers, I have taken your advice and gone onto the AIC website, but I brought up one union official I know and I found a duplication. Is there any duplication in the data you were giving us before? I presume this is an Industrial Registry matter. Who is responsible for this database?

Mr Lloyd—That would be the Australian Industrial Registry.

Senator JACINTA COLLINS—That is fine. I will not take it further with you.

Senator CASH—Prior to turning to my next set of questions from Senator Brandis, could I take you to page 338 of the ABCC budget statements, which states:

Challenges impacting on the Australian Building and Construction Commission outcomes during 2009-10 are:

... ..

- the continued disregard some industry participants display towards the legal rights of others.

Could you explain in detail what that actually means.

Mr Lloyd—There we are enunciating the challenges which will impact on us in the coming year. The first one is the transition to the new arrangements. The second one is that the fact that we do have 65 investigations underway is indicative that there are some industry participants who still display an attitude which is not good towards lawful conduct. It is a fact that, as I mentioned, particularly in Victoria and Western Australia, people in the industry have a disregard for the law.

Senator CASH—I suppose that, as a challenge, I would have thought there would have been a bit more background to the particular challenge than that there are 65 investigations underway. Is it the nature of the investigations that have made this one of the challenges that you hope to achieve?

Mr Lloyd—There is a challenge in that it is impacting on our outcomes. It is matter we have to address. Our preferred outcome is to achieve lawful conduct in the industry, and the challenge that we face, I suppose, is the fact that despite us being around there are still some in the industry who do not have proper regard for legal rights. These statements are written at fairly high level, and you have to keep them reasonably brief.

Senator CASH—On the same page of the budget statements you also state:

During 2009-10, the Australian Building and Construction Commission plans to achieve the following outcomes:

... ..

- an improved level of knowledge about National Code compliance requirements.

Can I get you to expand on that. One always hopes that these statements actually have some meat behind them.

Mr Lloyd—One of the aspects of code compliance is the education role that the ABCC plays. Apart from simply monitoring and reporting the results of our audits to the CMG, we also have an active education process, and that comment relates back to that.

Senator CASH—On page 341 of the budget statements under the heading ‘Outcome 1 Strategy’ you also state that one of your key strategies is to:

- Provide an active and accessible team of investigators to respond quickly to complaints of unlawful conduct.

Can I get you to take me through how many investigators you currently have on a state-by-state basis and how this compares to the previous 12 months.

Mr Lloyd—The national figure is about 70.

Senator CASH—Across Australia?

Mr Lloyd—I mentioned that in my AiG speech last week. Whether we have got a state breakdown I am not sure.

Mr Draffin—We would have to take that on notice—the exact numbers of where the investigators are in each state.

Senator CASH—Are you also able to provide me with a comparison for the previous 12 months on a state-by-state basis? Has there been an increase in the number of investigators or a decrease in the number of investigators?

Mr Lloyd—It is pretty similar, I think.

Mr Draffin—The number of investigators has generally remained the same. However, the number of code-compliant officers has increased.

Senator CASH—By how many or from what to what?

Mr Draffin—I would have to take that on notice.

Senator CASH—Another of your strategy outcomes is to ‘inform and educate industry participants through a variety of mediums about their rights and obligations’. I am interested in what ‘through a variety of mediums’ actually entails?

Mr Lloyd—Obviously, we have a website and on that we have, as I mentioned, an e-alert email system. We have a monthly what we call ‘industry update’—again, that is another electronic type newsletter. We place on the website summaries of cases and decisions. We issue media statements. In addition, we have face-to-face presentations with industry participants.

Senator CASH—What do they entail?

Mr Lloyd—They can entail things like me giving a speech to a construction conference last week, down to an inspector meeting with a number of key people on a building site at a time which suits them, and everything in between. We are quite accessible and willing to convey and present information to people at any time and at any forum. We have other promotional material. I think we have a few posters and leaflets about right of entry and things like that. They are the main sorts of avenues to inform and educate people.

Senator CASH—When you say ‘industry participants’, how does somebody hook into, say, your email alert system? How do you know that that information is actually getting out to industry participants?

Mr Lloyd—We have a web based arrangement. You register and you are entitled to unsubscribe. We keep a track and a record of who has subscribed. We publicise it and encourage people to access it. Of course, we might have about 2,000 primary recipients, but there are a lot of other organisations that it would then get flicked on to.

Senator CASH—There is a multiplier effect?

Mr Lloyd—Yes.

Senator CASH—I go back to the KPMG Econtech analysis commissioned by the Master Builders Australia. Have you seen the analysis in terms of industry productivity?

Mr Lloyd—Of what, sorry?

Senator CASH—The KPMG Econtech analysis commissioned by the Master Builders Australia. Pages 2 to 6 set out some staggering figures about the impact of the ABCC and reforms on the construction sector—for example, such as adding 9.4 per cent to labour productivity in the construction sector or the \$5.5 billion economic benefit to the community, resulting in a boost of 1.5 per cent to GDP. Do you agree with those figures or do you have any comment on those figures?

Mr Lloyd—We commissioned Econtech in previous reports. The feature, as I mentioned previously, was that a number of the outcomes of the various data and studies all point in the same direction—that there has been a significant improvement in productivity since the ABCC and the associated industrial relations reforms were introduced. It is not just one measure; it is the Rawlinson's survey data—

Senator CASH—What was that one?

Mr Lloyd—It is Rawlinson survey data. That is a very detailed analysis of cost data for the industry.

Senator CASH—Just explain that to me in a little bit more detail. What does it actually analyse and where would you obtain the information.

Mr Lloyd—As I understand it, it is a very thick volume published on a regular basis which analyses the costs of building tasks and functions across various states and territories. I believe that actuaries, financiers and people who are constructing tenders for building projects rely on it quite considerably. That is very detailed cost data and I am told it is the most detailed cost analysis.

Senator CASH—When I stopped you, you were referring to other—

Mr Lloyd—There is the Australian Bureau of Statistics data on productivity which is published on a periodic basis. In addition to that, other studies have been conducted, like Senator Cameron referred to, the Allen Consulting Group. There have been some individual case studies undertaken. All that data points in the same direction.

Senator CASH—Again, could I get you to elaborate on what you mean by 'pointing in the same direction'?

Mr Lloyd—A feature of it is that they are indicating improvements in productivity over the period roughly since the ABCC was introduced, ranging from 6.2 per cent to 13.6 per cent.

Senator CASH—When you say 'individual case studies', are you able to elaborate on that any further? I would be interested in knowing what individual case studies have been done.

Mr Lloyd—I think they are referred in the report. Page 17 has individual project comparisons. When Econtech KPMG were doing the study for us they analysed, as you see on page 18, four particular projects—two in Victoria and two in Queensland—and I think compared the costs of those pre and post the ABCC.

Senator CASH—Can I get you to go further in relation to that and just give us the comparison of the costs?

Mr Lloyd—There is a fair bit of data for me to assimilate and give you a summary in a short time, I would have to take that on notice.

Senator CASH—If you could take that on notice, that is fine, I am happy for you to provide the information. Is there any document that outlines on a regular basis, whether it be quarterly, half-yearly or annually, the achievements of the ABCC in terms of its legislative powers and requirements?

Mr Lloyd—I suppose the most authoritative one is the annual report. I submit an annual report every year, and there is one coming up.

Senator CASH—When is that one due out?

Mr Lloyd—They are normally tabled in the parliament about the October-November period.

Senator JACINTA COLLINS—It usually gets a good thrashing at Senate estimates, doesn't it?

Mr Lloyd—Occasionally—yes.

Senator CASH—Are you able to outline for the committee any of the successes or the achievements of the ABCC in the last 12 months?

Mr Lloyd—That goes back to, perhaps, what I said earlier. There has been a marked improvement in the conduct of the industry. That has improved compared to previous years. As Mr Dalgleish referred to, the vast majority of the cases we undertake are successful. I think that means that people respect that, when we do take on an investigation and it proceeds to a prosecution, it has been thoroughly considered and the outcome is likely to be positive for the ABCC—there will be a finding in its favour. That is also reflected in some states in a trend of the parties which we act against—both union and employer—I think in the last year or so, being more prepared to entertain a settlement before proceeding to a full proceeding. Those are the features which I think are improvements.

Also, I think, as I said, and this is what the industry tells us, more projects are completed on budget and on time. Also—and this is, for me, a very important measure which I cannot give you data for but about which I am told repeatedly by the industry—subcontractors, not the head contractors but subcontractors, medium to small operators, are now perhaps more aware of their rights and more prepared to stand up for them. In the past they might have felt they had very little recourse if they were facing pressure from a head contractor or a union or both parties acting in concert. Now, those smaller contractors are more prepared to stand up for their rights, which I think is very encouraging.

Senator CASH—And what do you put that down to?

Mr Lloyd—I think they are aware that there is regulator around which is accessible, prepared to take cases on and prepared to take on those that do engage in unlawful conduct. Also, I think, through the education we have done—both directly and through industry associations—they have just become more aware that they have rights.

Senator CASH—One might say that is a positive benefit from your organisation.

Mr Lloyd—Yes, I think so. It always used to dismay me that you would hear a lot of people say, ‘I operate in the domestic area of the industry, building houses and whatnot, and I would like to expand but I am reluctant to expand—because if you go into the more commercial side of the industry, you do encounter a lot more industrial strife.’ Therefore, that held people back from expanding sometimes.

Senator CASH—What would the statistics now show, in relation to that expansion?

Mr Lloyd—I do not have any statistics concerning migration from domestic to commercial, but just the feeling you get is that people now are more confident to take that step—to grow their business, to employ more people and to get involved in the more complex side of the industry.

Senator CASH—Mr Lloyd, going back to my earlier questions, you said to me that one of the indicators of success in relation to the ABCC was the number of working days lost per thousand employees, and that there had been a marked decrease.

Mr Lloyd—Yes.

Senator CASH—Are you also able to give me an analysis of the costs relating to IR disputes, in terms of whether or not there has been a decrease in them as well?

Mr Lloyd—We do not have data at our disposal. As I did mention, the industry tells us that, before the ABCC, the amount being tendered for a project could reach 10 to 20 per cent of the total cost of the project through industrial factors. Now the major contractors tell us that that has been reduced markedly down to—as some claim—the two to three per cent level.

Senator CASH—I have one more question from Senator Brandis’s list of questions, if Senator Brandis is happy for me to ask it.

Senator BRANDIS—Absolutely.

Senator CASH—On 28 April this year, there was a national day of strike action in the construction sector as a protest against the ABCC. I understand that the strike was also about safety, and that some observers said that the lack of action to improve construction on safety sites was evidence of the need to abolish the ABCC and the industry-specific industrial relations laws. Can I ask what you make of those comments, and what do the ABCC and related acts say about safety?

Mr Lloyd—The starting point on safety is that the industry’s record is poor.

Senator CASH—Right. The industry’s record is poor.

Mr Lloyd—The industry's OH&S record is poor. The ABCC has a very limited jurisdiction over occupational health and safety. A person is entitled to stop work if they feel there is a serious imminent risk to their health and safety; that is a valid ground on which to stop work. Our act requires that be properly exercised and we are entitled to take proceedings against people who abuse that right. The important stop on that ground is if it is not sustained by the facts. If we take those cases then they have to prove they took the stoppage on valid grounds. The regulation of occupational health and safety in the industry though is the responsibility of the state and territory OH&S agencies and Comcare. The Federal Safety Commissioner has a role as well. Where we can, we work in concert with those people, in cooperation with them. But it is not a direct responsibility for us to regulate occupational health and safety.

Senator CASH—What do you say when a claim is made that the lack of action to improve construction on safety sites is evidence of the need to abolish the ABCC?

Mr Lloyd—My view is that it is not our primary jurisdiction. We have a limited role in occupational health and safety. I do not think those arguments are valid.

Senator CASH—You say those arguments are not valid and that they would perhaps be better directed towards the relevant state bodies that are responsible for safety?

Mr Lloyd—They have the regulatory responsibility for it. But, like anything in occupational health and safety—and I have been involved in various forms of that in the past—it essentially comes down to those people directly engaged to take it seriously and to follow careful and proper procedures.

Senator CASH—Another criticism of the ABCC—and it was canvassed earlier with Senator Brandis—is in relation to the coercive powers and that the coercive powers are too broad. Can you comment on that particular statement?

Mr Lloyd—The powers are in the act and it is for us to administer powers in accordance with the act. We have found them useful. We have conducted about 151 examinations—I think that is the latest number. Before the ABCC was established there was often a code of silence and investigations of serious unlawful conduct stalled because people would not provide evidence, or were not prepared to provide evidence, because of the fear of reprisals if they were seen to be cooperating with an investigation. The power has gone quite a way to overcome that reluctance to provide information when an investigation is being conducted. We use it, as Mr Dalglish said earlier, as very much a last resort. We take great pains to gain information voluntarily but if people will not provide it on a voluntary basis then, if it is justified, the power is relied on.

Senator CASH—When you say you 'take great pains' to get organisations or people to provide information voluntarily, what type of people or organisations are you talking about?

Mr Lloyd—These are the industry participants. They might be employees, subcontractors, head contractors or union officials—anybody involved—

Senator CASH—So it is across the board?

Mr Lloyd—Across the board.

Senator CASH—It is not directed at any one particular industry participant?

Mr Lloyd—No.

Senator CASH—When you say you ‘take great pains’ to obtain this information prior to actually launching an interrogation with the coercive powers, what are those steps that you take? What are the ‘great pains’?

Mr Lloyd—Inspectors have a range of powers which are normally attached to any labour inspector to gather information, to ask for documents or information and to interview people. All those normal inspector/investigation procedures are gone through in the hope of obtaining information voluntarily.

I should add that the compulsory power is used on occasions too because people are scared of reprisals and therefore they have the information and they express their desire to do it pursuant to the power so they can say to those who might be threatening them with some reprisal, ‘You might want to cooperate with the ABCC. Because the bottom line sanction might be up to six months in prison I decided to go ahead and give the information to the ABCC under the power.’

Senator CASH—I have just conferred with Senator Brandis, Chair, and those are all the questions that I have on behalf of Senator Brandis.

CHAIR—I thank the ABCC for its evidence this evening. We will now be moving to outcome 5 and, given that this is a major change in the program we will suspend for five minutes while the department comes in.

Proceedings suspended from 5.26 pm to 5.35 pm

CHAIR—We will resume. Before we proceed to outcome 5, some matters arose out of questions asked yesterday. Senator Humphries will kick off with a question.

