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Official Committee Hansard

SENATE

EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS
LEGISLATION COMMITTEE

ESTIMATES

(Supplementary Budget Estimates)

WEDNESDAY, 20 OCTOBER 2010

CANBERRA

BY AUTHORITY OF THE SENATE

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SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS**LEGISLATION COMMITTEE****Wednesday, 20 October 2010**

Members: Senator Marshall (*Chair*), Senator Back (*Deputy Chair*) and Senators Bilyk, Cash, Hanson-Young and Wortley

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

Senators in attendance: Senators Abetz, Back, Bilyk, Carol Brown, Cameron, Cash, Fifield, Fisher, Humphries, Marshall, Parry, Ryan, Siewert, Williams, Wortley and Xenophon

Committee met at 9 am**EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO****In Attendance**

Senator Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations

Department of Education, Employment and Workplace Relations

Ms Lisa Paul, Secretary

Mr Robert Griew, Associate Secretary, Strategy

Mr Michael Manthorpe, Deputy Secretary, Office of Early Childhood Education and Child Care and Building the Education Revolution

Mr Ewen McDonald, Deputy Secretary, Corporate and Network

Dr Michele Bruniges, Deputy Secretary, Schools

Ms Kathryn Campbell, Deputy Secretary, Tertiary Youth and International

Ms Sandra Parker, Deputy Secretary, Employment

Mr John Kovacic, Deputy Secretary, Workplace Relations

Corporate and Network

Ms Lisa Paul, Secretary

Mr Ewen McDonald, Deputy Secretary

Mr Craig Storen, Chief Finance Officer, Finance and Business

Ms Susan Monkley, Group Manager, Finance and Business

Ms Robin Kingston, Chief Internal Auditor, Audit Group

Ms Sue Bird, Acting Chief Lawyer, Legal and Investigations

Ms Helen Willoughby, Group Manager, Communication and Parliamentary

Ms Helen Skrzeczek, Group Manager, Technology Solutions

Ms Susan Smith, Group Manager, Cluster Strategic Team

Mr Walsh Rodney, Branch Manager, Cluster Strategic Team

Mr Benjamin Wyers, Acting Group Manager, People Group

Ms Christine Silk, Branch Manager, People Group

Ms Sue Saunders, Branch Manager, People Group

Ms Tina Daisley, Acting Branch Manager, People Group

Ms Margaret Leggett, Acting Branch Manager, People Group

Outcome 1, Office of Early Childhood Education and Child Care

Ms Lisa Paul, Secretary

Mr Michael Manthorpe, Deputy Secretary

Ms Vicki Rundle, Group Manager, Early Childhood Quality

Ms Joan ten Brummelaar, Branch Manager, Early Childhood Quality

Mr David De Silva, Branch Manager, Early Childhood Development

Mr Ben Johnson, Group Manager, Child Care Programs and Business Support

Mr Murray Kimber, Branch Manager, Child Care Programs and Business Support

Mr Mark Wright, Acting Branch Manager, Child Care Programs and Business Support

Ms Robyn Shannon, Branch Manager, Child Care Programs and Business Support

Ms Rose Giumelli, Branch Manager, Child Care Programs and Business Support

Ms Ngaire Hosking, Group Manager, Indigenous Pathways and Early Learning

Ms Robyn Priddle, Branch Manager, Indigenous Pathways and Early Learning

Mr Matthew Hardy, Branch Manager, Indigenous Pathways and Early Learning

Dr Russell Ayres, Branch Manager, Indigenous Pathways and Early Learning

Ms Lisa Berry, Acting Branch Manager, Indigenous Pathways and Early Learning

Outcome 2, Schools

Ms Lisa Paul, Secretary

Dr Michelle Bruniges, Deputy Secretary

Dr Evan Arthur, Group Manager, National Schools and Youth Partnerships

Ms Louise Hanlon, Branch Manager, National Schools and Youth Partnerships

Ms Rhyann Bloor, Branch Manager, National Schools and Youth Partnerships

Ms Viv Johnson, Acting Branch Manager, National Schools and Youth Partnerships

Mr Patrick Burford, Acting Branch Manager, National Schools and Youth Partnerships

Ms Gabrielle Phillips, Branch Manager, National Schools and Youth Partnerships

Ms Catherine Wall, Group Manager, Engagement and Wellbeing

Mr Stephen Goodwin, Branch Manager, Engagement and Wellbeing

Ms Janet Davy, Group Manager, Curriculum, Assessment and Teaching

Mr Tony Zanderigo, Branch Manager, Curriculum, Assessment and Teaching

Ms Margaret Banks, Branch Manager, Curriculum, Assessment and Teaching

Mr Craig Robertson, Group Manager, Infrastructure and Funding

Ms Chris Woodgate, Branch Manager, Infrastructure and Funding

Ms Leonie Horrocks, Branch Manager, Infrastructure and Funding

Ms Karen Sandercock, Acting Branch Manager, Infrastructure and Funding

Ms Kylie Emery, Branch Manager, Infrastructure and Funding

Mr Atul Sehgal, Director, Infrastructure and Funding

Outcome 2, Building the Education Revolution

Mr Michael Manthorpe, Deputy Secretary

Mr Anthony Parsons, Group Manager, Building the Education Revolution Program Management

Ms Gillian Mitchell, Branch Manager, Building the Education Revolution Program Management

Mr Stewart Thomas, Branch Manager, Building the Education Revolution Program Management

Outcome 3, Tertiary, Youth and International

Ms Lisa Paul, Secretary

Ms Kathryn Campbell, Deputy Secretary

Mr Michael Maynard, Group Manager, Youth and Industry Skills Group

Ms Katy Balmaks, Branch Manager, Youth and Industry Skills Group

Ms Jan Febey, Branch Manager, Youth and Industry Skills Group

Mr Daniel Owen, Branch Manager, Youth and Industry Skills Group

Ms Kathryn Shugg, Branch Manager, Youth and Industry Skills Group

Ms Donna Griffin, Branch Manager, Youth and Industry Skills Group

Mr Neil McAuslan, Branch Manager, Youth and Industry Skills Group

Ms Jennifer Taylor, Group Manager, Tertiary Skills and Productivity Group

Ms Maryanne Quagliata, Branch Manager, Tertiary Skills and Productivity Group

Mr Linda White, Branch Manager, Tertiary Skills and Productivity Group

Mr Patrick Cremen, Branch Manager, Tertiary Skills and Productivity Group

Mr David Hazlehurst, Group Manager, Higher Education Group

Ms Julie Randall, Branch Manager, Higher Education Group

Ms Jenny Chadwick, Branch Manager, Higher Education Group

Ms Susan Bennett, Branch Manager, Higher Education Group

Ms Claire Atkinson, Branch Manager, Higher Education Group

Mr James Hart, Branch Manager, Higher Education Group

Ms Lisa Schofield, Branch Manager, Higher Education Group

Mr Colin Walters, Group Manager, International

Ms Tulip Chaudhury, Branch Manager, International

Mr Jason Coutts, Branch Manager, International,

Mr Vipan Mahajan, Branch Manager, International,

Ms Di Weddell, Branch Manager, International,

Mr Robin Shreeve, Chief Executive Officer - Skills Australia, Skills Australia

Ms Sue Beitz, Head - Skills Australia Secretariat, Skills Australia

Outcome 4, Strategy

Ms Lisa Paul, Secretary

Mr Robert Griew, Associate Secretary

Ms Margaret Kidd, Group Manager, Labour Market Strategy

Dr Alison Morehead, Group Manager, Social Policy and Economic Strategy

Ms Jo Wood, Group Manager, Indigenous Economic Strategy

Ms Helen McCormack, Branch Manager,

Mr Mark Roddam, Branch Manager, Social Policy and Economic Strategy

Mr Anthony Fernando, Branch Manager, Social Policy and Economic Strategy

Ms Debbie Mitchell, Branch Manager, Social Policy and Economic Strategy

Outcome 4, Employment

Ms Lisa Paul, Secretary

Ms Sandra Parker, Deputy Secretary

Ms Dianne Fletcher, Group Manager, Procurement and Business Partnerships
Ms Margaret McKinnon, Group Manager, Job Services Australia
Ms Fiona Buffinton, Group Manager, Specialist Employment Services
Mr Stephen Moore, Group Manager, Employment Systems and Relationships
Ms Marsha Milliken, Group Manager, Income Support
Mr Justin Griffin, Branch Manager, Employment Monitoring and Evaluation
Ms Alison Durbin, Branch Manager, Disability Employment Services
Ms Natalie James, State Manager, Victoria State Office, State Offices

Outcome 5, Workplace Relations

Ms Lisa Paul, Secretary
Mr John Kovacic, Deputy Secretary
Ms Michelle Baxter, Group Manager, Workplace Relations Implementation and Safety
Mr Jeff Willing, Federal Safety Commissioner, Workplace Relations Implementation and Safety
Mr Peter Cully, Branch Manager, Workplace Relations Implementation and Safety
Ms Flora Carapellucci, Branch Manager, Workplace Relations Implementation and Safety
Ms Colette Shelley, Acting Group Manager, Workplace Relations Policy
Ms Susan Devereux, Branch Manager, Workplace Relations Policy
Ms Fiona O'Brien, Director, Workplace Relations Policy
Ms Jody Anderson, Branch Manager, Workplace Relations Policy
Ms Louise McDonough, Branch Manager, Workplace Relations Policy
Ms Barbara Turnbull, Director, Workplace Relations Policy
Ms Jacinta Galluzzo, Director, Workplace Relations Policy
Mr Jeremy O'Sullivan, Group Manager, Workplace Relations Legal
Mr David Bohn, Branch Manager, Workplace Relations Legal
Ms Elen Perdikogiannis, Branch Manager, Workplace Relations Legal
Ms Kellie Hoffmeister, Director, Workplace Relations Legal

Australian Curriculum, Assessment and Reporting Authority

Prof Barry McGaw, Chair, ACARA
Dr Peter Hill, Chief Executive Officer, ACARA
Mr Peter Adams, General Manager, ACARA
Mr Robert Randall, General Manager, Curriculum ACARA

Australian Building and Construction Commission

Mr Leigh Johns, Commissioner, Australian Building and Construction Commission
Mr John Casey, Chief Financial Officer, Australian Building and Construction Commission

Comcare

Mr Paul O'Connor, Chief Executive Officer, Comcare
Mr Steve Kibble, Deputy Chief Executive Officer, Comcare

Fair Work Australia

The Hon Geoff Giudice, President, Fair Work Australia
Mr Terry Nassios, Acting General Manager, Fair Work Australia
Ms Bernadette O'Neill, Director, Fair Work Australia
Mr Brendan Hower, Director, Fair Work Australia
Mr Dennis Mihelyi, Director, Fair Work Australia

Fair Work Ombudsman

Mr Nicholas Wilson, Fair Work Ombudsman, Fair Work Ombudsman, Agencies

Mr Michael Campbell, Executive Director WR Policy and Education, Fair Work Ombudsman, Agencies

Mr Alfred Bongi, Customer Service GM, Fair Work Ombudsman, Agencies

Mr Bill Loizides, Field Operations GM, Fair Work Ombudsman, Agencies

Mr Karsten Lehn, Executive Director Complex Investigations and Innovation, Fair Work Ombudsman, Agencies

Mr Steven Ronson, Executive Director Regional Services and Targeting, Fair Work Ombudsman, Agencies

Ms Janine Webster, Executive Director Legal and FWO Strategic Development, Fair Work Ombudsman, Agencies

Mr Mark Scully, Chief Financial Officer, Fair Work Ombudsman, Agencies

Safe Work Australia

Mr Rex Hoy, Chief Executive Officer, Safe Work Australia, Agencies

Ms Amanda Grey, Branch Manager, Safe Work Australia, Agencies

Ms Justine Ross, Branch Manager, Safe Work Australia, Agencies

Mr Wayne Creaser, Branch Manager, Safe Work Australia, Agencies

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

Mr Andrew Craig, Director, Safe Work Australia, Agencies

Ms Julia Collins, Director, Safe Work Australia, Agencies

Skills Australia

Mr Robin Shreeve, Chief Executive Officer, Skills Australia, Skills Australia

Ms Sue Beitz, Branch Manager, Skills Australia Secretariat, Skills Australia

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 2010-11 and related documents for the Education, Employment and Workplace Relations portfolio. The committee has set Friday, 10 December 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. This includes answers to questions on notice. Officers and senators are familiar with the rules of the Senate governing estimates hearings and if anyone needs assistance the secretariat has copies of those 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.

The statement read as follows—

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).

(Extract, Senate Standing Orders, pp 124-125)

[9.02 am]

Comcare

CHAIR—I welcome the witnesses from Comcare. Mr O'Connor, would you like to make an opening statement?

Mr O'Connor—No, thank you.

Senator HUMPHRIES—My questions are about the dismissal of an employee of Comcare and the way in which this matter has been handled. I am referring to the case of Ms Sarah Ryan, who I understand was employed for a short period by Comcare in Canberra. What is the current status of the litigation between Comcare and Ms Ryan?

Mr O'Connor—Ms Ryan was an employee for a short period, as you correctly state. There are a number of matters of disputation and litigation under way between Ms Ryan and Comcare. One of those is challenging the decision that Comcare made with regard to her workers compensation claim. She claimed that her ill health was brought about as a result of her time with Comcare. That claim was determined and that decision was conveyed to Ms Ryan.

Senator HUMPHRIES—Determined by whom?

Mr O'Connor—By Comcare. It was then reconsidered at her request. She asked for a reconsideration in the normal process of exercising the rights of federal workers who either do not understand or do not accept decisions made by Comcare. That reconsideration took into account what had happened and information that was available. The original decision was reaffirmed—that is, to deny workers compensation. That Ms Ryan is injured is accepted; what is not accepted is that there was a substantial connection with her employment or, if there was a substantial connection with her employment that the injury has arisen despite reasonable management action reasonably taken. Ms Ryan is exercising her rights of merit review with the Administrative Appeals Tribunal and that matter is about to be listed for hearing, I believe.

There were separate proceedings instituted in the Supreme Court of the Australian Capital Territory with regard to the employment conditions. Those matters were resolved, although we have been advised that that claim will be re-instituted. There were also other complaints made by Ms Ryan to the Office of Legal Services Coordination, the Attorney-General's Department and the Office of the Privacy Commissioner. The first of the concerns that she raised—that we were not open and honest and fair and reasonable in our assessment of her matters—was considered by the Office of Legal Services Coordination and no difficulty was found there. We understand there is another matter that has been raised with the Office of Legal Services Coordination and that is currently being evaluated by that office. Similarly, with the Office of the Privacy Commissioner, the concerns that were raised were addressed and the Privacy Commissioner in the initial matter was comfortable with Comcare's actions and communications with Ms Ryan, but there is a second matter of concern that is being considered by the Privacy Commissioner.

Senator HUMPHRIES—Who within Comcare made the initial decision about Ms Ryan's claim for workers compensation?

Mr O'Connor—It was done by one of our claims service officers in our eligibility team, bearing in mind that we put special processes in place when there is a claim that is made by one of our own colleagues—a staff claim, as we would call it.

Senator HUMPHRIES—What sorts of special arrangements are put in place?

Mr O'Connor—There is a process which also applies when we have a new employee joining Comcare who may, for example, have had a workers compensation claim with us in previous employment or where there has been a claim made by an employee in that new employee's previous employment. The special arrangements include significantly restricted access on our computer system to information about the claimant. In addition, such claims are allocated to a discrete team within the recovery and support area—the areas that make the claims determinations.

Senator HUMPHRIES—Is it common practice for a team or officer from a different location to make an assessment about a claim from an officer of Comcare itself? For example, if a claim were coming from a person in Canberra, would it usually be made by a person from another state office?

Mr O'Connor—That is the customary practice. It was not the situation with regard to Ms Ryan's claim.

Senator HUMPHRIES—Why not?

Mr O'Connor—I am not aware of the detailed background, but I will take it on notice to get you an explanation why normal practice was not followed. However, irrespective of that, we believe that the fact that the claim was determined by somebody who did not know Ms Ryan, who was not connected with her or her work—

Senator HUMPHRIES—but who worked in the same office environment and therefore would know other people who may have been involved with the claim—people like supervisors and so on?

Mr O'Connor—Potentially.

Senator HUMPHRIES—Ms Janean Richards is, or at least was at this time, an officer of Comcare. Is that correct?

Mr O'Connor—Correct.

Senator HUMPHRIES—I understand her husband, David Richards, has appeared on a number of occasions as counsel for Comcare. Is that correct?

Mr O'Connor—I believe so. I can take on notice the number of occasions.

Senator HUMPHRIES—I would appreciate knowing in how many Comcare cases Mr Richards was retained, what percentage of cases in which Mr Richards was retained went to full hearing in the AAT and what percentage of matters that Mr Richards was handling were settled before the cases were actually heard in the court or the AAT with Comcare paying legal costs to the claimants. I understand that Ms Richards has now left Comcare. Is that the case?

Mr O'Connor—Correct.

Senator HUMPHRIES—Is Mr Richards still being retained as counsel for Comcare?

Mr O'Connor—I am not aware, but I will be able to take that on notice.

Senator HUMPHRIES—I am informed that he is not and that the number of times that he has been retained is very small or zero. I am interested in knowing why, assuming there was no patronage by Ms Richards of her husband as counsel for Comcare, Ms Richards's departure should mean that Mr Richards was no longer acting as counsel for Comcare.

Mr O'Connor—I understand that Mr Richards is a member of the independent bar and acts for a number of potential people seeking representation, including federal workers.

Senator HUMPHRIES—Which would beg the question: why is he no longer doing work for Comcare? Is there any connection between his wife's departure from Comcare and his no longer being retained by Comcare? Perhaps he is being retained by Comcare but, as I

understand it, he is not being retained at anything like the same level that he was being retained while Ms Richards was a member of the staff of Comcare. In Ms Richards's departure from Comcare, was there any reflection in her departure of the handling of Ms Ryan's matter—that is, the removal of Ms Ryan from Comcare's employment?

Mr O'Connor—No.

Senator HUMPHRIES—None whatsoever?

Mr O'Connor—Correct.

Senator HUMPHRIES—Mr Kibble, I understand that you have written a number of letters to Ms Ryan at her home address in respect of the termination of her employment and her workers compensation claim. Is that correct?

Mr Kibble—I have not written in relating to a workers compensation claim. I have written to Ms Ryan on a number of occasions this year in relation to range of concerns and issues that Ms Ryan raised in relation to her employment at Comcare.

Senator HUMPHRIES—Ms Ryan retains legal representatives, doesn't she?

Mr Kibble—Ms Ryan retains legal representatives in relation to her workers compensation claim, which, as Mr O'Connor mentioned, is before the AAT. She also retains legal representatives in relation to other matters unconnected with her workers compensation claim but connected with her employment at Comcare.

Senator HUMPHRIES—So why have you not written to her legal representatives rather than to her, given that there is litigation going on between Comcare and Ms Ryan?

Mr Kibble—In relation to her workers compensation claim, as I understand it, apart from one occasion we have corresponded with her legal representatives. In relation to other matters we did write to her legal representatives, but some of the matters that Ms Ryan has raised directly with Comcare were, in our view, best conveyed to Ms Ryan directly. They were not connected to any legal matters at all. They were issues that Ms Ryan raised about her employment at Comcare and various complaints et cetera, about which we wrote directly to Ms Ryan.

Senator HUMPHRIES—Did Ms Ryan indicate that she would prefer to be corresponded with through her lawyers?

Mr Kibble—On workers compensation matters, yes. We undertook to do that, and we have done that apart from one occasion. In relation to the other matters, yes, she did. But certainly the matters that are not connected with any legal matters at all are matters that Ms Ryan has raised. I would add that this particular complaint that Ms Ryan has in our contacting her directly is the second matter that Ms Ryan has raised with the Office of Legal Services Coordination recently. That office is currently looking at that matter. In that context, we provided information at the request of that office in relation to that contact between legal advisers and Ms Ryan and us.

Senator HUMPHRIES—Mr O'Connor, are you satisfied that this matter has been handled appropriately and with due diligence and that there is nothing inappropriate about the way this particular litigation has been handled?

Mr O'Connor—I am very comfortable with the way Comcare has handled the various matters: the Supreme Court litigation, the disputation and merit review at the AAT and the independent, arms-length review. Ideally, with the original determination of her claim, if we had followed our customary work practices, it would have helped the appearance of reassurance and independence for that matter to have been determined in our Melbourne claims team. But it is a small agency and even our staff in Melbourne would be aware of senior executives in the agency. That said, this was an example where the customary practice was not followed, so I would certainly have my reservations about that. But that does not alter the degree of confidence that we have that we made the correct or preferable decision and offered Ms Ryan full support in exploring the rights of reconsideration and also in how the matter has been prepared for merit review by the Administrative Appeals Tribunal.

Senator HUMPHRIES—I will not ask any further questions about this matter at this stage; I may return to this, though, at the next estimates round.

Senator Chris Evans—Senator Humphries, I understand there is a long history to this. Is there anything we can do to assist you in terms of briefing notes? I do not want to put Mr O'Connor in it, but I gather you have been pursuing this for a while. Often these matters are too delicate to handle at Senate estimates hearings, so perhaps there is a way that might help you get to the bottom of whatever this is without necessarily having it on the public record. I know these things are very difficult to deal with in that way.

Senator HUMPHRIES—I have a constituent who is concerned about this and I think that a briefing may be useful. Can I get back to you about that, please.

Senator Chris Evans—Maybe you could have a think about it and maybe I will have a chat to Mr O'Connor.

Mr O'Connor—I am very comfortable.

Senator Chris Evans—I do not want to commit him to something, but I have had a few of these cases myself. It is very hard to resolve during estimates, but you have a right to pursue it on behalf of your constituent. So you have a think about it and we will have a think about it and maybe you could let me know if you think there is a better way through.

Senator HUMPHRIES—Thank you very much, Minister.

Senator ABETZ—Can Comcare shed any light on the asylum seeker compensation payouts? We canvassed that with the immigration people yesterday. Some asylum seekers have had payments made to them by way of compensation. Have any of those actually gone to trial?

Mr O'Connor—I will have to take that on notice. This is Comcare compensation as opposed to civil compensation?

Senator Chris Evans—Why would it be relevant to you, Senator?

Senator ABETZ—A department of immigration spokesman said compensation payouts and disease breakouts were 'inevitable':

It's the law of averages—some may well choose to litigate against us or, in some rare cases, we may be at fault and have to pay out under Comcare and Comcover.

I was told yesterday to ask questions about this because you allegedly handle these cases on behalf of the department of immigration.

Mr O'Connor—Certainly with regard to any federal workers who may have sustained injury in the course of their employment working with and supporting the asylum seekers we would certainly handle those matters, but I am not aware of claims that Comcare would be handling them with regard to—

Senator ABETZ—Because that would be Comcover.

Mr O'Connor—Correct.

Senator ABETZ—So with Comcare, could you take on notice for us how much has been paid out, or whatever, in relation to workers dealing with asylum seekers over the last three years.

Senator Chris Evans—If I could perhaps be helpful with my former immigration minister hat on, I think there were some compensation payments involving Comcare and Immigration—for instance, to do with the *Malu Sara* disaster and the loss of Immigration officers. When you were talking to Immigration they might have included the in the broader compensation matters. For instance, we have negotiated outcomes for the families of the men who died on the *Malu Sara* Immigration vessel, and certainly I think Comcare was—

Senator ABETZ—Take it on notice and see what you can provide. It is only on top of the heap in the file that was bounced yesterday from Immigration to here. I do not want to delay the committee on that any further if you can take that on notice.

Mr O'Connor—Yes.

Senator ABETZ—We were told, courtesy of a media item on 16 September 2010, that the Rudd government in November 2007 made a list of reviews—and I think this was quite a notoriously long list—which included a review into the adequacy of the Commonwealth's Comcare scheme.

Mr O'Connor—Yes.

Senator ABETZ—How is that going?

Mr O'Connor—One of our former ministers, the former Deputy Prime Minister, commissioned that review and released the government's response to the review that was undertaken by the department of education—

Senator ABETZ—When was that?

Mr O'Connor—That was in late September, perhaps 29 September, last year. As a result of the government's response to the Comcare review, a number of measures were identified by the then minister, which were to be implemented. Some of those were reflected in legislation that was put before the parliament earlier this year, but I believe that legislation lapsed with the proroguing of parliament.

Senator ABETZ—I asked a number of questions last time round about the model occupational health and safety act and the HSR training. Can you confirm to me that, under the model act, HSR training in the Commonwealth will go from being compulsory to optional—is that right?

Mr O'Connor—I will get Mr Kibble to address that.

Mr Kibble—Under the model act, HSR training will be compulsory for health and safety representatives if they wish to exercise various powers under the model act, which might go to the issuing of notices to their employer or stop-work notices et cetera.

Senator ABETZ—Yes, but if they do not want to get to that level of issuing notices but just to be of assistance and to be aware of matters generally, that is not compulsory?

Mr Kibble—I believe that is correct, yes.

Senator ABETZ—Right. So, for those people, why wouldn't you want to create a wider variety of training approaches?

Mr Kibble—Senator, there are two aspects to this question. There is a requirement under the Commonwealth OH&S act now for compulsory HSR training and, as we have discussed previously, the Safety, Rehabilitation and Compensation Commission has issued guidelines in relation to that training, which include various requirements. That is the situation under the current laws that apply in the Commonwealth.

Senator ABETZ—Yes, but if I may interrupt you, the guidelines have nothing to do with the proposed laws.

Mr Kibble—Yes, and I was just coming to that. The model laws, as you know, are aimed to come into effect on 1 January 2010 in all jurisdictions, including the Commonwealth. As part of that process Safe Work Australia, as they mentioned at the last estimates, are developing guidelines for the training of HSRs which would be aimed to be issued in every jurisdiction.

Senator ABETZ—Yes, but those guidelines are going to exclude a certain service provider that I understand even Comcare has used with great satisfaction in the past.

Mr Kibble—That is why I raised the issue about what applies currently and what will apply after 1 January 2012.

Senator ABETZ—Yes, but what I do not understand and what the provider does not understand is why these guidelines have changed. It appears the change will be to the ultimate detriment of HSR training when the guidelines do not need to be changed for the purposes of the new legislation.

Mr Kibble—No, as we indicated in our questions on notice, that is true but the commission required Comcare to review the guidelines in 2009. That review involved consultation with a range of stakeholders—unions, employers, HSRs and training providers—and based on the recommendations of that review, the commission agreed to issue new guidelines which were effective from 30 April 2010. In regard to the particular element you are talking about—the five-day, face-to-face requirement—the commission took a range of factors into account in making that decision, and the commission agreed that, taking into account a range of factors, that was the most effective outcome. One of the factors they took into account, for example, was the practice in other and state and territory jurisdictions which currently require face-to-face training of various lengths. In some states, it is five days face-to-face training and in some states and territories it requires four days face-to-face training. That was only one of the factors they took into account, but the guidelines do reflect the

commission's view of the most effective training arrangements for health and safety representatives.

Senator ABETZ—Surely the bottom line in this is an effective outcome that you have trained individuals in the workplace. If there is a methodology that has been proven to work especially amongst a lot of Commonwealth departments, who have given a certain process the tick for being effective et cetera, why can't there be a recognition that possibly this one-size-fits-all approach is not necessarily as indicated? Why can't this be reviewed and reconsidered and have it acknowledged that this straightjacket might not necessarily be the best approach?

Mr Kibble—I can agree with you that HSRs play a key role in working to ensure the safety of federal workers and others. In that context, of the HSRs is obviously very important. The training arrangements, in particular the five-day, face-to-face training arrangement was an issue which was fully canvassed in the review and fully canvassed in discussions in the commission, and various parties put their views about what the most effective training arrangements were.

Senator ABETZ—Because it suited those various parties. Clearly, it is not so much the methodology—and that seems to be the issue, that various parties put it that a certain methodology was the best one because that is what suited them; it is the outcome we should be interested in and the competency of the workers after they have been through a particular training methodology. If somebody wants to offer five days face to face and at the end of that delivers the competency required, great, but why not let some other training provider provide a different system which delivers exactly the same if not better competencies at the end of that training that does not involve five days face to face? Somehow process and a straightjacket have been applied to suit certain individuals and certain training providers, and you have become consumed in process as opposed to outcome and competency. I would have thought that is what the concentration should be on.

Mr Kibble—As we discussed at the last estimates hearing, we can completely agree with you in terms of the outcomes, which in the end are about ensuring the safety of federal workers. As part of that process, the HSR is playing a very important role. The commission and Comcare are interested in the best outcome which is the most highly trained HSRs exercising their powers in an appropriate way.

Senator ABETZ—So if they can be delivered without five days face to face, why wouldn't that be allowed?

Mr Kibble—As I said, the commission discussed a range of options raised by a range of stakeholders. I can assure you that this issue was central to their discussions about the new training guidelines and the commission took account of the wide range of views and made a considered decision. They did take a month or so to discuss it because it was such an important issue. But they made that decision.

Senator ABETZ—We will have to agree to disagree on this and move on but, with respect, I think it was an ill-considered decision where a very highly reputable training provider has now been dealt out of the system because of this silly straightjacket that has been imposed that suggests one size fits all. I think those that have made the decision, and are still pursuing this decision and supporting it, are doing a great disservice to HSR training in Australia. But

that is enough of the homily. Let's move on to Safe Work Australia. I do not have any more on Comcare.

CHAIR—Is there additional training on top of the mandated officer safety course?

Mr Kibble—No, and there is nothing to stop them under the current laws that apply in the Commonwealth.

Senator BILYK—I have a query in regard to how people who have claims into Comcare are able to receive a fair hearing. I have a constituent. This is in regard to the fact that she was unable to afford having her medical practitioners attend a hearing. I know the ATO will run a test case to see if they will help fund a claim in regard to that. Does Comcare do anything similar? The constituent feels that she was disadvantaged obviously by the result by not being able to have her medical practitioners attend. She could not afford to pay their fees.

Mr O'Connor—We would be concerned if any federal worker was not able to exercise their rights and entitlements and to get that fair hearing. We would be only too happy to—

Senator BILYK—I think you have certainly been informed of this situation with this particular person.

Mr O'Connor—And we would be concerned that if there was a matter that was before the Administrative Appeals Tribunal—and it depends what the decision of the Administrative Appeals Tribunal would be—if they thought that Comcare had not made the correct or preferable decision in those circumstances and either set aside or varied that decision. Then it would be customary for the costs associated with that hearing to be paid for in the general case. If the AAT confirmed the decision and believed that the original decision maker did make the correct or preferable decision, then one of the consequences could be that the costs associated with pursuing those rights—whether they are legal costs or associated costs—often would have to be borne by that worker.

Senator BILYK—I am still not quite clear about this. She was unable to afford to pay for her medical practitioners to turn up to give any evidence. As a result of that, she lost her claim—she was not successful in her claim. She appealed and it went further, but the next decision was based on the factual evidence given at that first hearing, the one at which she was unable to have her own representation, her own medical practitioners. To me, that sounds like the second outcome was going to be skewed anyway—if it was based on the result of the first case, where she was not represented because she could not afford to pay their fees. Or have I missed something?

Mr O'Connor—I understand the context that the Senator is explaining with regard to her constituent. My recollection, if I do have the right matter in mind, is that the AAT—

Senator BILYK—It is a fairly ongoing one.

Mr O'Connor—provided a very comprehensive consideration in its 'reasons for decision' about the competing evidence. I would have to take it on notice to look again at that particular element—whether or not treating practitioners or medico-legal experts who were retained by the federal worker in this case did not have the opportunity to have that material before the Administrative Appeals Tribunal.

Senator BILYK—I would appreciate it if you could do that.

Mr O'Connor—Because if it had been shared with us at Comcare and had formed any part of the decision-making process, the reconsideration or the merit review, then all of those documents and all of that information would have been shared by us with the Administrative Appeals Tribunal. But I am happy to follow through and look into that case. We would be only too happy to assist the Senator through the minister's office.

Senator BILYK—I am also aware of a case where a Comcare client had massage treatment denied. She had suffered a psychological injury at work but the therapy was not regarded as reasonable treatment. Comcare's contention was that it treated the symptoms of the injury rather than the injury itself.

Mr O'Connor—Correct.

Senator BILYK—Don't you believe that it is reasonable to treat the symptoms of an injury, given that you have already accepted liability for the injury and the worker is suffering those symptoms because of that injury?

Mr O'Connor—Again there was an extensive 'reasons for decision' offered by the Administrative Appeals Tribunal. It canvassed, in that particular case for that particular federal worker, what was 'treating the symptoms' and what was treating the underlying cause; what was therapeutic; what was beyond the range of therapeutic treatment; and what was evidence based or not evidence based. We take an approach of looking at what the reasonable cost is of medical treatment that is sought and has a clinical justification—treatment that is addressing the underlying injury or disease. In some cases, a treatment can be particularly beneficial in the early symptomatology and manifestation of an injury or disease, but then the question arises: at what point does the clinical efficacy of that continuing treatment, which might be declining, cease to be sufficient justification? I understand that in one particular matter the AAT canvassed the expert evidence before it—it looked at the evidence not only from Australia but internationally—about what the appropriate principles were for clinical justification. It looked at those principles in order to determine whether or not Comcare's decision in the particular matter—a decision not to pay for a particular form or modality of treatment—was appropriate. The AAT in that case, for that treatment, in response to the particular circumstances of that federal worker, made a view that the treatment was not clinically justified.

Senator BILYK—I might come back to that discussion in a different forum. Going back to that first question I asked, I have just been reminded that the Government Solicitor commented that it was disappointing that the claimant's medical people were unable to give evidence in person. Would that have made a difference to anything you looked at, if you had known that comment had been made? Would you know that and would that make a difference to any future actions?

Mr O'Connor—I could not be definitive about that, but I think it is a perspective I would be wanting to take advice on. We pay high regard to the advice of the Australian Government Solicitor. They provide extensive advice across a range of matters and I would interested to become personally familiar with the perspective that the Australian Government Solicitor provided in the context of their legal advice.

Senator BILYK—I think it is probably best if we take this up in a different forum, but, thank you, for answering the questions.

Mr O'Connor—I am happy to assist with the minister's office.

CHAIR—We know one of the policy rationales for applying the notional five per cent superannuation penalty to permanently injured workers is that it might encourage a return to work. In the May estimates you told me you were not aware of any miraculous recoveries of permanently injured people because of that five per cent penalty applied to them. Since then have there been any miraculous recoveries as a result of applying the five per cent penalty to anyone?

Mr O'Connor—For the sake of continuity, I will ask my colleague Mr Kibble to continue his discussion with you on that matter.

Mr Kibble—We provided some evidence through questions on notice in relation to nine employees who could have an ability to earn or return to work out of 391 people receiving incapacity payments under that particular provision. Nothing has particularly changed in the circumstances of those people, but I can confirm that for you on notice.

CHAIR—So you believe that those people who are seeking to return to work because of the five per cent penalty that is being applied to their payments?

Mr Kibble—They return to work for a range of reasons because that is what we are aiming at and what they are aiming at as well, of course. I will confirm if there has been any change. I do not suspect there has been any particular change in the numbers that we provided in the proportion, but I will confirm that on notice for you.

CHAIR—But for the remainder of the people it is not an incentive for them to return to work because of their permanent injuries. What is the point of continuing to apply this penalty to them?

Mr Kibble—The overall scheme is about encouraging federal workers who have been injured or ill to return to work as quickly and safely as possible. Obviously, those people who are never going to return to work are in a different situation. They can be on benefits until aged 65 in our scheme, but the overall scheme design and this particular formula is part of that overall scheme design in encouraging people to get back to work as quickly and safely as possible.

CHAIR—I look forward to the report of any miraculous recoveries at the next estimates. There are no further questions for Comcare, so thank you, Mr O'Connor and Mr Kibble, for your attendance at the estimates today.

[9.40 am]

Safework Australia

CHAIR—Welcome, Mr Hoy. Thank you for your appearance today. Do you have any opening remarks you would like to make to the committee?

Mr Hoy—No, thank you.

Senator ABETZ—Are you able to assist us as to the state of play in relation to national uniform occupational health and safety laws?

Mr Hoy—Safe Work Australia’s role is to develop model legislation in accordance with policy decisions of workplace relations ministers. In 2009, ministers tasked us to develop a model act, model regulations, priority codes of practice and a compliance and enforcement policy. In 2009, we developed the model act. That was submitted to the Workplace Relations Ministers Council for final approval in December 2009. The ministers agreed that model act and, in accordance with the intergovernmental agreement, that becomes the model act.

It is now the responsibility of all the jurisdictions—that is, the states, territories and the Commonwealth—in accordance with the IGA to implement that act in their respective jurisdictions by the end of 2011. At the moment we are developing the model regulations and priority codes of practice to go with that and subsequently we will develop the compliance and enforcement policies. They will all be submitted to workplace relations ministers in 2010 and, again, all of those will need to be implemented by 2011.

Senator ABETZ—For our part, the coalition, well done on the work that you have done to date in relation to that. Can I ask in relation to the intergovernmental agreement: is that a binding agreement?

Mr Hoy—Could I please request that you direct questions about the IGA to the department, who will be appearing later on.

Senator ABETZ—So that will be outcome 5—is that right?

Senator Chris Evans—Yes, Senator, but—

Senator ABETZ—I am happy to do that, Mr Hoy.

Senator Chris Evans—can I just indicate that Mr Hoy’s responsibilities obviously do not go to the broader stuff, which I presume we will get to later this afternoon. I am happy to deal with those issues but obviously he is constrained to the—

Senator ABETZ—I was not going to go to the detail of it; I just thought—

Senator Chris Evans—If you want to ask about the regulations et cetera—

Senator ABETZ—having been involved in the legislation, having been involved in the regulations and having been tasked, you may also have been involved in the framing of the intergovernmental agreement.

Mr Hoy—No, I was not.

Senator ABETZ—And your section was not; that was dealt with by the department?

Mr Hoy—It was done within the department and—

Senator ABETZ—Yes. Thanks.

Mr Hoy—Well, just to be clear: at the time it was done our agency was not in existence.

Senator Chris Evans—That is a pretty good excuse.

Senator ABETZ—That is a very good excuse, I have to say. I understand that we are employing Mal Meninga to assist in promoting the harmonised occupational health and safety laws—is that right?

Mr Hoy—For my part I do not know anything about that. It might be one of the jurisdictions doing it, but Safe Work Australia has not engaged Mr Meninga.

Senator ABETZ—One of these things online, ohsonline.com, tells me: ‘Rugby legend leads Safe Work Australia Week events’.

Mr Hoy—Mr Meninga may be leading something in the particular jurisdictions.

Senator ABETZ—In Queensland. And that would then be up to each individual state to fund?

Mr Hoy—Correct.

Senator ABETZ—You know what? That avoids a whole lot of questions, which is very good; we can move right along. I have no idea how reliable this document is. It is www.ferret.com.au.

Senator Chris Evans—You are not off to a good start with credibility.

Senator ABETZ—But it has, next to ‘Ferret’, ‘Australia’s Manufacturing, Industrial and Mining Directory’. I don’t know how it got its name but it tells us:

The Safe Work Australia Assessment Instruments (test papers) are in review and unlikely to be released soon. This puts a brake on all states and territories from fully implementing the new system.

With state and territory differences, it is hard for customers to know what products to buy at the present moment.

What do we make of that?

Mr Hoy—I am not sure what that article is actually referring to. I have not actually seen that. I do not subscribe to ‘Ferret’, so I cannot comment.

Senator ABETZ—Will the adoption of the model laws require changes to Commonwealth legislation and, if so, in what regard?

Mr Hoy—Do you mean the Commonwealth OHS legislation?

Senator ABETZ—Yes.

Mr Hoy—Again, can you please ask the department that because they will be responsible for implementing that with the Commonwealth. They will take the model legislation, then we will need to enact it through this parliament.

Senator ABETZ—But you were tasked, we are not, by the ministerial council to put together model legislation?

Mr Hoy—Yes.

Senator ABETZ—Was part of that process to find out what the various states might have to change within their jurisdiction and also what the Commonwealth might have to change in its jurisdiction? Was that not part of the overall task?

Mr Hoy—The process was that the Commonwealth established a national review panel to model occupational health and safety legislation. That panel started in April 2008. It produced two reports, with the final one in January 2009. That review considered the issues you are talking about. It provided a report and recommendations which ministers considered and in the light of those recommendations ministers made policy decisions which they then conveyed to Safe Work Australia and we used those policy directions to develop the model legislation. To consider variations between individual states and territories you would need to

ask the Commonwealth in its own jurisdictions and we would need to examine the particular issues in each of the jurisdictions.

Senator Chris Evans—We will require Commonwealth legislation to do with Commonwealth employees, but we will answer questions about that when the department is here.

Senator ABETZ—I thought that may have been a part of the task before settling on model legislation and drafting model legislation—that some advice may have gone backwards and forwards to the federal department indicating that, if we do it this way, there might be certain changes required on the Commonwealth level, and would they be agreeable to that before it was written into the model legislation.

Mr Hoy—The Commonwealth is also represented on Safe Work Australia. They have a member there, similar to the states and territories. Through the development process they were involved in all of that but to go to the manager you talk about, I suggest you talk to the department please.

Senator ABETZ—Fine. I understand there has been some funding for occupational health and safety and workers compensation project officers. Is that right?

Mr Hoy—Could you give me some details, please?

Senator ABETZ—Yes. The ACTU advertised in recent times for a position where the key responsibilities included representing the ACTU on Safe Work Australia committees and other government and non-government committees. I understand this position is funded by the Commonwealth. Is it funded through your section or through the department?

Mr Hoy—It is funded through the department.

Senator ABETZ—That is another outcome 5—thank you.

Senator WORTLEY—Mr Hoy, are you able to tell us of any emerging occupational health and safety or workers compensation issues?

Mr Hoy—Do you mean in Australia?

Senator WORTLEY—Yes, in Australia.

Mr Hoy—There are emerging issues all the time. There are particular ones at the moment associated with the potential use of nanotechnology—that is one particular issue. Are there others you wanted to go to?

Senator WORTLEY—Issues relating to our ageing population.

Mr Hoy—At the moment we have not specifically looked at that particular issue. We have been doing research and analysis on a number of issues like that, but other Commonwealth departments have been working on that. One other issue in which the Commonwealth has been progressing is disability in the population more generally and workers.

Senator WORTLEY—Thank you.

Senator CAMERON—Mr Hoy, you oversee health and safety generally in Australia.

Mr Hoy—We are a national policy body; we are not a regulator.

Senator CAMERON—Have you had any policy discussions with the ABCC in relation to any policy requirements for the building and construction industry?

Mr Hoy—Not with the ABCC, no. We have been involved in developing regulations for the construction industry and there have been consultations with industries and unions but not specifically with the ABCC.

Senator CAMERON—Do you know that the statistics on deaths in the building and construction industry only have employees in the published figures and that contractors are not included in the published figures?

Mr Hoy—I will get some advice from Ms Grey.

Ms Grey—The reason we do not publish those figures is that our figures are based on workers compensation. They are compensable injuries, so contractors are not covered by workers compensation.

Senator CAMERON—So if you are a contractor and you are killed on the job, you are not a ‘statistic’?

Ms Grey—Not through our national dataset but we do collect other information. We collect information from the coroners and also notify fatalities from the jurisdictions.

Senator CAMERON—If you look up 2008-09, 31 deaths in the building and construction area—the information I have is that the number of deaths in that industry is much higher. Is that correct?

Ms Grey—That may be correct, but we rely on information from the jurisdictions. We have preliminary figures which we release and then we go back to check those figures as matters go through the court and so on. So we rely on information from the jurisdictions.

Senator CAMERON—But most people who do research on deaths in the industry would look to you to give that information, would they not?

Ms Grey—Yes, unfortunately. I suppose it is one of the limitations of our statistics.

Senator CAMERON—It is not about limitations when workers are being killed and the body supposed to supply the advice does not have them in the statistics. Is that not an issue?

Ms Grey—Yes, it is. We work to improve the statistics but we are limited by the availability of the data from the jurisdictions and from sources. Over recent years we have not tried to improve those statistics by expanding our data collection through the use of coronial information and so on, but again that relies on coroners coding information as being a work-related fatality. We are working with the coroners to improve that dataset.

Senator CAMERON—The Safe Work 2008-09 publication says 31 deaths. How many deaths of were there in the industry?

Ms Grey—I can only provide you with the information we put out publicly because that is the only information we have.

Senator CAMERON—So workers are dying in the industry and you cannot tell me?

Ms Grey—Unfortunately, it is a limitation of the dataset.