Senator HUMPHRIES—Ms Paul, I just want to come back to that issue that was raised yesterday in cross-portfolio consideration about the answers given relating to Dr Glover’s contracts. I think your attention has been drawn to some information provided to the committee that was inconsistent with the information on the website, about the contracts. Are there any matters that were placed on the record yesterday which need to be corrected at this point in time?

Ms Paul—I do not think there was anything that needs to be corrected. You were asking for us to expand on our answer to a question on notice about Dr Glover, so we have gone back and looked at that, and we should have given a more fulsome answer. Basically we pulled the files out in answering the question the first time and talked with our people and so on. We actually cannot pin down any further who recommended him—that was the question that was on notice. We are aware of his reputation, and I can absolutely assure you that we have done the right thing by way of asking and all that, but we cannot pin down precisely who it was. We had a lot of personnel change and so on at that time. I can offer a more fulsome response, but in effect I have just given it verbally here.

You also had an issue where there were some apparent discrepancies on the AusTender site. It was about the SES conference. I can give some advice on that, and thank you for drawing that to my attention. CN118037 was originally loaded onto AusTender on 8 September 2008 by the department at a value of \$150,000 for a contract period of 5 August 2008 to 20 November 2008. The contract was with the Crowne Plaza, Coogee Beach and was for the provision of services for the SES conference et cetera. CN157313 was for \$21,000 for the period 5 August 2008 to 20 November 2008 was originally loaded onto AusTender on 12 February. It was a contract variation because we used more meeting rooms and that sort of thing at the venue. We have reloaded them because—this is where the confusion comes in—we are moving to a single system. We have actually had two—we had the old desk system and the old DEEWR system, and we are moving to a new system so we had to reload in preparation for 1 July. That is why there is an appearance that it has only just been loaded but, in fact, it is the new number for the previous entry. CN118037, which was for \$150,000, originally loaded on 8 September, was reloaded the other day, on 31 May, as new CN188255, which is the one that you drew my attention to, and old CN157313 for \$21,000, which was originally loaded on 12 February, was reloaded as CN188670. The frustration here is, of course, it automatically generates a new number, but it is precisely the same thing. That is where the confusion lies. They are just the original costs for the SES conference and they have not changed.

Senator HUMPHRIES—The numbers are different, but aren't the amounts also different?

Ms Paul—No. The first contract was for \$150,000 and then we extended it by \$21,000, and that is the same.

Senator HUMPHRIES—So those two constitute one contract—that is, one contract and an extension to that contract.

Ms Paul—Correct—\$171,000 all up.

Senator HUMPHRIES—And then there was a second contract.

Ms Paul—The second contract we discussed yesterday was for the Nous Group, for facilitation and so on. This is only for the venue.

Senator MASON—Has the Nous Group contract been renumbered?

Ms Paul—I cannot answer that. It may have been.

Senator MASON—It should have been if we were consistent, shouldn't it?

Ms Paul—It may well have been. But it has not changed either, so the amounts have not changed. It is just that we have to reset it for the new system that comes in on 1 July.

Senator MASON—CN188255 is for \$150,000. You said that was originally generated on 8 September last year. Could you just give me the number once again?

Ms Paul—Certainly. It was CN118037 on 8 September. It is now 188255.

Senator MASON—And it is for \$150,000.

Ms Paul—It is the same, yes.

Senator MASON—Is it just a coincidence that they were reloaded the day before estimates?

Ms Paul—It is, and I have asked that.

Senator CASH—My understanding is that the \$150,000 contract was reloaded at something like 2.34 in the morning—

Ms Paul—Probably.

Senator MASON—The dead of night!

Ms Paul—We were clearly working hard! But, seriously, it is because it is a new system, and I have asked that question.

Senator CASH—Have all contracts that have been entered into since 24 November 2007 been reloaded and consequently renumbered?

Ms Paul—I will have to check that. I think so.

Senator MASON—When I was asking these questions yesterday morning, I mentioned the contract for \$79,000 for the Nous Group and the \$21,000 for the venue hire. No-one offered any suggestion that it was costing any more. In other words, no-one mentioned the existence of the \$150,000, which is just a little bit disappointing. I thought someone might have said to me: ‘It didn’t cost \$21,000—it actually cost \$150,000 more.’ I know it is my duty to find it, but I just think that perhaps someone should have been a bit more forthcoming.

Ms Paul—I take the point. That is a fair point.

Senator CASH—A correction was sent around yesterday by the secretariat to question EW1096-09, a question that Senator Ronaldson asked at the last estimates hearings. It reads:

I have a question about Samuel Dennis Glover who was given a contract for some \$46 000 between February 2008...

What was the actual date of that contract?

The answer provided was:

Dr Glover’s contract ran from 12 February 2008 to 6 February 2009.

That was corrected yesterday to:

Dr Glover’s contract ran from 4 February 2008 to 6 February 2009.

That time period brings into play two other contracts, so what we now have are three different contracts for Dr Glover: one, publish date 15 April 2008 for \$46,000; one, publish date 31 May 2009—and I think that one was also done in the dead of night—at \$32,000; and one on 6 May 2009 for \$21,015.08. Can you give us the total amount that Dr Glover was actually paid?

Ms Paul—I have not brought that with me but I reckon I can find it quite fast for you and bring it in here either tonight or tomorrow morning. My expectation is that there will be two contracts; one will have been that early period and then he has joined a panel of speechwriters—you would remember Ms Pearce, I think it was, talking about that. So my guess is that there are two contracts and then we would probably have the same problem: that

they have been renumbered. That is my expectation but I am happy to check that out and come back with the contract numbers.

Senator CASH—I am happy to defer to Senator Ronaldson as it was his question.

Senator RONALDSON—If there were two contracts when we discussed this matter in February, why didn't the department volunteer that there was not just one contract for \$46,000—

Ms Paul—I think one has come after that.

Senator RONALDSON—Can I finish?

Ms Paul—Sorry.

Senator RONALDSON—These were questions asked on 25 February this year and the contracts go back to last year: CN71064, CN180856 and CN189059. Why would those extra contracts not have been raised with us in Senate estimates when we were talking about the \$46,000 contract?

Ms Paul—Sure. My sense would be that we have talked about one main contract, the second one has probably come after the February date and then they have been replicated with new numbers. But I will check that out.

Senator RONALDSON—I also asked in February:

How many external speechwriters are currently employed by DEEWR?

The answer to that was:

One.

So the only external speechwriter who has been used by the department is one, and that is Mr Glover, is it not?

Ms Paul—No. In cross portfolio yesterday we said that we now have a panel of speechwriters.

Senator RONALDSON—When did you put the panel in?

Ms Paul—Reasonably recently. I would have to get the date for you.

Senator RONALDSON—After the last estimates hearing?

Ms Paul—Yes.

Senator RONALDSON—Did you put a panel in after the last estimates hearing as a result of the questioning of Dr Glover's contract in February?

Ms Paul—No. You might remember in the February estimates that we talked about how we had tried to recruit speechwriters into the department and basically failed. They are very hard to find. We were not able to recruit speechwriters as public servants and in the end we went to a tender.

Senator RONALDSON—So we had a direct procurement method for Mr Glover up until the Senate estimates in February and we have then apparently found ourselves with a panel. I

notice that the latest contract for Mr Glover—CN180842—for \$30,000 was apparently under the open procurement method.

Ms Paul—That is right.

Senator RONALDSON—So how many people are now on the panel?

Ms Paul—I think we mentioned this yesterday in cross portfolio. I think we have eight. But we are able to expand it depending on the amount of speeches to be written.

Senator RONALDSON—Why didn't you put a panel together back in—

CHAIR—Senator Ronaldson, I am happy to be flexible about this but these are matters that were properly canvassed in cross portfolio, which we dealt with yesterday. I am happy with these queries where they are raised by senators seeking some additional information but I do not want to go back into cross-portfolio questioning. Could you bear that in mind? The officers for cross-portfolio questions are not all here.

Senator RONALDSON—I understand that. We have already been told by Ms Paul that no-one can remember who made the recommendations so we probably do not need anyone else, but I am going to pursue that again in a second. Just to be absolutely clear, despite this being canvassed extensively in February we had a \$46,000 contract—and that was the nature of the discussions as you might remember—and there was absolutely no mention at all during those discussions about these two further contracts, both of which were obtained through the direct procurement method last year. Why wouldn't the department, while we are having an open and frank discussion about this, have also indicated that there were further contracts that Mr Glover had been given?

Ms Paul—I will check this. I think that in February we did discuss in completeness the nature of the contracts with Dr Glover. I do recall that in February we discussed that we had attempted a recruitment approach and failed. Since then we have undertaken a tender and we do have a panel and I suspect—but I will check—that some of the appearance of multiples is this problem we have got with things being renumbered, like with the other one I mentioned before.

Senator RONALDSON—How much of the slack did Dr Glover take up. Did he become the major speechwriter? What was his role?

Ms Paul—We do have statistics on that, which I can bring in. There have been hundreds and hundreds of speeches in the portfolio and he took a part of them but it would not be the majority of them.

CHAIR—I think we could canvass that.

Senator RONALDSON—And why was there a need to employ Dr Glover when he only prepared 65 out of some 420 speeches. That does not indicate to me that you had a desperate need for external speechwriters.

Ms Paul—We did. On the creation of the new department we found ourselves really struggling to keep up. We did it but it was very tough and, as I said and as we said on notice, his reputation was well known. We did need it, and I think we have canvassed that before.

Senator RONALDSON—Can it take you to the response that I received, and I will put the question again and ask you whether you, in your senior position, think that this is an appropriate response:

Senator RONALDSON—But you were having trouble finding speechwriters last year, and I presume Mr Glover was recommended to you, was he?

Ms Pearce—Yes, and I cannot remember who recommended him. But he has been used as a speechwriter—

I will give the whole answer so that it is complete—

across the Public Service; I do know that.

Senator RONALDSON—Can you take that on notice, please, as to where the recommendation came from.

It was a specific question and an undertaking was given to find out. This was the answer:

Dr Glover's reputation and track record as a speechwriter is widely known.

Do you think that answer is good enough?

Ms Paul—I said before on the record to Senator Humphrey's question when we started this session that I think we could have been more fulsome. Had we been we should have said that we actually did go to the files and we did ask and we cannot find where the recommendation came from. We did do the—

Senator RONALDSON—When did you go to the files?

Ms Paul—We did that at the time that we answered the question on notice. We just should have been more fulsome in our answer.

Senator RONALDSON—Ms Paul, I think you would—

CHAIR—Senator Ronaldson—

Senator RONALDSON—Sorry, Mr Chairman, I have got—

CHAIR—I am sorry too.

Senator RONALDSON—I am sorry but this is a matter—

CHAIR—We have made a significant indulgence to just clarify that answer. That has been clarified. That is the reason we have allowed ourselves to technically go back to cost portfolio. Now we are really moving into things that should have been done yesterday. Is this your last question?

Senator RONALDSON—Chair, I am getting towards the end of this matter.

CHAIR—If it is going to go on too much—we have got a lot in outcome 5 still to do.

Senator RONALDSON—I understand, but that will very much depend on Ms Paul's answer.

CHAIR—It will depend upon me, quite frankly.

Senator RONALDSON—We have got an acknowledgement and I will use the words that the answer was actually quite disgraceful. I ask you, Ms Paul, given that you were apparently pressed for speechwriters—and yet over a 12-month period Dr Glover has only written 65 out of 420—and given that he has been paid close to \$100,000 for writing these speeches, I would have thought that you or Ms Pearce would remember this recommendation, given that you were so desperate. I put it to you that this answer was used to avoid answering the question as to who it was, because the department knows exactly who it was; that it was the Deputy Prime Minister herself who made this recommendation—or her office.

I put it to you that this folly that was the February sittings, when we went round and round and round, and the fact that you have now put a panel in place and the fact that you now have an open procurement method—all since then—is a clear indication that back in February or January of last year a recommendation was made to the department, and the department knows exactly who it was, by the Deputy Prime Minister or her staff or someone associated with her that Mr Glover be put on.

CHAIR—Ms Paul, I'll ask you to respond to that, and then we are moving to outcome 5.

Ms Paul—I have absolutely answered honestly. I have asked those questions, and I asked them again last night, of my people. We were in the middle of an enormous machinery-of-government change at that time. We had two of everything. We had two communications areas and there was a lot of personnel change and so on. We simply cannot remember, but we do know that he has a good reputation for speech writing. So that is an absolutely honest answer.

Senator RONALDSON—And a good political reputation as well as a good speech-writing reputation.

CHAIR—You are making speeches now.

Senator RONALDSON—I have one final question: can you tell this committee that the minister, the Deputy Prime Minister, and/or her staff or someone associated with her did not make that recommendation?

Ms Paul—I have given you the answer to that question several times.

CHAIR—Senator Ronaldson, no. The answer has been given. We are now going to move to outcome 5.

Senator RONALDSON—You do not know who gave the recommendation. You are therefore not in a position to deny that the Deputy Prime Minister used her position to put a friend into a \$100,000 contract; is that right Ms Paul?

Senator Ludwig—That is a very silly, loaded question.

CHAIR—You do not have the call, Senator Ronaldson. We are now moving to outcome 5. Thank you very much for the speech.

Senator CASH—Chair, I want to put a question on notice.

CHAIR—You can put things on notice at any time. We are now moving to outcome 5. Thank you very much for your participation at our committee today, Senator Ronaldson.

Senator RONALDSON—Thank you for your indulgence, Chair.

[5.51 pm]

Senator CASH—I want to start with the General Employment Entitlements and Redundancy Scheme, which I will refer to as GEERS. Can you confirm that the amount currently allocated to GEERS in the budget is \$106 million?

Mr Kovacic—That is correct.

Senator CASH—Has this changed in any way from the previous budget?

Ms Baxter—The figure of \$106 million is the 2009-10 estimate of appropriation. That has increased from the figure published previously, which was \$89 million. It has increased by \$17½ million.

Senator CASH—What was the figure for 2008-09?

Ms Baxter—The original figure for 2008-09 was \$82,803,000.

Senator CASH—Clearly I am looking at a different document because the figure I have is \$135 million.

Mr Kovacic—Through the additional portfolio estimates process this current financial year, an additional \$50 million was provided to GEERS.

Senator CASH—Yes, and I was going to move on to that.

Mr Kovacic—I have just been corrected: the figure is \$70 million.

Senator CASH—My understanding was that the amount had been reduced from \$135 million to \$106 million—that is, 2008-09 and 2009-10.

Mr Kovacic—That is correct. As I mentioned, that \$135 million is the adjusted figure, taking into account the additional \$70 million that was provided through the portfolio additional estimates.

Senator CASH—Okay. So on page 164, just to clarify, in 2008-09 the \$135,303,000 takes into account the \$70 million in the additional appropriation?

Mr Kovacic—That is correct.

Senator CASH—So what was the original figure?

Ms Baxter—The original figure was \$82,803,000.

Senator CASH—So it has increased.

Ms Baxter—That is correct.

Proceedings suspended from 5.59 pm to 7.30 pm

CHAIR—Thank you. We will recommence these estimates hearings and welcome to the table, Senator Mark Arbib, Parliamentary Secretary for Government Service Delivery. I think we are up to questions from Senator Cash.

Senator CASH—If I could just continue in relation to the General Employee Entitlements and Redundancy Scheme. What is the average claim from GEERS?

Ms Baxter—In terms of the average amount?

Senator CASH—The amount, yes, please.

Ms Baxter—Excuse me a moment to get that for you.

Mr Kovacic—I might take the opportunity to explain the numbers that we were canvassing before the dinner break—the \$135 million. The original allocation for the last financial year was in the order of \$82.8 million. You add the \$70 million to that which gives you \$152.8 million. Then there is \$17.5 million which has been moved from last financial year to this financial year, which you take off that \$152.8 million to give \$135 million. That \$17 million has been added to the original notional allocation of this year to give the \$106 million that is in the portfolio budget statements.

Senator CASH—Whilst that additional information is being sought in relation to the average claim amount, can I ask you for some more context in relation to the actual figures and why it actually had to occur?

Mr Kovacic—In terms of the additional \$70 million last year through portfolio additional estimates there was an additional \$50 million to support possible claims for GEERS assistance from employees of ABC Learning as well as an additional \$20 million to cover an increase in demand for GEERS. As it has turned out the amount that was necessary in respect of ABC Learning has been less than was estimates, which is why that \$17.5 million has been moved to this financial year in anticipation of both the increase in claims for GEERS assistance as well as the prospect of still some residual claim from ABC Learning Centre employees.

Senator CASH—Okay. That is fine. How is the GEERS scheme publicised? How do people know that there is this scheme?

Ms Baxter—We have a GEERS website that has information on it surrounding GEERS and has information such as facts sheets in terms of how to make a claim for GEERS, when you might be eligible for GEERS, that type of thing. The department also speaks with insolvency practitioners quite regularly and speaks with businesses and employer and employee groups.

Mr Kovacic—Often in circumstances where a business goes into liquidation the department will actually attend meetings with employees to explain to them the potential access to the GEERS scheme. That is clearly in circumstances where it is apparent that the business that has gone into liquidation may not have the adequate funds to pay employee entitlements. Those are the sorts of circumstances in addition to the sorts of measures that Ms Baxter has outlined.

Senator CASH—Thank you. Did you manage to get the information?

Ms Baxter—Yes, I did, Senator. Up to the end of April this year the average amount of GEERS paid has been \$9,000.

Senator CASH—\$9,000. What is the average time frame for the assessment of a claim?

Ms Baxter—The average time frame is 10.4 weeks.

Senator CASH—How does that compare to 12 months ago?

Ms Baxter—Approximately the same amount of time, Senator.

Mr Kovacic—Senator, can I also just point the performance indicator that is included in the portfolio budget statements for timeliness of processing GEERS claims.

Senator CASH—What page are you on, Mr Kovacic?

Mr Kovacic—Page 166 and it is the third row down on that page. The target is that 90 per cent are processed within 16 weeks of receipt and the advice that Ms Baxter has indicated is that we meet that target very well and that 98 per cent are processed within four weeks of receipt of verified entitlement data.

Senator CASH—Thank you for pointing that out. How many staff does the department have working on the processing of the GEERS claims to date? I will get you to compare that to 12 months ago.

Ms Baxter—We have 72 staff who are engaged in the employee entitlements branch, which is the branch that has responsibility for processing GEERS claims. I do not have the figure for 12 months ago. I will need to take that on notice.

Senator CASH—Thank you very much. If a Job Network provider who lost business under the Job Services Australia tender is unable to pay all entitlements, would their staff be entitled to GEERS?

Ms Baxter—Their staff may be entitled to GEERS if the provider were to enter liquidation. It would then be open to staff to make an application for a GEERS payment.

Senator CASH—What is the relationship, then, with the Agency Adjustment Fund and those particular staff?

Ms Paul—Part of the relationship is that the Agency Adjustment Fund, which we discussed yesterday, if you remember, is to help organisations which lost all their business under this tender for Job Services Australia to actually stay viable and probably do something different. That would mean that if the Agency Adjustment Fund is successful for the successful applicants then they would not go into liquidation. They would actually transform themselves into offering a different type of community service, or they might become a subcontractor or something. So the employees would probably keep working for them, but they would be doing something different.

Senator CASH—So is the first step for Job Network provider employees the Agency Adjustment Fund? Is that the first step in the process?

Ms Paul—No. For the business itself, for the provider, or for the employees? What is actually going on at the moment is that there is quite a bit of transference of employees. So we actually have not come across many instances of employees becoming unemployed because of the tender, because they are actually being snapped up. In fact there is what we might call quite aggressive poaching going on. There are also some websites, phone lines et cetera to help do a job match. Indeed, the government funded the National Employment Services Association to help do that matching. So that is the connection for employees, and

that seems to be going quite well. For businesses, yes, the Agency Adjustment Fund is a first call. In addition, many of them already have different arms to their businesses. They might offer homelessness services funded by other programs or whatever. Of course I would imagine many of them would be part of applications to the \$650 million Jobs Fund as well. So there is a range of avenues for them.

Senator CASH—Do you have any information in terms of how many claims have been made under the Agency Adjustment Fund to date?

Ms Paul—We spoke about that yesterday in the relevant outcome, and we actually did go through the numbers, which I do not have here because they are not part of this outcome.

Senator CASH—That is fine. In terms of dissatisfaction with an employee's outcome of their claim, do you review the particular claim if an employee lodges a complaint?

Ms Baxter—Yes, there is an internal review process that is undertaken.

Senator CASH—How many of these internal reviews have been undertaken in the last 12 months? I am also then going to ask how many of them have resulted in an increased payment being made to the employee.

Mr Kovacic—In the last 12 months there have been 120 applications for review. I do not have data in terms of the outcomes of those reviews. I will need to take that on notice.

Senator CASH—Thank you.

Mr Kovacic—Again, on page 166 of the portfolio budget statement the performance indicator is the fourth one. I apologise for the typographical error, but it is that over 98 per cent of payments are not varied after appeal. So that is a fairly significantly high target.

Senator CASH—Thank you for that. Could you comment on the average time frame for an appeal or the outcome of an appeal?

Ms Baxter—I will need to take that on notice.

Senator CASH—That is fine. In the instance that funds have become available during an insolvency process, is the department able to recover the funds?

Ms Baxter—Yes. If the department has advanced funds under GEERS to an employee then the department, as it were, stands in the shoes of the employee. Any funds that may be payable to employees are therefore subrogated because we stand in the shoes as a subrogated creditor.

Senator CASH—Are you able to provide the figure as to how much has been recovered via that process for the 2008-2009 financial year? And, finally, how many calls have been received by the GEERS hotline in the 2008-2009 financial year?

Ms Baxter—Up to 30 April in the 2008-2009 financial year, \$8.3 million has been recovered in GEERS advances made. In terms of calls to our hotline, there have been 29,443 calls to 30 April 2009.

Senator CASH—Do you note the queries that are being asked? Do you do a breakdown or an analysis of that?

Ms Baxter—No, we do not.

Senator CASH—So all you know is there are 29,443 calls?

Ms Baxter—That is right.

Senator CASH—Chair, at this stage I am going to defer to Senator Fisher to ask some questions.

Senator FISHER—I have some questions around the award modernisation process. I presume the department is more than aware of the Deputy Prime Minister's letter of last Friday to the President of the Industrial Relations Commission.

Mr Kovacic—We are indeed, Senator.

Senator FISHER—What involvement did the department have in the process leading up to the writing of that letter?

Mr Kovacic—As is normal, the department provides advice to the Deputy Prime Minister on a range of workplace relations issues, of which award modernisation is one.

Senator FISHER—What specific involvement did the department have in the process leading up to writing of this letter?

Mr Kovacic—In keeping with our general policy advice, we would have provided advice to the Deputy Prime Minister on a range of issues related to award modernisation.

Senator FISHER—When would you have provided that advice, Mr Kovacic?

Mr Kovacic—We provide advice on an ongoing basis.

Senator FISHER—How did this issue first come to the attention of the department, in the capacity of its advising the Deputy Prime Minister?

Mr Kovacic—My understanding is that the Deputy Prime Minister had a meeting with representatives of the Restaurant and Catering Industry Association earlier this year. I cannot recall if the issues were first drawn to our attention as a result of that meeting or as a result of some of the media reports around the issues associated with that particular sector.

Senator FISHER—Can you take that on notice? Can you clarify, please, when this issue first came to your attention—whether, in fact, it was as a result of meetings that you say the Deputy Prime Minister had with the restaurant and catering sector earlier this year—

Mr Kovacic—We can.

Senator FISHER—or as a result of media reports around and about the sector?

Mr Kovacic—We can take that on notice.

Senator FISHER—What modelling did the department do with respect to the situation that the sector claimed—and claims—it was facing with the modern award by which it was to be covered?

Mr Kovacic—We have not done any economic modelling in the traditional sense of the word. We have clearly done some analysis in terms of the pre-existing industrial instruments in the modern award. We have also sought to have discussions with some of the industry

stakeholders, particularly the Restaurant and Catering Industry Association, around some of the modelling that it has undertaken, as part of the process of understanding the assumptions and working patterns that underpin their modelling.

Senator FISHER—So did your modelling assess the claim from the sector about the restaurant and catering sector, in particular, having difficulty with its capacity to bear significant cost increases that would be imposed under the modern award?

Mr Kovacic—A moment ago I indicated we had not undertaken any modelling.

Senator FISHER—Did you do any assessment of that claim made by the restaurant and catering sector in the process of advising the Deputy Prime Minister prior to the penning of her letter last Friday?

Mr Kovacic—We did some comparisons of pre-existing industrial instruments, both at the federal level and also notional agreements preserving state awards against the modern award. What that indicated is that there is a disparity of conditions that the commission sought to combine to create the modern award. As I mentioned, we had some further discussions with the restaurant and catering association around the modelling that they had undertaken in the context of the award modernisation process.

Senator FISHER—Did the department assess the claim made by the sector of the labour intensive nature of the sector?

Mr Kovacic—Clearly, I think the Deputy Prime Minister's letter refers to data from the Australian Bureau of Statistics that identifies some elements of the nature of the business. That is, I think, the nature of the sort of discussions we have had both with the restaurant and catering association and also some of our own analysis or work that we have done.

Senator FISHER—The Deputy Prime Minister's letter refers specifically to the operational requirements of the restaurant and catering industry, its core trading times and the labour intensive nature of work in the industry. What assessment did the department undertake of those aspects of the industry?

Mr Kovacic—I think that is something that we have explored in our discussions with the restaurant and catering association. Clearly one of the very practical difficulties is that when you are talking about the restaurant and catering area you are talking about a diversity of businesses both in terms of the nature of the business, the size of the business but also the particular market that they target. The notion of a cafe that might open Monday to Friday and do lunches is quite different from a restaurant that might specialise in top end meals, which is a dinner service—perhaps weekend meals. Some of the areas that we canvassed with the restaurant and catering were to try to understand what might be some of the working patterns that might apply in a particular industry and which underpinned the modelling that it had undertaken as part of the award modernisation process.

Senator FISHER—Thank you. What process did the department undertake to assess the industry's claim that, were the proposed modern award to cover the restaurant and catering sector, it would cover both its sector plus, for example, the hotels sector, which operate under different business models and with different revenue streams?

Mr Kovacic—One of the key criticisms from the restaurant and catering sector is that the modern award, which the commission created, combined restaurant and catering provisions with provisions from the hotel award. That was a concern in the sense that the industry did not believe that that was appropriate, and certainly that was an issue that we canvassed in discussions with the industry and also that the industry canvassed in the discussions that it had with the Deputy Prime Minister, to the best of my knowledge.

Senator FISHER—So the process that the department undertook in respect of that claim was discussions with the industry; is that right?

Mr Kovacic—As I mentioned, the Deputy Prime Minister met with representatives of the restaurant and catering association and we subsequently had further discussions with members of that association as well.

Senator FISHER—Can you provide the committee with the dates and times of those discussions and meetings?

Mr Kovacic—We have to take that on notice.

Senator FISHER—Thank you. When do you think the first might have occurred?

Mr Kovacic—It would have been early this year, but I cannot be precise. Indeed, I am not even completely confident that it was this year—it may have been late last year. From recollection, the modern award was established by the commission in December of last year, so it would have been after 19 December. I would imagine it was early this year, but I will need to double-check that to confirm it.

Senator FISHER—You earlier suggested that the catalyst in terms of the department's involvement—and you have taken this on notice—might have been media reports or earlier meetings that the association had with the Deputy Prime Minister. I look forward to that answer. But how might media reports have influenced the department's processes?

Mr Kovacic—Just by potentially highlighting that there was an issue there.

Senator FISHER—What might the department have done as a result of that highlighting that there was an issue?

Mr Kovacic—It is an awareness of an issue. To the extent that it ultimately becomes a major issue, it may generate some work or some consideration or investigation as to the nature of the issues. But, as I said before, I cannot recall what the first thing was that brought the issue to our attention and I have taken that question on notice.

Senator FISHER—You have. If media reports were to raise the department's awareness, resulting in consideration and investigation, would you necessarily advise the minister of the outcome of that investigation?

Mr Kovacic—That is speculation. It really depends. You could have what might be a relatively trivial matter referred to in a media report about which you might seek some information or, indeed, do nothing. There is a judgment call made on any of these issues in terms of what you may inform the minister or his or her office about.

Senator FISHER—Sure. What involvement did the department have in the process? The Deputy Prime Minister's letter to the president of the commission attached a variation to her administrative direction of 14 months earlier. What involvement did the department have in the process leading to the drafting of that variation to the administrative direction?

Mr Kovacic—As I mentioned before, the department provides advice to the Deputy Prime Minister on a range of workplace relations issues, of which award modernisation is one. Your question goes beyond that in terms of what might be the nature of advice that the department may or may not have provided to the Deputy Prime Minister.

Senator FISHER—With respect, Mr Kovacic, I disagree. I am asking whether or not the department was involved in the process leading up to the variation to the administrative direction.

Mr Kovacic—We provide advice on a range of workplace relations issues, of which award modernisation is one.

Senator FISHER—Did the department prepare a draft of the Deputy Prime Minister's letter to the President of the Industrial Relations Commission?

Mr Kovacic—I really do not have anything to add to the answer I have just provided.