Senator CAMERON—It is a bit more than a limitation, is it not?

Ms Grey—I agree with you but, again, our data is based on the data we received from the jurisdictions.

Senator CAMERON—What can be done to fix this?

Ms Grey—We are working with the jurisdictions but we are limited by the court system as well.

Senator CAMERON—What is the problem with the court system that you cannot tell the Senate and the Australian public how many people have died in the industry?

Ms Grey—The problem in regard to prosecutions et cetera is that we wait to have the data confirmed and, as I said, we rely on data from the jurisdictions.

Senator CAMERON—But if there is a prosecution on a contractor who dies—and if you die as a contractor or you die as any employee you die. It is still a tragedy for the families. How do you deal with that then?

Ms Grey—As I indicated, we collect data from different sources and one of those sources is the coroner, but that does rely on the coroner coding it as a work-related fatality. I apologise, but that is in a limitation of the data.

Senator CAMERON—It seems to me it is not a limitation; it is a fundamental problem and a fault that needs to be fixed.

Senator Chris Evans—Ms Grey, are you saying that Senator Cameron, for instance, could not look at other sources and get the gross figure? If it is not in your data, is it the case that we cannot establish those numbers?

Ms Grey—It is the case that we also receive anecdotal information of course but that is difficult to substantiate.

Senator CHRIS EVANS—So there is no other source that Senator Cameron can look at?

Ms Grey—No. Obviously unions collect that information but there is a range of data that has been agreed to be provided by the jurisdictions.

CHAIR—It is my understanding that the death, whether it be an employee or a contractor or a bystander or anyone else in a work place, is a notifiable event to the relevant jurisdiction.

Ms Grey—Yes. It is notified to us and that is what we report on. We have what we call the notified fatalities collection. That is the information that we provide but, again, we do not collect that information ourselves other than rely on the jurisdictions. They provide that information to us as is required by their occupational health and safety legislation, but then we also check with coroners to match those and see if we can find any other fatalities. As I said, we rely on the coroners to code that information. We also obviously go through newspaper reports and those sorts of things and we do have a data collection process. We do rely on the states and the territories to provide that information.

Senator CAMERON—If the minister asked you, ‘How many people have died in the construction industry 2007/2008?’, you will give him a figure.

Ms Grey—Yes.

Senator CAMERON—That figure will not be the correct figure?

Ms Grey—That is the figure that is notified to us by the jurisdictions.

Senator CAMERON—That might be the figure that is notified but it would not be the correct figure. The minister would have to do what I did. Go to the CFMEU and ask the CFMEU, ‘How many people have died in your industry?’ They can tell me. I think Safe Work Australia have to lift their game on this.

Mr Hoy—We have been in existence since 1 November last year. We are a tripartite body. We have representatives of employers and the unions. I have been meeting with the employers and unions and actually asking them to assist us, as well as the states and territories, to improve our data information in terms of common definitions, timeliness and the information they have. They all commit to do it, but it is very difficult to extract this sort of information. We have been working at this through a predecessor body—NOHS—and I have spent a lot of time working at comparative performance. They also had difficulties in getting information. We are about to put out the 10th edition of the *Comparative performance monitoring report* and it compares performance, but it does understate the statistics.

Senator CAMERON—If anyone was doing any analysis in Australia, the first thought would be Safe Work Australia. I do not want to belabour this; I would like you to take on notice—

Mr Hoy—I acknowledge your point and we are working to improve our data.

Senator CHRIS EVANS—I think Senator Cameron obviously has a fair point and Mr Hoy has a fair point in the sense that they do not have the data and he is trying to get it going. Senator, I am happy to take this issue up and see, with Mr Hoy, whether or not we can help at all from a departmental view, because it is something that obviously we ought to know. I had the same problem earlier in the previous portfolio I had with 457 workers and being able to establish the health and safety record or the numbers that might have died on the job. Immigration had terrible difficulty getting it out, and sometimes reports from unions were the only decent source they had. Obviously it is an issue. The organisation has not yet been able to nail how they can get that information, but it is clearly something that is very important to be in the public arena. I guess we will give an undertaking that I will ask the department to see if we can assist at all with the task Mr Hoy is obviously trying to achieve. We have not got there yet and it is a —

Mr Hoy—A difficult task.

Senator CHRIS EVANS—A difficult task, but also something that ought to be available. It ought to be something we know, and we have to work out how we do it.

Senator CAMERON—It was not a difficult task putting 80 inspectors in the industry to make sure a worker does not swear at an employer. It was not a difficult task and huge amounts of money were spent. But it is a difficult task to actually tell us how many workers are killed. I am not asking you to comment on that, Mr Hoy. I am just giving you an example. I do not think it is a difficult task. If the resources are put in place, this can be done. I accept the minister’s commitment that this will be looked at and obviously I will be following up at future estimates about progress you have made in being able to tell the Australian public how many workers die—not only in the building and construction industry but industry generally.

Senator CHRIS EVANS—I think we are in agreement on what would be desirable. We have to see if we can make it work.

CHAIR—Thank you, Mr Hoy and Ms Grey.

[10.07 am]

Fair Work Ombudsman

CHAIR—We welcome officers from the Fair Work Ombudsman: Mr Wilson, Mr Scully and others. Mr Wilson, do you have an opening statement you would like to make to the committee?

Mr Wilson—No, I do not.

CHAIR—We will move straight to questions.

Senator RYAN—There was an article in the *Financial Review* on 24 August which concluded by saying:

The Fair Work Ombudsman says the regulator will make up to 50,000 visits to employers over the next three years to educate them about the new system—

with respect to modern awards. Does the Fair Work Ombudsman have a role in determining those visits? I was not quite sure whether that referred to the regulator—that being Fair Work Australia—or your own office visiting workplaces.

Mr Wilson—That is our office.

Senator RYAN—How many of these visits have taken place so far?

Mr Scully—To the end of September there have been 19,478 transitional educational visits conducted.

Senator RYAN—How do you determine which workplaces? Is it a request and response or is it something that you scope and make an offer about?

Mr Scully—It can be both. We can receive a request, but we also work closely with the state government agencies to agree priorities and a program of locations, businesses and industries that these visits will be targeted at.

Senator RYAN—When you take advice from a state government agency which, for example, may just say ‘retail’ or a particular geographic area, in short—I am not sure of your powers in this regard—does your office contact them or are these people contacted by state agencies?

Mr Scully—They are contacted by the state agency who conducts the visit.

Senator RYAN—In what form are the state agencies? Victoria, my home state, no longer has a tribunal but other states do. Are we looking at state government departments?

Mr Scully—Yes.

Mr Wilson—Maybe I can give you an overview of how we operate with those arrangements. We have contracts with the states of Queensland, New South Wales and South Australia to deliver services. We also have a contract with the state of Tasmania for a variety of other matters which do not include service delivery. The contracts with those three service

delivery states have a requirement on the state agencies, for example the Office of Industrial Relations in New South Wales. They have obligations on that office to provide a variety of activities in the states, which include investigation services and also educational visits. The contracts have their staff appointed as Fair Work Inspectors—to all intents and purposes as inspectors of our agency, but they are managed through the state.

Senator RYAN—So the state governments appoint inspectors for your agency?

Mr Wilson—No, that is not strictly correct. They contract to provide particular services, and then they suggest names of staff who should be appointed as Fair Work Inspectors. We conduct preliminary checks in the same way we do with our own staff, and ultimately appoint one of their staff members as an inspector.

Senator RYAN—Are most contracts with those states publicly available?

Mr Wilson—They are public documents. There is an element of commercial in confidence with them. I am not sure I would want to have them completely released, put it that way.

Senator RYAN—You say they are public documents. Are they public at the moment?

Mr Wilson—No, they are not public at the moment. They are public in the sense that they are a document between two public service agencies—

Senator RYAN—How is that commercial in confidence?

Mr Wilson—There are arrangements which have not been the subject of negotiation with all the states, and I am not sure I would want every state to know exactly the terms on which other states agreed to provide services.

Senator Chris Evans—Senator, are you after the commercial aspects of that or are you after something else?

Senator RYAN—I would appreciate having a look at the contracts, but if the numbers are the sensitive part, as opposed to the terms of the service delivery and various processes, I would be happy for you to delete those.

Senator Chris Evans—Let us take it on notice, knowing that that is what you are after. If we can exclude the commercially sensitive bits and we can release it, we will. We will take it on notice formally.

Senator RYAN—Are the nominees of the state agencies that have been appointed inspectors, as we discussed earlier, publicly available?

Mr Wilson—They are not. There is no reason why they cannot be.

Senator RYAN—Can you take that on notice—the names of the people who have been appointed as Fair Work Inspectors. As I understand it, New South Wales, Queensland and South Australia nominate people to undertake these visits and to be Fair Work Inspectors. You consider those suggestions—they are not nominations—and then you appoint them. I would be interested in knowing who they are.

CHAIR—It is not actually usual for names of public servants at that level to be provided to the committee. There is not necessarily any rule about it, but I know that information has been sought over the years I have been involved with this committee, and there has been a reluctance to provide it.

Senator RYAN—I will be honest and explain the reason—I want to know the background of the people who have been appointed as Fair Work Inspectors.

CHAIR—That information has been sought about other appointments without necessarily providing the names.

Senator RYAN—I am happy with that; that is why I said what I said.

Senator Chris Evans—I think we will be able to help with that.

Mr Wilson—We can give you some broad information on that. I do not have any difficulty with providing names of people who are inspectors. I would prefer they not be incorporated in *Hansard*, just because we do not do that with our own staff.

Senator RYAN—I do not think anyone would be surprised by why I am asking this and what I am interested in, which is the backgrounds of people who have been appointed as Fair Work Inspectors on the nomination of three state Labor governments.

Mr Wilson—I do not think the information will assist you in that.

Senator RYAN—So when they make a suggestion, and you consider it, are you given a CV or something to judge whether the person would be suitable?

Senator Chris Evans—I presume these are people who are employed by that agency.

Senator RYAN—But they are granted powers by the Commonwealth agency.

Senator Chris Evans—There are other similar circumstances; where the person is an officer at a certain rank and classification and role, they are then given those powers—is that it?

Mr Wilson—Not quite. The way it works is that Queensland, for example, would say that in order to provide the contract they need to appoint these 50 or 60 people distributed through the state. They would provide information to us including the verification that the person is a fit and proper person. Each one of those staff is appointed under the relevant public service legislation in those states. I am not restricted in appointing people, but we would not necessary go into their backgrounds beyond that.

Senator RYAN—I was not sure of the numbers, but if we use Queensland as an example and Queensland says it needs 60 people to fill the terms of the contract, does it offer you 100 names or does it offer you 60? My point is, if this example is continued and Queensland says it needs 60 people to fulfil the terms of the contract, does it put up 60 names? As I understand it from what Mr Wilson is saying, these are not positions and classifications for which individual people—John Smith or Betty Jones—are appointed as Fair Work Inspectors as these inspectors are appointed by the Fair Work Ombudsman. Are you offered any more choice or are you just given 60 names for which you do a probity check, for lack of a better way of putting it?

Mr Scully—They give us the names of the people that they request to be appointed as Fair Work Inspectors. It is probably worth adding that these individuals were previously time and wage inspectors and so they were performing similar tasks under contract to the federal government prior to the state referral.

Senator RYAN—Some of us who have worked in state governments do not necessarily have the same degree of faith in state appointment processes as we might at the Commonwealth level. I would not like the Commonwealth level to reflect the state level as much as I would like the state level to reflect the Commonwealth level.

Senator Chris Evans—Maybe Mr Scully should take us through the process of the nomination and who they are nominating. Perhaps Mr Scully could give us a two-minute version of what they do, say, in Queensland and then we would all be better informed.

Mr Scully—We receive the listing from the state of Queensland, for example, which indicates the names of people that they wish to be appointed as Fair Work Inspectors and we require a form to be filled out for each of those individuals giving the basic employment details of those people. It also requires the state to ascertain that those people are fit and proper to do the task and that they are of good character.

Senator RYAN—I hasten to add that I am not making any allegations about any assertion that they are fit and proper. My concern initially relates to the diversity of people that might be Fair Work Inspectors and whether or not there is sufficient oversight by a Commonwealth agency where officials of another government are exercising powers of the Commonwealth. We have had just under 20,000 visits to the end of September, and the state governments have a distinct role in choosing where these inspectors, who are employed by state governments, go and they are exercising the powers of your agency. Am I correct so far?

Mr Scully—I just have one point of clarification. Where the visits are conducted—so where the inspectors go—is done in consultation with ourselves and the state agencies through regular meetings that we have where we identify the priorities for these visits and where they will be conducted. So we do have some input into where the visits are conducted.

Senator RYAN—You have some input, but I will be really blunt and suggest that if Queensland suggests 60 people to be Fair Work Inspectors and you subsequently appoint those people, you would have less input than if they gave you 120 names and you chose 60. When the sites are being chosen for the visits, do you use the same process? Effectively are you given a list by the state agency you are contracted to and then you go to those sites? That could be consultation too if you stick around to discuss it.

Mr Scully—There is consultation, but this largely reflects the priorities of the state and where the state sees the work and the best benefit from these visits.

Senator RYAN—Where these visits take place has reflected the priorities—at least in Queensland, New South Wales and South Australia—of the state departments of industrial relations or whatever the correct terminology is. Is that a yes?

Mr Scully—To a large extent with the proviso that there is consultation at the partnership management committees between ourselves and the state agencies.

Senator RYAN—Now that I know that your inspectors were state officials, are these visits entirely educational or are they also partly compliance related? If I am a 7-Eleven in a suburb of Melbourne or Brisbane can I ring up and you decide to come to me? Can someone approach you and you decide to go to a particular site, or is someone required to approach a state agency?

Mr Wilson—People can approach us through many ways and there are various activities which go on. The ones that you have been talking about so far we refer to as educational visits. They are within the contract that you have referred to where there is a mutual prioritisation that we agree to. If an employer or employee in any of the states wanted to make a complaint directly to either ourselves or to a state government office, then they could. But if it was a complaint about the operation of the Fair Work Act and whether compliance had been given effect to, then that would go to first of all our central assessment team. It is called something else, but it is effectively a central assessment team which would then allocate the work to an inspector for investigation. It might go to a Fair Work Ombudsman employee or it might go to an employee of the state government.

Senator RYAN—With these 19,478 educational visits, have any prosecutions or otherwise action for breaches flowed from them?

Mr Scully—I do not believe so. I am not aware of any. In fact, the information I have is that during these visits some non-compliances have been identified which the employer has volunteered to rectify at that time, and no further action has been taken apart from paying the correct entitlements to the employee.

Senator RYAN—Sure, which presumably is the aim of the visit in the first place.

Mr Scully—Indeed.

Senator RYAN—How many of these visits have been the result of the request of employers versus the direction of the state government agencies or yourselves?

Mr Scully—I do not have accurate information on that, Senator; I can take that on notice.

Senator RYAN—Okay. If these visits are undertaken by an employee of a state agency, is there anything preventing any such information, gleaned advertently or inadvertently, being utilised by other elements of a state government, whether that be the agency pursuing a non-compliance issue or maybe an OH&S issue? Is there anything preventing that information being otherwise used for the purposes of prosecutions against that business or addressing non-compliance issues in other fields?

Mr Scully—The contracts which we discussed earlier have confidentiality provisions in them which require that information collected as part of the work that the states are doing under contract to the Fair Work Ombudsman cannot be disclosed to any unauthorised areas. That includes other parts of the respective state governments. However, my colleague has raised the issue also about long service leave, which is a state jurisdiction. I am advised that if they uncover any information that relates to items that are under the state jurisdiction such as long service leave, they can act upon that information during the visit.

Senator RYAN—So a business could request assistance and an educational visit through your various processes with the state governments—I note that they are all Labor ones that we are talking about—because they might be having a problem, as you have outlined in other newspaper articles, calculating various payments and trying to comply. They could have a visit, they could be non-compliant in some other way that the inspector, who is an employee of the state government department, becomes aware of—inadvertently or advertently; it could be an honest disclosure because they think they are compliant—and then that information

flowing from an educational visit could be used in a prosecution against them by that state government if it was something outside the ambit of that visit.

Mr Scully—That would generally only occur with respect to long service leave.

Senator RYAN—Do you keep records of whether that happens?

Mr Scully—The Fair Work Ombudsman does not. I am not sure what records are kept by the state agencies.

Senator RYAN—Given you are having 50,000 visits over a very short period, do you think it would be a good idea to maybe keep records? Surely this goes to the sense of trust that employers all act in good faith. I understand that you or one of your officers, Mr Wilson, have said that you will give employers one chance, effectively, with the modern awards to get things right—

Mr Wilson—I do not think I have said that, Senator.

Senator RYAN—I do not think it was made by you but it was someone else from the ombudsman. In the *Australian* on 2 July it says:

But Canberra's Fair Work Ombudsman, Nicholas Wilson, declared he would give employers a second chance before prosecuting them for inadvertent breaches. 'We understand the concerns of business,' he told *The Australian* ...

I was not trying to verbal you, I was just trying to—

Mr Nicholas Wilson—That is not saying that I will give them one chance.

Senator RYAN—I was not trying to verbal you, I was just trying—

Senator Chris Evans—Clearly, a sense of that was that they were looking for a negotiation or education response first.

Senator RYAN—This goes to the point—

Senator Chris Evans—Can we just go back to the point you raise: I think the officer's advice was that they look at the employment conditions as part of the invitation to visit, and that the one set of state conditions where there is an agreement about sharing information is long service leave. Is that right?

Mr Scully—That is correct.

Senator Chris Evans—So that is part of the package, if you like, of employment conditions but remains under state jurisdiction. It is not inconsistent in the sense that it is the one condition in the package which remains subject to state law.

Senator RYAN—And this is one of the reasons I was interested at looking at the contracts, to look at this information that can be disclosed. I will move on quickly as I appreciate others have questions. Do you know of any businesses that have received multiple visits out of those 19,478? Have they all been single visits? Have some areas or businesses been subjected to, shall we say, more gracious attention from some of our state government agencies?

Mr Scully—I believe there has been no doubling up, but I do not have a list here of the 20,000 that have been undertaken, so I will check that.

Senator RYAN—If you are aware of doubling up, I would appreciate it if you let me know.

Mr Scully—I am not aware of it, but I will check.

Senator RYAN—Chair, I can actually place the rest of my questions on notice. Thank you for your time.

CHAIR—Because we have had you before us over the years, Mr Wilson, my understanding of your approach in these matters is that, if you identify a breach or noncompliance, unless it is malicious and deliberately being applied you would give the proprietor or the owner the opportunity to rectify the breach with no prosecution.

Mr Wilson—Most certainly.

CHAIR—And that is clearly a policy position which I think you have articulated before.

Mr Wilson—Most certainly it is our policy position and we certainly do understand the need to, I suppose, have a dialogue about what may have occurred and what has got them to that point of noncompliance, if in fact it is noncompliance.

CHAIR—Having identified a breach and requested voluntary compliance by the owner, if they declined to voluntarily rectify the problem it would be untenable for you to not forcefully rectify the breach, wouldn't it?

Mr Wilson—Of course. The processes we run, and I think the processes run through the states, encourage that. The first approach, whether it is an educational visit or an audit or an investigation, is to understand exactly what is occurring within the workplace. Then there is a dialogue about what needs to occur. In most instances the workplace will say, 'Look, okay, I accept the problem and I will move forward and remedy it.' There are then also beyond that cases where people are not convinced and we may then write to them with what is called a compliance letter, saying, for example, that we believe that you are trying to avert such and such award and that the rate of pay payable to Nick Wilson is something and you have not paid that and you need to pay it within a defined time period. Usually that completes most of the work that we do. There are then a very few matters which are considered more seriously and that is usually where people have dug their heels in and full investigations need to be conducted.

CHAIR—Even if a business has actually asked your office for some educational support or some advice it would be untenable to accept that, if there are other matters they may be breaching, somehow they might be indemnified from having to rectify those or avoid prosecution if they refuse to rectify them simply because they had asked for some help in a different area in the first place?

Mr Wilson—It would be untenable. You would have to do something about those circumstances, I think.

Proceedings suspended from 10.30 am to 10.50 am

CHAIR—We will now resume the Senate estimates hearings and we are still on questions in the area of the Fair Work Ombudsman. Have you finished?

Senator ABETZ—No, I have not even started.

CHAIR—Back to Senator Abetz.

Senator ABETZ—The Fair Work Ombudsman runs an information line?

Mr Wilson—It does.

Senator ABETZ—To your knowledge does Fair Work Australia run an information line?

Mr Wilson—The hesitation is that I am not sure how they could characterise it, but they certainly do run a call centre.

Senator ABETZ—They are two separate and distinct call centres?

Mr Wilson—Yes, they are.

Senator ABETZ—You have told us previously that you have a number of initiatives in place to identify complainants that have an outstanding entitlement; that is, the money that is sitting there. In general how are those initiatives going? Is the number of those complainants that have money sitting there diminishing or is it growing?

Mr Wilson—I will let Mr Scully respond to that.

Senator ABETZ—Whilst you are doing it, chances are in the same brief you might have the total amount that has been outstanding for 90 days, 180 days and greater than 180 days.

Mr Scully—I do have all the information, Senator.

Senator ABETZ—I thought you might do.

Mr Scully—These are numbers as at the end of September 2010. The total amount of unclaimed moneys that we are holding is \$1,554,969 of which \$123,055 is between zero and 90 days; \$319,736 is between 91 and 180 days; and \$1,112,178 is over 180 days. I am pleased to advise that the proportion of the outstanding amount over 180 days has reduced from the last information we provided to you, which I think was based on 30 April 2010. At that time the proportion of the total outstanding for more than 180 days was 88 per cent. As at the end of September it has come down to 72 per cent. So we have been successful in our initiatives in reducing the proportion of the very old amounts.

Senator ABETZ—Thank you for that update and also well done on being able to reduce it. That is good. Mr Wilson, as I understand it, a decision to prosecute a business may be dependent on their what—on your view as to their cooperation with you and that, of course, would require them to respond to requests from the Fair Work Ombudsman from time to time; is that correct? That is one of the factors.

Mr Wilson—It is one of the factors. Those factors are outlined in a litigation policy which, as you would expect, has a number of different factors. The extent of the alleged wrongdoing is one of the issues; the issue of whether or not the workers or others are vulnerable workers becomes an issue; but then also the extent to which the breach has been admitted and things of that nature are taken into account.

Senator ABETZ—But their cooperation and the promptness of their response to your inquiries is one of many factors that is taken into account?

Mr Wilson—It is.

Senator ABETZ—Thank you for that. Can you tell us how the employee calculator on the website works?

Mr Wilson—I personally cannot.

Senator ABETZ—Believe it or not there is another question following.

Senator Chris Evans—Is that an IT lesson you are after?

Senator ABETZ—No. The employee calculator or the wage calculator—what is it called so we get our terminology right?

Mr Wilson—After I answered that I was not exactly actually sure we had an employee calculator, but we do have something called PayCheck.

Senator ABETZ—PayCheck, that is it, thank you very much.

Mr Wilson—There are a number of services that operate off that, but the core of it is a service that enables both employers and workers to ascertain their current wage rates.

Senator ABETZ—Have you received any complaints about the wine industry award PayCheck?

Mr Wilson—Maybe before I answer that I can preface it with a couple of comments, the first of which is that PayCheck is necessarily not a comprehensive service, it is one which provides assistance for quite a number of thousands of classifications but of necessity there are some which it does not include. Effectively what the service does is to walk the user through a series of questions: are you or your employer a constitutional corporation; was that business in operation before 27 March 2006; are you full time, part time; and so it goes on. Depending on the answer to those questions, an answer is then provided; for example, this is the shop assistant rate for a Queensland retail worker before the modern award, and this is the rate after the modern award.

Coming directly to your question about whether there have been complaints. There have been instances where industry associations and unions—and others for that matter—have come to us and said, ‘Your assumptions about which allowances and others should be taken into account in that calculation are not strictly correct.’ At the same time there have also been more than a couple of Fair Work Australia decisions which mean that the interpretive base has moved. To bundle all that together, there certainly have been occasions where clients have come to us and said, ‘We’re not sure this is accurate,’ and certainly a debate has then had to ensue.

Senator ABETZ—I have been told, for example, that if you use the pay calculator or PayCheck for the wine industry award, it does not show the transitional wage rate to be paid but the rate as it will be on 1 July 2014 at the end of the transitional period. Has that been drawn to your attention?

Mr Wilson—I do not have direct knowledge of it and neither does Mr Bongi who is here this morning. It is possible.

Senator ABETZ—In that case if you can take it on notice. I would invite you to not only check the wine industry award pay check but the others as well. I have not looked at this personally but the information I have received is that is what has occurred. Of course, this has

led to considerable ill-feeling between workers and employers when an employer says, 'No, I only have to pay you so much.' Then the worker says, 'No, have a look at this PayCheck on the Fair Work Ombudsman site,' they go through it and a completely different figure comes up. Then the employer worked back and, I am told, realised that it was that final figure as of 1 July 2014 and was not going through the transitional steps. I cannot vouch for that fact, but that is as it has been explained to me. If you could please take that on notice and let us know first whether that is the case and, second, what you are going to do to rectify it—or, if somebody has misused the calculator, if you can let us know that as well.

Mr Wilson—We will certainly take that on notice. If I can also add that, where people have drawn out-and-out errors to our attention, they have been corrected very rapidly. I would be confident if this fell in that category then it would have been corrected. There is another category of dialogue that occurs, which is when one of the industry parties, an employer association or union, puts to us an interpretive view which may not be uniformly shared across the boundaries. That requires us to have dialogue with the associations about do you think overtime is included in this aspect of it and do you think the penalty rates are included in this aspect. It may well be that ultimately we agree with portions of the industry or we agree with the whole industry or we agree with none of the industry. In those sorts of instances, that is not necessarily an error but an interpretive difference which can occur.

Senator ABETZ—We might get to that—not might—we will get to that a bit later. I have another complaint from somebody who is not in the wine industry but who claims that the Fair Work Australia pay calculator is not working and after some hours there was an admission that there was, in fact, a glitch in the program. I am just wondering how widespread are these complaints and how many have been drawn to your attention, if any. Have any of them been drawn to your attention?

Mr Wilson—No glitches as such have been drawn to my attention, but certainly I am prepared to take on notice for the organisation what may have been drawn to our attention.

Senator ABETZ—Let us not debate what we mean by the term 'glitch'. Has any concern been expressed that the pay calculator may not be as accurate as it ought to be?

Mr Wilson—As I said in response to the earlier question, we have had industrial parties come to us and query the information. In a few instances that has been as a result of incorrect data; in other instances there has been an interpretation issue.

Senator ABETZ—So in short, without verballing you, the answer is yes, you are aware and the Fair Work Ombudsman has acknowledged that, at least in some, the error has been on the part of information that has been inputted by your staff. Is that correct?

Mr Wilson—Yes.

Senator ABETZ—That is fine. It is a new system and these things are bound to happen, so I am not overly critical of the system that you are seeking to implement. We are agreed it has happened in some circumstances. Are you able to tell us how many such complaints or indications that there may be an error have been provided to you which has required an adjustment to the information?

Mr Wilson—No, I am not. We would have to take that on notice.

Senator ABETZ—If it is not too difficult to find out, that would be very helpful. Is it correct that the Fair Work Ombudsman in a guidance note on litigation published on your site states:

3.4 In broad terms, the Fair Work Ombudsman: ...

- (e) investigates complaints;
- (f) inquiries into, and investigates ...
- (g) commences proceedings or makes applications ...

You would not disagree with that?

Mr Wilson—I am sure that is what the guidance note says.

Senator ABETZ—Then we are agreed that parental leave is a matter covered by the general protections provisions and that might be something that, if there was a breach of those drawn to your attention, that might excite your interest.

Mr Wilson—It is certainly within our jurisdiction, yes.

Senator ABETZ—Yes, it is clearly within your jurisdiction. I am told that somebody did approach the Fair Work Ombudsman with a situation of parental leave and asked for assistance but they were then told that they would have to launch a general protections claim themselves with Fair Work Australia entirely off their own bat, which of course includes paying a fee for the privilege of lodging it. So the constituent inquiry is what role does the Fair Work Ombudsman actually play given that on the website it says, ‘Come to us with a complaint; we will investigate and, if need be, prosecute’ and then they are left at the end of all that being told, ‘Well, you will have to bring your own action’. Have they misdirected themselves from the website?

Mr Wilson—That would be difficult if not impossible to answer without knowing the case.

Senator ABETZ—In principle, could you foresee a circumstance where you would run a prosecution on behalf of a worker where it was deemed that parental leave requirements had not been abided by?

Mr Wilson—Certainly, in principle, I can. It needs to be borne in mind that in the course of the year we might have 20,000 to 25,000 matters that we deal with. I do not know offhand the proportion of those which would fall into the general protections category. There are all sorts of dialogues with complainants as to the progress of the matter and what they are actually seeking. It is quite common that the initial point of contact is not necessarily satisfied best through an investigation. I really do not know the circumstances that you are referring to but it may well be that we said to the person, ‘We can investigate this and we are resourced to do it. This, however, is a process that might take several months for us to go through and this might be the outcome. There are other avenues for you as a citizen to pursue and one of those includes Fair Work Australia. There are other avenues as well.’ Ms Webster, who is our Chief Counsel, has reminded me of a particular part of the legislation and I will ask her to refer to it.

Ms Webster—There is an issue in the time within which a general protections matter needs to be filed. Accordingly, we would advise persons, who come to us with that type of complaint, of those filing requirements with Fair Work Australia because, as I am sure you

can appreciate, not all matters or complaints that we receive will necessarily be litigated or taken any further by the Fair Work Ombudsman.

Senator ABETZ—What you said, Ms Webster and Mr Wilson, in relation just to the generality of the matter I have raised all makes sense to me—that you have to prioritise and that you do not have limitless resources et cetera. But does your website actually counsel people or indicate to them that just because they have a valid complaint it may not necessarily be something that the Fair Work Ombudsman can champion on their behalf because of restrictions with the number of employees, resources et cetera. As it has been put to me, somebody felt badly let down. They thought, ‘There was the champion of the worker’ but they were not willing to go that final step of lodging and prosecuting it. Are there any—for want of a better term—warnings on the website that this is just generally what the Fair Work Ombudsman can do in some cases but not necessarily in every single case?

Mr Wilson—First of all, it is much more nuanced than simply not being resourced. It is also a situation where we may well say to the complainant that, depending on what it is you want to achieve, you might be better to go in a particular direction. That is not resourcing. Beyond that, I do not believe the website—unless you can point me to the page that you are referring to—would give that level of advice.

Senator ABETZ—You do? Thank you for that.

Mr Wilson—No, I did not say that. I said I do not believe it says, ‘Bring your complaint to us and we will litigate.’ We would be very cautious about that. But we also endeavour not just to speak in the voice of the Fair Work Ombudsman but also to provide advice about how people can access the wider Fair Work system. On that basis, without knowing the specific page, it may well be that it talks about remedies which are available across the bounds. The point I would put, regarding the reference that we are the champion of the worker, is that we put a lot of effort into demonstrating that we act for no-one. People might characterise it as that, but that is certainly not how we present ourselves on the website.

Senator ABETZ—Do you think it might be wise to have some sort of statement on the website that just because you have a valid complaint it does not mean that the Fair Work Ombudsman can necessarily assist in every case?

Mr Wilson—I would be absolutely certain that that is there now.

Senator ABETZ—If somebody could confirm that for us and point out where on the website it could be found, that would be helpful. Can I ask you about the horticulture award?

Mr Wilson—Yes, you can.

Senator ABETZ—I understand part-time and shift workers being entitled to overtime has been an issue between you and the National Farmers Federation for some considerable period of time. First of all: do you find it acceptable that correspondence that was forwarded to you was not answered for a period of five months?

Mr Wilson—If that was the case, certainly it is not acceptable. My recollection of that matter is that there was a lot of dialogue. I would be staggered if there was not communication within a quicker time frame. It may be that a particular letter of the 14th of something was not specifically responded to with a return letter, but knowing the amount of

dialogue that has gone on in that industry it would be quite stretching it to think there had not been a reply in the sense of a coming back to the organisation.

Senator ABETZ—You would be aware of the letter that you wrote on 2 August, which said, ‘I acknowledge that you first wrote to us on 2 March.’ Sure, dialogue had taken place, but for five months there was great uncertainty within that industry, was there not, about casual employees and their entitlement to overtime under the award.

Mr Wilson—Yes, but that is different to saying that the letter had not been responded to.

Senator ABETZ—People need answers not just acknowledgements of letters. It does not help you if you are a farmer and you do not know whether you have to pay a casual overtime. On your website you had that it was required. The employee believed he or she was entitled to it and the employer believed, on advice from elsewhere, that they did not have to pay it. For five months this issue festered and caused ill will between employer and employee until such time as it was resolved.

Mr Wilson—That characterisation is not consistent with our understanding of that matter. There certainly has been uncertainty in the industry about the interpretation that you allude to and that uncertainty went on for some time. However, I am aware that there have been numerous conversations between our staff, those at the National Farmers Federation, the Australian Industry Group and the rest of the groups escape me for the minute. That dialogue went on; I will have to get the full details of how that matter traversed, but my understanding is that there were a number of different inputs which were required, including legal advice and, I believe purely from recollection, some sort of finality from Fair Work Australia on that issue.

The final wash-up which the NFF complained to me about was that we had released an interpretation without informing them. On that I am certainly prepared to say this was not acceptable and I made that point to the staff involved, but that is quite a different characterisation from saying that we left the industry hanging for quite a time and did not respond to the correspondence.

Senator ABETZ—Until the issue was resolved, if you were actually on the ground as an employer, the industry was left hanging especially in circumstances where your officers were providing opposite advice to each other—depending on which officer you got, the advice was different. Your website specifically stated that full-time, part-time and shift workers were entitled to overtime whereas now I understand it is agreed that casual employees under the award are not entitled to overtime.

Mr Wilson—Yes, and the correspondence that you have in front of you would also make the point, I believe, that the fact sheet that Ms Warn was complaining about had recently been released by the Fair Work Ombudsman without consulting with the industry in that final stage. As I said before, that is certainly not something that I think we shone on and we certainly could have done better. But as soon as it was released—and I believe that was within a day or two—the NFF drew that to our attention and we expressed our apology to the NFF and ensured that there was a very rapid review of the circumstances.

Senator ABETZ—I am sure you will be just as obliging to small businesses that make errors and have difficulty in responding and coming to a position in relation to their

requirements under the Fair Work Act. As I understand it, legal opinion in relation to this matter of overtime under the Horticulture Industry Award was obtained.

Mr Wilson—I cannot recall specifically whether it was, but it would not be unusual for it to be obtained.

Senator ABETZ—It could well have been obtained and I believe that that information could have just sat somewhere without being forwarded to the federation and neither was it reflected on your website. So you received some legal advice which led to your reconsideration of the entitlement to overtime of casual workers. How long did it take from receipt to the website being changed and the National Farmers Federation being told about that legal opinion?

Mr Wilson—That one we need to consider for taking on notice. I am uncomfortable responding to the question because it invites a waiver of privilege, ultimately. I am apprehensive about that.

Senator ABETZ—I am not asking for the legal advice. What I am asking is: when did you receive the legal advice, which I understand was the precipitator for changing the information on your website?

Mr Wilson—I am not sure that it was the precipitator, but certainly we will take those issues on notice and provide a response.

Senator ABETZ—Let me quickly backtrack. Let us be quite clear on this. I understand that the Farmers Federation was advised that legal advice was received early this year as a consequence of correspondence of 2 March that casuals were entitled to overtime but that information was never forwarded nor was it reflected in your own website material. That is in a letter dated 29 July 2010.

Mr Campbell—As to the second thing, we do not have that information here right now, but we will take those issues on notice.

Senator ABETZ—See what you can provide me with. You would be aware—or possibly not—of an *Australian Financial Review* story of 12 October, with an introductory paragraph which states:

The paperwork nightmare that is the federal government's awards scheme is proving so complex that legal action is costing businesses hundreds of thousands of dollars.

Do you agree with that statement?

Mr Wilson—I haven't had it put to me.

Senator ABETZ—It is now being put to you. Do you agree with that statement?

Mr Wilson—What I meant, Senator, is that I have not had that proposition put to me by business that it is costing them hundreds of thousands of dollars. So, necessarily, I do not know whether I agree with that statement. I heard that for the first time when I read that particular article.

Senator ABETZ—Would you agree in the analysis that we are told about in the *Financial Review* of the date to which I referred that, for 33 businesses that underpaid their employees, the average fine was \$33,000. They are relatively heavy fines that we are talking about.

Mr Wilson—I agree that that is what the author says it is. We have not conducted our own analysis. I do not know what the analysis would show, but I then agree with the proposition that they are pretty significant fines that generally would be achieved.

Senator ABETZ—The story, in fairness, goes on to say that often the employers could have done more to help themselves, which brings me onto the next point that—

Senator Chris Evans—It is a longstanding provision in the Australian industrial relation system over the years that prosecutions are possible to enforce industrial legislation on employers who do not do the right thing. Obviously, the severity of the fines will reflect the severity of the offence.

Senator ABETZ—But when the enforcement organisation takes over five months to determine what an employer should or should not do in relation to casuals and overtime in the horticultural award, you can understand that there is widespread confusion in the sector generally and that there is difficulty in knowing what they ought do. This article goes on to say that a number of employers have brought it on themselves by not seeking further information and advice. That is where I got to, which brings me onto the next point—

Senator Chris Evans—Can I just say before you move on that you will be pleased to know we have funded 15 employer organisations.

Senator ABETZ—That will be under outcome 5 I am told.

Senator Chris Evans—Yes, but we have funded 15 employer organisations to help with this process and to provide advice to their members. That was announced the other day.

Senator ABETZ—Except one particular one, but we will get to that in outcome 5.

Senator Chris Evans—That will be one compared to the 15 that we have funded.

Senator ABETZ—The feedback I am getting from a lot of employers is that the Fair Work Ombudsman acts both as educator and, potentially, prosecutor. Therefore, there is real reluctance in bringing a particular case to the attention of the ombudsman for fear of then being audited and the matter potentially leading to a prosecution or negative publicity in the media. Are you aware of any of that sort of concern or feedback in the community?

Mr Wilson—The proposition put by the author in that newspaper article you refer to is correct at one level and wrong at another. The correct aspect of it is that business needs advice and assistance to determine what it should do, and the consequences if it does not get good advice and assistance can be dire. That is a truism across all business life—into tax, environments, planning and all the rest of it, as well as workplace relations. So the proposition that the author and the consultant put in this article is a sound one: there should be advice sought on workplace relations as much as anything else.

The proposition, though, that she does advance that the penalties achieved in the past have somehow been achieved because people fail to get advice and so on I think is incorrect. When you look at the judgments that are issued in those matters you will find that the reasons they have been taken to court—in the main, if not all—have been because the duty holder decided that they were not going to comply with the law. Therefore, not only were they not going to comply with the law in the first instance they then decided that they would, in the course of

the investigation, not remedy the breach. Therefore, the proposition that if you do not get advice you, too, can be prosecuted and get this kind of fine is very tenuous.

Senator ABETZ—With respect, Mr Wilson, that is a very long non-answer. All I am asking you is: are you aware of a sentiment within the business community of a reluctance to engage with the Fair Work Ombudsman for educative purposes because of the possibility of a prosecution outcome at the end of their inquiry with your office? This may be a completely ill-founded perception that you would seek to dispel, but I am just asking are you—

Senator Chris Evans—By definition they would not have spoken to the Fair Work Ombudsman because they are too intimidated, according to that analysis.

Senator ABETZ—That is right.

Senator Chris Evans—So they would not know.

Senator ABETZ—Oh, my goodness, Minister!

Senator Chris Evans—Isn't that the logic?

Senator ABETZ—This is a wonderful example of this government's head in the sand. You do not read small business magazines, you do not read media stories that tell you that—

Senator Chris Evans—One media story—

Senator ABETZ—You are not aware of any feedback from backbenchers to you—

Senator Chris Evans—One media story—

Senator ABETZ—No, it was not even in that media story.

Senator Chris Evans—Anyway, the point is that you are asking—

Senator ABETZ—They either know or they do not know about the sentiment, and that is all I have asked.

CHAIR—The minister is trying to make a response.

Mr Wilson—I am happy to say—well, I am not happy to say—I can say that when I speak with people such as AiG or the Australian Chamber of Commerce and Industry or their affiliates they do tell me that proposition—that people are intimidated. But I have no direct evidence myself.

Senator ABETZ—So you are aware of that sentiment, that is all I was asking. Moving on. You might not be able to answer this question, so I will flick this one to the minister, about looking at the possibility of providing binding advice from the Fair Work Ombudsman so that if advice is sought and obtained by an employer that is later found by—best endeavours used, and I accept that that is what the Fair Work Ombudsman does—Fair Work Australia or a court of law to be wrong that the employer who follows that in good faith cannot be prosecuted or fined. Has the government turned its mind to instituting such a procedure?

Senator Chris Evans—The issue was raised with me in passing, but I have not given it any detailed consideration. I am happy to give you a response when the department is here, if you like, if you want to raise it again, because it is not something I have been provided with any detailed advice on. I am sure the department will be able to give you a response. So maybe we will come back to it when the department is back here this arvo.

Senator ABETZ—For the purposes of this, in case I forget, can we take it on notice here and now for the department—so that is on the *Hansard*—but I accept what you are saying, Minister.

Senator Chris Evans—We will all be listening.

Senator ABETZ—Yes, but I have to remind myself to ask the question again.

Senator Chris Evans—I will not promise to remind you about questions you might want to ask me, Senator, but if you ask, we will find you an answer.

Senator ABETZ—Has the Fair Work Ombudsman had any concerns expressed to it about the confusion in relation to the superannuation threshold? As I understand it, under the tax act or whatever it is called, under taxation law in this country, the threshold is at \$450 per month that super has to be paid for an employee if they earn more than that, whereas I understand that some awards have in fact reduced that to \$350—for example, the restaurant award. Has that confusion been expressed to your office as to which one prevails, what do they need to do?

Mr Wilson—I am not aware of that issue. That does not mean that in a call to our contact centre someone has not said, ‘What on earth is this and what does it mean?’ But I am certainly not aware of it from a policy point of view.

Senator ABETZ—I understand that you might not be, but would the hotline or something like that be able to find that out for us without too much work?

Mr Wilson—We could not do that without too much work.

Senator ABETZ—All right, in that case I will not pursue it.

Mr Wilson—What I am trying to say is if it were a substantive issue that had been put to us formally, we would be aware of it.

Senator ABETZ—It has been put to me by some people—that is, which one prevails and why. If the threshold is \$450 per month, why do some awards then vary that and therefore you have differing thresholds?

Senator Chris Evans—Perhaps I will ask Mr Wilson to take it on notice as well. Rather than search every query, but if there is any reporting inside the system—

Senator ABETZ—I think we have just been told that there is not.

Senator Chris Evans—No, I will ask him to double check, short of checking every query ever made.

Senator ABETZ—I do not want you to go to too much work in relation to that. Has the ombudsman finalised its review on leave loading, whether that was payable under fair work on termination or resignation?

Mr Wilson—No, we have not finalised our review of that.

Senator ABETZ—How long has that now been in abeyance or under consideration?

Mr Wilson—I returned from leave at the start of October, I cannot quite recall the date, and I went immediately into a meeting with industry stakeholders, including the ACTU, AiG and ACCI, and I raised that in that meeting. That was the first time it had been formally

brought to my attention at a significant level, and I believe it had only been raised with us a few days before that. What we undertook in that meeting was to circulate advice within those industry parties to obtain legal advice and circulate that to them for the purposes of consultation and discussion. We have recently received that legal advice and, within a few days, we will be writing to those industry associations inviting their views, and very clearly that will then take a few weeks to resolve.

Senator ABETZ—Look I do not blame the Fair Work Ombudsman for this. It is a new system, new rules and these things have to be sorted out, but in the meantime there is a lot of concern amongst employers—do they have to pay, don't they have to pay, workers believing that they should be entitled to it—and it just creates ill will in the workplace. This has been outstanding for a number of weeks now, if not a number of months. Is that correct?

Mr Wilson—I do not specifically know. The interesting thing there is that the—no, I will leave it at that.

Senator ABETZ—Were you going to say something, Mr Campbell?

Mr Campbell—My comment would be that in the conversations I have had with the industrial parties that we intend to speak with about this matter were—it was news to them as well. They had not picked up on this issue. It was news to us—well, news to me certainly.

Senator ABETZ—Yes, but when was that?