Senator FISHER—But that is a yes or no, Mr Kovacic.

Ms Paul—We have already said that we offered advice right along the way, so—

Senator FISHER—I take that to be a yes.

Ms Paul—You could say that, but I think our answer stands as it is.

Senator FISHER—Did the department prepare a draft of the variation to the administrative direction?

Mr Kovacic—As I have said, we provide advice to the Deputy Prime Minister on a range of workplace relations issues, of which award modernisation is one.

Senator FISHER—I am not quite sure why you cannot answer that specific question. I am asking about the process and the fact, not the content, in substance.

Ms Paul—I think it is sort of on the margins, with respect, because—

Senator FISHER—And then on the margins, with respect, I would say: on what basis are you saying that you cannot answer the question, in any event, but before we get to that—

Ms Paul—Simply because it gets quite close to the nature of our advice and that is where we cannot go. So I think where we can go is just to say—

Senator FISHER—The Deputy Prime Minister might have disregarded every component. If you did provide a draft, she might have disregarded it. I am not asking you to indicate to that or otherwise. I am asking about the fact of—

Ms Paul—I think it is sufficient to say that we have offered advice all the way through.

Senator FISHER—Thank you.

CHAIR—If I can be of any assistance, Mr Kovacic raised to the very dizzying heights he did under the previous government. I remember being in exactly your position asking the same questions and getting exactly the same answers.

Senator FISHER—It is beautiful, isn't it? It is a very enviable position. Hopefully, you will return to this one reasonably soon.

CHAIR—I do want to make the point that there is nothing inconsistent with the way the department is dealing with these questions. This has been longstanding practice.

Senator FISHER—Indeed. I want to turn to a few more questions about the Deputy Prime Minister's letter and the variation to the administrative direction. The Deputy Prime Minister's letter refers to factors in respect of the restaurant and catering sector, such as the continuing viability of restaurant and cafe businesses which operate in an industry characterised by low profit margins and peak operating times of evenings and weekends. She goes on to say: 'I have been provided with material that supports the claims that the modern award in that sector would result in significant cost increases for the restaurant, cafe and catering sector in many states, and that the capacity of that sector to bear such increases, even with transitional arrangements, is limited.' She goes on:

The material also argues that other sectors covered by the modern award, notably hotels, operate on different business models and typically have streams of revenue from other activities such as gaming and accommodation.

She goes on to cite the Australian Bureau of Statistics figures—to which you referred in part, Mr Kovacic—and says that they show that 'cafes, restaurants and catering services are characterised by comparatively low profit margins and high labour costs as a proportion of total expenses. Moreover, the industry has a very high award-reliance.' Would there be other industry sectors that would consider that they enjoy—or not—one or more of those factors?

Mr Kovacic—There may be.

Senator FISHER—Is the department aware of any sectors that may experience or that may exhibit one or more of those factors? If so, you might suggest some sectors.

Mr Kovacic—I would have to take that on notice. I am aware that there are a number of other sectors that have expressed some concern about the modern award, or the draft modern award which the commission has either issued for consultation purposes or finalised. They include industries such as retail, aged care and there are possibly some others, such as horticulture. Whether they fit the criteria in terms of those particular indicators, I have taken that on notice. I am not aware of that off the top of my head.

Senator FISHER—How have you become aware that those sectors might consider that they have those concerns?

Mr Kovacic—Through representations to the Deputy Prime Minister, primarily all representations directly to the department, and through discussions with a range of stakeholders following on discussions that they may have had with the Deputy Prime Minister as well.

Senator JACINTA COLLINS—Does the department still monitor hearings before the commission?

Mr Kovacic—Significant hearings, Senator.

Senator JACINTA COLLINS—So that would be another avenue through which you would be aware of such matters?

Mr Kovacic—Certainly. In the context of providing advice, as I have indicated to Senator Fisher, we have been monitoring the award modernisation process fairly closely all the way along and, as I have indicated before, providing advice throughout the process as part of our normal policy advising role. Clearly, award modernisation is one that we have followed very closely, so I suppose it is very different from some of the more day-to-day matters that might be heard by the Industrial Relations Commission.

Senator FISHER—So, Mr Kovacic, the same process trigger mechanisms, if you like, that came about in the restaurant and catering sector are coming about in these other sectors of which you are speaking. So, for example, consultations with the department and meetings between the Deputy Prime Minister and stakeholders have raised these issues?

Mr Kovacic—In some cases. I would have to say overall that the award modernisation process has been very successful with the number of concerns about draft modern awards being limited to a few awards rather than being wholesale.

Senator FISHER—Given the department's awareness of the fact that at least some sectors, some of which you have named, have indicated that they experience at least one or more of the factors listed by the Deputy Prime Minister in her letter last Friday to the president of the commission, what is the department doing to assess those claims?

Mr Kovacic—To clarify what I have said, I am aware of a number of industry sectors expressing concern with either draft modern awards or the modern awards which the commission may have made. I have taken on notice the question of whether they exhibit any of these sorts of factors that are referred to in respect of the restaurant and catering sector. I have not said whether they do or do not, but they may do. To get to—

Senator FISHER—Has not the department assessed that in respect of any other sector?

Mr Kovacic—As part of the general role we have of providing advice to the Deputy Prime Minister, the department is now undertaking an analysis of the modern award against the pre-existing instruments that might have applied.

Senator FISHER—You have got your workplace relations implementation group team here: Ms Anderson, who manages the private sector branch; Ms Bull, who, similarly, is a branch secretary of the private sector branch; and Mr Maynard. Are you suggesting that none of those officers can indicate to you whether any one sector within the private sector can properly claim to exhibit one or more of the factors that the Deputy Prime Minister cited in her letter last Friday to the president of the commission?

Mr Kovacic—I have taken the question on notice, Senator. You asked previously whether there are any other sectors that exhibit those sorts of qualities. I have taken that question on

notice because, as I have indicated, I did not know that off the top of my head. I am not prepared to hazard a guess—

Senator FISHER—But you have officers in the room who may well know, Mr Kovacic.

Mr Kovacic—I have indicated that there are a number of industry sectors that have expressed concerns either with the draft modern award which the commission has issued for consultation processes or, alternatively, the modern award which the commission has finalised. In circumstances where those concerns have been brought to the attention of either the Deputy Prime Minister or the department, we have done some analysis, as we did on the restaurant and catering area, examining the modern award up against pre-existing industrial instruments in order to assist us in the provision of advice to the Deputy Prime Minister, as we would generally do.

Senator JACINTA COLLINS—Mr Kovacic, just on this question of—

Senator FISHER—Chair, I had the call. May I continue, please?

Senator JACINTA COLLINS—I am seeking to extend your question on notice in one particular respect that is relevant to the nature of the questioning. We can take copious amounts of time at another stage if that suits you, but it would be quicker to do it this way.

Senator FISHER—Proceed.

CHAIR—Generally, we have a practice, while everyone is getting on well, that, if people have got supplementary questions—

Senator FISHER—I am trying—very trying!

CHAIR—And we are getting on well at the moment! Senator Collins, ask your question and we will come straight back to you, Senator Fisher.

Senator JACINTA COLLINS—Mr Kovacic, on Senator Fisher's question: I would also be interested in the perspective of what problems that have arisen to date have indeed already been resolved through the process in the award modernisation. So, if we are looking at a snapshot at a particular point in time, some of those problems either have already been resolved through the draft discussion phase before awards have been finally modernised or may yet, by the time we get the question back on notice, further be resolved in the commission's process.

Mr Kovacic—I will take that on notice.

Senator JACINTA COLLINS—Thank you.

Mr Kovacic—Can I just perhaps clarify: I have some advice about when the Deputy Prime Minister met with the restaurant and catering association. It was 26 February.

Senator FISHER—This year?

Mr Kovacic—That is correct.

Senator FISHER—And you are suggesting that it was that meeting that led to the Deputy Prime Minister's letter of last Friday, are you?

Mr Kovacic—I am suggesting that it would have been, I suppose, the commencement of a dialogue with that body and the commencement of some consideration by the Deputy Prime Minister of the issues that were raised by that association.

Ms Paul—I think the only person who can answer that is the minister herself.

Senator FISHER—Would you care to venture an answer on her behalf, Senator?

Senator Arbib—I certainly would not, but I am happy to take that on notice and try and get an answer for you tonight.

Senator FISHER—Thank you, that would be very good.

Senator Arbib—Also, I am advised that the department is examining other issues concerning award modernisation, including in relation to the horticulture and retail awards—just coming back to your earlier point.

Senator FISHER—Thank you. That was the point at which Senator Collins asked her question. Mr Kovacic, you said variously that the department is doing analysis and that it has done analysis. In respect of what sectors have you done analysis, and what do you mean by ‘done analysis’? In respect of what sectors are you—as Senator Arbib has just given a couple of examples—doing analysis, and at what stage is that ‘doing analysis’?

Mr Kovacic—The analysis that we are undertaking is still in train. Part of it has been—

Senator FISHER—So, Mr Kovacic, by what did you mean that you have ‘done’ analysis.

Mr Kovacic—It was a poor use of language on my part. It is work in progress, if I can put it that way. Part of that process is—

Senator FISHER—So does that mean that no information in that respect has gone to the Deputy Prime Minister at this stage?

Mr Kovacic—As I have said before, we have actually provided advice on the award modernisation process throughout, and that advice has been consistently provided to the Deputy Prime Minister. It might go to some of these issues, but I would rather not go to the detail of what we may or may not have provided.

Senator FISHER—Can you provide the committee with a list of the sectors in respect of which you are conducting this analysis?

Mr Kovacic—I will certainly take that on notice. One of the points I was going to make was that part of the process and part of the dialogue we are having with some of the industry sectors is that clearly the working patterns of employees in a particular industry sector are quite critical in terms of undertaking the analysis that we are undertaking.

Senator FISHER—Yes, indeed.

Mr Kovacic—We have been having discussions with a range of industry bodies including the Australian Chamber of Commerce and Industry to assist in clarifying what those working patterns might be. At this stage, in a number of areas we are still waiting for advice back from some of those industry bodies to facilitate us to progress that analysis that we are undertaking.

Senator FISHER—The *Australian* on the weekend, on Monday and on Tuesday has had a range of articles dealing with this issue, some of which have been penned in the name of Patricia Karvelas, citing the retail, fast food and pharmacy industries. We have referred to the retail sector as being one that the department is including in its analysis. Given that you indicated earlier, Mr Kovacic, that, if nothing else, media reports raise the department's awareness of a potential issue, and then you went on to say that whether it was a trivial little issue or not would influence the extent to which you then advised the Deputy Prime Minister, in this case, of an end result of the department's consideration and assessment, what consideration is the department giving to the concerns being expressed by the fast food sector and the pharmacy sector that are being expressed along exactly the same lines as those expressed by the restaurant and catering sector?

Mr Kovacic—Certainly we are aware of the concerns. Indeed, we have had some discussions with the Pharmacy Guild, I think it is, about their particular concerns, and they have provided some advice to us about working patterns in that sector to enable us to undertake the analysis that I have mentioned previously. In terms of fast food, we have not had any discussions with representatives of that sector at this stage that I am aware of.

Senator FISHER—Given that, consistent with your own say-so, a media report raises the awareness and given that there have been media reports yesterday and today referring to the fast food sector, will you? I can provide you with copies if it assists, but I am sure you are better at that than I am.

Mr Kovacic—I do not know that there is an answer. Certainly, were the sector to want to have discussions with the department, we would be more than willing to have those discussions should they wish.

Senator FISHER—Brodies Meal Makers Queensland franchisee Mr Aaron Steer was quoted yesterday in the *Australian* as saying:

... the new award wages would mean 50 per cent of the fast-food chain's 14 restaurants would be forced to close.

He might be best advised to contact you, Mr Kovacic, quick smart, based on what you have indicated. Is that right?

Mr Kovacic—As I have indicated, were they to approach the department seeking discussions, we would be more than happy to meet with them.

Senator FISHER—Very good. What about the cleaning services industry, again given the press in recent days about the concerns expressed by the cleaning services industry?

Mr Kovacic—I am not aware of any representations that have been made to the department around that particular sector.

Senator FISHER—You have earlier said that media reports raise the department's awareness. There has been press in respect of a South Australian based company called Longford Cleaning services reported particularly in South Australian press and also in the *Australian*—I think last Friday or over the weekend—expressing the concerns that they had

about the imposition, as they saw it, of a modernised award in their sector. Are you aware of those reports?

Mr Kovacic—I am aware of the reports, but, as I indicated, we have not received any representations from that particular sector.

Senator FISHER—Has the Deputy Prime Minister?

Mr Kovacic—I would have to take that on notice, Senator. I am not aware of any, but I would have to take that on notice.

Senator FISHER—I am informed by Longford Cleaning services, having to hand a letter from Longford Cleaning services to me, that they have written in identical terms to the Deputy Prime Minister and did so more than a week ago. The department has no knowledge of that letter?

Mr Kovacic—I have taken the question on notice. I have certainly personally not seen a letter to that effect. That is not to say that it has not been received, but I have taken that on notice.

Senator Arbib—Senator, it is probably more appropriate that I chase that up with the minister's office and try and get you a response.

Senator FISHER—It probably is, Senator Arbib. Yes, thank you. I am told that the letter was posted to the Deputy Prime Minister care of her Parliament House address on 21 May. That letter expresses confusion about the Deputy Prime Minister's repeated comments that the award modernisation process should not leave employees worse off or drive up costs for employers.

Mr Kovacic—As I think I have mentioned in evidence at both previous estimates hearings and this committee's inquiries into various components of the fair work legislation, what is provided for both in the award modernisation request and also through the transition and consequential bill is scope for the Industrial Relations Commission, in those circumstances where there is the potential either for employees to be disadvantaged or for a cost impact on employers, for that to be addressed either through the inclusion of transitional provisions in modern awards—and, as you might be aware, the commission has commenced a process with initial submissions lodged with it last Friday—

Senator FISHER—I have some questions about that, which I will go to later.

Mr Kovacic—Indeed, the second component of that is the scope for take-home pay orders to be made by Fair Work Australia in certain circumstances.

Senator FISHER—Of course, that is in a bill that is before parliament.

Mr Kovacic—That is correct.

Senator FISHER—The letter from Longford Cleaning services that was written to me—and I was informed by the company that the letter to the Deputy Prime Minister was in identical terms, other than that it was addressed to the Deputy Prime Minister—said: 'In the cleaning services industry, industry margins are slim and hopefully five per cent. We have always charged a little more'—say Longford Cleaning services—'than most of our

competitors and given our customers a lot more in terms of quality. An important part of this has been giving our employees sufficient time to do the work.’