Mr Campbell—The conversations took place at that meeting in early October.

Senator ABETZ—As I understand it, from my source, some people had been waiting for at least one month by the time I was notified, which was on 1 October. So if we go through the processes, this will be outstanding for a number of months before it is resolved with workers and employers not knowing what their entitlements and their requirements are.

Mr Wilson—We can make a decision tomorrow, if you want, but the preferred position is to consult with industry, and that is the path we undertook to do with them.

Senator ABETZ—Of course, and with respect, Mr Wilson, your flippant response about making a decision tomorrow is not warranted. All I am asking you to understand is the very serious consequences this has with employer-employee relationships where some people think they are entitled to something and others think there is no such entitlement and they go to the ombudsman to sort it out and they say, 'Well, it's got to be time-out', and that time-out then develops into weeks and months. I do not blame you for that. It is this government's new system that is leading to all of these difficulties, but we are continually told it is working as expected, everything is fine.

Senator Chris Evans—At the heart of this, Senator, is that we are moving to modern awards, reducing the number of instruments from thousands to 122 or what have you. We are trying to make a simpler system and, yes, there are changeover and transition arrangements, which will be a little complex in that period. It will require adjustment, but we will end up where you as the previous government wanted to end up as well—that is, with a smaller number of instruments to make it less complex for business to understand what their responsibilities are.

Senator ABETZ—Yes, ‘less complex’. I do not think that is currently, with respect, the experience.

Senator Chris Evans—My point is that we are in a transition period; we will have issues that we will have to deal with. That is always the case with transition. We will try to make the transition as easy as possible, and that is why we funded education services and that is why officers like the ombudsman try to be lenient in the sense of understanding people are learning new systems while making the transition. But when we get to where we are going we will have a much simpler system that will be much easier for business to administer.

Senator ABETZ—This is all very nice to talk about in the abstract in Canberra, but today, yesterday, tomorrow there are employers and employees not knowing what their entitlements are, what they should be doing and that, unfortunately, creates unnecessary and unfortunate ill will within the community. It is all very well to say, ‘Look, in two, three years or by 1 July 2014 workers will have all this resolved for them,’ but that is cold comfort for an employer who does not know how much he or she should be paying or for an employee who does not know what their actual entitlement may be.

Senator Chris Evans—That is right, and that is why the Fair Work Ombudsman and Fair Work Australia and everyone involved in the system, including employers and unions, are working to try to make sure we address any of those concerns. If you have got any concerns raised with you by business maybe you can raise them directly with me or with the ombudsman and we will seek to address them.

Senator ABETZ—Mr Wilson, you were reported somewhere, as I do not have the source. Tell me whether you said:

... there were some risks associated with giving “binding advice” without seeing the workplace so there would be instances where binding advice could not be offered.

Mr Wilson—Yes, I did say something along those lines.

Senator ABETZ—And—this is not a trick question at all—can I ask then how confident, having read this, can an employer be in getting non-binding advice, but nevertheless advice, from the info line when that info line person has not been to the work premises. So should they then be concerned that this advice might be less rigorous than if there had actually been a workplace visit?

Mr Wilson—The proposition I always put to industry and, to employees for that matter, is that we can give you general advice about wage rates and we can give you general advice about award coverage and classification coverage; however, it is heavily reliant upon the questions we are asked. The view that I would put to industry—and I do this very consistently—is to say that if you want anything more than general advice then you really do need to consider joining an employer association or a union or speaking to a legal practitioner. I speak as someone with more than 25 years of background in industrial relations. It has been the way for that whole period that there are many examples where if you really want to know what classification applies to a person you have to see the duties. That is not new.

Senator ABETZ—But can you understand that some employers that have received information on the info line took it in good faith, adopted it and are now wondering whether they should have invited the info line worker for a cup of coffee at the workplace so that there

was a better understanding of all the different nuanced positions that the employer may not have thought of in providing the information on which the info line worker undoubtedly responded in good faith?

Mr Wilson—I think that would be the wondering that any caller of any contact centre would have, frankly.

Senator ABETZ—So you would expect every caller to have that concern?

Mr Wilson—It is an issue of how they propose to rely upon that information. Do they have that same wonder when they contact the tax office or the occupational health and safety line or the local council about dog registration? All those things have to be put through the caller's own filter and the best advice, frankly, is from the union, an industry association or a professional.

Senator ABETZ—Talking of which, has the ombudsman ever asked for membership databases from employer groups, either verbal or written?

Mr Wilson—It may have. I do not know. I can think of an example where it would be necessary and that would be in ascertaining whether or not an employer is bound to one of the awards that used to exist which were binding upon employer associations—the metal industry award, for example. To consider an investigation and so on, you would need to work out whether the employer had at any stage during the relevant period been a member of, for example, the AiG or the Motor Trades Association, so it is possible those questions have been asked.

Senator ABETZ—Not of an individual employer. I would have thought that, if you were investigating, let us say, Evans Services, and they asserted that they were a member of AiG, you would ask Evans Services for proof of their membership of AiG rather than going to AiG for them to divulge Evans Services' membership of AiG—surely.

Mr Wilson—It is a matter of evidential process, I suppose. But the proper thing would be either to get conclusive proof from the employer or, failing that, to go to the employer association and ask for a certification that the person was a member.

Senator ABETZ—Which is, of course, right, and I accept that, but that is different from asking for the membership database, as in: every single member.

Mr Wilson—Indeed.

Senator ABETZ—And have you—and when I say 'you' I mean the ombudsman's office—asked for databases from employer groups?

Mr Wilson—I am not aware of a database—are you?

Senator ABETZ—I have been told that, yes, you have. When I say 'you' I mean—

Mr Wilson—You know which association? That might help us to look.

Senator ABETZ—Yes I do, because I have the diary note right in front of me from when I visited them, but I will, if need be, get back with a question on notice because I am not necessarily prepared to divulge the association's name.

Senator Chris Evans—I think Mr Wilson's general answer, Senator, is that he does not think so. But we will certainly take it on notice, and I think the office can check. Clearly if

you have a particular association or business that you can alert us to, then that would obviously be helpful. But I understand that you may not want to.

Senator ABETZ—Of course, but I do not want to divulge my source.

Mr Wilson—For the sake of clarity: our policy would not be to ask for the generality of membership.

Senator ABETZ—All right. Thank you. A quick Tasmanian matter: is the Fair Work Ombudsman currently investigating Ta Ann?

Mr Wilson—We would have to take that on notice; we do not know.

Senator ABETZ—All right then. I daresay the Tasmanian office would know. If a message could be put through somehow as to whether or not that is the case, that would be helpful.

Mr Wilson—Senator, if you could give us five or 10 minutes we will find that out.

Senator ABETZ—All right. I will take a break now and allow Senator Cameron and Senator Fisher to ask their questions, and then if I may I will resume after that.

Senator CAMERON—Mr Wilson, I want to continue some of the lines of questioning from last estimates in relation to sham contracting. We discussed at the last estimates some of the problems in the relationship between yourself and the ABCC, and I took the view that there were problems falling between the cracks between the two organisations. Since budget estimates, have you taken any steps to bring about clarity in the division of labour between Fair Work Australia and the ABCC?

Mr Wilson—We have. We have considered the questions that you asked us and also where that took us, and we have had a series of conversations with the ABCC. The wash-up of those conversations has been to agree that any issues concerning sham contracting with building industry participants should be through the ABCC. That is the first issue. The second issue is that recently the commissioner wrote to me—and indeed had conversations—terminating the exchange of letters that Mr Lloyd and I had in 2006.

Senator CAMERON—Well that is welcome news. So in the building industry I can ask questions of ABCC and it will be their responsibility on sham contracting in the building and construction industry.

Mr Wilson—Yes.

Senator CAMERON—Consistent with the act.

Mr Wilson—Yes.

Senator CAMERON—I want to go to this exchange of letters before we move on. You provided me copies of the correspondence in response to one of my questions on notice and I go to the letter dated 26 June 2006 from yourself to the ABCC. In the first couple of lines, you say:

Dear John—

this to John Lloyd, the then commissioner—

thank you for the opportunity to meet with you regarding the exchange of work between the ABCC and the OWS.

Then you make a statement:

I agree that the volume of work likely to be exchanged in either direction will most probably be fairly low.

What analysis did you make to make that statement?

Mr Wilson—Senator, you are asking me to recollect things four years ago, and that is a little bit difficult. I am not trying to be flippant. My recollection is that it would have been an assumption on my part about how the work would go. My recollection at that time was, which is actually not what came to pass in some ways, that the work involving building industry participants would naturally go to the ABCC and the Office of Workplace Services would not do the general underpayments concerning carpenters and electricians and so on. That proved to be wrong. However, the reference in the correspondence was to the formal redirection of matters across the boundaries and certainly our assumption was that there would probably be very few matters where that actually did occur.

Senator CAMERON—Did you take the view that there would be a very small volume of work on sham contracting?

Mr Wilson—I would have to remember my sequencing when the sham contracting and the independent contractors act was passed, but my recollection was that that was not until later in 2006 and so it probably was not an issue of our discussion at that time. In relation to your proposition I think the view was that we would not be doing much work in the building industry in sham contracting.

Senator CAMERON—And you are aware, I have put it to you before, that basically the response I had from the ABCC was that you would be handling sham contracting. This created a problem and you have now decided that the exchange of letters will no longer apply.

Mr Wilson—Yes.

Senator CAMERON—So the ABCC has responsibility for sham contracting in the building and construction industry.

Mr Wilson—That is correct.

Senator Chris Evans—Can you tell us when that happened.

Mr Wilson—The most recent letter, is that what you are referring to?

Senator Chris Evans—The change in the terms of the arrangement.

Mr Wilson—Mr Johns, the new commissioner, wrote to me on 11 October. I am happy to table that and I think he would be as well.

Senator CAMERON—Yes, I would like that.

Mr Wilson—That is my only copy, but the letter essentially says—

Senator CAMERON—That was 11 October, so it was fairly recently. Was there still an ongoing discussion between your office and ABCC in terms of keeping a record of matters that went between the two organisations? That was part of the original agreement.

Mr Campbell—Yes, we did continue to keep records of the matters that were referred between the two agencies. In fact, we gave you an update on those matters in the last round of questions on notice that we took from you.

Senator CAMERON—Is there an updated report from the report you gave in the questions on notice?

Mr Campbell—I am sure I can get you that information, if you bear with me for one second.

Senator CAMERON—I am happy for you to take that on notice.

Mr Campbell—I am happy to do that.

Senator Chris Evans—11 October might be a suitable end date.

Senator CAMERON—Yes. We have subsection 900(2) and you have provided a response to me in relation to some of the difficulties in dealing with sham contracting. This goes to the question of section 900(2). The relevant section of the Fair Work Act is 357(2) and it says:

Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

- (a) did not know; and
- (b) was not reckless as to whether;

the contract was a contract of employment rather than a contract for services.

Is that part of the act still providing you problems in dealing with this effectively?

Mr Wilson—I think the short answer is that it is a problematic section as to how it operates on an individual basis—it would be the facts that would determine how it operates. The point that we made in the reply to you in question on notice No.EW0265-11 is that the defence in what is now 357(2)—and also the way that that has been interpreted within the Federal Magistrates Court matter *CFMEU v Nubrick*—that the employer did not know or was not reckless has become an awfully important issue.

The further issue for us is that we are bound as a model litigant and that part of the obligation of a model litigant is to search for an explaining behaviour for what is seen as wrongdoing. I am doing this very tortuously, but the point I am trying to make is that when you see a set of facts it is sometimes difficult to go beyond subsection 357(2), but it can be done. Indeed, the matter that we commenced in the Federal Court this week involving a pretzel firm in South Australia is an example of that.

Senator CAMERON—I will come to that.

Mr Wilson—That is probably the extent of my legal knowledge, but maybe Ms Webster can add something.

Senator CAMERON—Before we get into any legal analysis, I want to get into the practical applications. Would you describe subsection 357(2) as a bit of a barrier to being able to deal with this effectively?

Mr Wilson—It is certainly a barrier. As to whether it is an insurmountable barrier, the facts will determine. I am not putting the view that it is a barrier that needs to be removed; that ultimately is a policy question, and I do not think we have had enough cases on this kind of

subject for us to make that call. But it is certainly an issue and it does cause us to move sideways in some instances as a result.

Senator CAMERON—I will now move to the case you just spoke about. I am alert to the fact that it is sub judice, so I will not ask you specific details about your arguments. Broadly, it has been reported publicly that three children were employed under a labour hire agreement by The Pretzel Bakehouse in Adelaide. There are two companies named in this report: a company called Labour Contracting Solutions Pty Ltd and another company called Contracting Solutions Australia Pty Ltd. These companies were operating under a guide which was the information guide for Odco contractors. Is that correct?

Mr Wilson—That is our assertion.

Senator CAMERON—There is a contractors' guide, the agency contracting system, under this Odco approach.

Mr Wilson—That too is part of our allegation to the court.

Senator CAMERON—This is an issue you are dealing with where three children have basically been removed from a contract of employment and are basically contract free. You saw fit to deal with it through litigation, and I am pleased about that. I now want to talk about the company Odco—first of all, the companies that are named in this workplace express report. I am sure you aware of it; it is yesterday's. It is the first I heard of this. Have you had any discussions with Labour Contract Solutions and Contracting Services Australia?

Ms Webster—Could I have the question again, please.

Senator CAMERON—This is in relation to the three children in Adelaide where you have taken litigation against these companies. The companies are Labour Contract Solutions and Contracting Services Australia. Have you had direct discussions with both of these companies?

Ms Webster—Yes, we have.

Senator CAMERON—Are these companies part of the Odco contracting agency group?

Ms Webster—No, they are not. What they have done is to have purchased the licence. That is the allegation. I am mindful, however—I can speak, if you like, about the Odco system, but this matter is currently before the court.

Senator CAMERON—I am not sure what implications there are for court hearings if these companies are part of a group. I am simply asking: is A.b.c. Engineering part of the AIG. It should not be a problem. I just want to know whether you know the answer to that question.

Ms Webster—This particular business did purchase a licence from the Odco business for the purposes of implementing this arrangement, if you like.

Senator CAMERON—So it would be fair for me to surmise that these three children who are exploited—the three exploited children that you are alleging—can be traced back to this Odco group, that there is an involvement with Odco?

Mr Wilson—I am not sure that Ms Webster should be asked to confirm anything that you might or might not assume.

Senator CAMERON—Okay; I am happy with that.

Senator ABETZ—As I understand it this is a matter that is before the courts.

Ms Webster—It is, Senator.

Senator ABETZ—As a result I would have thought any question—

Senator CAMERON—I am not going to raise any more issues.

Senator ABETZ—All right.

Senator CAMERON—I am going to raise some general issues about Odco.

CHAIR—I will just say to the officers that if there is something you feel you ought not answer, you ought not.

Mr Wilson—We are happy, I suppose, to answer questions about arrangements which may exist to take people beyond the employment laws. We can do that generally; we would be more than happy to do that.

Senator CAMERON—One of the organisations that are established on a formal basis to do exactly what you have described—take people out of the employer-employee relationship—is this group called Odco. Are you aware of them?

Mr Wilson—Yes.

Senator CAMERON—On your website you indicate that part of your role is to conduct audits and campaigns.

Mr Wilson—Yes.

Senator CAMERON—I could not very easily see any mention on your website about sham contracting. If you go to every heading on the Fair Work Ombudsman's site, you cannot find any mention of it. These are the main blocks that you have laid out. I cannot find any advice to the public about the problems with sham contracting. Why is that?

Mr Wilson—Your proposition is probably correct. We do not quite know that at the moment, but we will check. We have recently refreshed the website. This is a new website which commenced from mid-September. I do recall that prior to that time we had specific information relating to contractors and sham contracting arrangements. We will take on notice whether we have particular pages there about sham contracting, and if we do not we will certainly remedy that problem.

Senator CAMERON—You can do a search and you will find deep in the bowels of your website somewhere some responses about sham contracting. I have to add: do you believe that is sufficient on the issue of sham contracting?

Mr Wilson—I think the short answer is probably not, but what I can say beyond that is that we approach sham contracting as a—and this is an inadequate way to put it—normal course of business in that we receive complaints about contracting arrangements. When we do auditing of workplaces we will look at the status of contractors in the workplace. It is, for a variety of reasons, not the sort of thing where we have specifically gone out and said, 'Now we are looking at only sham contracting.' That might explain where we have got to. If the point is that the website has insufficient information about sham contracting then I am happy to look at that.

Senator CAMERON—Mr Wilson, given this most recent litigation that you have engaged in—I am not going into the detail of that litigation—does that send any alarm bells off with the Fair Work Ombudsman that this is a bigger issue that we have been realising recently?

Mr Wilson—That case itself does not send those alarm bells because they were ringing beforehand. We certainly are concerned about it and there are a number of litigations which have already been commenced on this subject, four in all, I think. We also have much larger numbers—

Ms Webster—Six.

Mr Wilson—We have six litigations, Ms Webster informs me. We also have quite a number of investigations on the subject. We have also participated in meetings between our agency and other agencies about an interagency approach to sham contracting or contracting arrangements generally. They have not brought the fruit we need at the moment; they are fairly recent. I think the most recent of them was just shortly before the election was called. But we are looking at all of those activities, I suppose, to put a better face on what we do with the issue of sham contracting. A couple of activities that I can point to are that, in the design of auditing campaigns, we have both the cleaning and security industry coming up in the next 12 months. We expect to be examining sham arrangements there as well.

Senator CAMERON—Would you expect you might find the name Odco coming up in the cleaning industry?

Mr Wilson—I am sorry, I missed that.

Senator CAMERON—Have you come across Odco operating in the cleaning industry?

Mr Wilson—Sometimes we have put to us that this is an ‘Odco arrangement’. What occurs there is that sometimes it could well be an arrangement marketed by that company or it could be someone saying that is just the name. I do not want to mislead you. We have had put to us recently by the Australian Cleaning Contractors’ Association some information which was drawing to our attention that in that industry people were advocating Odco-style arrangements and they asked us whether we thought that was lawful. The response that we put back to the cleaning association was that it was our view that the arrangement is unlikely to be lawful under the culmination of the current Fair Work Act and other laws, including tax and workers compensation and occupational health and safety, unless the engager and contractor supply more to their contract than their labour. So that kind of operation has come to our attention and we have tried to say that we do not think it is lawful.

Senator CAMERON—But like the answer you gave Senator Abetz in relation to the need to provide advice on general workplace inquiries, you would have to assess this Odco arrangement as to whether it is legal or illegal.

Mr Wilson—We would, and it is foreseeable that there may well be some cleaners who are quite legitimately in a contracting arrangement and others who are not.

Before you go, I have just been advised that in relation to our website we do have sham contracting arrangements set out on the website. They might be hard to find, and I will take that point but, for the record, I am told that they can be accessed through the tabs. First of all

it says 'employment' then, secondly, 'contractors' and then there is a page relating to sham contracts.

Senator CAMERON—There is no tab called 'employment'. There is 'conditions of employment'—is that the one?

Mr Wilson—I think it is 'conditions of employment'.

Senator CAMERON—So you have 'conditions of employment'? Then what is it?

Mr Wilson—I am sorry—I thought we had that clarified. We will have to get back to you.

Senator CAMERON—I still cannot find it there.

Mr Wilson—We will still come back. I am sorry.

Senator CAMERON—I think that just demonstrates the difficulty. If someone is worried about their employment, or if it is an employer who is worried about an Odco arrangement, there is no real up-front help on this site that I can see. So can you take it on notice?

Mr Wilson—Sure.

Senator CAMERON—I will be asking about this issue at next estimates. It is not a question on notice, but a bit more notice that I will ask about this. I will come back to Odco; but with the interagency cooperation issue—is there any information you can give me on that? What agencies have been involved, and is this a new approach to try and deal with the issue of sham contracting in a more coordinated effective manner from your point of view?

Mr Wilson—I can advise that in June the former Deputy Prime Minister asked for a meeting to be convened between us and a number of agencies. Those agencies were us, DEEWR, the Tax Office, the ACTU, CFMEU, the LHMU and also advisers from Ms Gillard's office. That conversation, as I said, took place in June and looked at endeavouring to establish a multi-agency approach. It looked at a number of areas that could have been the subject of work by us jointly—hence the attendance of both those unions that I mentioned.

We agreed that there needed to be further conversations, and then very shortly after there were some changes to the ministerial portfolios and then the election, and nothing has occurred since then. But that good will and preliminary work has been established.

Senator CAMERON—Can I just advise you that I will ask further questions on the progress of this on notice during next estimates. Let's come back to Odco. What is your understanding of what Odco is and does?

Mr Wilson—I will deflect that to Ms Webster.

Ms Webster—Essentially, an Odco arrangement—if I can start with that—is a situation where a company is set up for the purposes of providing labour to a business. Then that company purportedly engages persons to provide that labour as independent contractors. What actually happens is that the workers do not have any formal contractual relationship with the business.

Senator CAMERON—Have you had a look at the Odco website?

Ms Webster—I have had a look at the Odco website.

Senator CAMERON—They talk about the contractors driving the agency contracting system. Are you aware of what is involved?

Ms Webster—I am aware, broadly, of what is involved, and also of the contents of the website. We have had some discussions and correspondence with Odco in respect of our concerns as to the arrangements which it advertises.

Senator CAMERON—What are those concerns? I had a look at this and it seems to me that there are some general claims made by this company about the benefits of this system without any proof that the system does deliver what they argue. For instance, assisting productivity increases of 70 per cent. Would you be concerned if these claims were not correct? Would that be an issue for the Fair Work Ombudsman?

Ms Webster—It would be, Senator. The thing that about the Odco arrangements is that what they provide is particular documents and a system to be introduced but it does not necessarily make those persons who are engaged through the system contractors just because it said that they are. So perhaps if the system was introduced in a legitimate way—and, indeed, we know that it can and it has been in the past—then those claims might well be true. The issue for us with an agency is the fact that, from time to time, we are concerned that the system is used in respect of employees and it has represented them that they are actually independent contractors.

Senator CAMERON—Given your concerns about some of these aspects, Odco claim to work across all industries. What steps have you taken to advise other industries of your concerns about this Odco system?

Ms Webster—We have had a number of matters come to us where there is an alleged Odco or Odco-like system which has been put into place, and we have investigated those matters. You see the results of that in the Wetzels Pretzels matter, which is currently before the court. So on every occasion we have looked behind those documents and that system to consider whether or not the persons and the workers involved are actually employees rather than independent contractors.

Senator CAMERON—That is not what I am asking you. You have conceded that you have got concerns about how this company operates. Mr Wilson has indicated that this interagency approach has taken place. Given that you have got some concerns about Odco, I am asking you: what have you done in terms of advising other agencies who may have to deal with sham contracting that you have these concerns about this so-called Odco system?

Mr Campbell—I think the answer would be that, as we have talked about before, there are informal arrangements whereby we refer information to other agencies on a range of topics. If we had a concern about a particular Odco arrangement or purported Odco arrangement then we may refer it to another organisation for their consideration. But that being said, our general advice or our community advice to any employer or business considering using these services—

Senator CAMERON—Mr Campbell, I am sorry to interrupt you, but that is not what I have asked you. If you have not done anything, can you just say, ‘We haven’t done anything.’

Mr Wilson—In relation to writing to employer groups or the industry at large saying that we have concerns, no we have not.

Senator CAMERON—And not just that, there are other agencies like the ABCC, whom you have had this relationship with. Why wouldn't you be saying to them: 'Here's a problem. Here's an organisation that we've got concerns about. They operate in building. They operate in manufacturing. They operate in retail. They operate right across the whole Australian industry. We've got concerns. We're alerting you to this'?

Mr Wilson—I do not believe that we have done that formally, but certainly we may well have said that informally at office and meeting levels.

Senator CAMERON—Again, this is a concern that you have with sham contracting. When it comes to sham contracting, there are informal arrangements, there are cracks in the floor that things fall through. Again, can I just alert you that I will be asking questions on this very issue about Odco and what you have done to alert your concerns to other agencies, player organisations and unions, because if there is any illegal activity taking place then organisations should know to keep clear.

CHAIR—Senator Cameron, we are 10 minutes before the lunch break. I am probably happy for you to finish that time, but that would have to end your questioning.

Senator CAMERON—That is no problem for me. I will finish in 10 minutes.

CHAIR—Just before we do that, there is a request to table a letter to the Fair Work Ombudsman from the ABC Commissioner. The committee has now had an opportunity to look at it. There is no opposition to its being tabled, so that letter is now tabled.

Senator CAMERON—On Odco's website they talk about licensed Odco agencies. These are the people who are going out and promoting this approach under some type of licence from this Odco group—some kind of pyramid system, by the looks of it. What do you know about licensed Odco agencies?

Ms Webster—It is essentially as you have described it, as I understand—that is, a pyramid style of scheme. I understand that there are certain persons who hold licences who would sell the system.

Senator CAMERON—Are you aware who these people are because I could not find out about them on their website? There is no link if you want to look for a licensed Odco agency in your region or your industry. You cannot do that, can you?

Ms Webster—I am not sure.

Senator CAMERON—I can tell you that from the website, you cannot. I am wondering what audits you propose to take with Odco to deal with the concerns you have with this approach. Are you going to analyse these licensed Odco agencies? Who are they? What are they doing? Why have we ended up with a situation where three children were put in a position they should never have been put in? What are you doing about that?

Ms Webster—We have taken on notice that you will be returning to the topic again. We have taken action when matters of this nature have come to us. I would reference the case that was filed just this week. We will continue to take those actions and we will address the questions that you have put to us today at the next Senate estimates.

Senator CAMERON—You are saying you will take on notice a response to me in relation to how you are dealing with the licensed Odco agencies and what you are doing in an audit on Odco?

Ms Webster—The matter that has gone to court is an example that you have referred to of a licensed—

Senator CAMERON—I do not want to go into that because we have traversed that as much as we can, but there is another issue. There are licensed Odco agencies and I cannot find what they do or how they operate. You have uncovered what you believe is a problem. I am now saying that, under your obligations, are you considering an audit on how this company operates to ensure that it operates legally?

Mr Wilson—The short answer is no, we are not considering that. The invitation you are giving us is that we should consider that.

Senator CAMERON—If not, why not?

Mr Wilson—I understand that point. I think that is something we will have to take on notice. The inadequate answer I can give you is that the people we look at at the moment are the people in the workplace. On that basis, we look at those people and then move up to who else might be involved in any offence we may allege. The invitation that you are putting to us is that we take a more sophisticated examination of it. I understand that point. But to date we have not been operating in that manner.

Senator CAMERON—I accept you have that approach. Let me tell you that it is on my radar now and it will be on my radar at estimates for the Fair Work Ombudsman. In relation to the successful prosecution of Land Choice Pty Ltd, did the Fair Work Ombudsman contact the Real Estate Employers Federation in relation to their role in this matter?

Mr Wilson—We will have to take that on notice. We would need to speak to the investigator and litigator involved in that. I think that was a 2009 case.

CHAIR—Senator Fisher.

Senator FISHER—Have you had claims or inquiries lodged by workers in the insulation industry? If so, how many and over what period of time, and what is the trend?

Mr Wilson—I will ask Mr Ronson to come forward on that point.

Senator FISHER—This can probably take us to lunch, Chair. I will resume my other questions after lunch.

Mr Ronson—Senator, could you repeat the question.

Senator FISHER—Has the ombudsman had inquiries made of it by workers in the insulation industry. If so, can you give us some details?

Mr Ronson—The Fair Work Ombudsman received a number of inquiries and complaints earlier in the year particularly around the February period. We also received one particular representation from the National Secretary of the Construction, Forestry, Mining and Energy Union regarding the employment practices of some installers.

Senator FISHER—Okay, can you provide further details of each. Can you provide further details in February: the number of calls, the nature of calls, whether they translated into

claims, from where the work alleged to be done—you know, by the worker—was done, states, duration of employment et cetera.

Mr Ronson—To give you a precise response I will have to take that question on notice.

Senator FISHER—Give us a feel, Mr Ronson.

Mr Ronson—In terms of a feel, most complaints and inquiries came from Victoria originally.

Senator FISHER—During February this year?

Mr Ronson—During February this year and, if my memory serves me right, the CFMEU's allegations related to one particular entity in Victoria which I can confirm is still being investigated.

Senator FISHER—Was that entity an insulation installer?

Mr Ronson—Yes.

Senator FISHER—Okay. And so the union's inquiry was about a number of employees working for that one installer?

Mr Ronson—Yes.

Senator FISHER—During what period of time?

Mr Ronson—I do not have the detail in front of me, so I am happy to correct this if it is incorrect, but from memory the period of employment was last year and early this year.

Senator FISHER—What was the number of workers involved, do you recall?

Mr Ronson—No, I do not have it precisely in front of me, but there were at least eight workers and we were particularly interested in the matter because they were vulnerable workers and overseas workers, from memory. I am happy to provide further particulars.

Senator FISHER—Could you please, and in respect of the earlier information that you volunteered, if we can translate the question that you will take on notice about the number of inquiries; the number of complaints; the number of investigations in respect of which states the work was done; over what period of time was the relevant employment, not necessarily disclosing the identity of the employers but any information about the employers themselves that the ombudsman has. If you could put all of that sort of detail in your answer to the question on notice. And in terms of period of time, let us say, can you provide that information for 2007-08, 2008-09 and 2009-10. Tell me if this will be too onerous as you have had a transition in between. If that is too onerous, when you hear my next question you may be able to suggest how you can do it better because I know the organisation has transitioned in that period, apart from everything else. Do you discern a trend in the volume of inquiries and/or claims from workers in the insulation industry over that period of time?

Mr Ronson—Again I would be happy to correct subsequently if what I am about to say is not right, but the trend that I am getting is that the numbers of inquiries and complaints have declined as this year has progressed and that certainly the number of complaints rose earlier this year. But we will need to validate that, particularly in light of your previous question. As to the reliability of the data for 2007-08 and 2008-09, the ability to mine that may prove too onerous.

CHAIR—That is a perfectly timed answer. We will now break for lunch.

Senator FISHER—Can I just finish my final question on this issue, Chair?

CHAIR—After lunch.

Proceedings suspended from 12.30 pm to 1.30 pm

CHAIR—Order! We will resume these estimates hearings. We are still in questions of the Fair Work Ombudsman and Senator Fisher has the call.

Senator FISHER—Given the break in proceedings in my view at a somewhat inopportune moment with the final question, Mr Ronson, can you refresh the committee's memory as to what you said just before lunch about the trend of inquiries and claims from workers in the insulation industry in the three calendar years that I listed?

Mr Ronson—Senator, I took the opportunity during the break to make some calls and inquiries to see what sort of data we can retrieve—

Senator FISHER—A helpful break.

Mr Ronson—I have been informed that we do not have specific call data relating to the insulation industry, that a free text search of calls will not pick them all up and there will be some 'fractured data', which is the technical term. What I can undertake to provide is the data that we can retrieve but it is important to take this opportunity to confirm that we may not be able to go back through the years that you have requested.

Senator FISHER—That is in respect of call data, what about in respect of investigation and claims data?

Mr Ronson—That data is far more easily obtainable.

Senator FISHER—Can I ask for all of that the same and then some, if you understand what I mean, on notice?

Mr Ronson—You mean going back to 2007-08?

Senator FISHER—Yes.

Mr Ronson—Certainly.

Senator FISHER—Again, if that is unduly onerous given where I think I want to go, then you might have a discussion with the secretariat in due course, and we can accommodate. My final question is: I understand you are taking all that on notice, but would it be fair to say that essentially the inquiries and claims from workers in the insulation industry really hit the Fair Work Ombudsman during February 2009 to February 2010 with the implementation and then cessation of the government's home insulation program?

Mr Ronson—It is fair to say that the interest in the sector in February this year was such that we believed it was appropriate to conduct and commence an audit into the insulation industry. I can report that the report of the insulation installers audit program that we have conducted this year is currently being finalised.

Senator FISHER—The interest in the industry was such that it led to an audit by the ombudsman. Were they your words, Mr Ronson, 'interest in the industry'?

Mr Ronson—The interest from the industry about the sector prompted us to consider whether a compliance activity was appropriate. We formed the view on the information and the allegations we were receiving that indeed it was appropriate. We have conducted an audit program and, as I said before, we are close to finalising that report.

Senator FISHER—Can you expand on what you mean by ‘the interest from the industry prompted you to consider an audit’?

Mr Ronson—I think I stated before but just to clarify that, because of the numbers of inquiries and complaints as well as the CFMEU allegations, we thought it was appropriate to conduct a compliance program.

Senator FISHER—So it was the volume and nature of inquiries, the volume and nature of complaints, and the contact that you had had from the national boss of the CFMEU in respect of a particular insulator and its workers in the insulation industry; is that right?

Mr Ronson—Yes.

Senator FISHER—So that the Fair Work Ombudsman to consider an audit in the insulation sector and you then decided to carry one out?

Mr Ronson—Yes.

Senator FISHER—Have the terms of that audit been made public in any way? I do not want to ask you at length about stuff that is already on the public record.

Mr Ronson—I would be surprised if we had not—I have a memory that we issued a media release at the commencement of the program but I am not sure whether we have had any further media activity about the program since.

Senator FISHER—What can you tell us about the audit in that case—who, what, when, where, why, how?

Mr Ronson—What I can say is that in designing the program we contacted the relevant stakeholders. They were groups like the Australian Cellulose Insulation Manufacturers Association, the Insulation Council of Australia and New Zealand, the Polyester Insulation Manufacturers Association of Australia and a range of other associations who are involved in the sector. We also obtained contact details for installers. At the commencement of this program we emailed 7,000—

Senator FISHER—Sorry, from where did you get contact details for installers?

Mr Ronson—From the Department of Climate Change and Energy Efficiency.

Senator FISHER—Are you able to provide this committee on notice with the list that you got at that time firstly? What did you find out about the names on that list?

Mr Ronson—With respect to the first question we would probably need to consider whether there are any impediments to production of that information. With respect to the second question, I can tell you that we attempted to contact 7,396 enterprises on 15 April 2010—

Senator FISHER—So they were insulation companies or entities—the employers?

Mr Ronson—Yes.

Senator FISHER—Wow.

Mr Ronson—On 15 April 2010 advising those enterprises of the insulation installers audit program.

Senator FISHER—And that almost 7,400 was based solely on a list that came from the department of climate change or complemented by your consultations?

Mr Ronson—It was complemented by additional information that we received.

Senator FISHER—From where?

Mr Ronson—We received information in particular from the Queensland state government who were able to provide us with information because they have a relationship with electrical safety. They had a fairly comprehensive database which was able to supplement the database that we had received from the federal department.

Senator FISHER—Did you consult with the electrical contractors associations in their various names—there are more than one—just out of interest?

Mr Ronson—I have the names of six associations in front of me that we contacted who are involved in the sector. For example, the Aluminium Foil Insulation Association, the Insulation Contractors Association of Australia, the Housing Industry Association.

Senator FISHER—Right, but no electrical contractors as such?

Mr Ronson—I do not have evidence in front of me.

Senator FISHER—So you contacted 7,400 installers on 15 April saying, ‘We are going to audit.’ What was the hit rate, if I can use that term, in terms of success in contacting those approximately 7,400 employers?

Mr Ronson—I am just seeing whether I have that information in front of me. I may have to take that on notice. I believe we have that information.

Senator FISHER—What is your gut feel, Mr Ronson? Did you find that most of them existed or were some of them non-contactable—number no longer connected, not at these premises, scarpered overnight with taxpayers’ money rebated by the government?

Mr Ronson—Because I do not have that information in front of me I will not attempt to give you my feel, but the report is due soon and that information will be covered in the report.

Senator ABETZ—But there were some?

Mr Ronson—Yes.

Senator FISHER—So some of the 7,400 were non-contactable for what sorts of reasons?

Mr Ronson—It is probably best if we wait for the report, which is due soon.

Senator FISHER—But some of them were non-contactable?

Mr Ronson—Correct.

Senator FISHER—I guess we are entitled to speculate until we get the report that that may be because they were no longer in existence; that is, no longer in business. When you say the report will be delivered soon, to whom and when?

Mr Ronson—Like our previous national campaigns, we publish the report and it will be made available on the website.

Senator FISHER—So as soon as you are ready it will be published on the website. Will you be providing a draft for clearance to the minister's office or to anyone else? Does a draft of your report go anywhere outside the Fair Work Ombudsman before you publish it?

Mr Wilson—Maybe if I can respond to that: ordinarily we would go through a process of clearing the report with the industry stakeholders. I do not believe that is expected in this case. We would not be providing a draft to the minister's office for clearance before we finalised it but we would have to consider the integrity of the report and whether we did need to consult with anyone before we did release it.

Senator FISHER—I presume I can ask you—but you will not volunteer information—about key findings of the report.

Mr Ronson—I think it is best we wait.

Senator FISHER—When will we be waiting until?

Mr Ronson—The most recent information I have is that the report is not far away from being finalised. It is likely to be in this calendar year.

Senator FISHER—Gosh, so we are possibly talking weeks if not months, are we, Mr Ronson?

Mr Ronson—More weeks than months.

Senator FISHER—That is comforting. Thank you, we look forward to that. I am moving to another area on the transition to the modern award system. Minister, is it extraordinarily difficult and complex and will it take years to play out, do you think?

Senator Chris Evans—Sorry, could you repeat that?

Senator FISHER—The transition to modern awards under the government's Fair Work Act and in particular the transition from the previous industrial instruments system or award system, could it be said that that is proving extraordinarily difficult and complex and will take years to play out?

Senator Chris Evans—No, I do not think that is right, but we can obviously have a discussion when department officers and Fair Work Australia are here. I would have thought the award modernisation process has gone remarkably well and in a remarkable time frame. Clearly there are transition provisions in terms of bringing the old instruments together which have a phase-in period of up to five years, as I understand it, and obviously that would need to expire before completion. Generally it seems to have gone very well and things are settling down. But, as I say, we can have a detailed discussion about issues you have when Fair Work Australia and the department are at the table.

Senator FISHER—You say it has gone fairly well. Would you say that it has operated largely as intended?

Senator Chris Evans—I think I used my words then.

Senator FISHER—Sorry, Minister?

Senator Chris Evans—I used my words in response to your question. I am not going to use your words.

Senator FISHER—Actually they were the Prime Minister's words.

Senator Chris Evans—I will not use hers either, I will use mine.

Senator FISHER—Fair enough. So you stick to 'it has gone fairly well'?

Senator Chris Evans—Yes, Senator. I am happy to go through any issues you want to raise when the department or Fair Work Australia are here, but all the reporting I have had has been of very good progress and good time frames.

Senator FISHER—So in your words the Fair Work Act transition has gone fairly well, and the Prime Minister says 'as intended'. I am sure that we will revisit those comments. I go back to your comment, Minister, when I asked, 'Could the transition to the modern award system be said to be extraordinarily difficult and complex and take years to play out,' I heard you say, 'No, that's not right,' and then you subsequently explained it. Mr Wilson, did you tell the Industrial Relations Society of Victoria exactly that in a speech recently?

Mr Wilson—No, but I did say something similar. I took the society through an example of award translation—I am happy to do that here as well—and then I said, 'Where does that example take us? Firstly, that award translation exercises can be extraordinarily difficult and complex tasks; and, secondly, that the consequences can take years to play out.' I stand by that. The example that I gave was of a company that crossed the boundaries of an industry sector award in 2004 to an occupational based common rule award in 2005. The extraordinarily difficult part of it related to the fact that we had initially got the advice wrong—and that was appropriate for the company to take up with us, which they did. But actually we had got the advice right because our inspectors had viewed the work in March this year and they had formed the view about the award that needed to apply. There was a lot of interplay, some of which has been in the public domain, and then in I think August of this year we re-inspected the work and saw different work in play. We then formed the view that the award the company contended should apply applied. The point I am making there is that is something which is necessarily a complex issue. That is not a particularly new issue, and it is one that we could be seeing in several years time.

Senator FISHER—So you are essentially saying that what you in fact said was that the transition can be extraordinarily difficult and complex and the consequences may take years to play out. Is that a more accurate paraphrase?

CHAIR—Mr Wilson has just put on the record his position.

Senator ABETZ—He can answer it for himself.

CHAIR—It is not about answering. It is not appropriate to repackaging what was just said.

Senator ABETZ—Yes, it is. You can't tell us how to ask our questions.

CHAIR—The evidence is what is put on the record, not the way Senator Fisher may like to repackaging it and put it back to the committee.

Senator FISHER—Minister, do you agree with what Mr Wilson just put on the record? Or, Mr Wilson, you might restate it perhaps a little more in summary.

Senator Chris Evans—Just to be clear, Mr Wilson was asked for his view and his experience, which is fine. That is why he is here. You get to ask him it; he gives you the answer. That is fine.

Senator FISHER—Mr Wilson, do you agree that the transition to the modern award system can be extraordinarily complex under the Fair Work Act and the consequences may take years to play out?

Senator Chris Evans—Well the transition provisions are five years so it will take years.

Senator FISHER—I am asking Mr Wilson, Minister, as you indicated I should do.

Senator Chris Evans—I just said that by definition it is a five-year transition so therefore it will take years—

Senator FISHER—I look forward to the answer.

Mr Wilson—That is indeed my point that the transition issues are for five years and the jurisdiction which the Fair Work Ombudsman has then runs for a further six years from there. Clearly this will take some time to work through. It is not news to the industrial parties, or to anyone for that matter, that the issues associated with moving from one award to another are necessarily matters of debate and complexity.

Senator FISHER—What is the role of the Fair Work Ombudsman in the process when the ground rules change and the duty holders need to know what the new rules are so that they can comply with their duty?

Mr Wilson—That is the much better question because that was the one—

Senator FISHER—Indeed, they might have been your words, Mr Wilson.

Mr Wilson—What I was trying to get to with the society is that necessarily the industrial relations parties, employer groups and unions have a very significant role in playing that out, that they need to be able to embrace not only their members to ensure that they are making transition properly but also non-members.

Senator FISHER—What is the role of the Fair Work Ombudsman in that transition when the ground rules change and the duty holders need to know the new ground rules?

Mr Wilson—The role of the Fair Work Ombudsman is to provide education, advice and assistance. Last year we spoke to around 1.3 million Australians about a whole variety of award related issues and employment issues. We are confident in that that we spoke to somewhere between 250,000 and 300,000 small business employers. Many of those calls were about moving from the old awards to the modern awards. The role we have is to provide that general kind of advice. But at the end of the day if it comes down to an interpretation associated with the subtleties of whether you operate under one particular award or another that may well require an inspection, and the groups who are best placed to do that are the industry associations and professionals.

Senator FISHER—So when the ground rules are changing and everybody in the work place need to know the new rules, you have an educational role, an advisory role and an assistance role. But you also have an enforcement role, don't you?

Mr Wilson—We do.

Senator FISHER—So there are those four limbs. In this transitional time, would you say that the Fair Work Act and its system is simple?

Mr Wilson—Well, it is no less simple than the former legislation.

Senator FISHER—Would you say that the Fair Work Act is simple?

Mr Wilson—I am not necessarily going to respond directly to that. That is asking me to make a statement about the policy and I do not think it is appropriate that I go down that path. We have to implement the policy as set out in the legislation. Whether it is simple and appropriate for Australians is effectively for the Senate to debate.

Senator FISHER—Mr Wilson, you were quoted in the *Financial Review* on 13 October, in an article written by Steven Scott and Mark Ludlow, as saying that ‘large numbers of employers had contacted your office with concerns about their new awards. “It’s possible that this may be too difficult for some employers and that’s where we have to provide a lot of assistance.”’ So is ‘too difficult’ simple or not simple? I would have thought it was less than simple but I am asking you the question. I did not suggest an answer. Is ‘too difficult’ simple?

CHAIR—Do you have the article there, Mr Wilson?

Mr Wilson—I do, Senator.

CHAIR—We do not but if you have it—

Senator FISHER—I am happy to provide copies.

CHAIR—Well, that is normal practice. If you are going to be quoting from documents you should provide it to the committee.

Mr Wilson—I guess the answer I would give is that, of its nature, workplace relations is not a simple issue and I do not think it ever has been during the past 105 years of the system.

Senator FISHER—Is it simple now?

Mr Wilson—But that is where I am probably not best qualified to make that statement—

Senator FISHER—You workplace relations veteran.

Mr Wilson—It is no less simple—I cannot put it any differently from that. Having been through the legislation that has operated over the past five years there has been complexity in all of it.

Senator FISHER—And there is still complexity.

Mr Wilson—Yes, and I do not shirk from that.

Senator Chris Evans—The context needs to be the transition from thousands of instruments to 122.

Senator FISHER—It does not sound too simple, does it, Minister?

Senator Chris Evans—No, it is not a simple challenge, it is a complex challenge. And that is why the previous government ducked it because it was too hard for them. This government has taken it on. Yes, there are transitional issues; yes, there are things we have to work through; but it is reform worth doing and that is why we are doing it.

Senator FISHER—Minister, is that complexity the clue to why you wrote—before I return to the article, Mr Wilson—to the president of Fair Work Australia expressing your concerns about the potential disadvantage to workers in the transition to modern awards and in particular the transition meaning that some workers will be left without protection?

Senator Chris Evans—No, that is not what the letter said. It is on the website so it is quite clear. I am happy to go through that but I would have thought we should do that in program five with Fair Work Australia. I do not think this is the appropriate place.

Senator FISHER—We may well, but I will return to that in a minute because I will have some enforcement questions of the Fair Work Ombudsman in that context. Mr Wilson, in this article you refer to some employers wanting binding advice from your office instead of going to the industrial umpire Fair Work Australia. The report for what it is worth, with all due respect to the reputable journalist, and then swung to the Prime Minister who is quoted as talking about some employers seeming to want more arbitration rather than less. So her counter to your concern about employers finding this difficult and therefore coming to your organisation for advice seems to be, ‘Well, why are employers now wanting more arbitration when before they wanted less?’ But that is begging the question, is it not: isn’t the issue that employers want to know from your organisation what the rules are right now? And that is a proper role for your organisation.

Mr Wilson—It is.

Senator FISHER—It is not about going to Fair Work Australia and having a fight to resolve a dispute, it is simply wanting to come to your organisation for assistance with ‘what are the rules and what should we be doing’.

Mr Wilson—Yes, and that is the point I suppose that people do put to us from time to time.

Senator FISHER—In that context, I am sure you are aware of the minister’s letter to Fair Work Australia?

Mr Wilson—I am aware of it. I haven’t seen it.

Senator FISHER—In this environment where the ground rules are shifting and we are now going to a process where Fair Work Australia is tasked with terminating ‘modernisable instruments’, as the minister has said in his letter, and the minister expresses a key concern in paragraph three to ensure that employees are not disadvantaged in this process. I am sure if I am misquoting the minister he will correct me—and he subsequently expresses concern about instruments being terminated, if I can put it that way, before they are replaced by something else to protect or maintain workers’ existing entitlements. The minister’s letter talks about the scenario where some employees will be left without entitlements and without wage protections or with a reduced wage protection.

Senator Chris Evans—Do you have the letter, Mr Wilson?

Mr Wilson—I do not but I do not think I need it.

Senator Chris Evans—Sorry, before you go on: as Senator Fisher indicates we are going to discuss it later, it does not matter whether she does it now but it is probably worth circulating it to committee members because if we are going to have a discussion about it they all need to have it.

Senator FISHER—Given the Fair Work Ombudsman’s role in advising, educating and assisting as the ground rules change and helping people to know the rules, and given your enforcement role, what processes and preparations is the ombudsman making for the environment outlined in the minister’s letter?

Mr Wilson—This will be an inadequate answer but it is the only one I can give—

Senator FISHER—I hope the preparation is not inadequate, Mr Wilson.

Mr Wilson—It is definitely not inadequate.

Senator FISHER—The workplaces of Australia do not want to hear that.

CHAIR—Let us just wait for the answer.

Mr Wilson—The answer is that we need to wait and see what the decision of Fair Work Australia is. Now that is not an attempt to give a trite answer, but the reality is that we can see what a variety of people are putting to Fair Work Australia for consideration. It is foreseeable that the tribunal adopt any one or none of them or a hybrid of those positions. It would be wasted work on our part if we tried to anticipate too directly where the bench might go.

Senator FISHER—How does that help employers in what you said is an environment where ground rules are shifting? How does that equip you to educate, assist and advise employers in that environment? Surely it holds you back.

Mr Wilson—The role of Fair Work Australia is to move as quickly as they can and as certainly as they can to create modern awards. I think all things considered the tribunal has done an absolutely admirable job in that regard.

Senator FISHER—Maybe.

Mr Wilson—The timing and the level of engagement with business and employees, large and small, has been outstanding. I have and I do support Fair Work Australia in any criticisms of their work this year. I think their role has been very speedy, all things considered. It is not for me to speak to why it may have come to this stage without a decision on those instruments, but they will get to it as quickly as they can. In the meantime, in terms of our operations, we have to say honestly and openly to the community that we do not have an answer on these issues at the moment.

Senator FISHER—Obviously, the minister has seen a gap, a potential gap, otherwise he would not have written to Fair Work Australia. You have said that you will wait for the decision of Fair Work Australia. What if Fair Work Australia does nothing to fill the gap to cover the breach? What will your organisation do then, and how would you see that scenario unfolding? You have said that there are a number of potential outcomes. Are you preparing?

Mr Wilson—We would make that determination when we know the outcome. At some point, we either know there is to be an outcome or there is not to be an outcome.

Senator FISHER—Do you have a view as to what sorts of workers may be the subject of the minister’s letter?

Mr Wilson—No, we don’t.

Senator FISHER—What would you say today, for example, to an employer who is currently covered by what under the old terminology used to be an enterprise award, which

was, in layperson's speak, about to be terminated and in theory replaced by a modern award? If an employer in that scenario rings you today, who're they gonna call? They're gonna call you. What'cha gonna tell 'em?

Senator Chris Evans—I was tempted to say Ghost Busters but I—

Senator FISHER—C'mon, minister, sing it!

Senator Chris Evans—You don't want me to, Senator, I can assure you of that.

Senator FISHER—It would be better than me.

Mr Wilson—I do not know the answer to that question, and I do not know whether we have the answer.

Senator FISHER—Would one of your officers, though? That is the point.

Mr Wilson—I have just checked with the officer here. I have checked with Mr Bongi. If any of us did have that answer right now, he would be the one who did. We do not have those scrips with us. We would need to take that on notice.

Senator FISHER—Do you believe that as of today the Fair Work Ombudsman could advise an employer in that situation with certainty, for example, over the next 12 months?

Mr Wilson—Of course not. The decision has not been made.

Senator FISHER—That is right. So that is not simple, is it, for an employer?

Mr Wilson—I thought that was a very simple answer, to be honest.

Senator FISHER—It does not bode well for a system that is supposed to be simple, does it, Mr Wilson, when you have said that part of your job is to help the duty holders when the ground rules are changing to know what their duties are?

Mr Wilson—Yes, but it is facile to think that we can invent solutions when they do not exist.

Senator FISHER—Indeed, in terms of one of the scenarios outlined before Fair Work Australia there could be a vacuum, could there not, for protection of certain workers?

Mr Wilson—I am sorry, what was that question?

Senator FISHER—You referred to the potential scenarios in front of Fair Work Australia. You said, 'We'll wait for the decision and number it one or a number or a hybrid.' What are those scenarios? What are the one or a number or a hybrid to which you referred?

Mr Wilson—I cannot answer those questions. I do not have enough knowledge of the issue to speak on them.

Senator FISHER—NBN Co. is on the record in the *Australian* of 19 October, page 3 as saying:

It is a condition of our contracts that all subcontractors—

CHAIR—It hardly helps us, if we do not have it in front of us, to know the date, really.

Senator FISHER—Would you like a copy? I am happy to come back to that question. I will give everybody a rest for now.

Senator ABETZ—I understand a letter was tabled from the Commissioner of the ABCC directed to yourself, Mr Wilson, dated 11 October. Just so I understand it, many matters in relation to underpayment involving building and construction employees have been dealt with by the Fair Work Ombudsman. Would it be fair to say that a lot of those found their way to the ombudsman's office courtesy of redirection from the ABCC?

Mr Wilson—I am not sure that it is correct to say 'many of them'. What occurred in most instances was the matters that we dealt with were people who approached us directly.

Senator ABETZ—Yes, but from your knowledge or discussions with the ABCC and its officers, if the ABCC were rung with an issue relating to underpayment, the ABCC, as a matter of course, would say 'We suggest you ring the Fair Work Ombudsman; here is their number.' From discussions with the ABCC, is that your understanding?

Mr Wilson—I will ask Mr Loizides to take that.

Mr Loizides—Most of the initial inquiries come through our info line and then, where appropriate, people put in complaints. A minority of time and wage matters in the building industry may be referred to us through the ABCC, but I cannot quantify that at the moment.

Senator ABETZ—You say 'a minority'. If you cannot quantify it then you cannot quantify it and you cannot say 'a minority' can you? Is that a fair point?

Mr Loizides—That is a fair point, Senator.

Senator ABETZ—To your knowledge, did the ABCC, in referring people to the FWO, provide the info line number?

Mr Loizides—Yes.

Senator ABETZ—That is all I wanted clarified in relation to that.

Senator FISHER—Back to the article in the *Australian*, of which the secretariat has now provided you with a copy:

It is a condition—

Says NBN Co. spokesperson—

of our contracts that all subcontractors be required to comply with the Fair Work Principles and the Australian National Code of Practice for the Construction Industry, 2009.

Are you familiar with one of the principles of the Fair Work Act, which is that there be a system of a strong, simple and enforceable safety net of minimum employment standards?

Mr Wilson—Yes.

Senator FISHER—Because, of course, you would be trying to enforce that wouldn't you?

Mr Wilson—Of course.

Senator FISHER—Given our previous discussion and given the difficulties which you have said employers are expressing to you with the ground rules shifting, how would you enforce a fair work principle that is embedded in a contract that requires the provision of a simple and enforceable safety net of minimum employment standards?

Mr Wilson—There is a stretch in that question that I am not quite comfortable with.

Senator FISHER—You are very flexible, I am sure, elastic.

Senator Chris Evans—He is also only required to deal with areas within his jurisdiction.

Mr Wilson—Indeed, that might be best directed towards the portfolio.

Senator FISHER—Enforceability is an enforcement in your jurisdiction though, Mr Wilson. So the ground rules need to be clear for you too, don't they?

Mr Wilson—Enforcement of fair work instruments and the Fair Work Act is within our jurisdiction.

Senator FISHER—And its principles?

Mr Wilson—I do not know what that is referring to. I presume it is the department code of practice.

Senator FISHER—Subsection 30B(9) Of the Fair Work Act. I think Mr Campbell is nodding his head.

Mr Campbell—It may actually have been a condition of government tendering that they comply with certain principles. I am aware that fair work principles had been discussed at a government level. I am not sure if they have been imposed on tenderers as part of the broadband network and that may well be the principles that they are referring to. I was not aware of principles beyond the objects as stated in the front of the Fair Work Act that would be ours that we would take into consideration.

Mr Wilson—You would have to ask the spokeswoman for NBN Co what she meant when she said fair work principles.

Senator FISHER—The final question I have of the Fair Work Ombudsman is: if I can take you to the minister's letter to Fair Work Australia of 29 September and his second last paragraph. In my understanding this is the second scenario in which he is expressing the need for Fair Work Australia to consider acting. It says:

A further issue to be aware of relates to cases where employees rely on pay scales which have not been translated into the modern award. In this circumstance, the termination of the pay scale would mean that employees would only be subject to the protections of the national minimum wage. There is the potential that this could inadvertently lead to a reduction in wages.

If that potential were realised, how would the Fair Work Ombudsman approach enforcement?

Mr Wilson—In that hypothetical and theoretical possibility—

Senator FISHER—Which the minister must reckon is pretty serious because I presume that is why he has bothering the President of Fair Work Australia with it.

Senator Chris Evans—The issue is serious, not necessarily widespread, but it was about trying to make sure we did not have any gaps. That is quite right. That is why it is expressed that way. But Mr Wilson can answer within the context of you putting a proposition to him that is hypothetical. He might want to talk about what their general policy is in dealing with these sorts of issues.

Senator FISHER—We are talking about an issue which could inadvertently lead to a reduction in wages, which may well be legal.

Mr Wilson—At any given time our policy is to enforce what the binding obligations on a duty holder might be. Those binding obligations can come about from several sources, one of which is the Fair Work instruments such as an award or agreement. It could come from the act itself, alternatively it could come from the take home order of Fair Work Australia or it could come from a contractual obligation. Now when we see the circumstance I can answer in some detail on which bits we will be enforcing. Until then I can only really give you that generality that we will enforce what is binding on the duty holder.

Senator FISHER—The minister's letter to which I have referred you is about employees relying on pay scales that have not been translated into the modern award. That is the beginning of that paragraph. Then it ends:

... There is the potential that this could inadvertently lead to a reduction in wages.

What would the Fair Work Ombudsman say and do if an employer maintains that they now have the right to pay an employee less money and the employee claims that he or she is entitled to the previous money, which was in fact more money.

Mr Wilson—I refer you to my former answer and in addition I would say, with the utmost respect to the minister as I have not read the letter previously—

Senator FISHER—It makes good reading. But he is going to have to enforce the consequences there.

Senator Chris Evans—I know, but you keep putting hypotheticals in.

Senator FISHER—But you have written about it, Minister, so it cannot be too hypothetical.

Senator Chris Evans—I have, but you are asking him what he is going to do in an enforcement situation if this came to pass and he is trying to be helpful about federal policy.

Senator FISHER—Workplaces in Australia want to know that the cop on the beat, other than the construction industry, is preparing for that and able to take care of that.

Senator Chris Evans—I think they would also be pleased to know that the minister is concerned to make sure those gaps do not occur.

Senator FISHER—Yes.

Senator Chris Evans—I am sure you are supporting me in that.

Senator FISHER—Indeed.

Senator Chris Evans—Good.

Senator FISHER—Quick smart! Yesterday!

Senator Chris Evans—That is great; we are as one.

Senator FISHER—On that particular issue.

CHAIR—This has just become too scary.

Senator Chris Evans—It has too, I agree. To be fair to Mr Wilson, witnesses do not generally answer hypothetical questions. He has tried to be helpful and I am happy for him to be helpful, but it is a hypothetical situation. He has told you what they would do regarding—

Senator FISHER—He may well get that as a question from an employer.

CHAIR—Senator Fisher, just wait.

Senator Chris Evans—He has tried to be helpful to you about the general principles of enforcement.

Senator FISHER—He has.

Senator Chris Evans—I do not think he could go much further than that, but if you have another for him that is fine.

CHAIR—Another ‘last question’.

Senator Chris Evans—He is at a stretch because of the hypothetical nature of the question, but he is trying to deal with it in terms of the principles that they apply and that is appropriate.

Senator FISHER—Mr Wilson?

Mr Wilson—I have nothing further to add.

Senator FISHER—Okay, thank you.

Senator ABETZ—Following up on that, before the election we were told by Ms Gillard that the Fair Work Act was working as expected and everything was hunky-dory, yet about a month after the election, on 29 September, you found it necessary to write to Fair Work Australia in the terms that you used countenancing that some workers will be worse off. Minister, are we being told that the government was not aware of the circumstances prior to the election and that they only came to light after the election?

Senator Chris Evans—You have a copy of the letter and it is very clear what it is about. I suggest as we have an agency before the chair that questions are supposed to be directed at the agency. When we get to section 5, which is about industrial relations policy in the department, we will deal with these matters or if you want to deal with how Fair Work Australia has responded that is fine. Quite frankly, I do not want to do it three times just for the sake of the committee and it is not appropriate.

Senator ABETZ—You do not want to do it once either from what we can gather.

Senator Chris Evans—We will do it once; I am happy to give you the answer. I would have thought that you would have been disappointed if I had not addressed this issue. Let us do it once in the right place in the program.

Senator ABETZ—As Senator Fisher pointed out quite correctly, this will be the agency that might have to deal with the complaints from workers. I can foresee what is going to happen; when we are at outcome 5 talking about the enforcement of all this, ‘You should have asked the ombudsman’. It is the oldest trick in the book, but it is the minister’s prerogative and we will deal with it in outcome 5.

Senator Chris Evans—It is not my prerogative, it is a question about the process of the Senate.

Senator ABETZ—It is because you will not answer the question.

Senator Chris Evans—If you have a question about enforcement, ask the ombudsman now; if you do not, let us move on.

Senator ABETZ—But we do not know all the circumstances and that is why we were asking the question.

Senator Chris Evans—That is because they are hypothetical; that is right, you do not.

Senator ABETZ—So this is a hypothetical letter—thank you, Minister, that is on the record.

CHAIR—That is not what was said.

Senator Chris Evans—I can see why you gave up the law. Let us just get on with it, shall we.

Senator ABETZ—Better than being a hack. Mr Wilson, when was the education phase of the national retail campaign started?

Mr Wilson—I will ask Mr Ronson to speak to that.

Senator ABETZ—Was it launched on 12 July?

Mr Ronson—Senator, on 21 June 2010 the education phase commenced.

Senator ABETZ—But when was the launch of the education phase of the campaign?

Mr Ronson—The notes I have in front of me is that on 21 June a dedicated retail webpage was launched at our website as the primary source of information for the sector.

Senator ABETZ—I am asking about the campaign. When was that launched?

Mr Wilson—I think I recollect the questioning at some of the earlier estimate committees. If I am right I think we had conversations about this in either February or June, and there were questions about our information to the industry about how we would be working with them over the following year. The question you ask is about a launch; I am not sure that word makes a lot of sense in itself. I am not sure that it was a big launch, but certainly there was a commencement process.

Senator ABETZ—If that does not make any sense, I feel sorry for your officer that used those words in an email saying:

We have now determined the best date to launch the education phase of the campaign is Monday, 12 July.

Mr Wilson—Could we perhaps see that letter?

Senator ABETZ—Yes, it does have on it to whom it is sent.

Senator Chris Evans—I think it just turns on the description—whether ‘we are going to launch it’ or there is going to be a huge launch as an occasion. But the officer is trying to be helpful, maybe you could expand on what you are after.

Senator ABETZ—Does anybody in the room agree that possibly a communication was sent to that effect?

Mr Wilson—If you put that to us, of course we do, but presumably it is not being seen particularly well by the industry group or someone now. We are happy to answer to those

questions as to why we worked in that particular way, but unfortunately we do not have the full details as to exactly which communications went on which occasions.

Senator ABETZ—The national retail campaign that was determined to launch the education phase of the campaign on Monday, 12 July—‘we consider this date will provide us with a better opportunity to gain media exposure.’

Mr Ronson—I cannot really add to that to either confirm—

Senator ABETZ—The changes started when—on 1 July?

Mr Wilson—Yes—well, no—

Senator ABETZ—Yes?

Mr Wilson—The changes, the modern retail award commenced on 1 January and presumably the wage rates and other elements—

Senator ABETZ—What was the campaign and the website information that was put up on 21 June all about, Mr Ronson?

Mr Ronson—The aim of the education campaign was to work with a number of significant stakeholders in the sector, and we spent a fair bit of time—

Senator ABETZ—About what?

Mr Ronson—About transitioning to the modern award.

Senator ABETZ—From 1 July?

Mr Ronson—No, I think the Fair Work Ombudsman is correct that the modern award began on 1 January, but 1 July—

Senator ABETZ—But the transitions were starting as of 1 July?

Mr Ronson—Correct.

Senator ABETZ—That is what this website information was about that was posted on 21 June, or are you telling me the changes that commenced on 1 January were only considered worthy of some educational material on your website six months later on 21 June?

Mr Wilson—No, we are not saying that at all.

Senator ABETZ—Right. In that case, you know exactly that the information that was posted on 21 June related to transitional changes commencing on 1 July this year.

Mr Campbell—The retail industry page went live on 21 June. Have you reviewed that retail page? It contains a lot of information about key aspects of the modern award. It gives guidance to employees and employers about wages so much as specific provisions within the award that go to hours of work, shift arrangements—

Senator ABETZ—If I may interrupt you: are you saying that there was nothing on the website before 21 June, or are we saying that it was refreshed on 21 June with new information relating to changes that would apply from 1 July?

Mr Campbell—The retail industry-specific pages are a new initiative. They have been developed over the course of the year to deliver industry-specific information to employers in those industries. We have a range of them now—six or so; I can get a list for you—but the

idea of the retail industry page is to break down the modern award into simple and important chunks for employers to access and understand what their obligations under those awards are. We deal with wages in a separate way, in that we use PayCheck—the online pay system—to give employers guidance about how their specific employees or workplace or award transitions into the new retail award. So they are two separate but related initiatives on the website.

Senator ABETZ—Was there any communication with the national retail sector or elements of the retail sector about the transitions that would take place on 1 July this year, and the consequences and the need to advise their members about the information so that they could be up-to-date with the changes that would be operative as of 1 July? Let us not obfuscate here.

Mr Wilson—Yes.

Senator ABETZ—Yes. Thank you. And then there was an education campaign related to that which was deliberately delayed until 12 July, 12 days after these transitional arrangements came into being. I can understand that the Fair Work Ombudsman's media thoughts were that this might maximise media opportunities, as indicated by the director of regional services and targeting targeted campaigns—I can understand that, and that is without saying the name; you will undoubtedly know now who it is. It just seems to me that if a transition starts on 1 July it might be helpful to start the education campaign of the public launch of that before the changes are in force.

Mr Campbell—Senator, I am not convinced that employers in the industry were not communicated with about the development and release of the retail industry page. I might well be responsible for the fact that the launch that you referred to, which I can only assume is a press release, was not issued until 12 July. That is a public launch for all people to mark the fact that we have an initiative on our website, which is a good initiative, which is available to all employers and employees. There was no delay. It was simply a matter of that was when the press release went out so that we could ensure that the widest audience could understand that this tool existed.

Senator ABETZ—I am sorry. Mr Campbell, your very own official—the director regional services on targeting targeted campaigns says:

The reason for delaying the launch—

You tell me there was no delay; this official tells me that it was delayed. Can you please take this issue on notice and come back with some coherent answers because time is running out.

Senator Chris Evans—Senator, I do not think there is any need for you to be rude to the officials. I think they, like I, are probably trying to struggle with what information you are after. You have a document there that refers to the launch on a certain date—well, that is all fine. You have evidence of when the website went up and what it was about. You are now suggesting there was a delay in the launch, which was maybe the case. Do you want to know the reason for the delay? What do you want them to take on notice that you cannot get now? How can we help you; what are you after?

Senator ABETZ—Minister, if you have not been listening that is your fault.

Senator Chris Evans—I have been listening. I am just trying to work out what you want.

Senator ABETZ—No, we ask the questions. I know what I want and I do not need to tell you why I am asking questions in a particular way.

Senator Chris Evans—Well, if you want me to take it on notice you better be clear about what you want, otherwise I will not take it on notice.

Senator ABETZ—That is the arrogance of this government coming through with this remark.

Senator Chris Evans—No, I am not going to ask officials to take something on notice if it is not fair. What would you like on this?

Senator ABETZ—This official said:

In fact, ideally it would have been prior to 1 July, however this is simply not manageable for our agency because of other work priorities.

If you want me to read more, and get more embarrassment for the section, I am more than happy to keep reading but I do not think this—

CHAIR—Order! What I would like is that you need to provide at some point—I see you hesitate maybe because you have some notations on this.

Senator ABETZ—I had indicated, without mentioning the name, that the position description—the director regional services and targeting targeted campaigns—

CHAIR—Will that be enough for you—

Senator Chris Evans—The agency, like me, does not see any reason to be embarrassed, so, if you want to read the rest of it, do so. If you want something, you need to make clear what you want.

CHAIR—I wonder if I could help there. Let us restate the questions you would like the department or the minister or Mr Wilson to take on notice.

Senator ABETZ—It is very obvious. These transitional arrangements started on 1 July this year—is that right? There were transitional arrangements that started on 1 July?

Senator Chris Evans—That is a statement of fact, yes.

Senator ABETZ—Good; we are agreed with that. Then is it agreed that the launch of the education fees, which include directing employers to the dedicated retail website, was delayed? Are we agreed with that?

Mr Wilson—We will take that on notice. You are putting a proposition to us. I have not seen the email and I do not know what was in the mind of that particular officer when they communicated in that way. I think, with respect, from what I have heard of the email that you have read out that that probably provides the answer which I would give, which is that the agency felt, for reasons that I do not have with me right now, that it was more beneficial to delay it because of other priorities. We will provide you with an answer as to what may have got in the way, but it presumably will not satisfy beyond the answer that we have already given.

Senator ABETZ—But what could be a greater priority than to tell employers about their responsibilities that start as of 1 July and say, ‘Oh, no, we’ve got other priorities and we’ll tell you a fortnight later and then you can try and backdate whatever you might have to do’? I would have thought your priority ought to be to get this up and out there so employers would be aware of their responsibilities on or before 1 July—

Mr Wilson—We can take that on notice.

Senator ABETZ—because this campaign afterwards might assist them in cleaning up a mess that they inadvertently created but it would have been better to advise them beforehand so that no mess was created in the first place. Do you agree that starting a campaign of education or the public launch of that after the transitional arrangements have already come into place is not all that helpful for employers?

Mr Wilson—The activity of the agency needs to be seen in context and, because of that context, I do not agree with the proposition that you are putting in that rhetorical question. The context is that there have been very considerable changes made to the award system in Australia. Those changes have been progressively rolled out over most of last year and then legally commenced from January this year and then July this year. In that time the first priority of the agency has been to make sure that we are able to respond to telephone calls that come to us about wage rates. We have done that successfully. In that period we have spoken, as I said this morning, to several hundred thousand businesses. The second priority that we had was to ensure that that same information could be provided to people through the internet, and that led to the development of the PayCheck service that we have talked about. That service is able to enable searches of several thousand classifications, and we now get more completed searches through that system than we do telephone calls.

We have at the same time produced something like 500 or so ‘how to’ guides which translate people from individual awards across to new modern awards. We have also worked to develop specialist transitional information for people—and the retail industry is one of them. Within the context of the retail industry, we have been working with the retail employer associations and the unions since an early part of this year to develop that material and to ensure that it is accurate and shared. There have been numerous meetings and discussions with those groups up to the period to June. I have not had put to me directly by one of those associations that they were troubled by the release of this information into July. If the question is whether I am defensive about the priority which we accorded to that industry, the answer is no, I am not. But if you are putting the proposition that you do not think it is satisfactory, I am happy to accept that proposition.

Senator ABETZ—After that very lengthy answer, which did not deal with the question as to whether it would have been ideal to have this information out prior to 1 July, your own official says that ‘In fact, ideally it would have been prior to 1 July.’ But you are unwilling to accept that.

Mr Wilson—I request a copy of that email please, Senator.

CHAIR—Are you able to provide the email to the—

Senator ABETZ—I won’t because it has certain identifying features on it—

Senator Chris Evans—Could I just make the point—

Senator ABETZ—but I have indicated by whom by position description—

Senator Chris Evans—Mr Chairman, can I just make the point that I will not be allowing witnesses to answer questions based on that sort of evidence. If Senator Abetz is going to play games by part quoting and then trying to say after a given answer that that somehow contradicts the next paragraph. In future, if that sort of approach is going to be taken, we will demand a copy of it or we will not respond to the question.

Senator ABETZ—That is just absolutely unacceptable, Chair. That offends every practice of the Senate.

Senator Chris Evans—No, it doesn't.

CHAIR—Let me just say this. The general process of the committee is that if people are going to use documents to quote from, they ought to provide the documents to the committee and to the witnesses. If they are quoting in general terms about things that may have been speculated in the press without actually going to specific quotes, that is fine, that is one thing, but if people are going to rely on quotes or specific emails they ought to be provided to the committee. That has been generally the practice that we have applied and I think we should continue it. I do understand that from time to time senators come in with documents that they have made their own personal notations on and it may not be appropriate—and they may not always have planned to refer to that document in the questions. But I would ask that if possible, Senator—not necessarily right now—if you are able to provide a copy of that email or some precise details to Mr Wilson that would certainly assist in answering the question taken on notice. If you can do that, it would be good. If not, the officers and the minister can only answer the questions which they are capable of answering in any instance.

Senator ABETZ—Can I ask you about the practice of the Fair Work Ombudsman in relation to going public with cases. I refer in particular to a *Sydney Morning Herald* article of Wednesday, 7 July 2010, relating to an employer accused of sacking a worker over pregnancy and we were told that 'The Ombudsman will use the case to launch a national awareness campaign today about pregnancy discrimination.' Is it correct that you decided to use this particular case referred to in the *Sydney Morning Herald* for that purpose?

Mr Wilson—Mr Campbell will answer that.

Mr Campbell—Certainly we used the opportunity to gain media attention of the significant issue which is pregnancy discrimination in the workplace.

Senator ABETZ—There is no argument about that and the appropriateness of it. The question is that before a hearing has been undertaken and the matter determined, an employer has been dragged through the media and used as an example. I would have thought that, in relation to the rule of law taking its appropriate course, that is not the behaviour of a model litigant—where all the allegations are set out and then the Ombudsman will use the case to launch a national awareness campaign before the company or the employer is actually found guilty of that which is asserted.

Mr Campbell—I do not agree with that proposition.

Senator ABETZ—So you believe that just because you think somebody might be irresponsible in an area you can, as a model litigant, trawl that through the media, use that as

an example to launch a national awareness campaign and then potentially find that the courts or the judicial process exonerates the example that you have trawled through the media?

Mr Campbell—I think it is worthwhile separating the two issues. Firstly, the case we put before the courts of pregnancy discrimination is quite a significant one. I am not sure if you are aware of the circumstances behind, but it is worthwhile hearing of it.

Senator ABETZ—This is before the courts. You may well be justified, and the employer may well have behaved in the most unacceptable manner possible. All I am talking about is not only the wisdom but also your responsibility as a model litigant not to trawl a case through the media and use it as an example to launch a national campaign when the judicial process has not been finalised and you may in fact be in a position of finding that the case is dismissed.

Mr Wilson—That is not our understanding of model litigant obligations that we have. From recollection, I do not believe that is the understanding of other regulators who are bound by those rules. The obligations which we have are set out in the Attorney-General's directions, which we follow. The policy which we have adopted which we believe is consistent with the obligations is to provide information into the public domain at the point that we have affected service. We do that for every case that we commence.

Senator ABETZ—I can understand that you might say, 'We have today launched proceedings against this company; these are the allegations.' That is one thing. With respect, I would disagree about the model litigant obligations, but I do not want to take that any further. I then move onto the question of the wisdom of using such a case to launch a national awareness campaign. Chances are you will win the case, but I am suggesting prudence might require you to think twice about using a non-determined case as the launch pad for something because in the event, be it some technical reason, the case is dismissed—

Mr Campbell—Nothing in our public statements about that matter hold out that we have determined that there has been a contravention. We make it very clear that we are prosecuting allegations of pregnancy discrimination based on certain facts that we have identified throughout an investigation.

Senator ABETZ—If that is the case, did you issue a media release to clarify that you were not using that specific case to launch a national awareness campaign about pregnancy discrimination, as it was asserted in the news that you were doing?

Mr Wilson—I do not shirk from the idea that we need to run a national campaign on pregnancy discrimination. I believe it is responsible that we should do that and I believe it was also responsible that we should do that at the point that we commenced this litigation. It would have been difficult for us not to do that. In the first year of the Fair Work Act we received about 804 discrimination complaints and roughly 300 of those were required to be investigated. Pregnancy accounted for 74 matters—

Senator ABETZ—Mr Wilson, if I may interrupt you there, I said before that the issue of running a national campaign is not in dispute.

Senator Chris Evans—I think you should let the ombudsman finish his answer.

Senator ABETZ—Unfortunately we are under time constraints and we know that what happens is that people give very long-winded answers.

Senator Chris Evans—But I am not going to allow the officers not being able to answer questions if the answer does not suit you.

Senator ABETZ—No, the answer is not relevant to the question.

Senator Chris Evans—He was just trying to give you the answer. I think it is more that you do not like the answer.

Senator ABETZ—No. How many discrimination cases were lodged—

CHAIR—The question went to asking Mr Wilson about the wisdom of conducting a national campaign at the same time as launching litigation. I think Mr Wilson was trying to explain the reasoning behind doing so.

Senator ABETZ—The number of cases, with great respect—

CHAIR—It all goes to the wisdom of why he made the decision to do it, I think.

Senator ABETZ—Then everything does and we just demean the whole process.

Mr Wilson—I have no problem with the approach that we take; I am happy to accept that others might. However, I can recall on previous occasions commencing public awareness around, for example, problems associated with vulnerable workers in the shopping trolley industry. We put that in the public domain at the same time as we commenced litigation. That is the only example I can recall at the moment, but it is a routine approach to say, ‘This is the problem which has occurred and this is our response: litigation’. But at the same time we are using that to indicate to the rest of the community that this is a problem and that workers have rights or employers have rights.

Senator ABETZ—If the prosecution fails—and there is every likelihood that it will not and I accept that—then you have put up in lights a particular business and said, ‘This is the type of thing you are trying to stamp out,’ and then your prosecution fails. I do not think that is a very clever activity.

Mr Wilson—I disagree.

Senator ABETZ—Fine—disagree by all means; that is your prerogative. I assure you that the workers in this particular business and also the employers have suffered a great degree of loss of business, personal abuse and vilification on the back of the sort of publicity which has yet to be determined by the process. But time is moving on.

Mr Wilson—I am sure the same can be said of David Jones, for that matter, but there is legislation on this.

Senator ABETZ—An individual brought the case and is not bound by those sorts of restrictions. With great respect, if you consider yourself to be in the same category as the publicist from DJ, so be it, but I do not think so.

Mr Campbell—Would it assist if I gave you some background on the matters that were put before the court so you can understand the circumstances of the employee involved?

Senator ABETZ—But it has not been determined by the court—is that right?

Mr Campbell—Yes, and we have not held out that it has been.

Senator ABETZ—That is the only point I make. I understand all the allegations that have been made; that is fine. But if this case collapses for whatever reason—I doubt it will, but if it does—then having based your whole campaign around this particular case—

Senator Chris Evans—But they have not, and they were going to tell you what they have based the campaign on but you did not want to hear that evidence. You did not want to hear the response.

Senator ABETZ—That is why I asked whether the issue—

CHAIR—Points have been made and are on the record. Let us move on.

Senator ABETZ—Thank you. In relation to the matters that have been raised with you by Restaurant and Catering, Mr Wilson, I understand that certain matters could not be addressed—I think this is what you said in some correspondence—because the government was in caretaker mode and there were certain policy decisions that needed to be considered.

Mr Wilson—I do not think I said to them that there were some policy decisions that needed to be considered.

Senator ABETZ—On 5 August 2010, Mr Wilson, you wrote to Mr Parkes and, in the second sentence of the second paragraph, said: ‘I confine my comments to operational matters only and I do not address matters that relate to government policy as it would be inappropriate for me to do so during the current caretaker period. I ask that you respect my need for caution in this regard.’ Right?

Mr Wilson—Correct, yes.

Senator ABETZ—Now that we are out of caretaker mode, I am wondering whether you have addressed these matters with Restaurant and Catering as yet?

Mr Wilson—We have.

Senator ABETZ—You have? Good, thank you. I had not had an update yet as to that, but if that has been resolved that is good to hear.

Mr Wilson—The minister reminded me that, while I do not believe we have written to them as such, certainly Mr Campbell and Mr Ronson did meet with them.

Mr Campbell—We have exchanged a range of correspondence with the Restaurant and Catering association and also met with them to discuss the—

Senator ABETZ—Good. The only question was whether or not we have moved on. We have moved on and I have not had an update, so that is good. I move to questions on notice that we had from last time—EW0272_11. This was the questioning that we undertook in relation to Terang Home Timber and Hardware and I asked of Mr Ronson:

... can you tell me what time of day the Ombudsman first made contact with the Terang hardware store?

Then I was told that the ombudsman first made contact at 2.14 pm on 5 February 2010, so that was very specific and I thank you for that. But, prior to that, I asked:

Can you please give me the time when, on 5 February, the first contact was made by the department with your office?

We were just told 'on the morning'. Why can't we have specificity in relation to the time? You were able to tell us 2.14 pm, and I thank you for that, but why were you so vague in saying that it was some time on the morning?

Mr Campbell—The easiest way to answer that question is that you are dealing with the difference between a manager and an inspector. An inspector made the first call to the employer in this case and he recorded his file notes in a detailed fashion, and he recorded the time he picked up the phone and it was 2.14 pm. As to the department's first contact with us, if the manager received a call—a number of people may have received a call on that morning—it was certainly our view that it occurred on the morning of 5 February.

Senator ABETZ—I know that because that is what you have told us. Thank you very much. So an inspector is a better note taker than a manager?

Mr Campbell—In this case it was an inspector.

Senator ABETZ—Who was it that received the phone call? I do not need to know the name, but what was the classification?

Mr Wilson—I think the Fair Work Ombudsman might have received the phone call.

Senator ABETZ—That being you?

Mr Wilson—I think so.

Senator ABETZ—All right. Can you tell us—

Mr Wilson—No. If I can come to the point that Mr Campbell made, which is that there were probably, we think, phone calls into several parts of the organisation. I recall having been out—I am not quite sure where I was; I would have to check my diary. I got an email or a phone call from a person—I really cannot remember who that was but I do remember that there was a conversation at some stage during the morning. I do recall that, by the time I spoke to someone within the organisation, there had been similar calls as well.

Senator ABETZ—Are we able to be told who got the first contact?

Mr Wilson—No, I do not think we are.

Senator ABETZ—So we do not know from whom these contacts came?

Mr Wilson—I am sorry; you are misconstruing the nature of managerial business or any other business for that matter. I have given you the answer, which is that I recall having a phone call. I do not remember exactly when that was and, by the time I spoke to other people in my organisation, they too recall having a phone call or email or some other communication. It is not the nature of the way we operate to keep things to that level of forensic detail.

Senator ABETZ—The forensic detail was kept in relation to the phone call that was made to Terang. I dare say that officer did not just think it would be a good idea to make that phone call of his or her own volition. Chances are that they were rung and asked or communicated with by email to follow up on this. Is that correct?

Mr Wilson—Yes.

Senator ABETZ—All right. Can we be told what time this inspector, as the person has been described, was first contacted and requested to make that phone call of 2.14 pm and who instructed this inspector to make that phone call?

Mr Campbell—I do not have that information available now.

Senator ABETZ—Of course not, but take it on notice. You must be able to provide that—with the inspector being so meticulous.

Mr Campbell—I do not doubt it.

Senator ABETZ—Good. I know I have to accept—but I do have difficulty in accepting—that there cannot be any specificity in relation to the time when somebody was first told about this matter in the ombudsman's office from the department, whether it was 9 am or 11.59 am. I think some specificity could be made available if there were a will to do so. This matter hit the public arena with a bang, and these phone calls occurred after the then Prime Minister was on the Neil Mitchell program on 3AW. I think we know the time frame and the reluctance to provide the time frame is, I must say, disturbing.

Can I move on to the question EW0273_11? We do not have a record management system which allows the Fair Work Ombudsman to provide the number of instances where a contravention letter has been issued and withdrawn on three occasions for the same matter. There is nothing in our reporting processes that would indicate that?

Mr Wilson—I will ask Mr Loizides answer that question.

Mr Loizides—At this point we cannot report on that number in our system. However, I can report that we are developing a new computer system, and one of the parameters that we will be looking at is trying to capture that information.

Senator ABETZ—Do not tell me something from estimates has actually had an impact somewhere! That is good to hear and congratulations on that.

Senator Chris Evans—I would wait to see if it works first.

Senator ABETZ—Yes. At least there is the goodwill attached in trying to do it, so I welcome that.

Mr Loizides—Yes. Just to clarify: that is in the text for the next system.

Mr Wilson—Senator, the correction is, if I am correct, that we roll the system over this month and that system tracks the information.

Mr Loizides—Correct.

Senator ABETZ—Well, be prepared next estimates. In the second paragraph we were told: However, varying circumstances may alter the course of an investigation and may result in a contravention letter being re-issued.

Now this euphemism, 'varying circumstances', I dare say, includes errors made by the Fair Work Ombudsman.

Mr Wilson—Yes.

Senator ABETZ—In DEEWR question on notice No. EW0276, we were told that your knowledge bank contained 1,794 articles as at 24 June 2010. Prior to that, we had 1,687, so

we now have an extra 107 deposits in the knowledge bank—if I can describe it as such. Have there been any more since?

Mr Wilson—I am sure there have been but we will need to take that on notice because we do not have the information with us.

Senator ABETZ—There seems to be relatively slow progress on the extra 107, but that may be an indication that the first 1,687 dealt with the major issues. It stands to reason it will tail off—the extra number of knowledge bank entries that would be required.

Mr Wilson—We are not able to comment on that proposition. I am not able to comment on the pace of accrual within the bank account. I would assume that many of the articles were written over a period of many years.

Senator ABETZ—That finalises me for the Fair Work Ombudsman. Thank you very much and thank you to the officials.

Senator WORTLEY—I understand that recently the Commonwealth Ombudsman conducted an own motion investigation entitled ‘Fair Work Ombudsman: exercise of coercive information-gathering powers’.

Mr Wilson—Yes, he did.

Senator WORTLEY—I understand it resulted in a very good report, so congratulations on that. There were a number of procedures where the Commonwealth Ombudsman recommended considering some improvements. Are you able to tell us where you are at with that?

Mr Campbell—It was a pleasing result and the Commonwealth Ombudsman certainly has made some recommendations to us. I did not bring a copy of the report with me and I should have. I can confirm to the committee that we are taking steps to respond to and implement those changes recommended by the Commonwealth Ombudsman. If you wish to jog my memory on one of the specific recommendations, I can certainly assist.

Senator WORTLEY—There were a number of recommendations: notices issued to employers before an investigation, guidance regarding the type and volume of documents requested, guidance for determining the time frame for compliance with notices, and the type of information provided to interviewers before and during an interview.

Mr Campbell—I will start with the last one. That goes to the standard statement our inspectors give to witnesses before they conduct an interview with us. The recommendation from the Commonwealth Ombudsman was to ensure that the witness understood that they were attending voluntarily and that they did not have to answer questions if they did not want to. It has been our practice—it has certainly been our intention—not to give a witness the impression that it is an obligation to answer our questions. We have clarified that with our opening statement before those investigations. Could you remind me of the first issue?

Senator WORTLEY—The first issue was ‘notices issued to employers before an investigation’.

Mr Campbell—That goes to a new process which the Fair Work Ombudsman commenced earlier this year about how we attempt to resolve matters at the commencement of investigations. We have always encouraged both parties in an investigation to try and resolve

the matter in the first instance. In that process we developed new correspondence whereby we outlined our role and responsibilities and those of workplace relations participants. At that point we did say that there were possible penalties for contraventions of workplace law. Largely that is saying that we were a little bit too firm in our language at the commencement of our investigation. The idea was largely to tone it down, which we have done.

CHAIR—Senator Fisher has indicated she has questions on notice. That concludes our questions for the Fair Work Ombudsman. Thank you, Mr Wilson, and your officers for your appearance before the committee today.

[3.05 pm]

Fair Work Australia

CHAIR—The next agency is Fair Work Australia.. I welcome Justice Giudice. Would you like to make any opening remarks to the committee?

Mr Giudice—No.

CHAIR—Then we will move straight to questions. Senator Abetz.

Senator ABETZ—Thank you and I welcome Fair Work Australia. I trust that this next question is a formality. I assume it is a requirement for all commissioners and commission members to resign from any trade union, employer organisation or political party with which they may have been associated prior to their appointment, is that correct?

Mr Nassios—I assume you mean its members or employees or paid or—

Senator ABETZ—Commissioners.

Mr Nassios—Yes, but are you asking about being a member of those organisations? Because I do not believe there is any restriction on them retaining their membership.

Senator ABETZ—Does his Honour have a view on that? Has any direction been given that it would be best practice for members to resign from their union, employer organisation or political party that they may have been associated with prior to their appointment as a Fair Work Australia commissioner?

Mr Giudice—It is not a matter of regulation at all. There is no direction about it.

Senator ABETZ—I know there is no official regulation, but from time to time a chief justice or a president of an organisation might issue a direction or indicate what he or she believes to be best practice. That has not occurred with Fair Work Australia?

Mr Giudice—No.

Senator ABETZ—I assume it was the case whilst you were in charge of the AIRC as well—that practice has continued over?

Mr Giudice—That is the case, but there is a stipulation in the act—I suppose, by inference—that there should not be any conflict of interest. That is a matter of common law. It is not something, so far as I am aware, that any court or tribunal has codified. There are publications. I cannot recall the name of it, but there is one put out by the Council of Chief Justices which deals with what might possibly constitute a conflict of interest. But it is not a

matter that there are any directions on. Obviously the range of circumstances is so diverse that it may be quite difficult to codify.