Longford Cleaning services say there are three options this modern award for their sector presents them with. They include attempting to gain what will be an inevitable price rise from their customers. They believe that will result in the loss of 75 to 80 per cent of their business. Their second option is to have their customers accept a lesser standard of work, which has not been custom and practice for their business. Finally, their third option is to have all workers finish work before 6 pm. That clearly raises a peak work time and peak work hours issue. They go on to claim, ‘The net result means our workers will be worse off because they no longer have a job or they have less hours and therefore are no better off.’ In that context, what is the department’s view of the claim by Longford Cleaning services that in their industry ‘margins are slim, hopefully five per cent’?

Mr Kovacic—I am not in a position, without having seen the letter or undertaken any research, to express a view on the question that you have asked.

Senator FISHER—I note that the Deputy Prime Minister’s letter to the president of the commission last Friday, which refers to the average profit margin experienced by the restaurant and catering sector, refers to an average profit margin in that sector of 3.8 per cent for cafes and restaurants and 5.3 per cent for catering services businesses. She goes on to say that that compares with some 12.7 per cent of all industries, which leads to her assessment that this is an industry characterised by low profit margins and peak operating times of evenings and weekends. What is the difference between a 3.8 per cent profit margin for cafes, a 5.3 per cent profit margin for catering services and a hopefully five per cent profit margin for the cleaning services sector, especially when compared with an average—on the Deputy Prime Minister’s say-so—of some 12.7 per cent across all industries?

Mr Kovacic—In terms of the specific industry or the facts in terms of the cleaning industry, I am not in a position to comment. I can say that the government have been prepared to consider issues raised by stakeholders where they believe there are real practical issues with modern awards that deviate from the principles of award modernisation and to take action, including amending the award modernisation request, if the government believe that that action is appropriate.

Senator FISHER—Given that the department was involved in general terms in advising the government and the Deputy Prime Minister in respect of this issue, can you provide the committee—presumably on notice—with the basis upon which the calculation was done to justify the Deputy Prime Minister’s claim in her letter to the president of the commission that the average profit margin for cafes and restaurants was 3.8 per cent and 5.3 per cent for catering services?

Her letter does say that the figures are based on ABS statistics, and she has utilised an example from 2006-07, but on what basis was the calculation done to then conclude that this compared with 12.7 per cent average profit margin for all industries? Can the department provide on notice the analysis done to underpin that claim for the 2006-07 year, and can the department also apply identical methodology to show what the results would be if you did

that same analysis for the preceding financial year and the post financial year, so 2005-06 and 2007-8 based on ABS data?

Mr Kovacic—We will take that on notice, the only caveat I might put on it is that, to the extent that it is relying on ABS data, the availability of that data may be an issue. It depends on what the source of the data, if it is survey based data which may be a longer time frame than annual, that might be the only caveat that would limit being able to deal with the years either side.

Senator FISHER—I appreciate that and that is why I have done it that way, nonetheless, irrespective of those caveats, there would be no reason why the department cannot provide the basis upon which the Deputy Prime Minister makes the claim she does in her letter.

Mr Kovacic—I have taken that on notice, happy to do so.

Senator FISHER—Thank you. Senator Arbib, this may be a question for you, and thank you for agreeing to come back to the committee on whether or not the Deputy Prime Minister has received a letter from Longford Cleaning services. If the Deputy Prime Minister has received a letter from Longford Cleaning services, in the terms that I have outlined, would you also be able to inform the committee by which time the Deputy Prime Minister would propose to respond to Longford Cleaning services?

Senator ARBIB—Sure, I think he said it was 21 May that he knew that the letter sent.

Senator FISHER—Yes, that is what I am informed

Senator ARBIB—So it has been about a week. That would be a quick turnaround time.

Senator FISHER—Yes, so it may well be in the Deputy Prime Ministerial ether.

Senator ARBIB—Sure.

Senator FISHER—Turning to the factors referred to in the variation of the award modernisation request which are the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry's core trading times. Are there other sectors that experience these factors?

Mr Kovacic—There probably are, but I would need to take that on notice rather than hazard a guess at what they may be.

Senator FISHER—What process does the department have to assess claims from those other sectors that they experience the same factors?

Mr Kovacic—In essence we are talking about a process where concerns about the award modernisation process, more particularly about either modern awards that have been made by the Industrial Relations Commission or, alternatively, draft modern awards which the commission has issued for consultation purposes, represent a small component of the modern awards and the draft modern awards which to date the commissioner has either made or issued. Clearly, in circumstances where representations are made either to the Deputy Prime Minister or to the department, we would be mindful of those representations. In a number of cases, as I have mentioned, we have already followed through in undertaking some further analysis of the issues which may underpin those concerns. Indeed, that has in some cases

involved discussions with representatives of the particular industry sector, so it is really in those circumstances where we become aware of concerns of key stakeholders, either through representations or some other form, that we may undertake that further work.

I have to stress that there are provisions in both the award modernisation request and in the transitional and consequential bill which provide the capacity for the Australian Industrial Relations Commission or, into the future, Fair Work Australia to deal with those circumstances where there is a potential for either employees to be disadvantaged or, alternatively, for business costs to increase as a result of the award modernisation process, and those provisions are the inclusion of transitional provisions, or, should the transitional and consequential bill be passed by the parliament, through the scope for Fair Work Australia to make take-home-pay orders in certain circumstances.

Senator FISHER—You have just referred to transitional provisions. Why does the Deputy Prime Minister's letter claim that the capacity of the restaurant and catering sector to bear such increases, even with the transitional arrangements, is limited? You seem to be putting a lot of store in the transitional arrangements of the deputy Prime Minister's letter seems to put pretty well nix on the transitional arrangements in respect of the restaurant and catering sector.

Mr Kovacic—I think that is against the background of the penultimate paragraph of the deputy prime Minister says letter, which says, 'Specifically my request requires the commission to create a separate modern award covering the restaurant and catering industry separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. My request now also requires the commission to establish a penalty rate and overtime regime that appropriately recognises the restaurant and catering industries' core trading times and the labour-intensive nature of the work in the industry.' In essence, it is about taking those particular factors into account in the nature of this sector's operations and, if there is then a need for transitional arrangements, it may be considered after the new modern award for this particular sector is made by the commission.

Senator FISHER—Which particular sector?

Mr Kovacic—Restaurant and catering. In essence, what the Deputy Prime Minister is asking, through the variation to the award modernisation request, is for the commission to create a new, modern award for the restaurant and catering industry.

Senator FISHER—That is right and a separate award for the hotel sector.

Mr Kovacic—In essence, the award which the commission has already made in terms of hospitality per se is a combination of hotel, restaurant and catering. Indeed, the concern from the restaurant and catering sector was that it was being combined with an award which also covered the hotels area.

Senator FISHER—Is the Deputy Prime Minister referring, even with transitional arrangements, to the transitional arrangements to which you referred in your answer just then, the work which now supposedly lays ahead of the Industrial Relations Commission, or is she

referring to the transitional provisions that may materialise as a result of legislation being considered this week by the House of Representatives in terms of the transitional bill?

Mr Kovacic—With this particular industry, the Deputy Prime Minister has asked the commission to create a new modern award. I have mentioned previously that there is a separate process, which is currently under way—

Senator FISHER—To what transitional arrangements is she referring, the work ahead of the commission which she itemises later in her letter or the transitional arrangements which may be legislated as a result of legislation currently being considered by the House of Representatives?

Mr Kovacic—I am looking in terms of the letter and very quickly—

Senator FISHER—You are right—it is kind of ambiguous.

Mr Kovacic—Bear with me. I am not sure that it mentions transitional arrangements for the restaurant and catering sector, at least I cannot find it very quickly. Clearly, in terms of the variation to the award modernisation request and the Deputy Prime Minister's request that the commission create a new modern award for the restaurant and catering industry, the commission cannot consider whether there is a need for transitional arrangements until after the modern award has been created. I have said that currently underway there is a process which the Industrial Relations Commission is undertaking in respect of stage 1 and stage 2 modern awards, considering the need, if any, for transitional arrangements to be included in those awards.

Senator FISHER—You have referred to the first part of the Deputy Prime Minister's request about the commission creating a separate modern award covering the restaurant and catering industry and separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. Is it proposed that in the retail sector the same modern award that would apply to Coles and Woolworths will also apply to the corner deli?

Mr Kovacic—My understanding is that the modern award, which the Industrial Relations Commission has created, covers the retail sector generally.

Senator FISHER—Indeed. I have not noticed a corner deli pumping petrol or having a liquor outlet. How is it different from having different revenue streams and operating on different business models as the Deputy Prime Minister cites as a part of her justification for appropriately special treatment of the restaurant and catering sector?

Mr Kovacic—What I have indicated is that the Deputy Prime Minister has received representations from the retail sector around a number of issues relating to the modernisation process.

Senator FISHER—And not from retailers?

Mr Kovacic—I said retail.

Senator FISHER—Sorry.

Mr Kovacic—That is currently under consideration. The other point that I made before is that the government has been prepared to consider issues raised by stakeholders where they

believe that there are real practical issues with modern awards that deviate from the principles of award modernisation and if, as a result of that consideration, it is deemed that there is a need to take action including variation of the award modernisation request, the Deputy Prime Minister will certainly consider that action.

Senator FISHER—Why does the Deputy Prime Minister’s letter refer to some factors that she cites as influential at the very least as the grounds for her varied direction to the commission? Why does she cite some factors in her letter yet the variation of the award modernisation request is silent on those factors?

Mr Kovacic—I cannot answer that question.

Senator FISHER—Given the department’s involvement in the process leading up to both the writing of the Deputy Prime Minister’s letter last Friday and the variation of the administrative direction, the department must have a view as to the effect of the factors that the Deputy Prime Minister has contained in her letter to the president of the commission versus the effect of the factors that the Deputy Prime Minister has included in her variation of the administrative direction. Given that there are some in the letter that are not in the administrative direction, what is the difference in effect of having a factor in the letter but not a factor in the administrative direction?

CHAIR—The problem I see with it, Senator Fisher, is that, whether or not you say it is a view, you are asking the officials to give an opinion on what the Deputy Prime Minister has written and they cannot do that.

Senator FISHER—Chair, the department has very experienced legal counsel, some of whom are in the room, who are able to provide the difference in effect between something being contained in a letter from the Deputy Prime Minister to the president versus the variation of an administrative direction.

CHAIR—But you are asking them to give you an opinion.

Senator FISHER—A legal opinion that they are employed to do. Ms James is chief counsel. Where are you, Ms James? There she is, trying to hide! No, she’s not.

CHAIR—Well you cannot ask them to give legal opinions either.

Senator FISHER—Chief counsel?

Senator Arbib—Why don’t I ask the Deputy Prime Minister’s office for an explanation of the intent to which the senator is referring? That might assist.

Senator FISHER—Thank you, Senator. An explanation as to the intent would go part of the way. You might also be so kind as to ask for an explanation as to the effect.

Ms Paul—I think we can offer some assistance here without of course going to any opinion.

Mr Kovacic—Clearly the variation to the request itself needs to make explicit what the commission is required to do as a result of the variation. So that is why the variation makes it quite clear that what the commission is being asked to do is to create a modern award covering the restaurant and catering industry, which is quite separate from those sectors in the

hospitality industry providing hotel accommodation or gaming services, and, secondly, that the development of such a modern award should establish a penalty rate and overtime regime that takes into account the operational arrangements of the industry including the labour intensive nature of the industry and the industry's core trading times. So it is quite explicit in terms of what the commission is required to do. For the purposes of the commission, the request is the document that it needs to comply with and that is why it is as explicit as it is in terms of the commission having to create that new, modern award.

Senator FISHER—The variation of award modernisation request does attempt—and we might talk about that shortly—to provide some guidance to the commission but that begs the question as to why the covering letter sees fit to contain more information, more verbiage.

Mr Kovacic—As you would be aware, the process that the commission has adopted in terms of award modernisation has been an extremely consultative process where all interested parties have had the opportunity of making submissions to the commission as part of the development of modern awards. Consistent with that approach, I would imagine that the commission would adopt that in respect of developing a new modern award for the restaurant and catering industry. So it is against that background that the request needs to make it quite clear what the commission is being asked to do by the Deputy Prime Minister through the request.

Senator FISHER—If it needs to make it quite clear through extra words in the Deputy Prime Minister's letter, why is it not appropriate to reflect those extra words in the variation to the administrative direction itself?

Ms Paul—I think we have just said that the request covers the bases and that we expect the commission to do further consultation.

Senator FISHER—It does not answer, however, Ms Paul, why the Deputy Prime Minister refers to continuing viability being an issue for the sector yet the variation request is silent as to that. It does not explain why the Deputy Prime Minister's letter refers to low profit margins yet the variation to the award modernisation request is silent as to that. It does not explain why the Deputy Prime Minister's letter refers to limited streams of revenue compared to others in the sector but the variation to the award modernisation request is silent as to that. It does not explain why the Deputy Prime Minister's letter refers to a very high award reliance in the restaurant and catering sector yet the award modernisation variation is silent as to that issue. If they are issues and grounds in the Deputy Prime Minister's letter that she says she took into account in deciding to do what she says she is now doing, in respect of the restaurant and catering sector, why aren't they reflected in the variation to the award modernisation request? What is the difference as to them being in her letter and not in the award modernisation request?

CHAIR—That was a very long question.

Senator FISHER—It was.

CHAIR—I hope no-one asks you to repeat it.

Senator FISHER—And here is my question about that. Would it surprise the department if other sectors wanted to know the answer to that question so they could queue very quickly, both to see the department and the Deputy Prime Minister, to get what the restaurant and catering sector have got? Would it surprise the department?

Ms Paul—We cannot comment on that.

Senator FISHER—That is a rhetorical question.

Ms Paul—Indeed.

Senator FISHER—Mr Kovacic, earlier on you referred to the transitional part of the Industrial Relations Commission's dealings with award modernisation. The government lodged a submission last Friday in respect of that, didn't it?

Mr Kovacic—That is correct.

Senator FISHER—Who prepared the government submission to the Industrial Relations Commission?

Mr Roddam—The submission was prepared within my branch, the Safety Net and Wages Branch.

Senator FISHER—Why was special reference made to the aged-care sector in that submission?

Mr Roddam—As explained in that submission, the aged-care sector is a sector of direct interest to the Australian government through funding arrangements et cetera.

Senator FISHER—So without funding from the government the sector would struggle to operate?

Ms Paul—I do not think Mr Roddam could even comment on that. It is not in our portfolio. He is just simply saying that obviously because of the funding arrangements of some significant importance to the Commonwealth government.

Senator FISHER—Thanks, Ms Paul. Mr Roddam, I interrupted you.

Mr Roddam—Can I refer you to paragraphs 3.24 and 3.25 of our submission, which state: The aged care industry, which the commission considered in stage two of award modernisation, is an industry of direct interest to the government. The government is committed to the long-term viability of aged care and considers transitional provisions in modern awards are important to enable the industry to manage any change in labour costs.

Senator FISHER—It then goes on to say, in paragraph 3.29, that aged care is a labour intensive industry—a factor that might be regarded as being in common with the restaurant and catering sector and indeed other sectors. The submission then exhorts the commission to use the full five-year transition period available to allow the aged-care sector to absorb any changes in labour costs. That is obviously very well and good in respect of the very important aged-care sector. But what is the effect of the government's singling out of the aged-care sector in this submission in respect of encouraging the commission to use the full five-year transition period available for that sector?

Mr Kovacic—I think that the purpose of the submission is to encourage the commission to utilise the capacity of transitional provisions to deal with the potential for increases in costs for businesses, and that will vary from sector to sector depending on how the modern award stacks up, if I can put it that way, against the pre-existing industrial instruments. Clearly, because of the government's direct interest in the aged-care industry that is one which the government has chosen to highlight, if I can put it that way, in its submission. Clearly, the government's view is that the commission should be using this process to include transitional provisions wherever the commission considers that appropriate.

Senator FISHER—Does the government consider that approach appropriate in respect of any other sectors?

Mr Kovacic—The submission is by and large of a general nature to provide assistance to the commission in terms of the legislative framework while also suggesting some principles which the commission may wish to consider in addition to the two principles that it has identified to guide the process of considering transitional arrangements. One of those principles that the government has suggested is that the parties themselves, as much as possible, should be encouraged to reach agreement on suggested transitional provisions as well as on a number of other sorts of comments in the submission as well. So it is of a general nature.

Senator FISHER—Yet the submission saw fit to single out the very, very important aged care sector in this stage of the proceedings. The aged care sector is one of a number of sectors subject to either priority modern awards or stage 2 modern awards which were the subject of this proceeding before the Industrial Relations Commission—were they not?—which led to the submission.

Ms Paul—I do not think that Mr Kovacic is claiming that aged care is used exclusively here—quite the opposite, really.

Senator FISHER—My question is: on what basis is the very important aged care sector the subject of encouragement from the government to utilise the full five-year transition period, yet other sectors are not part of the same sort of encouragement by the government? The government's submission says that the government is committed to the long-term viability of aged care.

Ms Paul—I think Mr Kovacic just answered that, actually.

Senator FISHER—Is the government committed to the long-term viability of other sectors, subject to—

Mr Kovacic—In responding to your question, I was actually going to refer to paragraphs 324 and 325 of the government's submission. The other point that I was going to make is that the government—

Senator FISHER—And why?

Mr Kovacic—Bear with me, Senator. The other point I was going to make is that the government has consistently encouraged the Australian Industrial Relations Commission to actually deal with transitional provisions as a means of dealing with the potential impact of

award modernisation on business costs. Indeed, I think I mentioned the last time we were before estimates that earlier this year the government, in its second submission to the award modernisation process, encouraged the commission to bring forward its consideration of transitional provisions from the proposed timetable of July, from memory, to early April. As it turned out, the commission sought submissions on transitional provisions by the end of May, which was last Friday, and the Commonwealth certainly welcomes the commission considering these issues.

Senator FISHER—Professor Ron McCallum was reported in the *Australian* today—and I have a copy of the article if you are not aware of it—as saying that, in referring to the Deputy Prime Minister’s powers in respect of award modernisation:

“In the modernising process, it’s the minister that has the power to direct,” ...

“Gone are the days before Work Choices ... this modernising process gives the power to the minister to order the commission to do things.

Is he right?

Mr Kovacic—I would rather not express an opinion on the views of Professor McCallum. What I can say is that, certainly, the Australian Industrial Relations Commission has undertaken a very consultative process in the development of modern awards which has been very inclusive in terms of seeking input from all interested parties.

Senator FISHER—I will now move to a final area of questioning. What is the effect of the variation of the award modernisation request on the restaurant and catering sector?

Mr Kovacic—It requires the commission to create a new modern award for that sector which is separate from the hotelier, accommodation and gaming sector. The precise nature of that award—

Senator FISHER—Mr Kovacic, can I stop you.

Mr Kovacic—is yet to be created.

Senator FISHER—Sorry?

Mr Kovacic—The award is yet to be created.

Senator FISHER—Where does it require the commission to create a separate modern award? Walk me through it.

Mr Kovacic—Can I refer you to paragraph 27A of the now consolidated and varied award modernisation request, which states: ‘The commission should create a modern award covering—

Senator FISHER—‘Should’.

Mr Kovacic—the restaurant and catering industry, separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. The development of such a modern award should establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour-intensive nature of the industry and the industry’s core trading times.’

Senator FISHER—Is ‘should’ the same as ‘require’?

Mr Kovacic—The request certainly requires the commission to create a modern award covering the restaurant and catering industry.

Senator FISHER—Where does it require the commission to create?

Mr Kovacic—I think we are playing with semantics.

Senator FISHER—If it is semantics, why does the variation of award modernisation request not say ‘require’—or, better still, ‘must’—instead of ‘should’?

Senator Arbib—I think Mr Kovacic has answered the question, and I think you have made your point as well.

Senator FISHER—Despite the Deputy Prime Minister’s claim that her request requires the commission to create a separate modern award for the restaurant and catering sector and despite her claim in her cover letter to the president of the commission that her request now requires the commission to establish a penalty rate and overtime regime to appropriately recognise the restaurant and catering industry’s core-trading times and the labour-intensive nature of the work involved—despite her claim that her request requires the commission to establish a separate award and requires the commission to take into account the labour-intensive nature of the industry—it does not, does it?

Mr Kovacic—Certainly that is my understanding of the intent of the Deputy Prime Minister’s variation of the award modernisation request. I will seek to confirm that this evening.

CHAIR—You can just wait and see. I bet you they do.

Senator FISHER—That may well be the intent. The question is as to the legal effect.

Ms Paul—I think we can confirm, exactly as Mr Kovacic said, and that is probably the best course of action.

Senator FISHER—An indication as to the government’s intent is not the same as guaranteeing that that will be the effect.

Ms Paul—I think it is a theoretical point that we can offer you some assistance on by getting some conformation.

Senator FISHER—Thank you, but let’s not belittle it by suggesting it is a theoretical point. The industry considers it has been—I will leave it there.

Senator Arbib—We will get you that information. I think we have covered the ground.

Senator FISHER—Will the variation of award modernisation request guarantee that, in the restaurant and catering sector, award modernisation will not increase employers’ costs and will not disadvantage employees?

Mr Kovacic—The Industrial Relations Commission is yet to create the draft modern award for the restaurant and catering industry. What I have said on previous occasions before this committee is that there are a range of mechanisms for dealing with the potential impact of award conversation on business costs, and they are primarily through the transitional

provisions, or indeed the potential impact on employees, and they are through the provisions in the transitional and consequential bill relating to take-home pay orders.

Senator FISHER—So there is no guarantee.

Mr Kovacic—What I have said is that there are mechanisms through the award modernisation request and in the transitional and consequential bill which is currently before the parliament which provide the capacity for either the Industrial Relations Commission or, into the future, Fair Work Australia to deal with the potential impact of award modernisation either on employees or employers.

Senator FISHER—I would be happy, Chair, to ask questions about the impact of the proposed provisions in legislation, given concerns expressed about the inadequacy of those provisions, but I understand they are not the province of estimates and that is for another time.

CHAIR—Yes, they are. The only time you cannot ask questions about bills is when they are before the committee itself for inquiry. We have reported on the transitional bill.

Senator FISHER—I am talking about the bill currently before the House of Representatives.

Senator JACINTA COLLINS—We have not received that one yet.

Senator FISHER—That is right.

Mr Kovacic—There are two bills currently before the House.

CHAIR—We do not have any such inquiry before us at the moment, so you can ask questions about it if you like.

Senator FISHER—I rest it there.

Proceedings suspended from 8.55 pm to 9.12 pm

Senator CASH—If I could turn now to the Unlawful Termination Assistance Scheme, which I will refer to as UTAS, can you confirm that this program will cease to operate as of the end of this financial year?

Mr Maynard—Yes.

Senator CASH—I understand that, as a result, \$24.2 million will be saved from the budget.

Mr Maynard—Just give me one moment. I believe that figure is correct.

Senator CASH—Thank you.

Mr Maynard—\$24.2 million over four years.

Senator CASH—How much was allocated to this program for the 2008-09 financial year, and, of this amount, how much was spent?

Mr Maynard—I am looking at PBS page 164. There was \$3.018 million allocated, and to the end of May we had spent \$140,442.82 on UTAS.

Senator CASH—How many times has the UTAS program been accessed from 1 July 2008 to date?

Mr Maynard—We have had 84 applications, 70 of which have been found to be eligible.

Senator CASH—How many times has the UTAS program been accessed from its announcement in the 2005-06 MYEFO?

Mr Maynard—For each of the financial years: 2005-06, 12 applications; 2006-07, 76 applications; 2007-08, 106 applications; and, as I previously mentioned, 84 for the current financial year to the end of May.

Senator CASH—Of those who have used UTAS, perhaps by way of the financial year breakdown, how many have been represented by a trade union?

Mr Maynard—I will take that one on notice.

Senator CASH—Of those who have accessed UTAS, how many pursued the claim to final court determination?

Mr Maynard—Again, Senator, I will have to take that one on notice.

Senator CASH—If I could get the breakdown by way of financial year, that would be appreciated.

Mr Kovacic—Senator, we may not be able to provide that information.

Senator CASH—You will take it on notice.

Mr Kovacic—We will take it on notice, but the nature of the program is that it is actually to support the applicant obtaining legal advice as to the prospects of an unlawful termination application succeeding. Indeed, we may not be able to provide information as to whether ultimately that has succeeded, who may represent them and the success or otherwise of the application should it be proceeded with.

Senator CASH—Thank you. What options are available now for employees to seek assistance when they believe they have been unfairly dismissed?

Mr Maynard—From 1 July there will be Fair Work Australia, which will have less legalistic approach than the current requirements. In addition there will be the Small Business Fair Dismissal Code, which will clarify for both employers and employees of small businesses whether or not the dismissal is fair or unfair.

Senator CASH—Can I get you to look at what is actually available now by way of a comparison?

Mr Maynard—Senator, at this point in time UTAS continues to be available and will be available for persons who believe they have been unfairly dismissed up to and including 30 June this year.

Senator CASH—Sorry, I misunderstood. I thought UTAS was unlawful termination as opposed to unfair dismissal.

Mr Kovacic—It is, Senator. In terms of what advice and information may be available at the moment in respect of unfair dismissal, the Workplace Infoline may be able to provide basic information to employees, employers and others. Similarly the Workplace Ombudsman may currently be in a position to provide some advice around those issues and, indeed, the Australian Industrial Relations Commission may also provide some advice in this sort of area.

Senator CASH—Thank you. My understanding is that the Fair Work Act restricts the representative of an employee to that of a union or the employee themselves from going to Fair Work Australia and that legal representatives must obtain permission of Fair Work Australia before they can appear. So unions can appear, individuals can appear, but legal representatives most obtain, I assume, the leave of Fair Work Australia before they can appear.

Mr Kovacic—We will get the official to the table to answer that.

Senator CASH—Thank you.

Ms James—If you will bear with me for a moment, I might point out the two relevant provisions. I think we have been over some of this territory in this committee before but perhaps in the context of inquiries into some of the legislation that has come before the parliament in recent times.

Senator CASH—Ms James, all I need to know is an answer to my question: are unions and individuals able to appear before Fair Work Australia without leave, and do legal representatives need leave?

Ms James—A person is entitled under the Fair Work Act as well as the Workplace Relations Act to be represented by an employer or an employee organisation without leave. For a legal representative outside of that framework leave is required. That is the same under both frameworks.

CHAIR—Including community legal services?

Ms James—That is correct. There are a range of criteria, factors if you like, that the tribunals are to take into account. In the Fair Work Act they have been somewhat streamlined. This takes into account the policy in Forward with Fairness.

Senator CASH—I used to obtain leave when I appeared before the commission so I am aware, so thank you very much. If a person then wants to pursue an unlawful termination claim without the assistance of a union and engage a lawyer, there is no guarantee that their chosen lawyer would actually be able to represent them? In other words, leave could be refused.

Ms James—That is correct. As is the case under the current framework, leave could be refused.

Senator CASH—Has the law changed regarding what is unlawful under the Fair Work Act when compared to the WR Act?

Ms James—There has been some fairly significant reworking of these remedies. In the Workplace Relations Act the unlawful termination provisions are based on an ILO treaty and they stand alongside other remedies in the act that also provide a remedy in the event of

termination—in particular, the freedom of association provisions. In the Fair Work Act there has been a streamlining of these remedies into the new general protections, which use some different concepts. These provisions have reduced duplication within the framework in relation to remedies on dismissal—court based remedies—and in the course of that they have changed in terms of the concepts that they use, and I guess I would say that in terms of the discriminatory grounds of unlawful termination I think they are by and large the same, although I think we have extended the remedy to cases of termination based on your status as a carer, for example. So there have been a number of changes and it would be quite a detailed job I think to take you through every aspect of those changes.

Senator CASH—Just to understand this, are you saying the law has changed, or is it merely the processes under the act that have changed?

Ms James—It is a new act and they are new processes.

Senator CASH—You referred to the law before. Are you actually saying that there has been a change in relation to what is regarded as unlawful behaviour?

Ms James—We do not use that term anymore but, yes, there has been some significant reworking of these provisions. I would say much of the same conduct that was prohibited before remains prohibited in the new framework, but they have been reworked; they have been restructured.

Senator CASH—In terms of going back to UTAS, what analysis was conducted about the impact of removing this program?

Mr Kovacic—If I can go back to the origins of the program, it was introduced by the former government in recognition of the changes that it made which significantly diminished access to the unfair dismissal regime and recognised that there may therefore be an increase in terms of the number of unlawful termination applications that might be pursued by employees, given that previously there was a sense that employees might have pursued the unfair dismissal course of action as it was a potentially cheaper regime for them. In the context of the changes that the government has introduced in terms of the Fair Work Act, the view was that the nature of the program itself was no longer necessary where the government had reintroduced access to unfair dismissal measures for all employees subject to qualifying periods and that, against that background, the program was no longer required.

Senator CASH—So is there an actual analysis that has been done on the impact of removing the program?

Mr Kovacic—In terms of a formal impact, probably not in the terms your question implies, Senator.