Senator ABETZ—Yes, and to try to cover the field would be impossible, but I would have thought that being a member of an employer organisation or a political party or a trade union might be one of those stand-out examples. If you are still a member of a trade union and then a fellow trade union comes before you or if you are an employer—well, there are not many from employer organisations but we will deal with that in outcome 5.

Senator Chris Evans—I do not know if that is right as a statement of fact.

Senator ABETZ—It is also a statement of fact.

Senator Chris Evans—We will test that if you like.

Senator ABETZ—Well, there have not been many appointments under your government.

Senator Chris Evans—That is a different point.

Senator ABETZ—No, it is not, but we will deal with that in outcome 5. So, Mr Giudice, nothing has been indicated to your fellow commissioners?

Mr Giudice—No, and I have indicated why. There is extensive case law on the issue of what constitutes a conflict of interest.

Senator FISHER—Is there a requirement that membership be declared? There is a distinction between someone having been an office-bearer of an employee organisation or an employer organisation and then being employed in another capacity. Obviously the previous office terminates it—between that scenario and being a member of a union. The rules for membership of an employer organisation would normally require you to be in business. You would not expect an employee of Fair Work Australia to be in business and, therefore, you would not expect them to be eligible to be a member of an employer organisation. That is the technical difference in this environment, in my view. Is there a requirement that members of employer organisations declare—not that they necessarily cease, you have addressed that issue—it on the public record in any way?

Mr Giudice—No.

Senator ABETZ—Where is Mr Lee?

Mr Nassios—He is not here today so I am the acting general manager.

Senator ABETZ—On page 151 of the *Hansard* of 01 June 2010, I asked questions about unfair dismissal applications. It was indicated:

... Fair Work Australia systems do not record the outcomes of conciliations as to distinction for the basis on which a compensation is agreed or paid.

I then asked:

Have the systems been changed or could they be changed easily to allow for that to occur?

Mr Lee said:

The short answer is that they cannot be changed easily.

On page 152, in response to similar questioning by me, Ms O'Neill said:

The reason that it cannot be done is not a technical reason. The system could be achieved. It is the nature of the conciliation process. ... It is not practical, or it does not work that way, to apportion any agreement to pay money to various components that it might be in relation to.

I think we need that background. Schedule 18, part 4, 20A of the Fair Work (Transitional Provisions and Consequential Amendments) Act says:

20A Report about unfair dismissal

- (1) The General Manager of FWA must prepare a written report about the first 3 years operation of the unfair dismissal system.

It goes on to say talk about what the report must deal with. The reason that this is important is that this section of the legislation was inserted as part of the agreement the government reached with the senators, including at least Senator Xenophon, to get the Fair Work Act through the Senate. This section 20A requires that the report should include:

- (h) the amounts of compensation paid, or the other remedies provided, when unfair dismissal applications were settled.

How are you going to abide by that legislative requirement?

Mr Nassios—The data at the time was not available, because we did not have that data collected. Since that time—and Ms O’Neill has some figures with her if you would like us to provide them—

Senator ABETZ—So, by the sound of it, all of a sudden the systems can be changed?

Mr Nassios—Correct.

Senator ABETZ—Have they been changed?

Mr Nassios—Correct.

Senator ABETZ—Excellent, very good to hear. That is all good news.

Ms O’Neill—The answer that I gave in transcript at the last hearing remains the position. The point that Mr Nassios was making was that we have reviewed all of our systems and introduced an entirely new system for recording results and outcomes and various other case matters. We are now able to meet the reporting obligations that you have referred to, in particular the amount of compensation paid and other remedies that are provided. That is a different issue on our construction of the requirements under the act to dissecting the basis and nature of any amounts of payment that may be part of a settlement as to the source of the obligation that has been settled in payment. That is perhaps a clunky way of expressing it.

In the example I spoke about, the payment an employer makes in deciding to settle a matter may be compensation or may be a reflection of entitlements, such as statutory notice or other underpayments that may be in the mix of the conciliation process that settlement is the result of. So we can record amounts of compensation settled, and we do, but the basis upon which they are attributed, what they are for, is a different question.

Senator ABETZ—So, if in a conciliation, for example, an employer says: ‘This is costing me too much. Here’s \$2,000 to get rid of it’—I understand it is usually a lot more than that, but for the sake of this example I will use that amount—you will simply record that it was settled for \$2,000 and not as to whether it was, if you like, go away money or as a result of

genuinely discussed compensation as to what would have been the right thing to be paid; is that right?

Ms O'Neill—That is right. That is because it would be impossible to discern all of the reasons why an employer decides to make an offer of payment. It may be matters that have been discussed during conciliation or it may be matters that are in their mind potentially liabilities, for example, that had not even been raised at the conciliation stage but are part of the rationale for the agreement that is ultimately reached.

Senator ABETZ—Without wanting to put words in your mouth, you are telling me that you will be able to live up to your legislative responsibilities; is that right?

Ms O'Neill—Yes.

Senator ABETZ—Of course that is in three years time. My question then is, and I will try my luck: will you be able to provide us with interim figures before the three-year report that is legislatively required? Will you be able to provide us with interim data as to the number of cases that have been settled and for what amounts? You would be able to provide that information?

Ms O'Neill—Yes, we would.

Senator ABETZ—Whereabouts are we with that system now? Are you in a position to provide that information?

Ms O'Neill—I can provide you some information. Essentially, the new system has been in operation for the 2010-11 reporting period, so we are three months in.

Senator ABETZ—In relation to the legislative requirement to provide a report about the first three years, is there going to be a bit of a hole at the beginning of those first three years that you will not be able to provide a report on because you were not capturing that information or are you going to be able to work back and retrieve that information?

Mr Nassios—There have been some consultations taking place with various parties as to what may be contained in that report in three years time. As to whether we go back and obtain that data, administratively I would hope we do not have to do that but, if as part of that consultation process it is felt to be so significant an issue, then that is a possibility. But certainly we started the system from 1 July and have collated the data since 1 July.

Senator ABETZ—From 1 July 2010?

Mr Nassios—2010.

Senator ABETZ—So there will be a bit of a gap in the three-year period on which you are supposed to be reporting.

Mr Nassios—What the context and content of that report will be is obviously at this point open to questions as to what exactly it will contain.

Senator Chris Evans—I am sure the parliament will recognise that there are some issues, as Senator Abetz has identified. We have got to a point now where we collect it, which is the main thing. If you can get regular reporting on it then we will be able to track it.

Senator ABETZ—A very shrewd draftsman put as the opening words of subparagraph 4, 'where possible', and I dare say that may well be relied upon by Fairwork Australia to say that

there was a certain time period where it was not possible. Anyway, you are getting systems into place. Thank you for that. Ms O'Neill, can you provide us with some of the data that is coming to hand.

Ms O'Neill—Certainly. I think your question was in relation to the amounts of compensation that have been involved in matters that have settled at the conciliation stage. The data I have with me at the moment relates to the period from 1 July 2020 to 31 August 2010. In the order of just under 25 per cent of matters that settle at the conciliation stage do so on a basis that involves payment of no money whatsoever. So the outcome may be that it is settled on the basis that either perhaps a statement of service is provided or perhaps the applicant undertakes to withdraw the application. There were 979 matters in that period that involved the payment of some money. That is 75 per cent. The way the data is recorded is in dollar amounts. So 28 per cent of the 979 matters were settled with a payment of less than \$2,000. Another 30 per cent involved a payment of between \$2,000 and \$4,000. Depending on the wages of the applicant concerned this would represent either a small number of weeks pay or a large number. It is difficult to draw conclusions around that. Another 15 per cent involved payment of between \$4,000 and \$6,000. The numbers drop. I can take you through them if you want me to.

Senator ABETZ—What is the highest figure?

Ms O'Neill—There was one per cent of matters involving a payment of between \$30,000 and \$40,000.

Senator ABETZ—Can we take it from that that \$40,000 is the ceiling?

Ms O'Neill—No, it is not.

Senator ABETZ—It is somewhere between \$30,000 and \$40,000.

Ms O'Neill—Yes. And there are some matters that are not in this data where in fact the settlement may involve a payment of greater than the maximum amount, and that might be, for example, where there are other claims, if you like, that are all settled in the one matter.

Senator ABETZ—I am not sure that I fully follow that, but let me finish with the numbers. We still have about 20 per cent-plus. Is there another category of \$6,000 to \$8,000?

Ms O'Neill—Yes, that is 10 per cent.

Senator ABETZ—That is 10 per cent, then \$8,000 to \$10,000?

Ms O'Neill—Five per cent.

Senator ABETZ—What is your next category?

Ms O'Neill—\$10,000 to \$15,000 is seven per cent; \$15,000 to \$20,000 is another two per cent; \$20,000 to \$30,000 another two per cent, and the \$30,000 to \$40,000 that I just mentioned is the one per cent—that hopefully adds up to 100 per cent.

Senator ABETZ—Excellent, that will make it easy for me, thank you very much. I understand some other colleagues have come in to ask some questions, so I will break there. But I will just put a question on notice to Mr Giudice. I have been advised that the New South Wales Industrial Relations Commission does require members to resign from any political party of which they are a member. Could you take that on notice for me and ascertain whether

that is correct and whether that practice is followed, to your knowledge, by any other industrial relations commission tribunal in Australia. It was just an email that was sent to me by somebody listening in, and I have got no idea if that is correct or not.

Senator Chris Evans—Senator, can I just make a point. I think it is fair to ask the judge questions within his control but you have asked him to undertake a research project which is not part of his brief. So I think it would probably be best for you to ask the library. You can certainly ask him in terms of his responsibilities but it would be impossible for him to answer questions with any surety about other jurisdictions.

Senator ABETZ—I do not want to embarrass Mr Giudice but he did give, I think in his evidence, that it was not a requirement of other jurisdictions—

Mr Giudice—I am sorry if I gave that impression. I was not talking about any jurisdiction other than—perhaps my memory is faulty on that—I do not want to—

Senator ABETZ—I do not want to, in any way shape or form, put words into your mouth and if I misheard or misunderstood I will withdraw that and accept that.

Senator Chris Evans—Senator, I will undertake to make inquiries.

Senator ABETZ—That is even better if you, Minister, could take that on notice, that is helpful.

Senator Chris Evans—We will take that on notice and make some inquiries in terms of state jurisdictions.

CHAIR—I just want to clarify some of those figures in your earlier statements about being unable to actually dissect what made up any final payment. I am just wondering what might be in that amount. If there was a dispute about underpayments which have gone back a long way and which were things that were raised and settled through the conciliation or the final arbitration, there is no way of actually determining how much of the final settlement they may be. In fact, in every instance it is possible—unlikely I say—but it is actually possible that every payment was about underpayments or other entitlements.

Ms O'Neill—It is really not possible from Fair Work Australia's point of view to disagree with that. It is not possible through the process to be absolutely sure on what basis the payments have been agreed to; hypothetically it is unlikely but hypothetically it could be.

CHAIR—I am just wondering what real use then the information actually is. My understanding, just from practical experience in terms of unfair dismissals, is that probably more often than not there is a component of either entitlement or underpayment in these issues. Again I am not relaying on any evidence, but that is my experience. Would that be the experience of the commission?

Ms O'Neill—It is certainly not for me to talk about the utility of the information. But certainly anecdotally, and from our experience over the past 15 months of the conciliation process, the parties generally—even though it is technically outside the jurisdiction—bring to the table all the matters that are in dispute. That may go to statutory entitlements, to underpayments, to claims of discrimination—it may involve any number of matters. And generally the agreement is made on the basis of full and final settlement of all employment

related matters. So it may be that parties compromise all their claims and all their potential claims that are on the table and that may not have even made it to the table.

Senator Chris Evans—So it could be in fact two weeks pay in lieu of notice because notice was not given but it is settled on that basis.

Ms O'Neill—That is right.

CHAIR—Sure. I think one of the things that concerns some senators is that 'go away money' was being paid. That was the political imperative of some of these concerns. I am wondering whether these figures actually help the Senate in a policy formulation way. Maybe not.

Senator Chris Evans—I think the officer would say to you, 'That's your problem.' You are asking for an opinion.

CHAIR—Okay.

Senator Chris Evans—I think your point is well made, but all the officer can do is meet the requirement of the act, which is to provide that information.

Ms O'Neill—That is right.

Senator HUMPHRIES—I want to ask about the process of approval of applications for the registration or certification of workplace agreements. I notice that you have a target in your key performance indicators of 34 days. It does not indicate on the page of the PBS that I am looking at whether there was a target for 2009-10 which was met. Can you tell me if there was a target for 2009-10 and whether it has been met?

Mr Nassios—That target was to be established for the last financial year.

Senator HUMPHRIES—You say 'to be established'. What do you mean? Retrospectively?

Mr Nassios—There was no target that appeared in the PBS statements.

Senator HUMPHRIES—Okay, so when it says under the column '2009-10 revised budget', that target of 34 days was an ex post facto reconstruction of what you would like to have obtained? What does that figure represent in that column?

Mr Nassios—I am not sure I am familiar with that figure.

Senator HUMPHRIES—I am looking at the PBS for Fair Work Australia. It is page 279.

Mr Nassios—Senator, I have just been—

Senator HUMPHRIES—On the table on the bottom of page 279 'key performance indicators 2009-10, revised budget 34 days' as it appears in that column for 'improve or maintain the time elapsed from lodging applications to finalising conciliations after dismissal'.

Mr Nassios—Yes.

Senator HUMPHRIES—Is that a target that you actually reached?

Mr Nassios—Sorry, when you spoke of agreements, I concentrated on agreements that—

Senator HUMPHRIES—Yes, I did conflate the two things.

Mr Nassios—That target is in relation to the median time taken for unfair dismissal applications. Last year the time taken was 24 days.

Senator HUMPHRIES—Right, so you are well under the target.

Mr Nassios—Yes.

Senator HUMPHRIES—Does that mean your target looks likely to change for the coming financial years? Or are you still aiming at 34 days?

Mr Nassios—I have no recollection of what we would have put into the—it is the same figure I understand, so we would be going for the same target.

Senator HUMPHRIES—It does not seem very ambitious to me, but all right.

Senator Chris Evans—If you lower the target, you can only underperform.

Senator HUMPHRIES—Yes, I suppose that is true; you can always achieve 100 per cent if it is high enough—or low enough. Going back to this question of approval of enterprise agreements, can you describe to me what the approximate or average approval time is between lodgement and certification of an agreement?

Mr Nassios—For last year in terms of the approval of the agreement, the median time was 32 days.

Senator HUMPHRIES—Do you break those figures up at all by states and territories or by whether the agreements have a union as party or whether they do not have a union as a party?

Mr Nassios—No.

Senator HUMPHRIES—So you cannot tell me whether agreements to which a union is a party are more or less likely to be approved quickly than an agreement without a union as a party?

Mr Nassios—I do not believe we can.

Senator HUMPHRIES—Is it possible to back cast the lodgements to obtain that information? Would that be difficult to do?

Mr Nassios—I am certain it would be difficult to do. Whether it is possible, I would have to see how we collect the data and what we have in terms of the way the application is made. The application is made under the same section. Whether there is a union that is somehow a signatory to the agreement or not, to the extent that there may be a union that has sought to be covered by the agreement, which is a different process, there may be a capacity to somehow match that and then try to work out a differential of time if such a differential exists. But I have to say that at this stage I am thinking of a possibility, but whether that is practical—I would have to take that on notice.

Senator HUMPHRIES—I will be blunt with you and tell you what it is I am angling at. A practitioner in this area has suggested to me that agreements to which unions are parties are more likely to be approved quickly by Fair Work Australia than agreements to which a union is not a party. That is his impression of the practices of Fair Work Australia. Can you offer the committee any assurance that that is not the case?

Mr Nassios—In terms of a figure, I certainly could not give that assurance one way or the other. In terms of whether that perception, if I could call it that, is accurate or not, I would have to say I just cannot say.

Mr Giudice—The sorts of considerations that will affect the time it takes to approve an agreement relate to, firstly, whether the formalities have been properly complied with, and that should be the same for most agreements. It is a question of checking that formalities have been properly dealt with. This second area is obviously the BOOT—the better off overall test. The closer the agreement is to the line, if I can put it that way, the more likely it is to be time-consuming. So I think there probably would be a correlation of some kind between the cases which are close to the line and those which are clearly above the line. It may be that the agreements without a union party might fall more often into the area where they are close to the line.

Senator HUMPHRIES—Why would that be the case?

Mr Giudice—I do not know, I am just saying that it may be. If the anecdotal evidence is that there has been some agreement or a number of agreements that have taken a long time and there are no union parties, I am simply surmising that the reason may not be because there is no union party, but it may be because the agreement is close to the line and took more time to look at. Likewise, the question of undertakings might slow things up. If, for example, there is some problem that needs to be dealt with and the member dealing with the application considers that it could be remedied by an undertaking, then that would also slow it up. Now whether that would correlate with union or non-union agreements, I have no idea. I simply make these comments to try to give an indication of what might make one agreement slower through the process than another.

Senator HUMPHRIES—Would you not agree that there is some benefit in understanding what slows down agreements being approved and providing some statistical evidence about those sorts of things? If it is true that the involvement of a union sorts out those sorts of close to the line issues more readily, then wouldn't it be worthwhile knowing that was the case and therefore collecting some data on what the approval time frame for non-union agreements, if I can put it that way, against union agreements might be?

Mr Giudice—Under the arrangements that operated prior to 2006, non-union agreements were reported on separately because it was a separate application. It was fairly easy to interrogate the case management system so that you got the non-union agreements and the union agreements separately. We did publish in the annual report the respective times. We do not have a ready discrimination at this stage, as Mr Nassios explained. I could certainly give some consideration to that, but it would involve quite a deal of extra recording and clerical work by the associate or the member involved to do that. Ultimately the task of the member is to deal with the application they are allocated in the most time-effective way they can, and I am sure they will continue to do that.

Senator HUMPHRIES—If those figures were effectively maintained in the past, it would be interesting and worthwhile, I would have thought, to compare a similar performance today under the new regime. So I commend that exercise to you if you are minded to undertake it. I will just ask about the auditing of employers for compliance with the act. Do you undertake or initiate those audits?

Mr Nassios—I am not exactly sure what you mean by ‘audit’. What do you specifically have in mind?

Senator HUMPHRIES—I understand that there can be audits or spot inspections of employers for their compliance with the terms of the act.

Mr Nassios—That would be Fair Work Ombudsman, not us.

Senator HUMPHRIES—Okay, I will put some questions on notice to the Fair Work Ombudsman. Since the new legislation has commenced, have you observed an increase in the number of parties who in some way come to the attention of Fair Work Australia, who plead, in effect, ignorance of the law and who are, for whatever reason, unfamiliar with the new provisions of the legislation or have assumed that old provisions continue to apply and are therefore unaware of how the new provisions work? Has it led them to the position where they might be in breach of the legislation in some way? Do you have, by virtue of the observation you make on these matters passing through FWA, any indication of whether that might be the case?

Mr Nassios—In terms of my observations in the types of matters Fair Work Australia would have, again, I suspect your question is more directed to Fair Work Ombudsman in terms of obligations that employers or employees may have under the act. I am not strictly sure exactly how that plays out for Fair Work Australia.

Proceedings suspended from 3.48 pm to 4.07 pm

CHAIR—We will resume questioning of Fair Work Australia.

Senator ABETZ—We have been told, courtesy of Parliamentary Secretary Senator Collins, that the fair work system has allowed two-thirds of new enterprise agreements to vary minimum conditions. Did that data originate from Fair Work Australia?

Mr Nassios—No, the data will have been compiled by the department as a result of our requirement to provide them with a copy of every agreement that is approved.

Senator ABETZ—Mr Giudice, last estimates, and unfortunately I do not have a copy of the *Hansard* with me, there was a discussion as to whether or not we could have a list of the number of the cases or matters that each commissioner dealt with. You considered that that might be inappropriate and might interfere with the judicial process. I will not pursue that further today, other than to draw your attention to the annual view of 2009 of the District Court of New South Wales where on page 28 it actually lists the acting judges and their sitting days. Sure, it does not deal with the number of cases or matters that they may have dealt with. So I am wondering whether we could refine the request to the number of days that each commissioner sat. Could you take that on notice and consider it. I do not expect an answer now, and given your concerns I would expect that you might want to consider that in detail.

Mr Giudice—Thank you, Senator.

Senator ABETZ—I just draw that to your attention. There is another outcome 5 matter. Minister, I think you may have been provided with a letter from the Australian Industry Group that had an attachment to it entitled ‘Ai Group Priority Workplace Relations Issues’, which was a document of some five pages. Unfortunately, I do not have the covering letter with it.

Senator Chris Evans—When was that?

Senator ABETZ—In the last week or so, relatively recently, from Ms Ridout.

Senator Chris Evans—I do not have it in front of me.

Senator ABETZ—Under the heading ‘Undertakings’—

Senator Chris Evans—Can I just be clear that I am not going to have a detailed discussion with you without the document in front of me. If you have general questions that is fine. If you want to take me through the content, I suggest we do it when I have a copy.

Senator ABETZ—I do not want to take you through the content. I want to take FWA through the content. If there are problems with it, by all means let me know. The concern was expressed that some FWA members have particular issues which they feel strongly about. Examples are: clauses dealing with the cashing out of annual leave or limiting the choice of superannuation fund. They refuse to approve agreements unless undertakings are given to remove or modify these lawful and agreed clauses. I am just wondering what Fair Work Australia is working on to try to get some degree of consistency between the reasonable but different approaches that individual members bring to the bench.

Mr Giudice—The normal process is that, to the extent that any policy is developed, it is developed through decided cases, including appeals. We do not make informal rules about things like that. Each member has to deal with the matter before them, based on submissions, their view of the law and the evidence, and give a decision. Then, if a party is dissatisfied with that, there is an appeal and so on. That is the way we operate.

Senator ABETZ—I understand that sometimes FWA members might have discussions or considerations via telephone conversation. Is that not the case?

Mr Giudice—There are telephone conversations, but I am not sure what you are referring to.

Senator ABETZ—AiG are telling us:

At the present time the developments which we are concerned about regarding undertakings are occurring ‘under the public radar’—for example, in telephone conversations between the FWA member and the relevant employer. A regulation should be made using the power available under section 610 of the Fair Work Act preventing an FWA member from suggesting or proposing an undertaking to an employer unless the member has issued a written finding that the enterprise agreement would not pass the better off overall test unless the undertaking is given and the finding includes details of the specific clause which the FWA member regards as deficient.

That is quite detailed. I will put a few questions on notice in that regard.

Mr Giudice—Is it appropriate for me to make a comment on that?

Senator ABETZ—Of course. Yes, please.

Mr Giudice—From what you have said, it is a matter of legislative policy, which we would not normally have any comment on. That is a matter for the legislature. If it is some issue of process that needs to be considered then it is not really a matter for us.

Senator ABETZ—Albeit the suggestion is that in these telephone conversations some commissioners take exception to a particular clause whereas exactly the same clause is not even commented on by others; therefore, those that practise in the area have a degree of confusion as to know what is expected, what is acceptable by Fair Work Australia.

Mr Giudice—That sort of inconsistency is capable of arising based on the views of individual members but in the medium to longer term those sorts of issues have always arisen in the past and have always been resolved in due course by the course of decision making, but not by some kind of administrative fiat which would in my view be quite inappropriate.

Senator ABETZ—Can I take you to question on notice—0286. In that question I asked, ‘Is it accepted by Fair Work Australia that due to an error in registration the supported employment services award had the transition schedule deleted?’ We are told that it did not contain a transitional schedule and that the award was varied on 15 March to include the transitional provisions as the result of an application to vary the award. It was accepted that the transitional schedule was not contained in it. I am wondering whether it is accepted that the fact the transitional schedule was not contained was due to an error in registration. That was the import of the question, and that has not been answered.

Mr Hower—The award, when it was issued in December 2009, did not include a transitional schedule.

Senator ABETZ—We know that. Was it an error that occurred within Fair Work Australia—as in an administrative error?

Mr Hower—I am not sure of the proceedings before the tribunal that led to the making of the award.

Senator ABETZ—I accept that you are not, and I accepted last time around that people at the table might not be aware of that. That is why the question was put on notice. The question related to whether it was due to an error in registration. With respect, I was hoping that a body like Fair Work Australia would be able to give us a straight answer as to whether it was an error in registration or not, and not just tell us that it did not contain a transitional schedule. We all knew that it did not contain that, so the answer provided was unhelpful, and avoided the substance of the question as to whether it was due to an error in registration. I also add, we all make mistakes so there is nothing shameful in saying, ‘Yes, out of all the awards we did, there was one where we accidentally missed out a transitional schedule.’ I do not think there is any great shame associated with that. The great shame might be trying to avoid acknowledging that it was in fact an error in registration—if it was. It may well have been that somebody had not applied, but I would of thought, with respect, it would have been a Fair Work Australia obligation to have that transitional schedule in the supported employment services award 2010.

Mr Nassios—We would have to have a look at the number that is contained in the answer there.

Senator ABETZ—It is AN2009-172

Mr Nassios—Correct. Unfortunately I do not have the answer for you.

Senator ABETZ—Can you please take it on notice again and give us a direct answer as to whether an error did occur within Fair Work Australia?

Mr Nassios—Yes.

Senator ABETZ—The follow-up to that question on notice is: it was corrected by way of application to vary the award, so who brought the application to vary the award and at what

cost? Surely there ought to be some mechanism where parties to it do not have to bear the costs of making an application to vary the award if—and this is the big ‘if’—it is the result of an administrative error in Fair Work Australia.

Mr Nassios—There would be no way we could ascertain the costs of such an application. There is no fee. You would be asking me to try to in some way work out what the cost of someone turning up is.

Senator ABETZ—All right. Could you advise me who brought the application to vary the award? One would imagine they would have been put to some inconvenience and expense to have the award changed which they should not have been put to if it was as a result of an error by Fair Work Australia.

Mr Nassios—All right.

Senator ABETZ—As a follow-up: as it is bound to happen again, is there a mechanism, or could there be a mechanism, whereby matters can be relisted et cetera without the parties having to bring a formal application for varying an award to overcome an administrative error? Once again, I say ‘if it was an administrative error’; I do not draw any conclusion that it was.

In determining the modern awards, were the matters canvassed by the minister in his letter of 29 September 2010 to you, Mr Giudice, to your knowledge in any submissions whilst modern awards were being made?

Mr Giudice—I am not sure which letter you are referring to.

Senator ABETZ—The letter of 29 September 2010 by the minister—

Senator Chris Evans—Are you suggesting you do not carry copies of my letters with you on all occasions!

Senator ABETZ—Does he write to you that often?

Senator Chris Evans—There was one tabled earlier.

Senator ABETZ—It is in relation to the determination of modernisable instruments. Were these matters in any way canvassed—and feel free to take this on notice if you have to refresh your memory on that letter—

Mr Giudice—I remember this letter. This letter is in relation to a proceeding currently before a full bench. It would be absolutely inappropriate for me to make any comment about it whatsoever. It is, as I understand it, a submission to the full bench. It has been posted to the website as a submission in that full bench proceeding. I am sure you would not want me to say anything about it.

Senator ABETZ—No, I did not. I did not understand the minister’s letter when it was sent off and made public as being a submission for a particular hearing. I thought this was a general letter dealing with issues generally. I understand there is a specific matter dealing with this, but I interpreted this letter as being of a general nature. I accept your counsel.

Senator FISHER—The minister says in his letter that the Commonwealth has not made a formal submission to Fair Work Australia on this matter to date. Are you saying that this letter is now a formal submission?

Mr Giudice—I do not want to say anything about the letter other than that it has been treated as a submission in the proceeding referred to in the first paragraph and has been posted to the website. Whether parties choose to respond to it, whether the minister chooses to say it was not meant to be a submission, I cannot control.

Senator FISHER—But it is a submission within your part of the world—

Mr Giudice—As it stands, I do not think I should make any further comment on it.

Senator FISHER—All right, thank you.

Senator ABETZ—Tell me if you can answer this one, it might be on the borderline. Without wanting to know the particularities of the circumstances, are there any circumstances of which Fair Work Australia is aware where instruments have been terminated and as a result of which workers are worse off?

Mr Giudice—I am not quite sure what the question is.

Senator ABETZ—The minister's concern is that certain instruments might be terminated, the benefits of which had previously accrued to workers but are not translated into modern awards. I think that is the mischief that the minister's letter seeks to address. I am wondering whether any of these circumstances have been drawn to your attention—without telling us the particular one, because it might be before you as we speak.

Mr Giudice—I think I can go this far at least and say that so far as I am aware, there have been no instruments terminated by a decision of Fair Work Australia at all.

Senator ABETZ—At all?

Mr Giudice—At all.

Senator ABETZ—So this is a process that is about to start?

Mr Giudice—It has started and there have been a wide range of submissions and there have been hearings.

Senator ABETZ—Right.

Senator FISHER—So there could be one in the future.

Senator ABETZ—So you will undoubtedly be, as the minister requests of you, mindful of not terminating an industry award or pay scale inadvertently where this underpins an enterprise award.

Mr Giudice—Senator, I cannot answer that question. These are quasi-judicial proceedings in which a wide range of parties make submissions. I cannot be expected to give a prognostication about what I might or might not do.

Senator ABETZ—All I was asking you was, if the *Hansard* bears me out, that you will be mindful of the government's request. Whether you like it or not, Mr Giudice, you have this letter. You have this request from the government courtesy of a letter. All I was asking was whether this will be taken into account. I am not saying whether you will rule in its favour or against it. I do not want to know that. But I want to know that this concern of the government, which the government believes that you should be mindful of, will be taken into account.

Mr Giudice—I have no further comment to make about proceedings before the full bench.

CHAIR—I think Justice Giudice has indicated how this letter has been treated by the commission which is as a submission. I guess it follows that like every other submission, weight will either be given to it or not given to it in the course of deliberation. That is the way I understand the evidence before the committee.

Senator ABETZ—Is Fair Work Australia hearing parties in relation to the process currently being undertaken?

Mr Giudice—There are proceedings before the full bench in which there have been written submissions and also oral hearings.

Senator ABETZ—Also oral hearings, thank you. So now re-reading this—Minister, if you can briefly help us—that ‘the Commonwealth has not made a formal submission to FWA on this matter to date’, is this now the formal submission?

Senator Chris Evans—I will take some departmental advice when the officials are here as to why we chose to do it in this form, but, as I understand from Justice Giudice’s advice, it is being treated by the commission as a submission—that is why it has been posted on the website—and will be considered by them. That is how they have treated it. In terms of why the department advised me to do it by letter, I am happy to entertain that—

Senator ABETZ—No, that is not the question; whether by letter or orally, I do not care how it is done. I misread it, as I think Senator Fisher may have done—a formal submission has not been made and we were reading this as in fact not being a formal submission, but there is the caveat ‘to date’, so does that mean, Minister, in writing it you are saying, ‘To date we have not made a formal submission, but this is’?

Mr Giudice—I wonder if I could interrupt. With the greatest respect to everybody, this is putting me in a very embarrassing position. These are proceedings to which many, many people are parties and there should not be discussion here about the significance of that letter. If there is to be discussion and submissions about it, it should take place in the proceedings. Otherwise other people who have an interest in the proceedings may be disadvantaged and, quite frankly, my position as a member of the full bench might be prejudiced because it might be said that I have taken into account things which are not available to the generality of people appearing. It really is a very difficult position for me.

Senator Chris Evans—I accept that and I do not think Senator Abetz is intending to do that. He wanted a discussion with me about some of these issues and I understand Justice Giudice’s position. Could I suggest, Senator Abetz, that we have this conversation and inquiry about my actions, the letter and the processes of the department when the department are here, because it goes to our motivation—

Senator ABETZ—All I want to know is whether the government submitted this as a formal submission or not.

Senator Chris Evans—Why don’t you ask me when we get there.

Senator ABETZ—I would have thought you could have answered that, but, if you need the department to tell us whether or not your letter is a formal submission, so be it and I have marked it ‘Outcome 5’.

Senator Chris Evans—As I said, I told you my position on the matter, but if you want to inquire as to why that course of action was followed I am happy, with the department's advice, to talk to you about it. We will do that in outcome 5 and then everyone will be accommodated, I think.

Senator FISHER—Minister, you might like these questions treated similarly, but could you give me clarification as to why, firstly, your letter was then made public and, secondly, why you wrote the letter—the issue which you are trying to address. Do you want us to ask you that in outcome 5?

Senator Chris Evans—I think if you go to my letter and departmental recommendations regarding that we ought to do that in outcome 5. If it is a question to Fair Work Australia as to how they handled it, I am not sure how they feel about it, but I obviously cannot answer that for you.

Senator FISHER—No, my questions are not about that.

Senator Chris Evans—You just asked about why it was on the website; I cannot help you with that.

CHAIR—Are we finished with that issue?

Senator ABETZ—Yes. We know how they have handled it because it is on their website as a submission. I ask Fair Work Australia: how many greenfields agreements have been registered or lodged?

Mr Nassios—For the last financial year 357 we lodged.

Senator ABETZ—And that took us through to 30 June 2010?

Mr Nassios—Correct.

Senator ABETZ—Do you know how many have been lodged since then? Is this lodgements or actual certified or ratified agreements?

Mr Nassios—They are lodgements. For the last financial year I do not think I will be able to give you a break-up of how many of those were approved, but I can indicate to you that 304 were finalised.

Senator ABETZ—Can you take on notice how many were approved, please, since Fair Work Australia started. That would be helpful.

Mr Nassios—Yes.

Senator ABETZ—How are we going with the information line? You have 13 people answering phones, I believe.

Mr Hower—That is correct.

Senator ABETZ—We were given some helpful figures in answer to question on notice 0284. How has the workload been going since May?

Mr Hower—It is continuing to be a very busy environment. We are still averaging over 700 calls a day.

Senator ABETZ—If you say you are averaging over 700 calls a day then that would suggest that there has been a bit of a lift in numbers.

Mr Hower—Yes, there has been a slight lift.

Senator ABETZ—Yes, a slight increase. And do you have any readily available quick statistical snapshot as to the majority of those calls being about a particular matter—I see you have a pie chart. How very impressive.

Mr Hower—I do have some statistics.

Senator ABETZ—Rather than delaying the committee, are you in a position to table that for us and then if any questions arise from that we will put them on notice.

Mr Hower—Okay.

Senator ABETZ—If that is agreeable. Thank you. My next question goes to the alleged inconsistency of decision-making by Fair Work Australia. It was asserted, and unfortunately I am not aware of the source of this, or suggested that Fair Work Australia rejected a penalty stripping deal after accepting three in similar terms. Are you aware of that media that occurred on 21 June or not?

Mr Nassios—No, not in specific terms.

Senator ABETZ—If not, that is my fault; I cannot take it any further because I cannot provide you with the source. My apologies for that. So overwhelmingly the reason for contacting your hotline was dismissals, with 28 per cent.

Mr Hower—Yes.

CHAIR—The committee has had an opportunity to look at the document and there is no opposition to it being tabled so it is therefore tabled.

Senator ABETZ—I did not canvass this issue last time because I think it may have been highlighted later—that is, the dual processing. I refer to the Riverina Division of General Practice case where I understand an application was filed electronically and another one by ordinary mail. They went to two different commissioners and had two different outcomes. I understand that the New South Wales Nurses Association complained about that, and I understand that Vice President Watson has provided correspondence to the Nurses Association that systems have been put in place to stop this happening again. Has that occurred?

Mr Nassios—Yes, that has occurred. We took steps at that time—in our case management system we now include the title of the agreement as well, which is what we also search on to determine whether we may have received an application more than once.

Senator ABETZ—And to your knowledge Riverina will be the one and only case where this has happened?

Mr Nassios—To my knowledge, yes. Whether it has happened before I do not know but certainly to my knowledge that is the case, yes.

Senator ABETZ—Fine, and once again teething problems occur. These things are likely to happen. It is unfortunate when they do, and if it has been so expeditiously dealt with then that clearly is good. Thank you for that information. Are you aware of any applications being brought to Fair Work Australia in relation to employees being paid less under the new award in the aged-care sector? Have you had any increase in take-home pay applications?

Mr Hower—Yes, we have had 58 applications lodged to 30 September.

Senator ABETZ—That is quite an increase since last time, when I think we only had 19, is that right? I was told that last time.

Mr Hower—I think that is right.

Senator ABETZ—It was dismissed at the time as only being 19; but, of course, one of the 19 was the Nurses Federation, which represents thousands and thousands of workers. So it had some real application for more than just 19 people, chances are it is more like about 190,000 people.

Mr Hower—That application by the Nurses Federation has since been withdrawn.

Senator ABETZ—Has been withdrawn?

Mr Hower—Yes, it was withdrawn on 29 July.

Senator ABETZ—Are you aware of any other changes to the award that may have been made?

Mr Hower—No.

Senator ABETZ—The 58 that you tell us about, are they individuals ones or brought by unions?

Mr Hower—Of the 58, 54 are by individuals and four are by unions.

Senator ABETZ—Do you have the information as to which sector or which unions?

Mr Hower—The Australian Services Union in the social and community home care award, and that has since been withdrawn; the Australian Workers Union in the concrete products award, and that has since been withdrawn; and the LHMU in the security services award, and that has since been withdrawn.

Senator ABETZ—Right, and so we do not know whether those matters have been resolved by other negotiations.

Mr Hower—No, I have not got that information.

Senator ABETZ—I understand that.

Senator Chris Evans—Can I ask, just to complete this, how many have actually been withdrawn?

Mr Hower—Of the 58, 34 have been withdrawn.

Senator Chris Evans—Sorry, this is for my information.

Senator ABETZ—Can I ask in relation to the time period for the filing of an unfair dismissal claim, under the previous regime I think there was 21 days allowed then the fair work bill I think proposed seven and that was then amended to 14, but in any event it is now 14 days. Is that, to your experience, an appropriate time frame? How is that working out? Are people saying 14 days is too long or 14 days too short? Is there any sort of counter-information or discussions that you are able to pass on where the 14-day time limit is a problem?

Mr Nassios—I think it is not really a question for us to answer in terms of whether it is or is not a problem.

Senator ABETZ—Chances are you would be the place where, when people are filing, people might be making comments such as, ‘Gee, we had to rush this one because of the 14-day time limit; it was a lot better when we had 21 days,’ or just anecdotal evidence. I am not anticipating any detailed statistical analysis, but I am wondering if there is anything that may be learned by us as legislators from your experience at the counter, if I can use that term, as to the reasonableness of that 14-day period.

Mr Nassios—I certainly do not have any anecdotal evidence one way or the other.

Senator ABETZ—Thanks for that. Would Fair Work Australia be restricted in any way if it were, say, minded to have its minimum wage decisions first in a draft before making a final determination? I know that would be highly—

Senator FISHER—Different.

Senator ABETZ—It would be different and, one would imagine, unjudicial to a certain extent, although I know that judges do from time to time say, ‘I propose to make the following orders,’ and provide them in draft form to allow counsel to comment on them if there are matters that may have been overlooked et cetera. The Productivity Commission and other bodies put out draft reports for people to comment on just so people get an idea of the thinking or the direction they are going in so they can respond. I am just wondering if there is any legislative or legal block to that process, first of all. Would it be open to Fair Work Australia to do that if it were so minded? Let us not get into the principle of whether it is a good, bad or indifferent thing—just whether it could be done.

Mr Giudice—I am not sure exactly what the scope of the question is but, shortly after the decision, draft orders for variations of the modern awards were published last year. So, as a matter of process, the instrument that will carry out the actual variation is published in draft and parties have an opportunity to comment on that. As to whether some draft of the whole decision—which I take it is your question—

Senator ABETZ—Yes. I did not know that the other occurred, and I commend you for doing that.

Mr Giudice—I would not care to express a view about that. If a party to the review made such a proposal then obviously it would be a matter for others to express views about it, and the Minimum Wage Panel would no doubt consider it, along with any other submissions. But in my view it would be quite wrong for me to express a view about that if it is a matter which is likely to be the subject of submission before us.

Senator ABETZ—That is why I said I do not want to talk about the principles—right, wrong or indifferent—but just whether technically, under the rules et cetera, you could entertain such an application.

Mr Giudice—I would not wish to express a view on it even technically.

Senator ABETZ—All right. We might, then, have to ask the department what their view is in outcome 5.

Senator Chris Evans—I could give you some unofficial legal advice, Senator, but it would not be worth much.

Senator FISHER—It would be worth what we paid for it!

Senator Chris Evans—Yes. I did remember, though, that you could have draft orders up.

Senator ABETZ—That is fine. I will take you to question on notice EW0280_11, where I asked about the number that were lodged before 1 January and how many are still awaiting their assessment et cetera. I was told:

Of the 3,825 single enterprise applications lodged before 1 January 2010, 3,528 were finalised as at 30 June 2010. The median time taken from lodgment to finalisation was 48 days.

I am just wondering how we are going with that. Are we getting them done quicker? I think we had a bit of a performance indicator suggested by the former minister—or two ministers ago now—Ms Gillard, that they were looking at, I think, seven days. So how are we going with the median time taken from lodgement?

Mr Nassios—It has shortened since the time that question was answered.

Senator ABETZ—Yes, from 48 to 20.

Mr Nassios—As to what it may have been in the last three months, just bear with me.

Senator ABETZ—If you do not have it to hand, take it on notice.

Mr Nassios—I will take it on notice. Thank you.

Senator ABETZ—How is the info line going in relation to returning calls? Are they still returned within two or three working hours of a message being left?

Mr Hower—Yes.

Senator ABETZ—You kindly provided a list, in answer to question EW0285, of applications for award variations. The Clerks—Private Sector Award had 13 variation applications and the General Retail Industry Award had 27. Are you able to give us a brief snapshot as to why those two awards have had so many applications for variation? Is it that there were matters in the modern award that might not have been as well expressed as otherwise or that the industry has moved and new times require changes to the modern award? Are we able to provide any detail as to that or not?

Mr Nassios—I will have to rely on Mr Hower for any information he may be able to provide.

Mr Hower—I will take that on notice.

Senator ABETZ—If it occasions too much work then do not bother, but, if you can, give us a bit of the flavour. If you could possibly just do the General Retail Industry Award, those 27, and limit it to that, that would be helpful.

Senator Chris Evans—Chair, could I raise the question of timing and the program. We are making fairly slow progress at the moment, which is fine; it is up to the committee. My only interest is that a large number of officers are required, under a large number of programs. I would appreciate if the committee would consider whether or not we are likely to get to them. The only feedback I have ever had from public servants about Senate estimates is the frustration that they hang around all night and they do not get called. I think it would be polite if we could give them some sense of the timing. Could the committee have a chat about whether it will prioritise certain bits and then we can advise them of that. I am in the committee's hands. My only interest is that we do not muck them around. They have their

own lives to live. Maybe the committee would like to give it some thought. It is about work and family balance for those doing program 4.4 That is all. I will get more work out of them tomorrow if they go home early.

Senator ABETZ—That is understood. Really, we are in the hands of Senator Cameron and how long he spends with the ABCC.

Senator Chris Evans—I think we can happily dismiss the others, then!

Senator ABETZ—Can I indicate that I have finished with Fair Work Australia. I do not know if other senators have.

CHAIR—I am about to find out. Do other senators have questions for Fair Work Australia?

Senator FISHER—I have a couple of short questions.

CHAIR—I am sure they are multifaceted questions.

Senator FISHER—They follow on from earlier discussions. Question on notice No. 283, which was actually answered by the department, relates to Senator Abetz's question for the provision of a list of commission members, a number of cases. But the department has indicated in its answer that the answer has been provided by Fair Work Australia, so I am hopeful that I can ask Fair Work Australia about the response that it provided to the department which has now been furnished to Senator Abetz and the committee. The response essentially suggests that it is not administratively practical to compile a list because individual cases may have been allocated to more than one member. I do not wish to go then to the discussion of that that is in the answer, but then the second limb of the answer is that the provision of such a list also has the potential to improperly influence the conduct of proceedings before individual members. I am wondering how? Can anyone answer that question?

Mr Giudice—The answer may be a longer one than you would expect. I suppose the first part of the answer really deals with the issue, but I think that the second part is there because of an exchange that I had with Senator Abetz on the last occasion where I expressed the view that it would be inappropriate to provide that information. If you wish to explore that, the explanation is as follows: the provision of individual information which focuses on particular members is likely to lead to some public debate about those particular members, on the various criteria that Senator Abetz I think raised on the last occasion; and that that would have the potential to lead people coming before particular members to wonder whether in any way their conduct in that particular matter was influenced by the fact that there had been publication, through this process, of details about the outcomes and other aspects of their decisions.

Senator FISHER—There is some concern about parties before individual commissioners being led to wonder whether the conduct of the case is influenced by the publication of the data—is that essentially what you are saying?