Senator CASH—You are saying there is an informal analysis?

Mr Kovacic—I think I am giving you a sense of the rationale that the program was originally introduced and with the changes to the Fair Work Act and the provisions in respect of protections for employees from unfair dismissal, the need for the program was no longer considered to be as great.

Senator CASH—Is there a document or are there documents that go to this informal analysis?

Mr Kovacic—This was all part of the consideration in the context of the budget process. In terms of the specific nature of the document and the analysis, I cannot recall the specifics but—

Senator CASH—Could I get you to take it on notice to have a look and, if there is one, to table it?

Mr Kovacic—I may be able to provide some sort of elements of it, but I will take it on notice.

Ms Paul—We are happy to take it on notice; it may just form the basis of advice in the budget context and we may not be able to give it, but we will see what we can do.

Senator CASH—When was the decision to discontinue this program formally announced?

Mr Kovacic—It was part of the budget.

Senator CASH—That was the formal announcement?

Mr Kovacic—Yes. It was a budget decision.

Senator CASH—Did any discussions take place with industry, unions or legal representatives about the removal of the program before the decision was announced or made?

Mr Kovacic—I will take that on notice but, to the best of my knowledge, they did not.

Senator CASH—Were any alternatives or replacements to the scheme considered before deciding to discontinue it?

Ms Paul—I think Mr Kovacic has gone through the replacement, which is certain elements of the fair work act, which offers a new series of measures in this area.

Senator CASH—So it is not an actual replacement by another scheme; it is replaced by a series of measures.

Ms Paul—Correct. It is not necessary to replace it with a scheme because the legislation itself offers a new regimen.

Senator CASH—UTAS was financial assistance to all the employees who believed they were dismissed unlawfully.

Mr Kovacic—That is correct.

Senator CASH—Has that been discontinued?

Mr Kovacic—That is correct.

Senator CASH—Is there any provision for financial assistance under the new scheme, Fair Work Australia?

Mr Kovacic—No, but it needs to be seen against the background where with the legislative framework being changed then, with the reintroduction of access to protection

against unfair dismissal for all the employees subject to certain qualifying periods together with the various initiatives in terms of assistance that can be provided to employees, it was considered unnecessary to continue the financial assistance.

Senator CASH—So the answer is that there is no replacement of the financial assistance?

Mr Kovacic—That is correct.

Senator CASH—I would now like to turn to an area that was canvassed earlier today in relation to the tendering process and the tender website. The contracts that I am going to refer to are ones where I have plugged in the numbers and they have not come up. If you would bear with me, they are contracts with the ACTU—CN178010 and CN177542. My understanding is that they both have confidentiality clauses in them. Who would have initiated the confidentiality clause? Would it have been the ACTU, the department or the minister?

Ms Paul—We would have to take that on notice. I think I said yesterday that a confidentiality clause may cover all sorts of things. It may simply cover an intellectual property request that the contract has made. It could cover all sorts of things. It does not necessarily cover our needs of confidentiality; it may cover their needs. We could not answer—

Senator CASH—If you could take it on notice, that would be appreciated.

Ms Paul—Yes, sure.

Senator CASH—On the contracts themselves, I understand that one of them was a payment of \$352,000. Do you know what that was for?

Mr Kovacic—That was to support the ACTU's participation in the Australian Safety and Compensation Council. The department has contracts with both the ACTU and the Australian Chamber of Commerce and Industry to support their involvement in that body.

Senator CASH—Yes—there was a payment of a similar amount to ACCI. I did not quite hear you. What was the actual payment for?

Mr Kovacic—It was for the participation of the ACTU and the Australian Chamber of Commerce and Industry in the Australian Safety and Compensation Council. It was a contract that came into effect on 1 July 2007, and it runs through until the end of June 2010.

Senator CASH—I have another contract number here—CN177839. My understanding is that that one is for reimbursement of airfares and that it was paid to the ACTU. Do you know what it is for?

Mr Kovacic—Is that an amount of just over \$12,000?

Senator CASH—Unfortunately I do not have that information.

Mr Kovacic—If it is the contract that I am thinking of—and I will take this on notice and confirm—it is for reimbursement of airfares to the ACTU for its participation in the Australian delegation to the International Labour Conference which occurs in Geneva each

year. Under the ILO's constitution, the government is required to fund participation of both the employer and worker delegates on the Australian delegation.

Senator CASH—So you would also have reimbursed other bodies for their flights?

Mr Kovacic—It would have been the employer delegation as well.

Senator CASH—Okay. My understanding is that flights for the Australian Chamber of Commerce and Industry were not reimbursed.

Mr Kovacic—I have taken the question on notice but I will double-check. I will take that issue on notice as well.

Senator CASH—I appreciate that. Thank you very much. I will now turn to the Fair Work Education and Information campaign. Could someone give a very brief overview of the campaign.

Mr Maynard—The Fair Work Education and Information Program provides grants to community, employer and employee organisations to deliver initial education and information to employers and employees on the new workplace relations system, with particular emphasis on those key elements commencing on 1 July 2009—namely, the collective bargaining framework and unfair dismissal.

Senator CASH—My understanding is that \$14.3 million has been allocated over two years for selected organisations to run information campaigns about the new laws.

Mr Maynard—I think it is slightly less than that.

Senator CASH—I am looking at page 166.

Mr Maynard—\$12.9 million has been allocated over two years. I presume you are referring to page 164 of the PBS?

Senator CASH—I was looking at page 166. It says:

The Government will provide \$14.3 million over two years for information and education activities to support the introduction of the new workplace relations system.

Where should I be looking?

Mr Maynard—Sorry, you said it was Budget Paper No. 2, Senator. That comprises two components. The first component is the Fair Work Education and Information program, which is the one that I just described to you.

Senator CASH—And what is the amount allocated to that?

Mr Maynard—It is \$12.9 million. The remaining funds are made available to the Young Workers Toolkit, which is a program associated with Fair Work Australia's information and education services. It is to commence in the next financial year. As the name suggests, it focuses on young workers.

Senator CASH—The budget paper also reveals that there will be a focus on the Small Business Fair Dismissal Code and collective bargaining. Why is the focus on those areas?

Mr Maynard—They are new elements to the Fair Work Act. They are particularly central to the Fair Work Act. Because of that, it is felt that it is important that people understand their rights and obligations—hence, the promotion of them through grants to employer and employee organisations to make sure the information is communicated broadly.

Senator CASH—What consideration was given to other areas—for example, industrial action or right of entry?

Mr Maynard—This initial focus is just that: the initial focus. The program will run for the remainder of 2009 and, as we go through the year, there will be a focus on other elements of the act.

Senator CASH—Have those other areas been decided yet? Have there been discussions surrounding them as to when they might be focused on?

Mr Maynard—The matters are being prepared at the moment. Off the top of my head I cannot recall them, but I am sure somebody can assist me.

Ms Anderson—We are looking at additional modules covering an overview of the Fair Work Act, which would include things like unfair dismissal and other elements of the act.

Senator CASH—Industrial action? Right of entry?

Ms Anderson—All those elements would be covered by that overview, yes.

Senator CASH—Can you just explain how the actual campaign, running for the balance of the year, will work?

Mr Maynard—First of all, can I just confirm that it will not be a ‘campaign’. The use of the word in the PBS was an error. We have gone through the government’s standard process, working with the department of finance, which have confirmed to us that it is not classified as a campaign. So it will be an information program. The word has a specific meaning.

Senator CASH—I completely understand. Have there been any discussions surrounding whether or not the education campaign components will address potential demarcation issues between unions?

Mr Maynard—We will have to take that on notice. I could not answer that at this point.

Senator CASH—My understanding is that 25 organisations were invited to apply for funding. How was this list determined and what are the criterion that have been set?

Ms Anderson—There were a number of key criterion as to how those organisations were chosen: one, that they were a peak employer, employee or community organisation and that they were considered a reputable provider of industrial relations advice or educational programs—

Senator CASH—Can I stop you on that one? When you say ‘considered a reputable provider’, how did you actually determine who was or was not reputable?

Ms Anderson—If they had been known to provide such services to the community or to members in the past or had indicated that they had undertaken those sorts of activities before.

Senator CASH—What sorts of checks and balances were put in place to ensure that they were reputable?

Ms Anderson—In terms of the application process, as part of the criteria of receiving funding that would also be considered in more detail.

Senator CASH—You can continue on, because I stopped you.

Ms Anderson—They must also have an ability to reach a broad and diverse target audience group and also ensure that they cover major sectors of the economy. A couple of these criterion were outlined in the minister's press release when the program was announced.

Senator CASH—Will there be any appeal rights for organisations who believe they have missed out and they should have been asked to apply for the funding?

Mr Maynard—Can I just add, in terms of the 25 organisations who were originally invited to put in an expression of interest, an additional seven organisations were invited to apply as a result of subsequent contact. At this stage, the decisions concerning which organisations are going to be funded are currently being worked through. Those decisions are yet to be finalised and made.

Senator CASH—Will there be appeal rights for people who believe they should have been able to receive the funding but the decision is unfortunately not in their favour?

Mr Maynard—When people were invited to attend the grants process, they were provided with a comprehensive document which referred to the guidelines. There is a complaints process outlined within that document that allows people who are dissatisfied with the outcome to seek recourse. Like most tender processes, however, it is not subject to an appeal.

Senator CASH—That is fine—that was incorrect wording on my behalf. Are you able to table that document that was provided to the guidelines?

Ms Anderson—They are on the website and they can be provided.

Senator CASH—Will there be any restrictions on those who are successful in obtaining funding?

Mr Maynard—They will be entering into a funding agreement which specifies the nature of the services that they are to provide, that they have effectively made application to provide and the amounts that will be available for those services, and they will be held to that funding agreement.

Senator CASH—Under the funding agreement, will there be any need for organisations to have the information that they intend on disseminating actually checked or verified by the department before they actually send it out to attendees?

Mr Maynard—As part of the process, the department has developed the core modules. The individual providers may then customise it and use it, as long as they do not alter the nature of the advice, in the way that they feel is best to get through to their constituency or their local areas that they are delivering the service in.

Senator CASH—But will there be any checks and balances in place to ensure that the content is not altered?

Mr Maynard—I am informed that, yes, part of the funding arrangement is that if they wish to alter the material provided to all providers that they would have to have the department's approval prior to it being used.

Senator CASH—What happens if they alter the material without your approval?

Mr Maynard—The funding arrangements are such that breaches of the funding agreement would mean they would not get subsequent payments. The arrangements are to be funded in proportions throughout the life of the contract and subsequent payments are contingent upon meeting the funding agreement requirements.

Senator CASH—My understanding is that \$6 million has been allocated for the first year?

Mr Maynard—Yes, that is correct. Sorry, Senator, \$5.9 million. That particular line in the PBS includes \$50,000 for the Wilcox inquiry.

Senator CASH—So where it says \$6 million, it should say \$5.9 million.

Mr Maynard—No, it should say \$6 million—part of the Fair Work Australia information and education process. My apologies, I did say there were two elements but there is actually a third, which is \$50,000 to meet a number of the costs associated with the Wilcox inquiry.

Senator CASH—Could you just explain that to me. In terms of the Fair Work Australia education and information, just explain to me the \$50,000 to fund the Wilcox inquiry.

Mr Maynard—The \$50,000 was to fund the production of the discussion paper and the report to promote information and awareness, and to seek consultation on how to transition from the existing arrangements into Fair Work Australia's new regulatory framework for the building and construction industry. Therefore it is an information component which has been bundled with the other two information components, the Fair Work Education and Information Program and the Young Workers Toolkit.

Senator CASH—This is Mr Wilcox?

Mr Maynard—Yes, that is correct.

Senator CASH—This is separate from the report he provided?

Mr Maynard—No, it is providing funding for that.

Senator CASH—How was the total amount of funding actually determined?

Mr Kovacic—It was a government decision.

Senator CASH—We have a complete rewrite of the workplace laws. Is the \$6 million forecast to actually be enough to educate people within the first 12 months?

Mr Kovacic—The amount of money that has been allocated through to the end of this calendar year is in the order of \$12.9 million or \$13 million. The government's decision was that that amount of funding was adequate to support the program.

Senator CASH—Was any analysis done to demonstrate that this amount of funding would actually be enough?

Mr Kovacic—I cannot add to the answer I just provided to your previous question. The government's decision was that \$12.9 million was considered adequate to support the program.

Senator CASH—What would be the cut-off date for applications being lodged?

Mr Maynard—The cut-off date for applications has passed. The applications are currently being assessed.

Senator CASH—When will the successful organisations be notified?

Mr Maynard—We anticipate they will be notified shortly. The assessment process is nearing completion. I do not yet have the outcome, so there is no announcement that has been made.

Senator CASH—When you say 'shortly', if the new laws are meant to commence in less than a month now, how shortly is shortly?

Mr Maynard—I would imagine it would be no more than a fortnight.

Senator CASH—Will this give the organisations enough time to actually prepare and get ready? Do they hit the ground running on 1 July?

Mr Maynard—The modules have already been prepared. In terms of the material that is to be provided, the agencies were aware of the time frames when they put in their applications. They put forward proposals on how they were proposing to hit the ground running, to use your expression, and we anticipate that they will do just that.

Senator CASH—Over the next 12 months to two years, how is the program's effectiveness going to be assessed?

Mr Maynard—As part of the funding agreement each of the successful applicants will have to report against a series of criteria in relation to the individual functions that they have been funded for, and an overall assessment will be drawn from that as to the effectiveness of the program.

Senator CASH—Are those criteria in the funding agreement?

Mr Maynard—Yes. The funding agreements are yet to be negotiated with the individual successful applicants. Of course the successful applicants have not yet been determined. So we still have some way to go.

Senator CASH—Are you in a position to give some examples of the types of criteria that will be in place to assess the effectiveness of the program?

Mr Maynard—If an applicant was committing to hold a series of seminars, we would want to know that those seminars were run, how many people attended, what sort of response they got from those that attended. If the applicant was funded to put in place websites, we would want to know about the number of hits.

Senator CASH—Will it be tailored to each individual funding agreement depending on what the applicant intends on actually doing?

Mr Maynard—Depending on the nature of the service that they have been funded to provide.

Senator CASH—If I could now turn to protected action ballot schemes. Under the Fair Work Act, AEC ballot costs are now 100 per cent funded by the government, whereas my understanding is that previously it was 80 per cent. Is that correct?

Mr Kovacic—That is correct.

Senator CASH—On that basis, will there be an increased cost to the Protected Action Ballots Scheme arising from the AEC now funding the full cost?

Mr Maynard—In part, that is going to depend upon the number of protected-action ballots that are run.

Senator CASH—If you were to look at going from 80 per cent to 100 per cent funding you would expect there perhaps to be a similar increase if there were the same number of protected ballots.

Mr Maynard—Yes.

Senator CASH—The budget papers indicate that the funding for the PABS has gone up from \$1 million to \$1.6 million. If the increase is, however, only 20 per cent, why is there such a big increase in the funding? Why wouldn't it just be \$1.2 million as opposed to \$1.6 million?

Mr Kovacic—This was a decision that was announced in last year's budget and not the current budget. It was a reflection of what the anticipated impact of the decision to move to 100 per cent funding of ballots would be. The corollary is that we do not anticipate a significant increase in the number of protected-action ballots over previous years and we actually think that the funding is adequate to deal with the level of ballots that are likely to occur.

Senator CASH—How much money was allocated for the scheme?

Mr Kovacic—I think it is largely a continuation of the historical level of funding that dates back, from memory, for several years. Originally it was in the order of \$1 million and to the best of my knowledge the increase that was announced in last year's budget has been the only adjustment.

Senator CASH—My next question was to be: is there a predicted increase in the number of protected ballots? I think you have answered that question.

Mr Kovacic—That is correct.

Senator CASH—Why don't you expect an increase in the number of protected ballots?

Mr Kovacic—In essence in any situation the bargaining in the majority of circumstances currently occurs freely and without resort to industrial action. We do not think that that will change under the Fair Work Act. The measure is there to deal with those sorts of

circumstances where it does arise. Clearly there is also a cyclical nature to bargaining in the sense that there are peaks and troughs in the number of agreements that might expire in any given period. That also impacts on not only the number of negotiations but potentially on protected-action ballots. So a combination of those factors underpins our thinking in that regard.

Senator CASH—How many ballots were funded in the financial year to date?

Mr Kovacic—We would have to take that on notice.

Senator CASH—Would you also take on notice the question of how that compares to the previous financial year.

Mr Kovacic—Yes.

Mr Maynard—I might be able to help you with that detail. Last financial year 325 ballots were funded. This financial year to the end of May there have been 233.

Senator CASH—How far back does that comparison actually go?

Mr Maynard—I can only go back as far as 2006-07 at the introduction of the scheme. It was a part year of 132. So I think your safest comparison would be between this financial year and the previous one.

Senator CASH—Does the department or the AEC keep a breakdown of what states the ballots take place in?

Mr Maynard—The AEC would probably have those details.

Senator CASH—So the department does not?

Mr Maynard—We provide the funds to the AEC and they look after the ballots.

Mr Kovacic—And I might say that not all protected-action ballots are actually conducted by the AEC. In some instances there are other ballot agents appointed by the Industrial Relations Commission.

Senator CASH—Does the department or the AEC keep a breakdown of the unions that are involved in the ballots?

Mr Maynard—Again, that is probably something that is best directed to the AEC.

Mr Kovacic—It might also be a question that is appropriately directed to the Australian Industrial Registry.

Senator CASH—In relation to the alternative dispute resolution program, can you confirm that it will cease to operate as at the end of this financial year?

Mr Kovacic—Yes, Senator.

Senator CASH—My understanding is that \$19.6 million will be saved as a result of this program.

Mr Maynard—Over four years.

Senator CASH—How much was allocated to this program for the 2008-09 financial year?

Mr Maynard—\$1.095 million.

Senator CASH—How much of the \$1.095 million was actually spent?

Mr Maynard—That is a very good question, Senator. This scheme was established in March 2006 and there has not been one application since that date.

Senator CASH—That takes care of my next question. How many times has the ADR program been accessed from 1 July 2000 to date?

Mr Maynard—Can I add that we have met all our performance indicators on that program?

Senator CASH—You get a gold star for that one. Well done!

Mr Maynard—We have exceeded them, I might add.

Senator CASH—It may well take care of my next question, which was how many times has it been accessed since its announcement in the 2005-06 MYEFO? So it has not been accessed once?

Mr Maynard—Not once, Senator.

CHAIR—That has to wrap that up, I would think.

Senator CASH—Just hold on, I am looking for an angle. What options are now available for parties to resolve workplace disputes, given that the ADR will cease?

Mr Kovacic—Clearly, Senator, under the Fair Work Act, they can utilise the resources of Fair Work Australia. Indeed, they could continue, should they wish, through bargaining arrangements, to appoint an alternative provider to assist parties to resolve disputes that may arise under the terms of a particular agreement. Past experience is that, in a number of cases, parties to agreements have chosen to do that. Clearly, with Fair Work Australia being able to provide a service, we imagine that many would use the services of Fair Work Australia.

Senator CASH—In terms of these other options, do all of them involve the involvement of a union or are there options that do not involve a union?

Mr Kovacic—In terms of who and whether a third party resolves those issues, it could be anybody that the parties might agree on.

Senator CASH—In terms of the decision to formally discontinue the ADR, was that also made as part of the budget process?

Mr Kovacic—That is correct.

Senator CASH—Was there any consultation with industry, unions, employees et cetera prior to this decision being made?

Mr Kovacic—Not that I am aware of.

Senator CASH—Chair, that is it from me. Can I just highlight that I did have some questions in relation to occupational health and safety. I can put them on notice if that makes it easier for you.

CHAIR—That is easier.

Senator XENOPHON—I will ask some questions in relation to the issue of the specialist information assistance unit for small- and medium-sized enterprises within the Office of the Fair Work Ombudsman that was agreed to by the government as a result of the negotiations for the passage of the Fair Work Bill. Could you tell me where you are up to on that including matters such as how is it proposed that it will work, what sort of funding is there, how many staff will there be, will there be a dedicated hotline to those small- and medium-sized enterprises and where is the cut-off? Presumably BHP will not be ringing you.

Mr Kovacic—I will just get the relevant officers to the table.

Ms Parker—There is no specific allocation for this but it will be part of the Fair Work Ombudsman's funding. Parts of the discussions about the establishment of the Fair Work Ombudsman include the various activities and functions it needs to take over from 1 July. There has been no specific discussion on how it will actually do that from 1 July yet.

Senator XENOPHON—Whilst there is no specific allocation in terms of funding, will there be a specific allocation of staff? The government indicated that this would be a specialist information and assistance unit for small and medium-sized enterprises so presumably that would mean there will be a separate unit.

Mr Kovacic—Perhaps I can assist here. In terms of the establishment of Fair Work Australia, the government has actually invested an additional \$149.7 million this year, which is to be shared between Fair Work Australia and the Fair Work Ombudsman. As part of discussions in terms of the establishment of the Fair Work Ombudsman we are very mindful of the commitments that were given around the establishment of a unit within the Fair Work Ombudsman, and those issues will necessitate staff which have special responsibilities in this sort of area and also the capacity to respond to inquiries from small business in terms of these sorts of issues. So I think the intention would be to have a discrete unit within the Fair Work Ombudsman to meet that commitment. Clearly the government more generally has ensured that there is adequate funding for Fair Work Australia and the Fair Work Ombudsman to meet their obligations under the act. Part of that additional funding, I would be sure, would be to facilitate the necessary sort of resourcing. Whether it goes to a designated hotline and those sorts of issues, they are some of the detailed sorts of issues that we need to work through with the Fair Work Ombudsman as part of the establishment process. That is something we have an establishment task force for. We will make sure that if it is not already on the agenda, it will be put on the agenda for next week.

Senator XENOPHON—Thank you for that, but I now have about a half-dozen questions arising out of that statement. This is supposed to be established as at 1 July?

Mr Kovacic—That is correct.

Senator XENOPHON—So in four weeks time, four weeks tomorrow, the government has promised a specialist information and assistance unit for small and medium-sized enterprises. That is only four weeks away. Is there at least some indication of the number of staff that will be involved in this specialist information and assistance unit—in other words, will it simply be people who have got some specialised knowledge or expertise, which I think you alluded to, or will it be, as I understand it in terms of the government's promise, a specific unit that

will deal with these issues? If there is a specific unit, do we know four weeks out how many staff there will be in respect of that unit, because this is something that I think small and medium-sized businesses would be quite anxious to—

Mr Kovacic—My understanding is that it will be a specific unit. In terms of the number of staff that might be dedicated to that specific unit, I would need to take that on notice and get back to you as quickly as we can on that.

Ms Parker—On the structure that we have been working towards for the Ombudsman there are two specific education senior executive roles. Underneath those—and I have the structure in front of me here—there is a section that will cover young workers' code of practice, small and medium business assistance and best practice guides. There are senior officers attached to those on the structure. In terms of the actual numbers for that small unit, I do not have that. But it is definitely on the structure and they are definitely working towards providing it.

Senator XENOPHON—Will there be a dedicated number for that assistance unit, Ms Paul?

Ms Paul—I think this is what Mr Kovacic and Ms Parker are saying. If it is a discrete function on that structure then the short answer is yes.

Senator XENOPHON—And what plans are there four weeks out to publicise the existence of that service and to educate employers of the existence of that service if they want assistance? And I suppose the argument can apply also to workers from other parts of the Office of the Fair Work Ombudsman.

Ms Parker—In terms of the establishment work that has been going on, certainly the Fair Work info line is ready to address calls and requests for information. In terms of the specific information that will be provided for small or medium enterprises, we would have to take that on notice and find out from the ombudsman itself.

Senator XENOPHON—So there may be a dedicated line for small businesses?

Ms Parker—It is not clear that there will be a dedicated line for small business as well. We will let you know.

Senator XENOPHON—In relation to the criteria, what is the cut-off point? Have protocols been developed to determine at what level is a business not a medium-sized enterprise? When does it go beyond that so that it cannot avail itself of the assistance that this service, or this unit, will provide?

Ms Parker—I would imagine that people who call the Fair Work info line would self-identify a small business. If there is an issue, then the officers who are taking the call can ask them how many workers they have.

Mr Kovacic—I suppose the definition of small business for the purpose of unfair dismissal arrangements under the Fair Work Act would be a guide.

Senator XENOPHON—Sure. That means that on a transitional basis there will be 15 full-time equivalent employees for the first 18 months, and then—

Mr Kovacic—Senator, as you can imagine, particularly when dealing with phone inquiries, there are always some difficulties around that in applying a strict cut-off to interacting with calls. I would imagine that there would be some flexibility around that.

Senator XENOPHON—Has consideration been given to the definition of a medium-sized enterprise?

Mr Kovacic—I would have to take that on notice.

Senator XENOPHON—Further to that, how will this unit work? Clearly, it will offer telephone advice—you have alluded to that. Will it also offer any advocacy assistance to small- and medium-sized businesses?

Mr Kovacic—I would have to take that on notice in the sense that, clearly, these are issues that we have been discussing in the establishment task force. Firstly, I am not entirely across where those discussions are up to and the precise nature of the services that might be envisaged at this stage.

Senator XENOPHON—If you could take on notice what the precise nature of the services will be.

Mr Kovacic—Certainly.

Senator XENOPHON—My understanding is that it would include advocacy advice for small businesses, but then the question is to what extent? Will that be providing initial representation at a conciliation hearing or for an unfair dismissal or for more complex matters?

Mr Kovacic—I will take that on notice, Senator.

Senator XENOPHON—In other words, where is the line drawn and, if the unit cannot assist, what will it do to refer people on for assistance?

Mr Kovacic—Certainly.

Senator Arbib—Chair, I was just going to suggest that maybe the department could provide a session with Senator Xenophon to inform him about the proposals, because obviously the date is drawing near. A briefing might be the easiest way.

Senator XENOPHON—I appreciate that, but we are kind of briefed out, I think, in my office at the moment with everything else. But it would be good to get these questions on notice and have the answers on the record.

Ms Paul—We would be happy to do so. We can try to answer them really fast for you because we just do not have the task force people here. I am sure we could come back quite—

Senator XENOPHON—It will be useful. I just think that it is an area of concern for small business, particularly with the transition, and that is understandable.

Mr Kovacic—I appreciate that.

Senator XENOPHON—So the nature and extent of the assistance that will be provided, where is the line drawn for the size of businesses, what is the nature of the advocacy services and where do you draw the line? Will it include actually attending a hearing, for instance? If it

is a contested hearing, will assistance be given? For instance, in terms of confidentiality what extent will there be—I was going to say Chinese walls, which is probably not the right phrase to use—a separation between those who advocate this sort of thing in this unit and others? There would be circumstances where, in the same office, a worker could be seeking assistance concerning the company that is seeking assistance from the specialised unit.

Mr Kovacic—We will take all those on notice and we will try and expedite our responses to those as quickly as possible.

Senator XENOPHON—We might take you up on that briefing once we get some more staff.

Mr Kovacic—Sure.

Senator XENOPHON—There was one other thing. The unfair dismissal system, particularly as it relates to small- and medium-sized enterprises, will be the subject of a thorough and transparent review by Fair Work Australia in 2012. Whilst that is still some time away, is there any structure in place as to how the information for that review will be provided? Will it be a case of collating the information from the specialised unit and the employee advocate units? How are you proposing to do it? Will there be a public process seeking submissions from the public or speaking with both workers and businesses about their experiences with the new system?

Mr Kovacic—The specifics of that one in how they conduct the review is a matter ultimately for Fair Work Australia. But I would envisage that, given that Fair Work Australia will be a key player, if I can use that sort of terminology, in dealing with unfair dismissal cases, it will have very much a hands-on knowledge. Clearly the Fair Work Act envisages a very close working relationship between the Fair Work Ombudsman and Fair Work Australia. I would imagine that, to the extent that the Fair Work Ombudsman can contribute to Fair Work Australia's deliberations in that regard, that will certainly be welcomed in terms of whether there is an open hearing process. I am sorry, I am not in a position to answer for Fair Work Australia, but I certainly think the language of transparency would be something that would be consistent with Fair Work Australia's modus operandi.

It has just been drawn to my attention that the provisions around the review require the general manager of Fair Work Australia to prepare a written report. These provisions are in the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 which is currently before the House of Representatives. Subclause (3) actually states:

(3) To prepare the report, the General Manager of FWA may do the following:

- (a) seek public submissions;
- (b) conduct surveys of employers, employees and any other persons affected by, or who have had experience with, the unfair dismissal system;
- (c) hold public hearings;
- (d) gather information in any other way he or she thinks fit.

So it certainly envisages a potentially very comprehensive process of seeking views and input into that review.

Senator FISHER—I will put on notice the questions relating to the Building and Construction Industry General On-Site Award in the context of the award modernisation process and some concerns that have been expressed by industry about the impact of that proposed award.

CHAIR—Being as no other senators have indicated that they have questions on outcome 5, we will now suspend proceedings until 9 am tomorrow morning.

Committee adjourned at 10.13 pm