Mr Giudice—It is essentially, although one could look at a whole lot of dimensions of this. To understand why a member would come to a particular decision in a particular case involves a consideration of a whole range of factors. Just by producing some statistics on a

limited number of criteria I do not think that it is possible to do justice to the outcome in that particular case and why it was reached. So that sort of analysis has the potential to open up all sorts of debate about why a particular member reached particular decisions, or why a percentage of decisions were in favour of the applicant, or why a percentage were in favour of the respondent, or how long they took, or all of those things that were part of the senator's question might be quite misleading. There might be all sorts of reasons why for a particular period there were particular outcomes. It is not a good guide to what is actually occurring and certainly in terms of the Senate estimates process I would have thought that the information provided on an aggregate basis or an average basis would be sufficient in terms of the outcomes tribunal wide.

Senator FISHER—So it is the publication of the data on an individual basis that gives rise to your concerns—it is the actual publication, making it public?

Mr Giudice—It is not just making it public. It is putting pressure on individual members through the fact they know that there is political scrutiny of what they are doing.

Senator FISHER—But there would not be political scrutiny were there not the publication.

Mr Giudice—Of course there would be political scrutiny if it was provided at this committee.

Senator FISHER—That is right, so publication to this committee is what leads to the concern.

Mr Giudice—Yes.

Senator FISHER—Fine. I accept that. Do you collate that data yourself as the President of Fair Work Australia and analyse and utilise it to manage Fair Work Australia?

Mr Giudice—No. We keep some statistics internally but we do not keep statistics about outcomes, that is, in relation to each matter whether a particular member decided the matter in favour of the applicant or the respondent, for example. We do not have the capacity to do that. It probably would not be a very good idea, anyway, for the sorts of reasons I have been talking about. We want people to decide things on their merits and on all the material before them and not on the basis of some external scrutiny.

Senator FISHER—I am now leaving external scrutiny out of the equation, so I want to discuss what is internal to Fair Work Australia and internal to you in terms of management. I understand that a particular outcome is not going to be relevant necessary—probably really—in terms of managing workflow. But then, on what data do you base decisions about management of workflow for individual commissioners.

Mr Giudice—With respect, I think you are getting into an area in which it is really inappropriate for me to be making comments, or indeed to be questioned. You are aware of provisions of section 580 of the Fair Work Act.

Senator FISHER—Yes, indeed.

Mr Giudice—In my respectful view, the purpose of that section is to protect members of Fair Work Australia from pressure, political or otherwise, in the way in which they carry out

their functions—members, including the president. In my view it is simply an inappropriate area for examination in a political forum.

Senator FISHER—You are essentially saying that my asking that question of you is making you subject to political pressure as to how you manage workflow within Fair Work Australia.

Mr Giudice—I would not attribute any motive to you. I do not know what your purpose is—

Senator FISHER—We can talk about consequences.

Mr Giudice—but in terms of perceptions by people who might come into contact with the tribunal, in my view it is open to the quite reasonable construction that some political pressure is being put on me in relation to the way in which I carry out functions and exercise powers under the act.

Senator FISHER—Thank you. I want to go back to earlier discussions and answers about individual office bearers in Fair Work Australia, in particular the commissioners. Is there any register of interests that is kept internally within Fair Work Australia or some sort of method by which members of Fair Work Australia are able to declare to you or to your colleagues, ‘I have these particular interests in case they might ever be relevant in terms of determining proceedings before me.’

Mr Giudice—There is an obligation on members to disclose a conflict of interest to the president. There is no other provision. For example, there is no requirement for a public register of those disclosures, but the accepted approach is that if a member feels a conflict arises in a particular proceeding that the proper thing to do is to announce that conflict to the parties and give them an opportunity to comment. It is a matter for individual members therefore as to whether they deal with a particular matter.

Senator FISHER—In respect of raising issues with you, I gather from your answer that there is not a private register that is also instance by instance or issue by issue.

Mr Giudice—I am not quite sure what the question is.

Senator FISHER—I understood you to be saying that individual members may raise an issue with you—

Mr Giudice—They are obliged to disclose a conflict of interest to me, yes.

Senator FISHER—How do they do that?

Mr Giudice—Verbally or in writing.

Senator FISHER—Issue by issue, case by case? Is it done when an issue arises or perhaps at the commencement of their term of office with Fair Work Australia, presuming the issue exists at that time?

Mr Giudice—Some choose to give me an indication of areas that could constitute a conflict and some do raise it occasionally on an individual case basis.

Senator FISHER—So they are compelled to declare, but how that actually happens is largely left to individuals?

Mr Giudice—It is an obligation on the individual, yes.

Senator FISHER—In respect of what an individual may then announce to the parties in particular proceedings, would you expect, therefore, an individual to announce to the parties in proceedings before that individual any sort of interest that the member may have in any of the parties appearing before that member, be they parties to the dispute themselves or their representatives? Would you expect a declaration of the existence of an interest by an individual?

Mr Giudice—Not any interest, if I could underline the word ‘any’. There is a lot of law on what constitutes a conflict of interest of a dimension which would require a member to withdraw. A practical course for a member who is concerned that there might be a conflict is to simply indicate that to the parties at the commencement. But, again, it is a matter of that individual’s perception of what the law means and whether the interest in question could lead to the kind of conflict or might constitute the kind of conflict that meant they really should not deal with the case or perhaps should not deal with it unless the parties agreed that it was okay. There have been instances of this, including a very famous one where a member withdrew on the basis that he had the view that, because of some advice he tendered prior to his appointment to the commission in his role as a solicitor, he had a conflict which was irreconcilable with his continuation. The High Court told him that, despite that view, he was wrong and not only should he not withdraw but he had a duty to deal with the case.

Senator FISHER—Perhaps more infamous than famous.

Mr Giudice—Yes. So the member has a duty to deal with matters allocated to him or her and it is a matter for them what they do about these issues of conflict.

Senator FISHER—I understand you to be saying it is a matter for them. Taking it back to earlier questioning, would you expect an individual, were they to be a member of an organisation that is appearing before them in a matter in whatsoever capacity, be it as a party or as a representative, to declare that interest in the proceedings?

Mr Giudice—I would not be prepared to comment on that because there might be a whole range of circumstances that might or might not be relevant. Even if all those circumstances were filled out by addition to your question, I think it would be wrong of me to tender a view on what is essentially a legal question as to what constitutes a conflict.

CHAIR—That concludes the questioning of Fair Work Australia. Thank you Mr Giudice for your appearance and for the appearance of your officers before the committee today.

[5.12 pm]

Office of the Australian Building and Construction Commissioner

CHAIR—Welcome, Mr Johns, to your first appearance before the committee as the ABC Commissioner. Welcome also to Mr Casey. Mr Johns, do you have an opening statement you would wish to make to the committee before questions?

Mr Johns—I do.

CHAIR—Proceed.

Mr Johns—I commenced my appointment as the Australian Building and Construction Commissioner on 11 October this year. The public value delivered by the Office of the Australian Building and Construction Commissioner is of critical importance to the Australian economy and to the employment of nearly one million Australians. This is particularly so having regard to the strong demand for resources-based construction and infrastructure. I am both proud of the ABCC's achievements to date and energised by its continuing potential. I am determined, as commissioner, to work hard with building industry participants to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.

Having spent seven months at the ABCC as its deputy commissioner in late 2009 and early 2010, I have a very strong sense of the high calibre of my staff, the challenges in the industry we regulate and the climate in which the agency operates. Having regard to the matters which are presently under investigation by the ABCC and which are the subject of a civil penalty litigation, it is clear to me that the ABCC continues to operate in and seeks to regulate a commercial sector that continues to require cultural reform. There continues to be a need for the recognition of the rule of law, a recognition of freedom of association and repudiation of coercion, control of building sites by head contractors and major subcontractors, and an attitudinal change to safety.

I appreciate that, in pursuing this agenda of cultural change, the ABCC at times operates in a climate of opposition to our regulatory intervention. However, I as ABCC Commissioner and the commission's staff of committed Australian public servants pledge anew to the job we have been directed to do by this parliament in the form of the Building and Construction Industry Improvement Act. As Commissioner, I am determined that the ABCC evolve into a full-service regulator in the building and construction industry. Our mantra will be: 'Fair and productive building and construction work'—productive in the sense that the ABCC will continue to work towards eliminating unlawful industrial action and barriers to participation like breaches of association, coercion and mandated industrial arrangements; fair in the sense that the ABCC will promote harmonious, equitable practices on site and tackle issues including sham contracting and the underpayment of building workers. I will be working with my senior executive team to redefine a broader role for the ABCC with a respectful acknowledgement of the wide range of interests in the building and construction industry. I am confident that the ABCC staff and, in particular, the ABCC inspectorate are more than equal to the task of promoting fair and productive building work in the industry.

Royal Commissioner Cole concluded that there is a significant role for the Australian Building and Construction Commissioner to play in connection with the nonpayment of employee entitlements. To this end, last week I wrote to the Fair Work Ombudsman, Nicholas Wilson, and terminated the longstanding practice which has seen the ABCC refer to the FWO claims of underpayments that would otherwise fall within the jurisdiction of the ABCC. I understand that Mr Wilson tabled that letter earlier today. The ABCC will assist building and construction workers in the regulated community to recover underpayments were they come to seek our assistance. As a citizen-centric agency we will not be turning away any participant in the building and construction industry. This decision is entirely consistent with the recommendations of Royal Commissioner Cole.

The existence of sham contracting in any industry adversely affects decent employers, employees and government revenue. Decent employers in the building and construction industry are at a competitive disadvantage to those who engage workers on sham arrangements. They then face with an invidious choice: to either engage in the same indecency or go out of business. For workers it means a reduced capacity to enjoy basic conditions of employment such as annual leave and sick leave. It means that work security is jeopardised, and usually it is attended by an absence of commitment to formal training. As a whole there is a reduced emphasis on workplace health and safety performance and poor workplace relations. For government, sham contracting has implications for taxation revenue and the degree of equity in the tax system.

All of the detriments which I have just identified were reported on by Royal Commissioner Cole. He said the best guard against sham contracting is for the revenue authorities and the government agencies responsible for recovering underpaid employee entitlements to perform their tasks efficiently and promptly. The ABCC is, of course, one of those agencies. Consistent with our existing efforts, which include civil penalty litigation in the ACT, we will continue to focus on sham contracting matters. However, it is vital that industry stakeholders engage with government agencies in this endeavour. Employer associations, with their membership of decent employers under attack from sham operators, and unions, representing the interests of workers who have been ripped off, both have important roles to play. Accordingly, I plan to convene a roundtable of relevant agencies and stakeholders to devise an all-of-government response to eliminating sham contracting in the building and construction industry.

We will continue to be ‘a tough cop on the beat’ in a way that is open, transparent and respectful of the community that we are tasked to regulate. Accordingly, I will soon publish an ABCC litigation policy. The ABCC litigation policy will set out guidelines to be followed by me and my officers in the making of decisions relating to the commencement of proceedings in relation to contraventions under the BCII Act and other workplace laws. The ABCC litigation policy will be substantially based on the prosecution policy of the Commonwealth and will also be consistent with the litigation policy of the Fair Work Ombudsman. The policy will then become a public document on our website, as you would expect from a world-class regulator.

In terms of our section 52 powers, which are often the focus of public discourse, I am mindful of the comments made by the Hon. Murray Wilcox QC in his report last year. In particular, I draw the senators’ attentions to paragraph 1.23. I endorse those comments. Nothing in my time as the Deputy Commissioner, or since, has convinced me that there has been an outbreak of compliance in the workplace relations community in relation to building and construction. Nor is there evidence that the ‘culture of silence’ has been entirely broken. Of course, it ought to go without saying that there would be a fewer number of section 52 examinations if employers and the staff of contractors and head contractors, in particular, did not insist that the ABCC issue a section 52 notice in circumstances where they should, in my view, more readily assist the regulator with our investigation. These requests account for nearly 35 per cent of examinations. There would also be a lesser number than 52 examinations if employees and their union representatives provided information about health and safety, and their side of the story, to the ABCC voluntarily and early in an investigation.

Just under 50 per cent of section 52 examinations would not have occurred had this information been provided to the agency.

In the circumstances, therefore, I continue to see a need for the use of section 52 examinations in cases where, adopting the criteria outlined by Mr Murray Wilcox QC, (1) the ABCC has commenced an investigation; (2) there are reasonable grounds to believe that a particular person has information or documents relevant to that investigation; (3) it is likely to be important to the progress of investigation that this information or evidence is obtained; and (4) it is reasonable to require the attendance, 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 on the person being required to do so. There is, however, one important change I plan to make in this regard. As the ABCC Commissioner, I will preside over section 52 examinations—at least in the foreseeable future. My experience as a lawyer, industrial advocate and chief counsel of a workplace relations regulator, and previously as the deputy commissioner who conducted these examinations, well places me to perform this role. Senators, I imagine you may well have some questions for me and I welcome them.

CHAIR—Thank you, Mr Johns. Are you in a position to table your opening remarks?

Mr Johns—I will make arrangements for that, yes, Senator.

Senator CAMERON—Mr Johns, I have consistently attempted to have information tabled by the ABCC on a number of the issues that you have raised. You raised the issue of productivity consistently throughout your opening address. One of the concerns I had went to the Econtech reports. In fact, there were two Econtech reports, in 2007 and 2008. These reports were roundly criticised by independent analysis, including that of Justice Wilcox. Are you aware of the concerns that Justice Wilcox raised in relation to these reports?

Mr Johns—Yes, Senator.

Senator CAMERON—I notice the reports are still on your website. Do you stand by those reports and the outcome of that Econtech report?

Mr Johns—Senator, I do not know when you last checked the website; I do not know that they are on there.

Senator CAMERON—I checked it five minutes ago and it is still there on media releases.

Mr Johns—It certainly might be there because there was a reference to it in a media release but, as I understand it, the reports are not available on the website. They were conducted in 2007. It is now 2010. We have moved on.

Senator CAMERON—I have not moved on yet. It is still being promoted in some areas by the opposition as the *raison d'être* for the ABCC. What was argued in this Econtech report is that GDP is 1.5 per cent higher than it would otherwise be if the ABCC were not in existence, that the CPI is 1.2 per cent lower and that there is a gain in real consumption of 0.8 per cent, and nobody with any credibility has supported this proposition. Treasury never mentioned this great leap in GDP growth in Australia because of the ABCC. Nowhere can you find Treasury validating this position. If you look at GDP growth in 2007, GDP growth was 2.7 per cent. The ABCC are claiming that they were responsible for 1.5 per cent of that to 2.7

per cent growth. It strikes me that we need to get all traces of this nonsense removed from the ABCC website. If it is still going to be on the website, then I would like you to satisfy yourself about the validity of the econometric analysis that was done.

Mr Johns—I am not quite sure what the question is.

Senator CAMERON—The question is this—I will make it clear: if you are going to keep this rubbish on the website, then are you prepared to back it up and say that we have achieved those outcomes as a result of the ABCC?

Mr Johns—Other than maybe a reference to the reports in our dated catalogue of media releases, I am confident that those reports are not on our website. As I say, they were written in 2007; it is 2010, and I am completely focused on the future of this agency and on its mandate to deliver fair and productive building and construction work.

Senator CAMERON—You may be that I am entitled to ask you whether you believe what has been peddled by the previous administration of the ABCC in relation to their so-called productivity gains?

Senator Chris Evans—I am not sure that Mr Johns ought to be passing opinions on those things in the context in which you put the question. You ought to direct questions to his responsibilities and what he has done, what he may do and how the organisation is operating. It is a bit unfair to ask him to pass opinions on economic modelling in the past and express a personal view on those things. It leads him into dangerous territory.

Senator CAMERON—I am not asking for his personal view; I am asking for his professional view as the ABCC commissioner.

Senator Chris Evans—If he has a perspective in his current role, then that is fine.

Senator CAMERON—Seriously, Minister, if Mr Johns believes that this has been achieved, then it could cloud his judgment in terms of some of the past performance of the ABCC. That is what I am worried about. If you think that turning yourself into a pariah amongst working people improves productivity, then I am worried about that. I am just asking you whether that culture is still there amongst the ABCC?

Mr Johns—If are you asking me if there is a culture of treating workers as pariahs, the answer is no.

Senator CAMERON—I am saying that you are viewed by many workers in the industry—not you personally but the ABCC—as a pariah on workers and their capacity to bargain effectively, on their rights in the industry. You just have to look at the Wilcox report to see some of the issues. You only have to address some of the questioning that I have made over a couple of years to the ABCC to see the performance of the ABCC, which is not good.

Mr Johns—In my opening statement I made some very clear remarks about our commitment to all building industry participants. I made some very clear remarks about our intended activity in relation to underpayment matters and sham contracting matters. I will be judged on my record moving forward.

Senator CAMERON—There is an old business adage that I have heard over the years that you cannot change culture you can only change people. If the culture amongst your enforcement officers—or whatever you call them; I am not sure what you call the 80 officers

who are out doing investigations—is the culture of the previous ABCC commissioner, how do we fix that? You are asking unions to cooperate with the ABCC?

Mr Johns—I am. They are an important stakeholder in this community.

Senator CAMERON—I am just wondering how you can convince the trade union movement to cooperate with an organisation that was clearly biased against them.

Mr Johns—I am not going to accept that proposition. I can only talk about what my plans are as the agency head moving forward. I took up my appointment last Monday. I have made some serious statements here today about some of the things which will be the focus of my work and I invite you to judge me against that standard.

Senator CAMERON—I have a number of questions on some of the issues that you have raised in your opening statement. Does the ABCC give equal priority to the means in subsection (2) by which it intends to achieve the principal object in subsection (1) of the act? The objects of the act are there. You know the objects of the act.

Mr Johns—We obviously seek to perform all of the objects in our act. One of the reasons that I have made the decision that we will not be referring underpayment claims to the FWA moving forward is that I understand the objects of that act to require me to do that work. As I say, it is entirely consistent with what Royal Commissioner Cole said the agency should be doing.

Senator CAMERON—I must say that, just because you are a royal commissioner, does not make you infallible—and certainly that is a view I have of Commissioner Cole and of the building industry royal commission. One of the areas in the objects of the act is to improve occupational health and safety in the building industry. I am not sure if you were listening in to the previous discussion I had with other witnesses about the fatalities in the building industry.

Mr Johns—Yes, Senator.

Senator CAMERON—Do you have a figure for fatalities in the building industry?

Mr Johns—I am sorry, Senator?

Senator CAMERON—Do you have a figure? Given that you have got a responsibility to improve occupational health and safety—

Mr Johns—Can I just clarify that? It is an object of the act that there be improvements in occupational health and safety. That object is not attended to my office; that object is attended to the office of the Federal Safety Commissioner. I do not have a direct role in relation to occupational health and safety matters. It is of course a very serious concern to all people in the industry, including the ABCC. I am cognisant of the fact that in 2008-09 there were some 27 fatalities in the building construction industry. What I would say is that there is a role for building construction workers. If they feel as though the general protections attached to their workplace rights around safety are being inhibited by employers then they ought to make complaints to us about those transgressions on their workplace rights that arise out of the general protections in the Fair Work Act and we will deal with those matters. I do not have, though, a statutory obligation or right to deal with occupational health and safety issues beyond that.

Senator CAMERON—Well the act does. Section (3)—

Mr Johns—They are the objects of the act. Not all of the objects in the act are attended to my office. That act creates my office and it also creates the Office of the Federal Safety Commissioner, and not all of the objects are attended to my office. It is a misunderstanding to say that I have a statutory obligation to deal with occupational health and safety. That is not what I am mandated to do.

Senator CAMERON—What is your mandate around?

Mr Johns—My mandate is around fair and productive building work arising out of workplace relations issues, not occupational health and safety issues. As I say, those occupational health and safety issues can arise because they are a workplace right. That gives workers protection under the general protections in the Fair Work Act in relation to those rights. If those general protections are transgressed, I would invite building construction workers to report those matters to my office and we would investigate those matters from a workplace relations compliance perspective, not from an occupational health and safety perspective. That properly belongs with the Federal Safety Commissioner or with one of the state-based OHS agencies.

Senator CAMERON—That is interesting. If that is your view I will go back and have another look at that. The greatest fairness you can provide a worker in the building industry is for them to fairly go to work and fairly come back alive. You say that you will only be reactive to that; there is no proactive approach in the ABCC on building industry deaths or any of those issues?

Mr Johns—Matters relating to occupational health and safety in that regulatory sense do not rest with me. What I do say, and I repeat, is that occupational health and safety rights that workers have are workplace rights under the Fair Work Act. They are protected by the general protections in the Fair Work Act and I enforce the Fair Work Act aspects of that as well. It is in that context that we would look to attending occupational health and safety issues, but not from a regulatory sense like the state based occupational health and safety agencies.

Senator CAMERON—I am not asking you to look at it on a regulatory basis, but as you say, you cannot extricate health and safety issues from industrial issues.

Mr Johns—It is a workplace right.

Senator CAMERON—It is a workplace right, so you have got an obligation for fair workplace rights in the industry. So you have to have some obligation on health and safety. So what do you see your health—

Mr Johns—The obligation that I have is the one that I have explained—which is to make sure that where workers exercise their rights in relation to occupational health and safety there is no adverse action taken against them in relation to the exercise of those rights. It is a workplace rights issue that I have role in relation to and I will to continue to have that role.

Senator CAMERON—I think that is a very narrow approach and I think that is one of the reasons—

Mr Johns—I am not going to act beyond the power that is given to me in the act. If this parliament changes the act and gives me different powers, I will exercise whatever powers it gives me.

Senator CAMERON—So there are 80 enforcement officers out there enforcing action against workers who may swear at their employer, but you are telling me there is nothing proactive in health and safety. That is what you are telling me?

Mr Johns—That is not my mandate.

Senator Chris Evans—As your Senate leader, I have been sworn at by you on a number of occasions, Senator Cameron. I might look for those powers myself.

Senator CAMERON—When I was in the building and construction industry there were some pretty tough employers there, let me tell you, and the ABCC did not turn up every time an employer swore at me, I must say. I want to move to an issue that has been reported in the press in relation to undercover police reports to the ABCC on a union meeting in Karratha.

Mr Johns—Yes.

Senator CAMERON—The media report was in November 2009, but the date of the meeting is not clear. As I understand it, there was a Western Australian police officer, Sergeant Jack Lee, who attended a CFMEU meeting in town dressed in plain clothes. Is that your understanding?

Mr Johns—My understanding is that there was a public meeting on 30 November 2009 and that there was a member of the Western Australia police force in attendance at that public meeting.

Senator CAMERON—In plain clothes?

Mr Johns—My understanding is that it was in plain clothes. I have seen the media reports as you have.

Senator CAMERON—There was an investigation by the ABCC in relation to this. So you are not sure whether it—

Mr Johns—I have no reason to tell you that he was not in plain clothes, but it was a public meeting. I understand that he was there for his purposes, such as making sure people were not blocking the road and the other things that the police do.

Senator CAMERON—In plain clothes?

Mr Johns—I have no reason to say that he was not. Why he was or what operational matters arise out of that are matters you would have to direct to the Western Australian police. They are not matters for me.

Senator CAMERON—If he was in plain clothes would you find it unusual for a plain clothes policeman to be directing traffic?

Mr Johns—I cannot express a view on that. I can confirm that from our investigation he was at a meeting on 30 November.

Senator CAMERON—Are any of the ABCC staff in Western Australia former officers of the Western Australian police service?

Mr Johns—I would have to take that on notice. Certainly there are members of our staff who are ex-police officers. I do not have a state-by-state break-up of that.

Senator CAMERON—Could you advise me whether the ABCC officer who received the statement from Sergeant Lee after the meeting was a former Western Australian police officer?

Mr Johns—I would have to take that on notice—sorry: I can tell you that as at 18 October 2010 in Western Australia, out of the 19 inspectors we have, seven of them have a police background and 12 do not. I will have to take on notice whether the inspector in this matter has a police background.

Senator CAMERON—That is what I am interested in. Is the manner in which Sergeant Lee of the Western Australia Police and the ABCC officer who took a statement about the meeting normal practice within the ABCC; that a police officer would come to the ABCC about a union meeting?

Mr Johns—I am sorry, Senator—

Senator CAMERON—Is it normal for a state police officer to be reporting to an officer of the ABCC about a union meeting?

Mr Johns—My understanding is that the Western Australian police officer did not report to the ABCC. In the ordinary course of our investigations, we seek information and statements from people who are in attendance at meetings. This was a public meeting and an approach, I understand, was made to the police officer to say, ‘Were you at the meeting?’ Yes, he was at the meeting. ‘Will you give us a statement?’

Senator CAMERON—How did your officer know there was a plain-clothes police officer at the meeting?

Mr Johns—The information that I have is that he did not know, but there was a contact made by our office to the WA Police to say, ‘Did you have anyone there doing the traffic?’

Senator CAMERON—For what reason?

Mr Johns—To find out whether or not there might be someone who was at the meeting from whom we could get information to further our investigation. We do not draw a distinction between whether the person who has given us the information is a police officer or a bystander who might have also been there at the public meeting.

Senator CAMERON—So a serving officer of a state police force and the Western Australia police force is treated exactly the same as any other member of the public?

Mr Johns—He is treated as someone who might be able to give us information about what happened at the meeting.

Senator CAMERON—Are there any protocols in terms of you dealing with the police?

Mr Johns—There is no protocol between us and the Western Australia Police in relation to those matters, I understand.

Senator CAMERON—The approach by your officer to the police—is that consistent with the APS Code of Conduct?

Mr Johns—It certainly would not be inconsistent to seek information from people who you think might have been at the meeting and might be able to advance the investigation. It is a very ordinary course of business.

Senator CAMERON—So, at every meeting that takes place, you in the ordinary course of business would seek advice from the New South Wales police, Western Australia Police. ‘Did you have an officer there who can provide us with advice’—is that how you operate?

Mr Johns—I would expect my inspectors to make inquiries about who was at the meeting to find out who might be able to give information that is relevant to the investigation. I would expect my inspectors to treat a member of the police force who might be able to give that information no differently to a bystander who might otherwise also have been at the public meeting.

Senator CAMERON—Who did your officer contact in the Western Australia Police?

Mr Johns—Bear with me—I might have to take that on notice; I do.

Senator CAMERON—I might leave that. I have a couple of questions on notice—

Mr Johns—Two, I think; yes.

Senator CAMERON—I might come back to you on that. I turn now to the bombing of the CFMEU offices in Lidcombe. The former ABCC commissioner took about two weeks to write to the CFMEU to seek any advance on that issue.

Mr Johns—There was a letter on 31 May. The bombing occurred on 13 May.

Senator CAMERON—Yes, there was a couple of weeks delay. What contacts did you make with the New South Wales Police on this issue?

Mr Johns—I will have to take that on notice. It is obviously a serious crime and these are matters that are properly dealt with by law enforcement agencies such as the police. I do accept of course that serious crime can have attendant with it a breach of workplace laws as well and those matters are properly within our jurisdiction. But it would be improper for us to seek to investigate a matter that is currently before the police. I would not want to prejudice any criminal matter that they have. So we always give the police, if they are investigating a matter, precedence over our workplace investigation.

Senator CAMERON—It just seems to me that in Western Australia you contacted the police there in relation to what you are describing as a public meeting and what the union describes as a union meeting.

Mr Johns—That was not a matter involving criminality; if it had been a matter involving criminality then we would have left it to the Western Australian police to deal with as the primary agency, as we have done in this matter.

Senator CAMERON—But you considered yourself that there may have been breaches of workplace law in relation to that bombing. In fact the CFMEU made some statements linking it to their industrial activities in the industry.

Mr Johns—Yes, and this agency wrote to the CFMEU on 31 May 2010 and we have received nothing from them.

Senator CAMERON—Did you write to the police then to see if they had any information about any link back to any industrial matters arising from their investigation into this bombing?

Mr Johns—I will take that on notice.

Senator CAMERON—So you do not know if there has been a letter to the New South Wales Police?

Mr Johns—I do not know.

Senator CAMERON—You know about the Western Australian meeting and yet you get a bombing of a union office and you cannot tell me about that. I am just wondering why there is a different approach here.

Mr Johns—The matters can be distinguished. One involves criminal matters; one does not.

Senator CAMERON—Mr Johns, I just remind you that you conceded that there could be issues of industrial—

Mr Johns—Yes, but the criminal matter must take precedence.

Senator CAMERON—I agree.

Mr Johns—And it would be improper for my agency to intervene in that matter or to otherwise try and advance our investigation whilst there is a criminal investigation on foot. So it is a very different matter to the matter in Western Australia.

Senator CAMERON—So you are saying that you are completely annulled from taking any action on anything that has some criminal investigation, even if that criminal investigation is separate on the issue of a bombing but not the industrial activities?

Mr Johns—We are not annulled but certainly we would, as is quite proper, hold in abeyance our investigation until the police had finished their's or were not going to take action. It is entirely appropriate for us to do that.

Senator CAMERON—Have the police finished their investigation into the bombing of the CFMEU office?

Mr Johns—I would have to take that on notice. I would not know.

Senator CAMERON—Have you made any inquiries as to whether the police have finished their investigation.

Mr Johns—I will take that on notice.

Senator CAMERON—On the sham contracting issues that you have raised, you outline the competitive disadvantage, the taxation issues and the Cole royal commission. What steps have you taken within the ABCC to allocate resources on sham contracting?

Mr Johns—We have been very active in relation to sham contracting matters. I can tell you that our New South Wales office in particular, in terms of its work in New South Wales and the ACT, has had quite a number of investigations on foot. We currently have 14 active investigations within the agency as a whole and we have 15 briefs which have been referred to our legal department. So we are very active in this area.

Senator CAMERON—You say you are active—

Mr Johns—Sorry, I failed to mention that of course we have already commenced a civil penalty prosecution in the ACT.

Senator CAMERON—Can I come back to Western Australia just for a minute before we go too much further. What was that ABCC investigation about?

Mr Johns—Unlawful industrial action.

Senator CAMERON—That is a wide net. What unlawful industrial action?

Mr Johns—As I understand it, the employees ceased doing their work and held a public meeting. That is, by definition, unlawful industrial action. That is what the investigation was into.

Senator CAMERON—What information could the Western Australian police give you about that?

Mr Johns—Often in unlawful industrial action matters we need to establish that they have been industrially motivated, and what is said at meetings is relevant to that question. Also it is necessary to establish whether employees are on a frolic of their own or these matters have been caused by the involvement of other people. Obviously you need to know what was said at the meeting, what happened at the meeting, in order to determine those evidentiary issues.

Senator CAMERON—On the sham contracting, have you spoken to any employers? Let me rephrase that. Going back to some of the evidence and answers I received on sham contracting, in a number of the sham contracting cases, with analysis that was done by the ABCC, your investigations were dropped because people would not take the matter any further. The report I have had from unions and some employers is that if they do not engage in sham contracting—and you raised this in your opening statement—then they are uncompetitive; and if they do not engage in sham contracting then they lose the contract, they lose their livelihood and they lose their ability to look after the family. That is how it was put to me. So it is a very serious matter, isn't it?

Mr Johns—Senator, they are exactly the points I addressed in my opening statement.

Senator CAMERON—How many resources do you have allocated now to sham contracting—how many officers? Do you have a unit within the ABCC looking at sham contracting? Do you have a business plan to deal with the sham contracting issue?

Mr Johns—We do not have a separate unit. These are matters that would be investigated in whatever jurisdiction they arose. As I say, we have been concentrating our efforts presently in New South Wales and the ACT, but obviously sham contracting exists elsewhere or allegations of sham contracting are made elsewhere and, when those allegations are made and come before us, we will dedicate resources to investigating them.

What I said in my opening statement, though, was that I think there needs to be a broader response to this which is not simply the ABCC investigating matters. Often these matters involve migrant workers or workers from non-English-speaking backgrounds, so we need to involve the immigration department. They involve matters, as I indicated in my opening statement, about losses to tax revenue, so we need to involve the ATO. There are other agencies that have a role to play in this. Also, as I said in my opening statement, there is a role to be played by both employer associations and unions. What I committed to do in my

opening comments was conduct a roundtable with all industry stakeholders and government to really nut out how we can deal with this issue in an effective way. Just having the ABCC investigate matters and prosecute some matters is not going to get rid of this problem. It will just drive it underground or move it somewhere else. People will regularise their affairs for a while, while we conduct an audit there, and then when we leave they will go and set up there again. There needs to be a better response than simply an ABCC investigation; but, while these matters are reported to us, we will investigate them.

Senator CAMERON—I would like to know what the ABCC's method is to get that wider, more effective approach and what you would see as required to deal with this effectively. Would you take that on notice?

Mr Johns—Yes, I will. I started in the job last Monday and this is something that I am very concerned about and something that I intend to develop a plan around and, as I say, host this roundtable to work on an all-of-government response to it.

Senator CAMERON—Are you aware of newspaper reports about a Korean tiler who was employed in the building and construction industry but died because he was what was termed an 'illegal immigrant' and was afraid to seek hospital treatment for a workplace injury?

Mr Johns—Was this the matter in Sydney?

Senator CAMERON—Yes.

Mr Johns—Yes, I have some awareness of it.

Senator CAMERON—Have you taken any steps to investigate that matter?

Mr Johns—I will have to take that on notice, I am sorry.

Senator CAMERON—Is it a matter that you think should be investigated?

Mr Johns—If the allegations are that there was sham contracting, yes, it ought to be investigated.

Senator CAMERON—When you reply on notice, would you tell me when the ABCC started to look at that incident?

Mr Johns—I would be pleased to.

Senator CAMERON—Thank you.

Senator ABETZ—Tell me, where is Mr Dalgleish?

Mr Johns—Mr Dalgleish is in Perth.

Senator ABETZ—Still working with the ABCC?

Mr Johns—Yes, he is the deputy commissioner.

Senator ABETZ—And that continues?

Mr Johns—His term expires on, I think, 6 November.

Senator ABETZ—Do we know what has happened or does his term expire then?

Mr Johns—His term expires on that date. Any questions about the fulfilling of appointments need to go to the department.

Senator Chris Evans—There is a selection process getting underway, but we will deal with it in outcome 5.

Senator ABETZ—Mr Johns, in relation to you and others in the commission, do you require that people be resigned from their political party, trade union, employer group or whatever group they may have been associated with prior to taking up certain tasks?

Mr Johns—No. I would not at any stage put my agency in a position where it was in breach of section 351 of the Fair Work Act.

Senator ABETZ—What about you personally? Are you a member of a political party or union?

Mr Johns—I am a member of a political party. The only union I am a member of is the Law of Society of New South Wales, if you consider it such.

Senator ABETZ—In my day, law societies were unions. It was compulsory to belong to them and I objected vehemently.

Senator Chris Evans—And they are very interested in restrictive work practices!

Senator ABETZ—Certain qualifications are required to be a lawyer.

Senator WORTLEY—Certain qualifications are required in many circumstances.

Senator CAMERON—Though common sense does not seem to be one of them!

CHAIR—Senator Abetz, you have the call.

Senator ABETZ—Will retain your membership of your political party, Mr Johns?

Mr Johns—I have not turned my mind to it.

Senator ABETZ—Do you think that your membership of a political party may cause certain public perceptions in your role, given that the future of the ABCC is clearly a matter of some political disputation in this country? As we saw from the good questioning of Senator Cameron—and, of course, the coalition has a certain view, the Labor Party has a certain view and the Greens have a certain view—do you think that your membership of a political party might impact on your perceived independence?

Mr Johns—No.

Senator ABETZ—You believe that nobody in the community will say, ‘Well, this person is a member of, let us say, the Australian Greens, and they are committed to its abolition,’ and that that would not impact on your undertaking the role?

Mr Johns—I could not speculate about what people may or may not think. I will be judged on my record, and I think my record in workplace relations—having acted for employees, unions and employers and having prosecuted unions and employers—stands for itself.

Senator ABETZ—But you are now in an official position—the head of an organisation. You and I might heatedly agree that it is potentially not a reasonable public perception for people to take, but nevertheless it may be a perception of bias or lack of independence, and I just wonder whether that in any way might concern you as to the viewing of you and, more importantly, the ABCC as a whole?

Mr Johns—I am confident that in the exercise of my duties as an independent agency head there will be no cause for anyone to have concerns about my bias or influences.

Senator ABETZ—That is reassuring, and I would have thought that may have been enhanced by leaving behind your party political membership whilst you have this very important job. But, clearly, you are not minded to do so and that is your prerogative. Do you favour having deputy commissioners?

Mr Johns—The legislation provides for deputy commissioners and matters as to the filling of those appointments are matters that you will have to direct to the department.

Senator ABETZ—Right, and my question was do you favour—not what the legislation has, but do you favour deputy commissioners?

Senator Chris Evans—I think that might be an opinion, but I think this is a decision for me. I think I have got a brief coming up about that. I am not sure what legislation Mr Johns has—

Senator ABETZ—Yes, but you will not have a brief coming up to you as to what Mr Johns' view is in relation to the appropriateness or otherwise of deputy commissioners.

Senator Chris Evans—I guess I am not sure whether Mr Johns should be offering a view in the sense that it is a decision for the minister. That was the only point I made.

Senator ABETZ—Clearly, but in the administration of the ABCC, it may be that from time to time recommendations might be made.

Senator Chris Evans—I will seek his advice before making that decision.

Senator ABETZ—Of course.

Senator Chris Evans—Otherwise the department will seek his advice but, as I understand it, the decision—

Senator ABETZ—No, I am not talking about appointees, but the general concept of the need for deputy commissioners.

Senator Chris Evans—There certainly will be at least one. Whether they go back to having two or not is a decision, as I understand it, for me.

Senator ABETZ—Yes, and I just wonder whether the actual commissioner has a view on that?

CHAIR—I think that is asking Mr Johns to give an opinion on government policy, and that is generally not what we ask questions on.

Senator ABETZ—As I understand it, there is no policy decision by the government and I have not asked him what his opinion is—just whether he does have an opinion.

Senator Chris Evans—I would say, Senator Abetz—

Mr Johns—I have an opinion.

Senator ABETZ—You do—good.

Senator Chris Evans—No doubt you will advise the department of that and then I will make the decision.

Senator ABETZ—I understand that in the past deputy commissioners have undertaken section 52 examinations?

Mr Johns—That is correct.

Senator ABETZ—If I heard either your opening statement correctly or in response to Senator Cameron—

Mr Johns—In my opening statement I indicated that I will preside over section 52 examinations in the foreseeable future.

Senator ABETZ—All of them for the foreseeable future?

Mr Johns—Yes. I note that Deputy Commissioner Dalglish's term expires on 6 November. It now being 20 October, I will be presiding over them. I do not have someone to delegate it to, presently.

Senator ABETZ—That was the point I was trying to get to: whether you were going to preside over all of them as a matter of policy because you believe that the commissioner can do it all along with the other duties or whether it was helpful to have a deputy commissioner to assist with that workload.

Mr Johns—Certainly having regard to the seriousness of a section 52 examination I think it is appropriate for me, as the agency head and as the commissioner, to preside over them. Certainly in the foreseeable future I will preside over them. I have presided over them in the past and I think it is entirely appropriate to elevate it to me as the agency head, certainly in the foreseeable future.

Senator ABETZ—Do you foresee having to pass over other duties to the deputy commissioner?

Mr Johns—Obviously, I will need to make an assessment of workload issues and resource issues.

Senator ABETZ—That is fair enough. We might revisit that next time around—

Mr Johns—I think it should be revisited in the future.

Senator ABETZ—after one week. That is fair comment. I understand that there has been a media report that an examinee in Queensland declined to attend a section 52 examination.

Mr Johns—That is true.

Senator ABETZ—What is the ABCC doing about it?

Mr Johns—The ABCC is preparing a brief in relation to the matter and we will, once we have prepared that brief and considered it, determine whether it ought to be referred to the Commonwealth Director of Prosecutions. They make decisions in relation to these matters. There is a lot of misconception out there about who makes that call.

Mr ABBOTT—Absolutely right. It is a pity Senator Cameron is not here to hear that.

CHAIR—I am sure he is listening, Senator Abetz.

Senator ABETZ—I am sure—glass against the wall, no doubt.

CHAIR—No, I think it is on TV in his office.

Senator ABETZ—Have you had the opportunity to consider all the legal proceedings that are currently underfoot by the ABCC and is it your intention to continue with them or do you intend to revisit each one and cast a fresh judgment?

Mr Johns—I have had a preliminary briefing from the Assistant Commissioner, Legal, about each of the proceedings we currently have on foot. I am very comfortable with the course of those matters. Obviously, as matters evolve, one reviews them from time to time so I am not going to say to you that all of them will go through to completion. Matters might happen in the future that cause us to revisit that. But if your question is, do I plan, as a result of being in the job for eight days, discontinue any particular proceedings—no.

Senator ABETZ—I am not sure if Senator Cameron asked you any questions about the arrangements that you have with the Fair Work Ombudsman.

Mr Johns—He did not.

Senator ABETZ—In that case, clearly you will not be continuing with the understanding that there had been with the Fair Work Ombudsman, albeit you have only been in the job for eight days. When did you take over as commissioner?

Mr Johns—On 11 October.

Senator ABETZ—That is what I thought. So on the very first day that you were in the job you wrote to the Fair Work Ombudsman changing, or suggesting a change in, the way that you undertake business, liaison or cooperation with the Fair Work Ombudsman.

Mr Johns—I did.

Senator ABETZ—There was one occasion where you changed the direction of the ABCC within less than 24 hours of taking on the job, so my inquiry as to whether you had undertaken a certain view and changed direction in relation to legal proceedings within eight days of being in the job, is not such a far fetched question.

Mr Johns—I did not suggest it was far fetched.

Senator ABETZ—You are very fortunate that Hansard does not record irony and a slight hint of sarcasm, along with the printed word. All I am suggesting is that in this area you have undoubtedly taken a course of action, and it did not take you much time to consider a new direction for the ABCC.

Senator Chris Evans—As you know, Mr Johns was selected by a merit selection process and I formally appointed him on the recommendation of that panel. I hope I am not speaking out of school, but it was the case that in the panel's assessment Mr Johns had the best strategic vision for the organisation. They were impressed by the fact he had clear ideas on where to take the organisation, and given his experience in the organisation before that he had an understanding of where he wanted to take it. While I was also a bit surprised at action on day 1, it was clearly the case that he got the job because he had a view about where he wanted to take the organisation, which I think is a good thing.

Senator ABETZ—I accept that but you cannot have it both ways and suggest, 'Oh, only after eight days in the job I would not deign to think of changing direction.' On the very first day he made directional changes! That is my only observation. But let us move on to the

content or detail of the change. In your letter you note that the ABCC referred only eight matters to the Fair Work Ombudsman, but that was, if you like, formal referrals.

Mr Johns—Yes, there were eight formal referrals to the Fair Work Ombudsman last financial year. Only four of those related to underpayment matters.

Senator ABETZ—Would you agree with me that out of the 5,700 underpayment matters involving building and construction employees that the Fair Work Ombudsman handled, a lot of them found their way to the Fair Work Ombudsman courtesy of the ABCC information line—what is it called? Telephone service?

Mr Johns—There is no way I can answer that.

Senator ABETZ—What is the service called?

Mr Johns—We have a phone line.

Senator ABETZ—Was it courtesy of the phone line? When people ring up with underpayment matters the ABCC phone service says, ‘Look, we suggest you go to the Fair Work Ombudsman and here is their information line number.’ That is how at least some of those 5,700 underpayment matters found their way to the Fair Work Ombudsman.

Mr Johns—In terms of the statistics we record, ‘informal referrals’ are classified as informal referrals to work place agencies. That would obviously include the Fair Work Ombudsman, but it might include the state based agencies, as they then were. I can tell you that in the period 1 August 2007 to 30 September 2008, there were 414 informal referrals. In the same period there were 25 formal referrals to the workplace ombudsman.

Senator ABETZ—So, they have been referred at least in the hundreds. Is it your intention that your office investigate complaints of underpayment from building industry participants?

Mr Johns—Yes.

Senator ABETZ—So a punter who is concerned about underpayment in the building industry can now ring either the Fair Work Ombudsman or the ABCC; is that correct?

Mr Johns—Presently, yes.

Senator ABETZ—‘Presently, yes’?

Mr Johns—Yes, you can.

Senator ABETZ—I can at the moment, but chances are the ABCC would say, ‘Go to the Fair Work Ombudsman.’

Mr Johns—That is correct. We would not as from 11 October.

Senator ABETZ—No longer as of 11 October; thank you for reminding me. If two people had a similar complaint, one could go to the ABCC and the other to the FWO and we would have two statutory government funded authorities pursuing virtually identical matters; is that correct?

Mr Johns—Presently, yes. Can I take you to my letter to Fair Work Ombudsman Wilson. You will see that after I terminate the arrangement whereby the ABCC refers matters to the Fair Work Ombudsman and I record the statistic that the Fair Work Ombudsman dealt with 5,700 matters in that three-year period—of course, the statistics that the Fair Work

Ombudsman records in relation to those matters will not all be building industry participants as defined in my act, so it will be certainly less than 1,400 a year—I then go on to say:

The ABCC agrees with the Fair Work Ombudsman that, while this arrangement has produced an acceptable arrangement for clients, it would be inconsistent with the ABCC ceasing to refer building work matters to the FWO for it at the same time not to move to take over the work that goes to the Fair Work Ombudsman in relation to underpayment matters.

We then commit to the transition period for implementing this by at least 1 March 2011. I say: ‘Presently, yes,’ but the intention is that at least from 1 March 2011 all building industry participant underpayment matters will come to my agency.

Senator ABETZ—And that will be a ‘building industry participant’ as defined under your legislation?

Mr Johns—That is correct. I do not have the jurisdiction to do any others.

Senator ABETZ—Exactly, but can we foresee building industry participants who are not necessarily caught by your legislation?

Mr Johns—By definition if they are building industry participants they are caught by my legislation. There might be workers in the building industry who were not caught by that definition.

Senator ABETZ—That is right.

Mr Johns—For example, workers on a single dwelling site would not be caught as a ‘building industry participant’ under my act.

Senator ABETZ—So we now have to educate workers as to all of the nuances so they know which way they ought to be going. I just do not see that as an effective and efficient use of taxpayers’ money. Why would you want to create this artificial distinction for underpayments?

Mr Johns—It is not an artificial distinction; it is one that is in the legislation passed by this parliament.

Senator ABETZ—Yes, but I think the FWO has been providing an excellent citizen service in resolving issues, according to the new commissioner.

Mr Johns—Yes, and obviously I have some knowledge about these matters.

Senator ABETZ—If it has been working well where everybody goes to the Fair Work Ombudsman for these issues and they have expertise in this area over all industry sectors, why would you want to drag some back into your jurisdiction when, as we have just agreed, it will not be everybody in the building industry that will be covered by your jurisdiction? Will your people do a better job than the Fair Work Ombudsman?

Mr Johns—They will do as good a job.

Senator ABETZ—So why the change if there is no actual material benefit for the punter who has been underpaid?

Mr Johns—I think there is a material benefit in circumstances where there might be some confusion as to why the regulator in the building and construction industry does not help workers in relation to these matters. As I said, in preparing for taking up this appointment, I

went back to first principles. I went back and looked at what Royal Commissioner Cole said: he said the ABCC should be doing this work. I then looked at my act: my act said I should be doing this work. I am doing this work.

Senator ABETZ—The act does not require you to do it; or are you suggesting that the commission has been in breach of its legal obligations by referring that as to the Fair—

Mr Johns—I am not suggesting that. I am suggesting that my act authorises me to do this work.

Senator ABETZ—Of course your act authorises you to do it; I am not suggesting otherwise. But I am suggesting that it is not a breach of the legislation to refer these matters to a specialist body that has a body of people and experience across the whole gamut of industry and sectors dealing with underpayments and that covers the whole building industry—not just that which the narrower definition under which you operate covers. I just cannot see, if exactly the same job is going to be done for these punters, why you would want to drag it back in when a perfectly reasonable, sensible system was already operating.

Senator Chris Evans—Senator, I think that Mr Johns has answered the question. The fact is—as is clear in that letter and, as you acknowledge, under the act—that it was given that role. That had been transferred, if you like. He made a decision to bring it back because of his vision of how the organisation ought to work. He has given you that answer, and it was perfectly appropriate for him to do that; I do not think there is any dispute about that. It was a judgement call as to whether to continue the existing arrangement or go back to what was envisaged under the legislation. I think he has given you the answer as to why he did that—

Senator ABETZ—At the end of the day, my concern is the punter who has been underpaid. I think we are in heated agreement that the ABCC will not do any better a job in looking after the punter than the Fair Work Ombudsman.

Senator Chris Evans interjecting—

Senator ABETZ—Well, I think the commissioner agreed—

Senator Chris Evans—That is what Mr Johns's view was, so—

Senator ABETZ—I am just wondering: why have this transfer if, at the end of the day, the underpaid worker will not be better off and there is a body of expertise and experience already existing in the Fair Work Ombudsman? I confess I do not get it. But you have made the decision, as is your prerogative, Mr Johns. Can I now ask: how much extra resource is that going to take?

Mr Johns—The reason we are looking at transitioning this work, at least by 1 March 2011, is to finalise those operational arrangements. It ought to be appreciated that the ABCC has consistently underspent its revenues from government. We have something in the order of \$31 million in retained surplus and we currently have less staff than is our complement. So I have formed the view that there is capacity within the agency to take on this additional work. I do think that those retained surpluses should be made available for us to make sure that we are a full-service regulator in the building and construction industry—they should be employed towards those endeavours, including underpayment matters.

Senator ABETZ—I understand that, but I do not think there is any suggestion in that that the Fair Work Ombudsman has been in any way tardy or lax in their pursuit.

Mr Johns—Having come from there and knowing a lot about their work and the great work of their inspectors—

Senator ABETZ—So, once again, I can understand the money is available and the capacity is available, but the capacity is already there in the Fair Work Ombudsman and they are doing it a timely, professional manner. I have no criticism of it. But you are going to bring it in, so that is fine. Tell me: are we going to get people across from the Fair Work Ombudsman to undertake this role so we get them to—

Mr Johns—We already have. When I was the deputy commissioner we put in place a secondment agreement between the ABCC and the FWO so that there would be a greater cross-fertilisation of the skills and experience of the different labour inspectorates. I think that that is something that should be encouraged. I think that as an employer we should provide those opportunities to our employees. I also note that a number of our inspectors and lawyers have previously worked at the Fair Work Ombudsman. We have the skills and experience already within the agency to take up this work. Obviously I am committed to the learning and development of my staff and I have made that commitment to them. I just do not see how this work will not be done as well by the ABCC as a full-service regulator.

Senator ABETZ—We have been around that. With respect, I do not think it is an efficient use of resource, but I can understand that you and I will have to agree to differ on that. Will there be any diminution in the other investigations and other matters with which the ABCC is currently tasked?

Mr Johns—No.

Senator ABETZ—Good. Can I ask you a question about the legislation that is currently before the parliament? I am not talking about the Greens bill, but the government's amendment bill.

Mr Johns—The prorogued bill.

Senator Chris Evans—It is not before the parliament because we have not yet reintroduced it, but we intend to.

Senator ABETZ—'The prorogued bill', therefore, as suggested by the commissioner, is the perfect description. Thank you for that. If the prorogued bill had been passed, would your powers under section 52 have been in any way modified?

Mr Johns—I do not know that I can be asked to speculate about legislation that is not before the parliament. In respect of my current operations, I have an act under which I operate and I continue to do so. What you are asking me to speculate about is really a policy question and it ought properly be put to the department.

Senator ABETZ—You know the bill that we are referring to. You have undoubtedly considered it and studied it.

Mr Johns—I have had a look at the bill.

Senator ABETZ—Would that bill make any changes, to your knowledge, to the operations of the ABCC and its powers in relation to section 52?

Mr Johns—It would abolish the ABCC. That is what the bill intends to do.

Senator ABETZ—The prorogued bill?

Mr Johns—Yes, it intends to abolish the ABCC and create a new agency.

Senator ABETZ—What powers would you retain in that circumstance? You are aware of what we are talking about and the detail of it.

Mr Johns—The ABCC would retain no powers under that bill.

Senator ABETZ—All right. Would the new body, thank you very much, have the section 52 powers retained for it?

Mr Johns—Yes.

Senator ABETZ—Minister, can you explain why your predecessor suggested that, in relation to the trial of Mr Ark Tribe, if the amendment bill had been carried, Mr Ark Tribe would not be charged for refusing to appear before the commission?

Senator Chris Evans—I do not know that my predecessor said that, but if—

Senator ABETZ—It was in the *Australian* on 30 July.

Senator Chris Evans—I do not have that before me.

Senator ABETZ—I understand your predecessor wrote to a Mr Setka requesting an apology and retraction for a speech made on 20 July 2010.

Mr Johns—Yes.

Senator ABETZ—And what is your intention in relation to that? Are you intending to follow that up and pursue such an apology?

Mr Johns—No.

Senator ABETZ—And what about the Public Service Commissioner? He has been informed of that, I dare say—the Public Service Commissioner cannot do much more other than be notified of what were, in effect, threats.

CHAIR—I just inform those parties that are interested how we will proceed with the program after the dinner break. I can advise the department in particular that we will commence at about 7.30 with some brief general questions under outcome 4. Officers for outcome 4 will then no longer be required for the rest of the program. We will then move to outcome 5, which actually starts with outcome 4.5 just to add to the confusion. So those officers will need to remain. Ms Paul is nodding so she understands how we will proceed.

Senator Chris Evans—I thank the committee for their cooperation in ensuring that those staff who were not likely to be needed are able to be excused. I appreciate that, because obviously it is of benefit to those individuals.

Proceedings suspended from 6.31 pm to 7.32 pm

CHAIR—Order! The committee will resume the questioning in this Senate estimates. We are now moving to outcome 4, on questions for the department. Welcome, Ms Paul. Senator Siewert has a question or two.

Senator SIEWERT—I have a range of questions that I will put on notice on both outcome 4.1 and 4.4. However, there is a specific issue I want to raise and get on the record. In answer to a question I asked about the eight-week non-payment periods and the no-show penalties, I specifically asked for some breakdown of figures, as I frequently do, on the numbers around mental health and people with mental illness and also homelessness and those at risk of homelessness. The answer I got, I have got to say, was not satisfactory in terms of information being made available with a breakdown of a whole range of areas. Also, there was a response around some regional breakdown that I asked for as well. You basically did not provide that information. I asked specifically for that information because I am concerned about the impacts of these measures on those who are homeless and those at risk of homelessness and those who are impacted by some mental condition. I was interested in the impacts on those two sections of the community. Given the government's social inclusion agenda, I would have thought the government and the department would have been interested in that information. I am wondering if you have it. If you do, can you go back and get it for me, please?

Ms Paul—I am absolutely happy to take that on notice and try to get that information. We have some of that information and some of it we do not, but, nonetheless, I will spell that out entirely. To the extent that we can get it, yes, we will. I agree with you that looking at issues like homelessness and jobseekers with mental illness is always incredibly important, so we will try to get that information. For example, Centrelink have added a homelessness flag reasonably recently, so there may be some things that we can get which we were not able to get in the past. Senator, the reference is probably EW0139-11 where you mentioned mental health, homeless people and so on. You also asked us, in EW0137-11, for information postcode based, electorate based or whatever we could get. We said it was an unreasonable diversion of resource. I will have another look at that for you.

Senator SIEWERT—Okay. I am aware that certain types of information—not exactly that information—has been provided to other senators. If it has been provided to other senators, I do not see why I cannot have it.

Ms Paul—Quite so.

Senator SIEWERT—I would appreciate it if you could get that information. That would be good. I go back to the first issue around mental health and homelessness. I thank you very much for taking it on notice and looking into it. You seem to think that some of that information is collected and some of it is not. Is that a correct understanding?

Ms Paul—I do not have the people here with the precise knowledge of exactly what is there, but we said to you in the answer, for example, that the reasons for participation reports not being applied were generally due to a range of reasonable excuses, such as a medical illness et cetera. I suppose my concern is that there may be some things that are not able to be broken down, but we will certainly try, even if it is on a sample basis. We will try to get you whatever is possible.

Senator SIEWERT—That leads me to my next question. I appreciate that some of that information may not be available and, therefore, you will not be able to provide it. My supplementary question is: could you look at whether there is a way of collecting that information?

Ms Paul—Yes.

Senator SIEWERT—We have a lot of focus on mental health and we have a lot of focus on homelessness, and it seems to me that they are two key focus areas for which we need that sort of information.

Ms Paul—Yes, I agree with you. As an example, as I said before, there is a growing recognition of exactly that. For example, homelessness is a reasonably recent flag in the administrative data. So, yes, we will certainly look at that. For example, we will look at not only what is available generically, which is the approach we clearly were taking in this answer, but also whether there have been any samples or pilots, where we can give some sense of it, even if every income support recipient is not flagged. We will look at the whole box and dice for you.

Senator SIEWERT—That is much appreciated. Thank you. I have a range of other questions on 4.1 and 4.4 that I will put on notice.

CHAIR—I thank officers for outcome 4 for their patience today. That concludes our questions on outcome 4. We will proceed to outcome 5, which actually starts at outcome 4.5. We will start with general questions.

Senator ABETZ—What benchmarks have you set yourself in this parliament in your new portfolio responsibilities?

Senator Chris Evans—Do you mean apart from world peace! I will be setting benchmarks in the various areas of the portfolio over the next little while. I am in the process of being briefed. I have been in the job for about four weeks. Part of what we are doing is reviewing existing programs, existing policies, looking at election commitments and taking a bit of a strategic view of all of those things. Being new in the portfolio, I do not want to set myself up as an instant expert. I have not had much to do with many of the areas for some years, but there is a very strong agenda of work that the government committed to end its first term. That has been started and we remain committed to that agenda. A large part of what I am going to need to do is finalise and drive home the agenda that we have set ourselves, whether that is in tertiary education, the quality agenda and reform agenda there, or vocational education training, the quality and standards agenda there, or industrial relations and bedding down the Fair Work Act, working with the parties to ensure that delivers for Australian workers and business—specific measures. As I said, I am taking a bit of a strategic look at the portfolio. There is a very strong agenda in each of the areas that the government has set that I am going to have to drive and make sure we deliver.

Senator ABETZ—What is your view as to full employment? What figure should that be set at?

Senator Chris Evans—I think Treasury probably are the experts in that regard. I think there is an academic debate about what full employment is. As I understand the economic debate, full employment is increasingly being talked about in terms of around four per cent I

think, but I can get an officer who is more expert than me in that. I think we used to talk about it in terms of two, and I understand the economic debate—

Senator ABETZ—I am in complete agreement with you that it should be four per cent.

Senator Chris Evans—I am not advocating that. I said to you that there is an economic debate around what is full employment, and its definition is a matter for Treasury.

Senator ABETZ—Can the department confirm for me that the section 52 provisions under the building and construction legislation will be in effect preserved in the prorogued bill?

Senator Chris Evans—We are in general happy to deal with this. We are going to do a bit of ABCC stuff for a while so I will bring those officers to the table.

Mr Kovacic—The prorogued bill does provide for the equivalent powers in terms of section 52. What it also does is introduce some additional protections that were recommended as a result of the consultations undertaken by the former Federal Court judge, Mr Wilcox. That goes primarily to the process in terms of, I think, the involvement of the Administrative Appeals Tribunal in terms of getting a deputy president or a presidential member of the tribunal's approval before the power can be exercised. There are also some—

Senator ABETZ—If I may interrupt, it will not excuse somebody from refusing to appear before the commission under the section 52 equivalent powers?

Mr Kovacic—That is my understanding.

Senator ABETZ—Yes, that is your understanding. That was my understanding and hopefully there will be a third understanding.

Mr Kovacic—There is a third understanding.

Mr Willing—Yes, that is the case.

Senator ABETZ—Minister, are you able to explain to us why Mr Crean on 30 July 2010 told us that Ark Tribe, a worker who faces a six-month gaol term for refusing to appear before the commission, would not be facing his charges if the bill had been passed?

Senator Chris Evans—No, I am not. I am not aware of those remarks—have you got a copy of them?

Senator ABETZ—Yes I do—30 July 2010, page 7 of the *Australian* newspaper. It is a bit sad when a former president of the ACTU and a minister would make such a statement, but we can let that ride. Why did we announce the new ABCC commissioner on the day of the opening of parliament?

Mr Kovacic—I think it is purely coincidental.

Senator ABETZ—Purely coincidental.

Ms Paul—I think it is where the process took us.

Senator ABETZ—It is fortuitous how that happened. When did the department put the recommendation to the government?

Mr Kovacic—In terms of the precise date, it would have been—I have not got a precise date, but I can get that for you shortly.

Senator ABETZ—Take it on notice, and also when it was agreed to in Executive Council.

Mr Kovacic—It was not an appointment that needed to go to Executive Council.

Senator ABETZ—Thank you for that correction. So it was simply for the government to announce.

Mr Kovacic—That is correct.

Senator ABETZ—So it would be good if you could give us that date. Ms Paul and Mr Kovacic, if I can take you to the *Hansard* of May 31, page 150. I was told, at the top of the page, first of all by you, Mr Kovacic:

At the time that the letter was written—

This is a letter to Mr Lloyd—

there was not any indication as to whether Mr Lloyd might take up the invitation to apply for the position.

Then, Ms Paul, you followed up:

It would have been inappropriate to guess what his actions might be.

Ms Paul—That is not the page reference we have. Page 150 is not taking us to that piece of discussion. I am sorry—I am just trying to find it.

Senator ABETZ—My apologies.

Ms Paul—I do recall the discussion, but we just cannot find it in our copy of the *Hansard*. It is not on the page that you have named.

Senator ABETZ—That is the problem when we print these things off—they are either not paginated or have—

Ms Paul—At any rate, we will keep on looking for it, if you like.

Senator ABETZ—Right. Later on—it may have been the next day, Tuesday, 1 June of budget estimates—the page reference I have, which the chances are will not be helpful to you, is 164. I tried my luck with Mr Lloyd and I said:

Can I push this any further? Did you make it perfectly clear to Ms Paul that you would not be reapplying?

Mr Lloyd said ‘Yes’. I said:

The department provided us with the letter that was sent to you inviting the possibility of reapplying. Can you recall when that discussion was held with Ms Paul?

Basically the tenor of it is that he said that prior to you writing to him he had indicated to you that, in the circumstances, he would not be reapplying. And so I am wondering whether your recollection of your discussion with Mr Lloyd is the same as Mr Lloyd’s?

Ms Paul—I do not entirely recall it, I am afraid, Senator. I do recall meeting with him. I do not actually recall the full content, and I am a bit loath to speculate. But at any rate—

Senator ABETZ—If I can try to help refresh your memory, I understand the legislation requires you to write to him, in relation to reapplication, six months prior to his term expiring.

Ms Paul—Yes, sure.

Senator ABETZ—His recollection is that prior to that six-month period kicking in—shortly before that—the two of you had a meeting in which he indicated that which in fact he had said publicly.

Ms Paul—I do not precisely recall what was said at that meeting. Nonetheless, no matter what was said—which I would need to recollect; if I could go back to notes or whatever—we would have sent him a letter, even an informal indication, if that is how it went, which I cannot recall entirely. I think the formalities are very, very important and it is a matter for him. He needed to be afforded the same approach as every other process in the portfolio and, indeed, across government the processes for statutory agencies are now the same.

Senator ABETZ—There is no argument with that at all—that a letter had to be written et cetera. But we were told that at the time the letter was written there was not any indication as to whether Mr Lloyd might take up the invitation and you, Ms Paul, said it would have been inappropriate to guess what his actions might be—

Ms Paul—Yes.

Senator ABETZ—whereas Mr Lloyd, on his evidence, was very clear that he had told you.

Ms Paul—We must have then slightly differing recollections of the tenor of the conversation.

Senator ABETZ—Well, not slightly, but substantially different, because they do not marry up at all, other than that the two of you had a discussion. I must say that it is concerning that this evidence was led, which was so different to that which Mr Lloyd provided, from either recollections and that is the best that one could hope for—that recollections are very hazy. Other than that, there are more serious consequences, but I will not go down that trail.

Senator Chris Evans—Do you have a question, Senator?

Senator ABETZ—If you do not bother interrupting and stay in your documents, we were doing just fine without you.

Senator Chris Evans—It just seemed to be a monologue.

Senator ABETZ—It is a matter of grave concern when senior officials, such as Ms Paul and Mr Lloyd, within a space of 24 hours give contradictory evidence.

Ms Paul—I think it is reasonable for me to have based my evidence on that. As we say, we have not seen it here. I recall the discussion here. I have always led evidence here in the correct and proper way. So the evidence I led would have been entirely my understanding of the situation at the time. So if we had a difference in view that stands as a difference in view.

Senator ABETZ—It was said that there ‘was not any indication’ and it would have been ‘inappropriate to guess’. That was gratuitous evidence stressing that no indication had been given and that it would be inappropriate to guess; whereas, the person whose job was at stake had a very clear recollection that he told you certain things. If your evidence would have been, ‘Sorry, we can’t recollect or we don’t know’, I would have had to accept that. But to assert so strongly that there was ‘not any indication’ and it would be ‘inappropriate’ is a matter that I must say leaves me somewhat cold.

Ms Paul—I stand by my evidence then and I stand by it now. I think if there was a difference in view—

Senator ABETZ—But your recollection now is that you were not sure what was said, but you are now able to confirm that which was said.

Ms Paul—No, I have not said that. I said that I cannot sit in here, which is some time after May, and recollect precisely the nature of that conversation. I stand by the evidence I gave at the time, which would have been based on my understanding. I am confident that it would have been based on an understanding at the time, but it is a long time ago now and I cannot fully recollect the nature of that conversation.

Senator ABETZ—Did anybody in the whole department draw your attention to the conflict in the evidence?

Ms Paul—No, I do not think so.

Senator ABETZ—Can you check up on that? Mr Kovacic, what about yourself? Did anybody draw to your attention the conflict in the evidence that you gave and what Mr Lloyd gave?

Mr Kovacic—Not that I can recall, but I am happy to take it on notice.

Senator ABETZ—If you could check, because I would find it surprising, with all the departmental people you have who would undoubtedly go through this, that nobody picked up the conflict in the evidence and that no clarifying letter or whatever was provided. I must say it is somewhat concerning. I will move on to the minister's letter on 29 September 2010 to the President of Fair Work Australia. Is this or is this not a formal submission to Fair Work Australia? The minister could not tell us, so hopefully the department can.

Senator Chris Evans—What I told you is that we wrote to them and that how they treated it was a decision for them, and that question should be addressed to Justice Giudice, the President of Fair Work Australia. Mr Kovacic may be able to help you with an explanation of the reasoning behind us making it through a letter rather than at the particular hearing.

Senator ABETZ—No, I am not interested in that.

Senator Chris Evans—It will go to the question you asked, which was 'Is this a submission or not?'

Senator ABETZ—The question was, 'Is this a formal submission to Fair Work Australia?'

Senator Chris Evans—If you let Mr Kovacic explain why he wrote the letter, you will get that answer. If you do not want to know, that is fine.

Senator ABETZ—I am not interested in why he wrote the letter and all the detail because that is set out in the correspondence.

Senator Chris Evans—Okay, we will take the question on notice.

Senator ABETZ—Mr Kovacic, can you—

Senator Chris Evans—No, we will take it on notice. You said you did not want the answer.

Senator ABETZ—No, I do not need the waste of time that you are so expert at providing, Minister. There was a very specific question that I am sure the officials can answer.

Senator Chris Evans—If I let him, yes.

Senator ABETZ—You are very arrogant yet again. We have Operation Sunlight operating here again with Senator Evans.

Senator Chris Evans—You have spent the last 10 minutes casting aspersions on the character of the two witnesses at the table. I will not let that go on. If you want an answer to the question, the officer will answer in the way that he sees fit, providing you with the information. If you want to tell us how he has to answer the questions, I will not let you get away with it. So you can either treat people with respect and allow them to answer your question, or I will take them on notice.

Senator ABETZ—Very, very arrogant, Minister. Can I ask you, Mr Kovacic, whether or not this letter of 29 September 2010 was meant to be a formal submission to Fair Work Australia?

CHAIR—I think that question has been taken on notice now.

Senator ABETZ—I am sorry, the official can answer it. To take it on notice would make a mockery of this process.

Senator Chris Evans—I am happy for the official to explain to the committee why we wrote the letter and why it took the form it did.

Senator ABETZ—But that question was not asked. I know you might want me to ask a different question but it is not the question that was asked. The answer is either yes or no. Was this letter intended to be a formal submission? What is the difficulty in getting an answer?

Senator Chris Evans—It is not a formal submission, it is a letter from me to the President.

Senator ABETZ—Thank you. This letter has been taken as a formal submission by Fair Work Australia and the minister never intended it to be a formal submission.

Senator Chris Evans—I did not say that.

Senator ABETZ—What? You just said it was a letter.

Senator Chris Evans—That is right—and then you sought to verbal me by putting a further construction on it. What I said is on the *Hansard*.

Senator ABETZ—Stop playing your silly games! Is this or is this not a formal submission by you to Fair Work Australia?

Senator Chris Evans—It is a letter to the President.

Senator ABETZ—Is it a formal submission?

Senator Chris Evans—It is a letter to the President.

Senator ABETZ—This is just ridiculous and shows an incompetent minister.

CHAIR—We heard in evidence earlier today how the commission has treated the letter.

Senator ABETZ—Yes, and what we are trying to determine is whether that was the intention of it when it was sent.

Senator Chris Evans—You would not let Mr Kovacic explain the processes to you, so we are where we are.

CHAIR—And that was the offer the minister made to you when the questioning was happening with Fair Work Australia.

Senator ABETZ—Chair, you should be ruling in favour of senators and not trying to hide ministers behind their incompetency. A direct question was asked and it should be answered: was this letter intended to be a formal submission? The fact that the minister does not know shows that, with all the time since we had Fair Work Australia before us, he and the department still cannot decide how they actually intended this letter to be treated.

CHAIR—I do not think it shows any of those sorts of things—but anyway.

Senator ABETZ—I do not need your commentary, Chair.

CHAIR—The minister has made the offer for the officers to actually take you through the process of why the letter came about and the process.

Senator ABETZ—Yes, but that is irrelevant.

CHAIR—Well, it goes to the very heart of what you seeking.

Senator ABETZ—No. Is it a formal submission not? I just want to know.

CHAIR—Anyway, you have asked me to rule on it. The question has been taken on notice, so let's move on.

Senator ABETZ—One wonders why it has to be taken on notice. Let's move on. In relation to minimum wage decisions, is there anything in the legislation that would stop Fair Work Australia from publishing a draft decision prior to making its final decision?

Ms Paul—We had a look at this arising from your questions earlier on.

Senator ABETZ—Yes.

Ms Kovacic—Our examination of the act indicates that there is not any legal impediment Fair Work Australia consulting with stakeholders in terms of an intended approach. As to whether that is an appropriate course of action, that is another matter.

Senator ABETZ—Completely. I agree with that. I discussed it with Mr Giudice as well. I thought that was the case, so thank you very much for that. There was an article in the *Australian Financial Review* on 14 October by Peter Wilson, National President of the Australian Human Resources Institute. Are you aware of that article—'Big problems in Fair Work Act'? 'The new works laws add severe complications to shifting employees between subsidiaries'.

Mr Kovacic—That is the article that refers to transfer of business provisions?

Senator ABETZ—That is basically it, yes.

Mr Kovacic—I am aware of the article.

Senator ABETZ—Minister, has that article been drawn to your attention at all?

Senator Chris Evans—I seem to remember reading it somewhere.

Senator ABETZ—Could you take on notice whether the government is prepared to look at that is and see if they have any plans to deal with the issues raised in that article?

Senator Chris Evans—Could you be a bit more specific? As I recall, there were a number of issues in the article. What was this in relation to?

Senator ABETZ—It was in relation to the severe complications to shifting employees between subsidiaries is the issue of the article. I wonder whether or not the government has exercised its mind in relation to those expressed concerns and what its reaction is.

Senator Chris Evans—Would you like me to get Mr Kovacic to give you a response from the department about that?

Senator ABETZ—I thought that this would be a policy consideration and, therefore, one best left to you.

Senator Chris Evans—Absolutely.

Senator ABETZ—Given that—and this is no criticism—I would not expect you to be fully across this issue as yet, could you take it on notice?

Senator Chris Evans—I am happy to take it on notice. If you wanted some response from the department about whether they had had a lot of complaints in this area or how they are handling it, we could do that; but, if not, we will take it on notice.

Senator ABETZ—We in the coalition identified in the committee report on the Fair Work Bill some of these things that are now being considered, but I fully accept that this is a policy issue for the government to consider. Ms Paul, have you seen a copy of the letter that Australian Industry Group wrote to the minister in recent times with an attachment of about four or five pages of policy concerns or workplace relations issues?

Ms Paul—I do not believe I have.

Senator ABETZ—What about you, Mr Kovacic?

Mr Kovacic—I saw it only yesterday.

Senator ABETZ—Could you possibly take it on notice?

Ms Paul—I think we will need to, because I have not seen it at all yet.

Senator ABETZ—Please include any response you might have for the concerns expressed there—are those concerns valid or not?

Ms Paul—We are happy to do so.

Senator ABETZ—Thank you. Minister, we have been told many a time that the Fair Work Act is working as expected et cetera. I wonder if you are aware of the sex offender who won an unfair dismissal case. It was reported on Wednesday, 7 July 2010 in the news.

Senator Chris Evans—I am not.

Senator ABETZ—It said:

A VICTORIAN man convicted of possessing child pornography and allegedly sexually harassing his co-workers has won an unfair dismissal case against food giant Nestle.

I wonder if the government thinks that this is exactly how they expected the Fair Work Act to operate.

Senator Chris Evans—Clearly I have not seen the article and do not know anything about the case, so I would not comment.

Senator ABETZ—Could you take that on notice?

Ms Paul—I think we will need to take it on notice.

Senator ABETZ—If that was all part of the great expectations for how the Fair Work Act would operate—

Senator Chris Evans—As you know, trying to make judgments about cases from newspaper reports is never smart, but we will have a look at the case.

Senator ABETZ—Some of us have actually read the decision—unlike you.

Senator Chris Evans—No, I have not had the advantage of that; that is right. You would not expect me to comment on that.

Senator ABETZ—That is why I allowed you to take it on notice.

Senator Chris Evans—Thank you for allowing me to take it on notice; it is very generous of you! As I said to you, I do not know about the case, I have not read the decision and I would not comment, but we will take it on notice.

Senator ABETZ—Is there an echo in here? I want to ask about new enterprise agreements lodged under Labor's Fair Work system. We were told, courtesy of the parliamentary secretary, that two-thirds of them include flexibility provisions that vary minimum conditions. Are you able to make any comment on that as to the full breakdown of that and the raw data from which it was obtained? I understand Fair Work Australia provides to the department every agreement, and it is from that that this analysis was undertaken, which Senator Collins then provided to the public. Of course, when it is done via a ministerial office, I suppose one wonders how sanitised the material might be, whether it tells us the absolute full picture. Minister, can the full analysis, undoctored by the department, be made available to the committee?

Senator Chris Evans—Senator, first of all I am not going to respond to questions where you try to make accusations against people in phrasing that question. The suggestion that the department has doctored information is unfair, not based on any evidence and deliberately provocative.

Senator ABETZ—No, I did not say that. I did not say that at all.

Senator Chris Evans—If you want to ask a reasonable question about the material, we will attempt to help you. If you are going to continue insulting officers and insulting the department, I will not put up with it. Now if you have a question about whether we have the statistics, whether they can be made available to you, I am happy for the officers to answer that question.

Senator ABETZ—That is exactly what I asked: undoctored and unsensitised by a ministerial or parliamentary secretary's office. Right? It was no slight on the officers—

Senator Chris Evans—Well if it is taken on notice, it will be approved, as you know, by the minister before it is given to you because that is the way it happened under your government and that is the way it happens under our government. If the officers at the table can help you, they will. If you want to ask how we got the statistics, we will give them to you.

Senator ABETZ—We know how you got the statistics. What I want to know is whether that which was put into the public domain by Senator Collins represented the totality of the statistics that the department put together from that information provided by Fair Work Australia.

Senator Chris Evans—I will take that on notice. I suspect it is not because it is rare that you give all the statistics in a speech.

Senator ABETZ—Right, and therefore my suspicion that not all the statistics were contained in it might be right, and therefore one might suspect—

Senator Chris Evans—Did you ever give a speech where you gave all the statistics?

Senator ABETZ—that the best statistics—

CHAIR—He probably did.

Senator Chris Evans—It would be a very dull speech.

Senator ABETZ—were picked rather than the worst. And therefore I think you have just made out my case very well.

Senator Chris Evans—This childish, student politician, barrack-room lawyer style of yours may make you feel better. If you want information from the department, though, we will attempt—

Senator ABETZ—I do not know what you had for dinner, but it was not good. It is not agreeing with you.

Senator Chris Evans—You just carry on the way you are and you will not get very far.

Senator ABETZ—Thank you.

Senator Chris Evans—If you want to ask factual questions without insulting officers, we are here to help.

Senator ABETZ—Where on earth was an insult to the officers in the last question?

Senator Chris Evans—You refer to ‘doctored information’.

Senator ABETZ—From the parliamentary secretary’s office.

Senator Chris Evans—You said ‘without being doctored by the department or the parliamentary secretary’. Anyway, the *Hansard* will reflect what you said.

Senator ABETZ—If I said the department—I do not think I did—I withdraw that absolutely. It was my concern that it had been put out in the public domain by the parliamentary secretary, and you, Minister, agreed that chances are it would not have been the totality of the statistics provided to Senator Collins, which was exactly my point and so I was asking whether the department could make available the totality of the statistics.

Senator Chris Evans—Senator, again, I will not have you verballing me. What I said was I doubted that it would be the totality of the statistics that the department held because in framing a speech one did not give that many statistics. I do not know, but I suspected that it would not be the totality of them. We will check for you whether or not it was the totality of the statistics, but I gather you do not want the stats, you just want to know whether it is the totality.

Senator ABETZ—Oh really? This is amateurish, Minister, it really is. I have asked for the totality of the statistics undoctored by the parliamentary secretary's office, which she has put into the public domain.

Senator Chris Evans—I reject that they were doctored by the parliamentary secretary.

Senator ABETZ—But you accept that it does not represent the totality of the statistics?

Senator Chris Evans—No, I said it may not.

Senator ABETZ—Really. Lift your game.

Senator Chris Evans—Senator, you can be as rude as you like, but it does not get you anywhere.

Senator BILYK—Condescending.

Senator ABETZ—Have you finished?

Senator Chris Evans—No, I am just making it clear to you: the ruder you get, the longer it will take because I am not going to wear it. If you want to be polite, you want to ask serious questions? You will be treated with respect.

Senator ABETZ—You are being as obnoxious as you possibly can be.

Senator Chris Evans—If you do not act—

Senator ABETZ—The officials sitting behind you are not impressed by your behaviour.

Senator Chris Evans—civilly, you will not be treated with respect.

Senator ABETZ—You are not impressing anybody by this.

CHAIR—Senator Abetz, have you got some questions to ask?

Senator ABETZ—Absolutely. When the minister has finished his homily, we will get back into it.

CHAIR—Well, let us start.

Senator ABETZ—What role will the Fair Work Ombudsman have in enforcing the paid parental leave obligations when they take effect? Rather than answering that question, I will withdraw it. But what extra resources will that take? I understand some money was set aside in the last budget for the Fair Work Ombudsman to undertake that. Is it your view that that is still a sufficient amount?

Mr Kovacic—In terms of the additional resource allocation for the Fair Work Ombudsman, that is a question better directed to the ombudsman in terms of the specifics. We can try to get the figures, but in terms of the adequacy or otherwise, it is really one that the ombudsman needs to really address.

Senator ABETZ—All right. Did the department give consideration to who is going to be paying the paid parental leave? It will not be this department, will it?

Ms Paul—That is right. It is administered by Minister Macklin's portfolio.

Senator ABETZ—But there will be amendments to be the Fair Work Act in relation to this.

Ms Paul—That is correct. Our role is on the legislation.

Senator ABETZ—One of the considerations that has been put to me is that this paid parental leave will be paid to the employer to then be paid to the employee. And of course if that money is paid and the employer goes into liquidation, it may be that that paid parental leave will not find its way to the employee for some considerable period of time.

Mr Kovacic—That is one of the areas where the Fair Work Ombudsman will have a compliance role—that is, in ensuring that the transfer of money, if I can put it that way.

Senator ABETZ—Look, you are right, but of course if they go bust the Fair Work Ombudsman—

Mr Kovacic—If they go bust, as you put it, then there are questions as to whether the employees will be eligible for assistance under currently GEERS, or, in the future, the fair entitlements guarantee.

Senator ABETZ—Is it true that the Fair Work Act only allows unpaid work placements if they are a mandatory part of a course or if a student is acting in a genuinely voluntary capacity for a non-profit organisation?

Mr Bohn—Work experience placements that are part of a formal course are expressly excluded from the definition of 'employee' under the act. There is some capacity at common law for there to be work experience where it is voluntary work and so forth. But it is relatively limited. It is the same under this act as it has been for a number of years.

Senator ABETZ—The suggestion has been made that where a student undertakes a period of unpaid work experience that is not a requirement of a course of study, the placement is legal if, in the opinion of the student's educational institution, the experience provides an opportunity for career development. I understand a local ABC somewhere refuses now to take work experience students, and this is now becoming a bit more widespread. Is the department aware of those problems?

Mr Kovacic—Certainly not aware of any concerns.

Senator ABETZ—It might be appropriate for me to forward some of those to you. Can I ask whether the agreement in relation to occupational health and safety and national uniform laws is a binding agreement between the Commonwealth and the states?

Mr Kovacic—In the sense that certainly it is an expression of the commitment of the Council of Australian Governments and the various jurisdictions that are party to it to progress the harmonisation of occupational health and safety. It is certainly a binding commitment in that context, yes.

Senator ABETZ—If it is a binding commitment, what power does the Commonwealth have to enforce it?

Mr Kovacic—I think the question is in terms of, it is really in the sense of, the spirit of the agreement itself. If I can perhaps jump ahead, certainly the terminology that the Prime Minister has used in response to recent developments in this area is that ‘a deal is a deal’, and certainly COAG arrangements need to proceed on the basis that all of the jurisdictions honour their commitments.

Senator ABETZ—The Prime Minister is not necessarily in a strong position to say a deal is a deal. The question was: is this a legally binding and enforceable agreement?

Mr Kovacic—I think, Senator, that time you have added—and I do not want to be picky—the word ‘legally’.

Senator ABETZ—Sorry, I said a binding agreement and I meant a legally binding agreement.

Mr Kovacic—In terms of ‘legally binding’, I would want to take some advice on that.

Senator ABETZ—All right.

Senator Chris Evans—I would just point out in terms of that, Senator Abetz, I do not offer a view on the legalities but it is the case, of course, that each of the states is required to get passage of legislation through their state parliament, so in that sense it is subject to the approval of each of the state parliaments for that legislation.

Senator ABETZ—Who signed on the behalf of New South Wales—do you know?

Mr Kovacic—I would imagine it would have been the Premier, given that it is a COAG agreement.

Senator ABETZ—They have had that many, can you remind us of who the Premier was at the time of the agreement?

Mr Kovacic—I would imagine it would have been Premier Rees, but I am—

Senator ABETZ—Gee, that’s a brave guess!

Ms Paul—We may have to take it on notice. The agreement was made on 3 July 2008.

Senator Chris Evans—One of the officers may be able to help.

Mr Kovacic—The printed version—it is not a signed version—has the Hon. Morris Iemma.

Senator ABETZ—There you go—he was still Premier. Then Mr Rees was after him and then Ms Keneally.

Mr Kovacic—I think that is correct.

Senator ABETZ—Has there been upset in the department about the welching on this deal by Premier Keneally?

Ms Paul—I would not say it is upset, but it certainly goes against the deal that was struck. The deal was struck in a way twice, in that there is the intergovernmental agreement, which we have just been talking about, which was made on 3 July 2008 and then that was followed by the Workplace Relations Ministers Council, which signed up to more of the detail of the approach in a consensual way. It is certainly a change.

Senator ABETZ—Ms Gillard told us that when this deal had been struck there were literally tears in the eyes of the officials that had been working on this.

Ms Paul—She did.

Senator ABETZ—If this were true, one would imagine there would also be tears in the eyes of the officials that have had all their hard work, over 25 years now, potentially thrown out the door.

Senator Chris Evans—I think they would share our confidence that the deal will go ahead.

Senator ABETZ—Barry O’Farrell is going to win in March.

Senator Chris Evans—That the deal will go ahead and that we will deliver uniform national occupational health and safety legislation.

Senator ABETZ—Good. So there weren’t any tears in officials’ eyes?

Senator Chris Evans—No, I think they share the government’s confidence.

Senator ABETZ—That is nice to know.

Ms Paul—Indeed, work has simply proceeded, of course, which it is on schedule to do.

Senator ABETZ—Can I ask, before passing over to Senator Fisher—if that is allowed by you, Chair—how much funding has been provided by the department for occupational health, safety and workers compensation project officers. I understand you are funding positions for the ACTU, AiG and ACCI.

Mr Kovacic—That is correct. By way of background, can I indicate that these are a continuation of arrangements that operated through the predecessor body to Fair Work Australia, the Australian Safety and Compensation Council and certainly preceded, I think, 2007 in terms of the funding.

Senator ABETZ—All I want to know is the figure.

Mr Kovacic—It is \$375,000 for ACCI, \$375,000 for the AiG and \$750,000 for the ACTU.

Senator ABETZ—Thank you.

Senator FISHER—I want to return to the minister’s letter of 29 September to the President of Fair Work Australia. Minister, when did you become aware of the issue that gave rise to your writing the letter?

Senator Chris Evans—I was briefed in the days leading up to that and my office was briefed—so in the period between my appointment and 29 September.

Senator FISHER—Congratulations on both—

Senator Chris Evans—Thank you.

Senator FISHER—perhaps. Were you briefed by the department?

Senator Chris Evans—Yes.

Senator FISHER—Did the department brief the previous minister on this issue?

Mr Kovacic—I would have to take that notice.

Senator FISHER—You cannot recall?

Mr Kovacic—No.

Senator FISHER—It is a pretty significant issue, but you cannot recall.

Mr Kovacic—As you would be aware from previous estimates hearings, there were a range of matters relating to award modernisation that we have briefed ministers on. I cannot recall the specifics of all of them.

Senator FISHER—Ms Shelley?

Ms Shelley—On this specific issue I understand we did not brief the previous minister.

Senator FISHER—Thank you for that answer; that is very clear. Minister, as Senator Abetz has pointed out, your letter says that the Commonwealth has not made a formal submission to Fair Work Australia on this matter to date—that is, to the date of the letter. Will the government be making a formal submission to Fair Work Australia on this issue? If not, why not?

Senator Chris Evans—As I indicated earlier, I am happy for Mr Kovacic to take you through the processes here, just because I think that will help us get to where you want to be.

Senator FISHER—Can I have an answer to that question first, please?

Senator Chris Evans—I think we need to know where the hearing is at et cetera. If you let Mr Kovacic give you a one-minute answer, I think we will make good progress.

Senator FISHER—One minute, right—this will be a record!

Senator Chris Evans—He is very succinct.

Senator FISHER—Come on, Chair, you do this to me. The minister has now done it to the key witness!

CHAIR—When you say you have one question I will hold you to that!

Senator FISHER—I have not said that this time.

Mr Kovacic—In terms of where the process is up to, Fair Work Australia actually had a public hearing on the matter on 21 September to discuss the submissions from interested parties. Those hearings, as I think the president indicated earlier this afternoon, have been adjourned. At this stage no instruments have been formally terminated. Certainly the president's response—or the full bench's response, if I can put it that way—to the issues raised in the minister's letter to the president, in short, urged Fair Work Australia to take a staged approach to this particular issue and urged caution, reflecting a concern that interested parties may not be aware of the process and that a staged approach would provide them with the opportunity to, if necessary, make submissions to Fair Work Australia. So really at this stage no instruments have been terminated by Fair Work Australia. Fair Work Australia has had one day of hearing and adjourned the proceedings and, really, the future course of the proceedings at this stage is unclear, given that Fair Work Australia has adjourned the proceedings.

Senator FISHER—So you do not know whether or not the government will be making a submission to Fair Work Australia on this issue?

Mr Kovacic—Ultimately that is a matter for government but at this stage I would not want to speculate one way or the other.

Senator Chris Evans—We have not taken a decision to do so in addition to the letter but it remains open to us. It will depend, in part, on how the commission proceeds.

Senator FISHER—Indeed. Nonetheless, the issue was of sufficient import for you to write a letter. So in terms of the issues, Minister, why did you write the letter?

Senator CHRIS EVANS—I was briefed by the department that concerns had been raised by stakeholders and that they shared those concerns and that it would be useful for me to bring that to the attention of the president and the full bench. So I agreed to write raising those concerns. As you see from the letter, it basically asked them rather than to take the exception based approach which they had indicated, to take a more staged approach just to make sure nothing slipped between the cracks.

Senator FISHER—Can you provide more detail as to your understanding of those concerns of stakeholders that led you to write this letter.

Senator Chris Evans—I think I will probably defer to Mr Kovacic to take it further.

Senator FISHER—I would prefer to hear it in your words, Minister. I know you will have an understanding, because you wrote the letter.

Senator Chris Evans—As you would be well aware, the department provides drafts to the minister—

Senator FISHER—And you signed, I think, Minister.

Senator Chris Evans—That is right. I stand by the letter but I would not want to mislead you that I drafted the letter.

Senator FISHER—You could have a go at answering and Mr Kovacic could add or supplement.

Senator CHRIS EVANS—As is proper, the department provided me with advice quite soon after my coming to the portfolio that they had had concerns raised with them about the potential that gaps might be created if Fair Work Australia went about their business on the basis of this exception based approach.

Senator FISHER—Gaps that might disadvantage employees?

Senator Chris Evans—I think I made it clear in the letter that there would be concern if they were cancelling instruments without, if you like, everyone having the opportunity to check. I understand that they had set a bit of a deadline for the exception based approach—or it had been mooted—and there was concern that that might be too quick, just to make sure that nothing had fallen between the cracks. It was about a pragmatic response to make sure that we did not—

Senator FISHER—No gaps, no cracks because otherwise employees would be disadvantaged—that was your concern.

Senator Chris Evans—There was a risk, yes.

Senator FISHER—Mr Kovacic, can you explain the scenarios in which, at the moment if Fair Work Australia proceeds as planned rather than as requested by the minister, there could be gaps and cracks that would result in employees being disadvantaged?

Mr Kovacic—You are asking me, in essence, to speculate.

Senator FISHER—The minister has said that he has written to Fair Work Australia to prevent—to quell—that very risk. So what are the issues that give rise to that risk of employees being disadvantaged?

Ms Paul—If I could start the ball rolling, the crux of the matter is that the worry that we had was that not all payees affected by determination of some modernisable instruments might be aware of the process. We had a process concern. So to try to address that potential issue of not all affected parties being aware, this seemed like a pragmatic sort of approach. It was not actually the case that we were imagining particular scenarios. The case was that we could see a process issue. So the nature of the letter is a process suggestion to Fair Work Australia—if I can make that distinction—rather than a content matter, which, for example, might have been the subject of a more fulsome formal submission or whatever. This seemed to be a process issue which could be easily handled and was useful to raise.

Senator FISHER—Are you suggesting that the reason behind the minister's letter is simply that employees might be disadvantaged because people are not aware of their obligations and rights. I read a bit more into it than that, and I will ask you about that. Is that what you are suggesting in making the distinction between process and content?

Mr Kovacic—I would perhaps express it this way. There may be individuals who are presently covered by modernisable instruments and remain covered by modernisable instruments, who may not be aware of the process that Fair Work Australia has adopted in terms of seeking submissions around its approach in this area. Were that instrument to be terminated—I stress that at this stage Fair Work Australia has not terminated any instruments—

Senator FISHER—No, we heard that earlier.

Mr Kovacic—I think, as you mentioned, the president indicated that earlier this afternoon. There is a potential, as the minister put it, for people to slip between the cracks.

Senator FISHER—Probably a small number of employees losing minimum entitlements, this letter says.

Mr Kovacic—Against that background the minister decided to write to Fair Work Australia, as I have indicated before, suggesting that it take a more staged approach to this particular area so that any interested party could be made aware of the process and could have the opportunity of exploring those opportunities and making any submissions that it may consider necessary.

The other point I would make is that in terms of the process, Fair Work Australia received something in the order of 40 submissions from interested parties. Those submissions relate to, I think, in the order of 119 modernisable instruments.

Senator FISHER—Modernisable?

Mr Kovacic—Instruments.

Senator FISHER—Instruments from which there must be a transition, effectively, under the new system.

Mr Kovacic—They are instruments that—

Senator FISHER—They have to be moved away from, over time.

Mr Kovacic—Exactly.

Senator FISHER—Let's talk about the who and the what. What sort of workers? What sorts of industries? What sorts of instruments?

Ms Paul—I think we are making the point that it was not us speculating on particular hypothetical scenarios; it was more us—

Senator FISHER—You must have had one or two, to advise the minister that there was a potential issue.

Ms Paul—We felt there was an issue in the timing, which is what is expressed here. We felt there was an issue in the quite stringent timetable that existed and currently exists. It was not so much thinking of particular scenarios. It was thinking, 'This is the timeframe and yet there is a lot of work to be done here.' It did not appear to us that there would necessarily be sufficient time. Therefore, as Mr Kovacic said, a staged approach seemed to us to be the more sensible course of action.

Senator FISHER—Has the timetable changed since the act was passed by parliament?

Mr Kovacic—In terms of the timetable requirements of the act, certainly not, but in terms of the process adopted by Fair Work Australia, there was an initial statement by the president on 23 April. That initial statement invited submissions by 30 June. There was a subsequent statement by the president on 27 August, which in essence reflected the 'exceptions approach', as the minister described it a moment ago.

Senator FISHER—Okay; thank you.

Mr Kovacic—It is against that background that the advice was provided suggesting that the minister write to Fair Work Australia.

Senator FISHER—As I said before, the minister's letter talks about probably a small number of employees losing minimum entitlements. How small is small?

Mr Kovacic—We cannot be precise in terms of the potential number of employees in this sort of—

Senator FISHER—What sort of entitlements?

Mr Kovacic—We could not really even speculate, to be honest.

Senator FISHER—What are examples of minimum entitlements?

Mr Kovacic—Again, in terms of the details I am not sure that I can speculate. We could take it on notice to see whether we could provide some further details.

Senator FISHER—Thank you. The minister's third last paragraph refers to a special national minimum wage for juniors or employees to whom training arrangements apply, and says that this may leave these 'already vulnerable employees' without adequate wage protection. Can you give us examples of these already vulnerable employees and what the

minister means when he says that they could be left without adequate wage protection under the Fair Work Act.

Mr Kovacic—If I could take a step back, one of the obligations that is placed on Fair Work Australia under the Fair Work Act is a requirement, by 1 July 2011, to settle or determine a national minimum wage for junior employees and those on trainee arrangements that are award- or agreement-free. That is something that we anticipate that Fair Work Australia will consider as part of its 2010-11 annual wage review. Indeed, there is a conference before Fair Work Australia on Friday of this week to canvass some of the issues around that particular matter.

Senator FISHER—So there is a group of junior employees who are award- or agreement-free.

Mr Kovacic—Yes.

Senator FISHER—So, if their existing coverage is terminated their modernisable instrument is terminated and they will be left, in the minister's words, 'without adequate wage protection'.

Mr Kovacic—Were they to be currently covered by a modernisable instrument and that instrument were to be terminated, that is a potential outcome.

Senator FISHER—That is one group of employees. What sorts of industries do those junior workers work in?

Mr Kovacic—I really could not give you a sense of that because one of the difficulties in terms of identifying groups of employees, particularly junior employees that are award- or agreement-free, is that it is an extremely difficult case.

Senator FISHER—You do not know what you do not know.

Ms Paul—That is right.

Mr Kovacic—That is exactly right.

Senator Chris Evans—Be careful how you say that, though, or you might wear it for a long time!

Senator FISHER—So be it.

Mr Kovacic—All I can say is that our sense—and I am not sure that it is based on anything other than a sense that modern awards would certainly cover the overwhelming majority—is that it is a very small component. But in terms of the numbers or the areas where they may be working, we really could not give you any indication.

Senator FISHER—In the scenario that the minister expands upon in the next paragraph of his letter he talks about cases where employees rely on pay scales which have not been translated into the modern award. He goes on to say that in this circumstance the termination of the pay scale—the modernisable instrument—would mean that employees would only be subject to the protections of the national minimum wage. He went on, 'There is the potential that this could inadvertently lead to a reduction in wages.' What sorts of workers is the minister referring to and what does the minister mean when he says that this could lead to their wages being reduced?

Mr Kovacic—Again, I could not give you an indication on that because, really, it is very difficult to get any handle on those sorts of areas. It is arguably mapping hundreds or potentially thousands of pay scales into modern awards. That is an extremely difficult task, which is why the minister decided to write to the president urging a staged approach in this area to maximise the opportunity for interested parties to raise issues around determination of modernisable instruments.

Senator FISHER—Because if nothing happens to change the course of the Fair Work Act then workers could be disadvantaged.

Mr Kovacic—Potentially.

Senator FISHER—So is that the Fair Work Act operating as intended?

Senator Chris Evans—What it is, is that in a particular part of the transition process the commission was intending to adopt a particular approach and we thought it wise to urge them to show a little more caution, to take a staged approach to ensure that the Fair Work Act did act as intended. Our advice or suggestion to the commission was that we needed to not move perhaps quite as quickly with the exception based approach, to ensure that we did not have a situation where the Fair Work Act was not—

Senator FISHER—A situation where it did not operate as intended. So is this a PS to Fair Work Australia: act with a bit more caution so that the act can unfold as intended?

Senator Chris Evans—No, this is part of the implementation process. As you would no doubt support, we want to make sure it is right. We want to make sure that there are no unintended consequences. We want to make sure that parties have a chance to make sure that they have dealt with those issues. This is a process question about us suggesting a slightly different process to make sure that there were not unintended consequences.

Senator FISHER—You will be wanting to keep your promise that no workers will be worse off in the transition to modern awards, won't you?

Senator CHRIS EVANS—I would absolutely want to make sure that workers are not worse off. I am sure you would agree with me.

Senator FISHER—Hear, hear.

Ms Paul—This is in the context, of course, that as of now no awards have been terminated.

Senator FISHER—Yes, at this stage.

Ms Paul—That is right.

Senator FISHER—I hear that from my colleague—

Ms Paul—So the question of whether the act is working or not is not actually relevant, because no award has been terminated.

Senator FISHER—Are you going to make sure that it does work?

Ms Paul—The question does not really play out because no award has been terminated. So it is not a question you can answer one way or the other.

Senator FISHER—Yet you have seen fit to write a letter. It has been posted on the commission's website.

Ms Paul—Of course, because we thought there could be improvements.

Senator Chris Evans—So, it is open, it is accountable and it is well placed. I think you would have been critical of me if I had not taken steps to ensure—

Senator FISHER—If workers ended up being disadvantaged as a result of the transition to modern awards indeed we would have been upset because you promised that they would not be.

Senator CHRIS EVANS—I am sure it was not motivated by political point scoring!

Senator FISHER—No.

Senator CHRIS EVANS—It was a genuine concern for workers! So you will be pleased that we have taken this action!

Senator FISHER—So, to that end let's get a bit more sense from Mr Kovacic. The sorts of workers that you are protecting, in urging Fair Work Australia to take heed and change—

Senator Chris Evans—I think his evidence to you is that it is about a process. It is not about a particular set of workers being brought to our attention. It is about our response to concerns about a process that is to occur in the future.

Senator FISHER—Mr Kovacic, what of workers who are covered by enterprise awards?

Mr Kovacic—Enterprise awards are subject to a separate modernisation process under the Fair Work Act. The time frame for the modernisation of those instruments is that applications can be made to Fair Work Australia up to the end of December 2013, and a person covered by an enterprise instrument may apply to Fair Work Australia if they wish to—

Senator FISHER—So, are workers covered by enterprise awards not part of the group covered by the modernisable instruments—

Mr Kovacic—That is correct.

Senator FISHER—that are the subject of minister's letter?

Mr Kovacic—They are the subject of a separate modernisation process for enterprise awards.

Senator FISHER—So they are not covered by the concerns expressed here?

Mr Kovacic—No.

Senator FISHER—Are there concerns that workers covered by enterprise awards could be left with lower wages in modern awards after transition, or lowered conditions?

Mr Kovacic—In terms of the process of modernisation of enterprise awards the threshold question is whether they should continue or whether, alternatively, the employees are more appropriately covered by the modern award. In circumstances where the decision is made that the enterprise award continues, it is really about ensuring that the enterprise award can continue to operate effectively and interact with the national employment standards, in particular—the new provisions of the act, the new framework—because most enterprise awards predate the Fair Work Act.

Senator FISHER—Many enterprise awards contain enterprise-specific and locked-in pay increases. So are there workers covered by enterprise awards that could move to a modernised instrument that has lower wages or lesser conditions?

Mr Kovacic—I am not aware of any concerns to that effect but I am happy to take that question on notice

Senator FISHER—This is the second bit of the same question. What about workers covered by enterprise awards, who might otherwise be award-free, so therefore not end up being covered at all by a modernised award?

Mr Kovacic—In terms of the premise of the question, if you are covered by an enterprise award you are covered by an instrument, so it does not work.

Senator FISHER—Yes, but you are not covered by an award in the traditional sense, which might be the underpinning of a modernised award.

Mr Kovacic—I think you are confusing enterprise agreements and enterprise awards. An enterprise award is, for all intents and purposes, the equivalent of an award; it just has an enterprise-specific focus.

Senator FISHER—So you think not?

Mr Kovacic—That is correct.

Senator FISHER—All right. Does moving to modernised awards in terms of the leave-loading type conditions prescribe that workers will get the higher level of their normal pay, which might include penalties and loadings, or the 17½ per cent holiday bonus? What are the typical provisions in terms of leave loading in modernised awards?

Mr Kovacic—I really have to take that on notice because I do not know that I could generalise. There are 122 modern awards, and I could not give you a sensible answer—

Senator FISHER—Yes, there are. Does the Fair Work Act allow the federal government to legislate lower entitlements than those that may have been negotiated through a collective agreement—however characterised—under the Fair Work Act?

Mr Kovacic—I do not think it does, but I am just trying to think through the question: so, legislate to reduce pay and conditions—

Senator FISHER—That may have been agreed through a collective agreement.

Mr Kovacic—Certainly, I think that would be contrary to the spirit and intent of the Fair Work Act.

Senator FISHER—Indeed, and contrary to one of the six workplace relations principles which underpins the referral of powers at the very least.

Mr Kovacic—That is correct.

Senator FISHER—And a breach, for example, that there be a strong and enforceable safety net of minimum conditions. A breach of that can allow a state which has currently referred its powers to unrefer—right?

Mr Kovacic—That is correct.

Senator FISHER—Under the referral act. You do not think that the Fair Work Act allows the federal government to legislate to provide less for workers than they may have agreed in a collective agreement?

Mr Kovacic—I think that would certainly be contrary to the spirit and intent of the Fair Work Act.

Senator FISHER—So does that mean that Premier Mike Rann, in partnership with Treasurer Foley, in proposing to legislate, for example, for lesser leave loading entitlements than those that were allegedly negotiated for and with South Australian public servants through a collective agreement-making process is contrary to the spirit of the Fair Work Act?

Mr Kovacic—Those employees, to the best of my knowledge, are employed under South Australian legislation—

Senator FISHER—So not contrary to the letter of the Fair Work Act—they are not covered by it because Premier Rann never referred them to Prime Minister Gillard and Minister Evans in the first place—

Mr Kovacic—None of the jurisdictions actually referred coverage of their public sector workers or local government workers. Nor, indeed did the policy that the government took to the 2007 election envisage that those workers would be captured by the federal system.

Senator FISHER—Okay. So not contrary to the letter of the act, nor to the referral of powers, but contrary to the spirit, as you have just said.

Mr Kovacic—The act does not apply—

Ms Paul—They are not covered, so the act just does not apply.

Mr Kovacic—It does not apply.

Ms Paul—It is not a question that we can really answer.

Senator FISHER—But it is not within the spirit of the Fair Work Act, as you have said, for a government to legislate away negotiated entitlements; so how can it be consistent with that spirit for Premier Rann to do so?

Mr Kovacic—Senator, the question you asked me was whether a federal government, in respect of employees employed under the Fair Work Act, could actually legislate to reduce terms and conditions under the federal piece of legislation that had been negotiated in an enterprise agreement—

Senator FISHER—And you said that was in contrary to the spirit of the act.

Mr Kovacic—The question that you are asking me is in respect of an action by the South Australian state government relating to its own employees employed under South Australian legislation, the provisions of which I know very little about and which I am not in a position to comment on.

Senator FISHER—In respect of the private sector, of course, Premier Rann has happily referred them, kit and caboodle, to Prime Minister Gillard based on those very fair work principles, contrary to the spirit of which you have said it would be for a federal government to legislate down their entitlements.

Senator Chris Evans—Senator, I think it is reasonable for you to ask Mr Kovacic questions within his jurisdiction. I am not sure he should be responding to political points that you are making. I think he has helped you as much as he can.

Senator FISHER—Thank you, Mr Kovacic.

Senator ABETZ—I take you to question on notice 0221 from the last estimates. I was kindly provided with the list of the 148 expressions of interest for Fair Work Australia. Before turning to that, how were applications or expressions of interest responded to?

Mr Kovacic—I will have to take that on notice given the effluxion of time since the process occurred.

Senator ABETZ—I assume an acknowledgement would have been sent out.

Mr Kovacic—I would assume so.

Senator ABETZ—Were those that were unsuccessful notified?

Mr Kovacic—I will take that on notice; I cannot recall precisely.

Senator ABETZ—I have been told by some that they found out they had been unsuccessful at the time of the public announcement of the six.

Ms Paul—We will look into that.

Senator ABETZ—Thank you. Were they at any stage advised as to when the announcement of the six commissioners would be made? Take that on notice too. Out of this 148 clearly the biggest cohort of applicants came from the employer industry associations. There are 24 with a union background, 45 persons with an employer industry association, 24 legal, 30 with a government background, 25 in an ‘other’ category. Then, for the category of employers, you very kindly gave all the reasons they were not good enough. But you did not bother to do that for the union applicants—whether there were any that were of a poor quality.

Ms Paul—We can do so.

Senator ABETZ—But why did you gratuitously do it just for the employer applicants when it was not asked for, and did not do it for the union applicants for Fair Work Australia.

Ms Paul—That was the tenor of your questioning, and it followed—

Senator ABETZ—Can you read the question and tell me where about in the tenor of that—

CHAIR—It was in the whole discussion that you had.

Ms Paul—I am not referring to this particular question; I am referring to the run of discussion we had at two, and perhaps three, successive estimates. That was certainly the tenor of the discussion and we thought it would be helpful to spell it out. If you would like us to spell it out for the union applicants too, that is fine. We are happy to do that.

Senator ABETZ—Could you provide us with a breakdown of that list in relation to the categorisation that you provided in relation to the shortlist. That is all that was asked for; but then we had this gratuitous commentary that out of all these 45 employer applicants seven were of poor quality, 14 had limited workplace relations; 13 were assessed as working in human resources and it was only one component of their overall responsibilities. I would have

thought trade union officials, university lecturers, et cetera would have had that problem as well—that they did not only eat and breathe, necessarily, workplace relations, that a trade union official, for example, might be involved in Labor Party meetings, going to community organisations and doing other work. I find that criticism somewhat bizarre, but I would be interested to see whether you categorised any trade union official in that category.

Then can I ask you—because you are right; you did make comments about employer applicants in terms of the depth of quality of applications from people with an employer background being lacking. I will take you through this:

I have more than 20 years experience in industrial relations and human resources. I have postgraduate qualifications in workplace relations. I have appeared for at least 18 years before federal and state industrial relations commissions. My experience as an industrial advocate has covered all aspects of the jurisdiction from appeals to the full bench, industrial disputes to unfair dismissal applications and everything in between. Currently I am representing a number of businesses in the award modernisation process. I have prepared their submissions and I am appearing on their behalf during the consultation proceedings. I usually represent and advise employers, although I have, on a fairly regular basis, represented and advised employees on a pro bono basis. I consider I have demonstrated the requisite knowledge and experience, particularly the ability to make sound decisions under pressure in conflict situations as well as the academic qualifications to be appointed as a commissioner.

Can you tell us in which category of employer you would have put this person?

Ms Paul—We cannot tell, because we do not know who it is. We would have to know—

Senator ABETZ—This person is a Mr Nelson. I will not give him a Christian name for the purposes of this, but it will be very easy for you to find—and he is happy for his name to be used tonight. With that sort of wealth of experience and having spoken to a few others who are similarly concerned, let me say that the assertions that have been made about the applicants—and having read the CV—does not, with respect, match that which we had put to us.

Senator BILYK—Did you read all the other applicants' CVs?

Senator ABETZ—Yes.

Senator BILYK—Every single one of them? This is a bizarre conversation.

Senator ABETZ—When you finish, Senator, and go back to whatever you were doing, we will get an answer to the question.

Senator BILYK—I am a woman; I can do two things at once.

Senator Chris Evans—If you like, we will take on notice the query regarding Mr Nelson, although I am a little reluctant to have us give you an answer which will then be public about him in particular. So you might want to think, maybe before you put in the question on notice, how you would like to frame that.

Senator ABETZ—Can you tell, at least, whether he was on the short list.

Ms Paul—Given that we do not know Mr Nelson—right here—to protect him, can we take on notice that we will tell you as much as we can—

Senator ABETZ—Or you can advise me privately.

Ms Paul—or we will advise you privately if the minister is agreeable.

Senator ABETZ—I fully accept that. On the face of it, with that wealth of experience—

Senator Chris Evans—The other point I was going to make is that, looking at these numbers, there were applicants who would have been suitable but did not make it and there were applicants described in this answer as not being suitable. They had varying levels of experience. We will get you an answer that we think handles it in the appropriate way.

Senator ABETZ—It just seems very fortuitous that, if you applied with a union background, you had a 20 per cent chance of being appointed, whereas if you had an employer background you had a one in 33 chance, if I have done the statistics correctly.

Ms Paul—I think that was the tenor of our previous conversation that actually went to—

Senator ABETZ—Oral assertions.

Ms Paul—That sort of tenor of conversation was why we thought we ought to go to the extra level of detail that we did about the applicants that Mr Kovacic had spoken about in previous evidence as not being up there. Even in responding to the question about a particular person, I note that in a merit process like this you have to take into account all the relativities. We may find that—

Senator Abetz interjecting—

Mr Kovacic—No, Senator.

Senator ABETZ—No, they were not. They were on the papers.

Mr Kovacic—That is correct.

Senator Chris Evans—Did you interview the short list?

Mr Kovacic—We did a short list which was provided to the then minister.

Senator ABETZ—But you did not interview them?

Mr Kovacic—No, Senator. We did referee checks in respect of all of those who were proposed to go on the short list. Indeed, as part of the process I used a consultant to assist with an initial short listing. I then personally went through all the applications myself.

Senator ABETZ—Having Mr Lloyd as a referee was not a smart idea by Mr Nelson.

Ms Paul—It would not have made any difference in the consideration. Referees would have been sought in a genuine merit based way. That is the nature of this selection.

Senator ABETZ—We will see. If you can provide us with the number of union officials knocked out in the same categorisation as you did with the employers, we will see the huge success rate increase even further of trade union officials getting these positions. After we were promised that an endless tribe of union officials would not be appointed, we now have six out of seven appointed.

Ms Paul—We are happy to give you information on Mr Nelson, but it may be better to do that privately.

Senator ABETZ—Thank you for that. Can I ask about the submission that was due in relation to the student minimum hours case before Fair Work Australia? Did that get submitted?

Mr Kovacic—In that particular matter there was a hearing before Fair Work Australia on 18 August. Given that at that stage the government was still—

Senator ABETZ—Sorry, I am only asking whether or not a submission was put in: yes or no?

Ms Paul—Mr Kovacic is explaining. He is getting to the bottom line—he is not far off.

Senator ABETZ—Can we just be given a yes or no answer as to whether a submission was put in. If that excites further questions, so be it. Time is marching on.

Senator Chris Evans—If you only want yes or no answers, and that is appropriate, that is what we will give you.

Senator ABETZ—Or, on this occasion, yes.

Mr Kovacic—The answer is no.

Senator ABETZ—No submission was put in. What about in relation to the historic equal pay case before Fair Work Australia? I understand there was a deadline of 14 October.

Mr Kovacic—The Commonwealth submission is due to be filed with Fair Work Australia on 5 November.

Senator ABETZ—So that is going to happen. Minister, can you indicate to us whether the government has received representations from the CFMEU suggesting changes to the union right of entry conditions and union involvement in negotiations of agreements?

Senator Chris Evans—Recently?

Senator ABETZ—Yes.

Senator Chris Evans—I have not had that approach. I will have to take it on notice.

Senator ABETZ—You can take it on notice through the department. Is the department aware of any?

Mr Kovacic—I am certainly not aware of any such representations.

Senator Chris Evans—But we will take it on notice as to whether the previous minister was or whether there is correspondence, but I am not aware of it.

Senator ABETZ—Minister, do you and the government have any concerns about the pay rises that have been extracted for the offshore oil rig construction workers?

Senator Chris Evans—Those concerns have been raised with me by a couple of people. I think there has been some press coverage of it. I have received correspondence from the Australian Mines and Metals Association and I am meeting with them—I think next week—to discuss those concerns.

Senator ABETZ—The fact that you are meeting with them would indicate that you at least are taking the concerns seriously.

Senator Chris Evans—They are a reputable organisation that raises serious concerns so we are going to have a talk about it.

Senator ABETZ—Thank you for that. Senator Collins provided some statistics about unfair dismissal cases. She said that there was no substantiated evidence that business were paying go away money for unmeritorious claims. Without knowing what was actually advised, did the department provide any advice to the parliamentary secretary in relation to unfair dismissal claims?

Mr Kovacic—We certainly would have prepared a draft for the parliamentary secretary's consideration in terms of that speech.

Senator ABETZ—Of course, you cannot tell us what was in that advice—

Mr Kovacic—Certainly it had, from memory, some statistics in terms of the number of unfair dismissal claims that had occurred in the first year of the Fair Work Act. It may have included other material but I cannot recall the specifics of that.

Senator ABETZ—We heard today from Fair Work Australia statistics that indicated that, I think, 25 per cent of claims were dismissed or not proceeded with without any money changing hands. The biggest cohort was for a very small amount of money, which would indicate on the face of it that there was in fact some substantial anecdotal evidence that—

Mr Kovacic—That was not their evidence.

Senator ABETZ—No, no, that is what I am suggesting.

Senator Chris Evans—I wrote it down as '28 per cent, \$2,000 or less and 30 per cent \$2,000 to \$4,000.

Senator ABETZ—And 20,000 was the 75 per cent.

Senator Chris Evans—Yes. So about 58 per cent of the 75 per cent were under \$4,000. And on a \$50,000 a year rate, that is equivalent to two or three weeks pay. So it seems to me it is not all that large.

Senator ABETZ—That is right. They are not large sums at all, and these are not claims about back pay or lack of pay. This is actually that they have been unfairly dismissed and therefore that you settle an unfair dismissal claim for \$2,000 would suggest that it was in the form of 'go away' money rather than compensation for a few weeks work.

Senator Chris Evans—That is an assertion I would not accept without evidence. The point I would make to you is that in my dealings in these matters in the past, often people who should have received notice have not been given notice, and the claimant is often seeking compensation for the failure to give notice. If the normal notice provision was two weeks—I am not sure what it is these days—then they might well be seeking two weeks pay as compensation for not receiving notice. That is just one example; there will be thousands of others.

Senator ABETZ—We can speculate, of course, and we do not know the figures—I am just wondering, seeing that we do not know, and I fully agree with you, Minister, how your parliamentary secretary could then say that there was no substantiated evidence to the contrary, because I think we are in heated agreement. There is no substantiated evidence one

way or the other, yet you were seeking to make the case in favour of the government. Can I move on and ask you, Minister: are you aware of some very real concerns, and also the department, about companies that have entered into long-term contracts, especially in the defence area? We are now, with modern awards and transitional payments, et cetera, the wages bill on which they contracted for a particular job has now escalated substantially and, in the defence area in particular, Defence are not willing to move to change the contractual arrangements to take into account the unexpected and extra payments that are now required by the subcontractors or, in some cases, contractors to Defence. I understand that this is across the board as well.

Senator Chris Evans—I do not have any knowledge of that. The secretary or the officers may be able to help you. I suppose, though, that would not be uncommon in the sense that it would depend on the nature of the contract someone entered into. I assume in that contract they make provision for possible wage increases. Mr Kovacic—

Mr Kovacic—Certainly from a departmental sense I have not heard any concerns.

Senator ABETZ—You have not heard of that all?

Ms Paul—No, we have not.

Senator ABETZ—Can I just quickly revisit, in relation to the unfair dismissals, if the department could assist me. If I did not get proper notice in relation to my dismissal, would you go for an unfair dismissal claim or would you go to the Fair Work Ombudsman? That would be the role for the Fair Work Ombudsman, wouldn't it?

Mr Kovacic—If it were purely non-payment of notice in lieu, potentially yes. But it would depend on the specifics of the matter as well, so I could not give you a black-and-white answer.

Senator ABETZ—So payment in lieu of notice would not be part of an unfair dismissal claim?

Mr Kovacic—Not necessarily. There could be—

Senator Chris Evans—My experience of these matters is very old, but often you end up with a calculation of those things.

Ms Paul—It could well be part of it.

Mr Kovacic—Particularly in circumstances where the employee has been summarily dismissed.

Senator ABETZ—All of a sudden it could be part of it, but I think we are agreed that the port of call would be the Fair Work Ombudsman for these matters.

Ms Paul—We are not saying that, no.

Mr Kovacic—In circumstances where an employee may be summarily dismissed it is most likely that the issue—particularly where an unfair dismissal claim is pursued—may also deal with payment in lieu of notice.

Senator ABETZ—Maybe, maybe. Can I go to question on notice 11? We were told about certain activities and the providers. UEF seems to have been the provider of the most activities. What does UEF stand for?

Ms Paul—What are the number of report levels—

Senator ABETZ—Number 11.

Mr Kovacic—It is the Union Education Foundation.

Senator ABETZ—I thought it might be, thank you. They got the biggest number of activities. We were told that the department has copies of standard documents handed out by providers, and you tell us that it would be an unreasonable diversion of resources to provide copies of this information to the committee. Chances are, given all the activities that you have outlined, that is quite a reasonable thing to say. I wonder, given that you do have all the materials, is it available in some location where it can be inspected and which would not require the cost and whatever of copying it?

Mr Kovacic—Can I take that on notice? I presume it would be available in departmental premises here?

Senator ABETZ—Yes.

Mr Kovacic—I think, to what extent—

Senator ABETZ—It would need the minister's approval whether or not somebody from my office could then—

Ms Paul—View those documents?

Senator ABETZ—Yes.

Ms Paul—Sure.

Senator ABETZ—Just to view those documents, because I fully accept that, given the list you have provided, to provide copies of it all would be a substantial task. So take that on notice.

Ms Paul—Yes.

Senator ABETZ—Has the government given any consideration to, as I understand it, a union campaign where:

Employers would be forced by the courts to move bullies away from their victims under an aggressive industrial strategy to be rolled out across Victoria and then Australia by a large blue-collar union.

Are you aware of that, and do you have any views on that?

Ms Paul—No.

Senator Chris Evans—I think you need to be more specific. It does not ring any bells with me.

Senator ABETZ—It was in the *Age* on 16 September, and it was interesting that it was the CFMEU, of all unions, albeit—

Senator Chris Evans—Is this supposed to be a Commonwealth program?

Senator ABETZ—No. They are saying, if they got their way, that employers would be forced. So I wonder if the CFMEU has made submissions or representations to the government for that to become part of the workplace—

Ms Paul—Not that I am aware of, but it is a tough reference to pin down. Perhaps we will take it on notice and go to that article.

Senator ABETZ—It was 16 September 2010—

Ms Paul—In the *Age*?

Senator ABETZ—In the *Age*.

Senator Chris Evans—About the bullies—

Ms Paul—Can you read it again?

Senator ABETZ—It said:

Employers would be forced by the courts to move bullies away from their victims ...

For the CFMEU to ask for that I find very novel, given their appearances and their \$1.3 million fines et cetera. But I then noticed it was from their forestry and furniture sectors that this request was being made.

Ms Paul—It does not ring bells, but if it was in the *Age*—

Senator ABETZ—All right—if it does not, that is fine. Minister, are you or the department at all concerned that the Australian Electoral Commission has had to deal with 608 protected action ballots between 1 July 2009 and 31 May 2010 in comparison to only 213 ballots from 1 July 2008 to 31 May 2009?

Ms Paul—We can comment on that if you like, Senator.

Senator ABETZ—Yes.

Ms Kovacic—The short answer is no, because the level of protected action ballots is not being reflected in an increase in the level of industrial disputation, which continues to be at a low level consistent with a long-term downward trend.

Senator ABETZ—But a little bit higher in the most recent years.

Ms Kovacic—It is certainly higher than recent years but, as we have indicated before, it is also cyclical depending on the bargaining cycle and a number of agreements. But the point I would really stress is that the increase in the number of protected action ballots is certainly not being manifested in an increased level of industrial disputation.

Senator ABETZ—Thank you.

[9.17 pm]

CHAIR—We will now move to program 4.5. Who has got questions there?

Senator ABETZ—I do. This will be very brief. I assume that the Australian Local Government Association—these people do know how to hurt; they wrote to me as ‘Dear Minister’—wrote to the real minister sitting at the table with a recommendation from the Holroyd City Council that, in recognition of the danger to public health from asbestos, ‘the national general assembly of the Local Government Association call on the Australian government as a matter of urgency to establish an independent national authority to develop regulations and to manage the safe removal and disposal of asbestos through local

government on an Australia-wide basis'. I am just wondering whether that proposal has been considered. Is there any departmental commentary on whether this would be a good idea?

Senator Chris Evans—I will let the department comment—they have the history—but it is fair to say that I am interested in this area. We are looking at some government policy initiatives in this area in the short term. But, equally, this is a long-term challenge for Australia as buildings age and we hit the peak of those affected. It is going to be a big issue for us and it is one we will be taking a keen interest in. In fact I was chatting to Senator Xenophon about it this afternoon and he wanted to raise a couple of issues with me in that regard. It seems to me that they are certainly addressing important issues with their suggestions, and I am certainly happy to think about those things among the other things we are thinking about. Mr Kovacic, have you got anything to add?

Ms Kovacic—We do not have anything to add to what the minister has said.

Senator ABETZ—Thank you. That is the only matter I wanted to ask about in that particular area.

[9.19 pm]

CHAIR—We now move to program 5.1.

Senator ABETZ—I refer to answer EW0202_11 from the last estimates. I asked for a breakdown of claims in the construction sector relating to insulation and I was told that it would involve an unreasonable diversion of the department's resources to ascertain such information. Given that there were 303 instances, what would the difficulty have been in trying to ascertain which of those were insulation related?

Ms Paul—The data is not broken down that way, literally. Mr Kovacic can expand, but I have certainly seen the categories within the construction area and insulation is not one of them. That is the problem.

Senator ABETZ—Within the 303, what are the categories?

Mr Cully—The ANZSIC definition of the construction services industry includes 'land development site preparation services', 'building structure services', 'building insulation services', 'building completion services' and 'other construction services' and each of those has between two and five subcategories as well.

Senator ABETZ—Building insulation services might be a good place to stop. How many were in that?

Mr Cully—We do not have figures below 'construction services industry'. That is where the figure—

Senator ABETZ—So that is one of the 303?

Mr Cully—Yes.

CHAIR—I am sorry, did you say 'building installation services'?

Mr Cully—I am sorry. I meant to say 'installation services'.

Senator ABETZ—Oh, installation services.

Ms Paul—'Insulation' is nowhere. 'Installation' is what the officer was saying.

Senator ABETZ—Quite so, sorry. I stopped listening after that.

Ms Paul—So there is literally not—

Senator ABETZ—At the risk of being tedious, could you please go through the categories again? My apologies.

Mr Cully—From the top or just from ‘building installation services’? After ‘building installation services’ there are ‘building completion services’ and ‘other construction services’.

Ms Paul—Then within each of those there are some breakdowns, too, but none of them goes to insulation. It is just not the way the data is set up.

Mr Kovacic—To give you a sense of that further breakdown, for ‘building installation services’, the categories that sit beneath that level are ‘plumbing services’, ‘electrical services’, ‘air conditioning and heating services’, ‘fire and security alarm installation services’ and ‘other building installation services’.

Senator ABETZ—Would it be fair to say the chances are that it is with fire alarms? It would not be in that category?

Ms Paul—It is hard to know. That is what we were reflecting in the question on notice.

CHAIR—It is getting too late for all of this.

Senator ABETZ—That is very wise counsel, Chair. I refer now to question EWO205_11 from the last estimates. On that occasion I used the term ‘legal loophole’ in reference to an issue raised by unions regarding the General Employee Entitlements and Redundancy Scheme and the answer I was given was, in essence, that there is no legal loophole. Is that correct?

Mr Kovacic—That is what the answer indicates. The operational arrangements for eligibility are that the employer needs to have entered into liquidation for employees to be eligible for assistance under the scheme.

Senator ABETZ—That is correct. Have there been representations from unions and other stakeholders about this issue in a formal sense? We read about it in the media.

Mr Kovacic—Over a period of time I think there probably have been representations. I certainly recall a period about six to 12 months ago when there were representations about GEERS more broadly. I am not aware of any specific representations more recently.

Senator ABETZ—Are you aware of any non-union stakeholders that may have made representations in this area? Take it on notice rather than have a memory test.

Mr Kovacic—I would be surprised if there were.

Senator ABETZ—In response to question 203, you say that unions and other stakeholders have made representations in relation to the inclusion of superannuation. Can you provide on notice a list of those stakeholders and the nature of their representation?

Mr Kovacic—I will do that for you.

Senator ABETZ—Possibly the department or the minister: is it correct to say that the revised approach to GEERS which was announced during the election has addressed those concerns in relation to superannuation?

Mr Kovacic—In terms of the announcement that was made during the election campaign, the protecting workers' entitlements package comprised three components, one was the Fair Entitlements Guarantee, which for want of a better description—

Senator ABETZ—I am only asking about the superannuation.

Mr Kovacic—There is an element I am coming to which is in essence putting the GEERS scheme on a legislative footing and also increasing the level of redundancy benefit that would be paid under the scheme. The second component relates to superannuation from a compliance perspective and some strengthened measures there, and that is probably the measure that relates directly to superannuation.

Senator ABETZ—If that were to be undertaken, would that require legislation, or regulation, or a bit of both, or haven't we taken it that far as yet.

Mr Kovacic—It would require regulation.

Senator ABETZ—Minister, is it intended to have any retrospectivity in relation to that?

Senator Chris Evans—Not that I am aware, but I have not got to the stage of considering the detail yet.

Senator ABETZ—I just want to know, so I will accept that answer in the event that something else—

Senator Chris Evans—The committee is introducing the new arrangements.

Senator ABETZ—You will let us know if the answer needs to be corrected. In this letter that I referred to earlier from the Australian Industry Group they talked about changes to GEERS as well, so I assume when you respond you will respond to that as well, thank you.

Senator Chris Evans—I can tell you Ms Ridout has raised that with me already, and I have had a couple of conversations with her, but we will be dealing with the detail of quite a large submission over coming weeks.

Senator ABETZ—How are we going with Pro Print; is there a claim being made on GEERS?

Mr Kovacic—Can we take that on notice.

Senator ABETZ—Yes, because there was an article on 27 September where some workers were concerned they would not be getting their entitlement, but if you can take that on notice that would be helpful.

Mr Kovacic—Certainly.

Proceedings suspended from 9.29 pm to 9.45 pm

CHAIR—We resume Senate estimates hearings. We are in outcome 5.1.

Senator WILLIAMS—To the GEERS experts I have a simple question. A company fell over. I think it was in Tamworth. A father and two sons were involved in the company. It was a proprietary limited company. The sons were employed by the company. Do they qualify for GEERS?

Mr Cully—Only to a limited extent. Under GEERS there are special rules about what are called excluded employees. Excluded employees is the same term as is used in the

corporations law, and that covers relatives of someone who is a director of a company that has become insolvent. Under GEERS, anyone who is an excluded employee is only entitled to a maximum of \$3,500, and that is made up of unpaid wages of up to \$2,000 and any unpaid leave of up to \$1,500. That is the same amount to which they are entitled as a priority creditor under the corporations law.

Senator WILLIAMS—So if the father and the two sons were shareholders in the company they are still eligible? Basically, are they still eligible under GEERS if the three were the owners of the company even though they were working for the company?

Mr Cully—They would still be excluded employees.

Senator WILLIAMS—They would be but are limited?

Mr Cully—Yes.

Senator WILLIAMS—Okay. If the sons were not partners in the company but were just employed by the company they would be qualified for full GEERS?

Mr Cully—No, they would still be excluded employees. The definition covers people who are relatives of someone who is a director of the company either at the time of liquidation or at any period during the 12 months before the liquidation occurs.

Senator WILLIAMS—So even the father, if he were part of the company, would qualify for a limited amount.

Mr Cully—Yes.

Senator WILLIAMS—Thank you for that. You would not be familiar with a company called Allco Finance Group? To give you a broad outline, this company fell over. It had 50 staff. The company is in liquidation. Ferrier Hodgson are the liquidators. Those 50 staff have not received any entitlements because the liquidators, Ferrier Hodgson, have gone to the court to say that they were employed by a sub-company, an offspring of Allco Finance Group. It is quite frustrating because, I think, there is a total of \$4.2 million to 5 million owing. My concern is that that \$5 million will be nearly taken up in legal fees by the time this dispute is settled. Can there be a situation where these 50 employees can receive their GEERS if Ferrier Hodgson does not win the case to say that they were not employed by the company? If the judge rules that they were employed by Allco Finance Group, could they then repay the GEERS at a later date? I know many of them are very desperate and now it has all been pulled up in the court. That is the situation. It is on ice. They cannot get any entitlements from the company because the liquidator has gone to the court, saying these people are actually employed by another offshoot of Allco. They are in a situation where they are not getting any of their entitlements—long service leave, holiday pay etc.

Mr Kovacic—I think it might be best if we took that question on notice, because we are not aware of Allco. If there is any information that you can provide to us about the arrangements that you mentioned, that certainly would assist us in framing our response.

Senator WILLIAMS—I will give you these two letters I have. They have some information on them. One is from Ms Christine Bowen, who has written to the Australian government's Department of Education, Employment and Workplace Relations. I will give you these letters if you like; they might be able to help you follow up. There are 50 people out

there and they have not received a red cent because of hold-ups in court. They are jammed between a rock and a hard place.

Mr Kovacic—Certainly we will look at it.

Senator WILLIAMS—Thank you.

[9.49 pm]

CHAIR—We will now move to program 5.2, Workplace assistance.

Senator ABETZ—Does the Fair Work Ombudsman administer the SIAP or do you make the funds available?

Mr Kovacic—It is a program that is administered by the Fair Work Ombudsman. When they were on earlier today, the minister alluded to the announcement that was made recently where 15 organisations were funded by the Fair Work Ombudsman. That is the program.

Senator ABETZ—When that announcement was made we were told that one of the industries targeted would be cafes, restaurants and clubs. Miraculously, restaurants and caterers were then not funded. But you are telling me that is all under the Fair Work Ombudsman, are you?

Mr Kovacic—That is correct.

Senator ABETZ—We should have spent longer on outcome 5 in that case.

Senator Chris Evans—As you know, Senator, they were all employer organisations. I think I remember seeing a brief that went to the question of selection on the merit of the applications.

Senator ABETZ—It is always on merit.

Senator Chris Evans—It was not done by the department or by me. It was done by the agency and the money was shared among employer organisations that made applications. That is my understanding.

Ms Paul—I think that is right.

Mr Kovacic—There was a tender process that preceded the decision-making process.

Senator ABETZ—It was interesting that when it was announced that the grants were available, the industries targeted for attention included cafes, restaurants and clubs. They were in fact the second ones mentioned, but they were then not funded.

Senator Chris Evans—That is because it was a competitive tender process and you would have objected I am sure, as I would have, if people had been funded just because they were who they were. As I understand it, there was a process and they give it to what they regarded as the best applications. But that is for them to explain.

Senator ABETZ—It is just amazing how these processes work with the appointment of an ABCC commissioner, with the appointment of Fair Work Australia commissioners, and with the non-funding of restaurants and caterers—just all based on merit I know.

Senator Chris Evans—You tell me which of the employer organisations got the money that they did not get and should not have got it, because that is the choice you have. They were all employer organisations that went into a process. They were selected on the basis of

their applications, as I understand it. As I say, it was a competition among employer organisations.

Senator ABETZ—Would you like to ask me the same question about appointments to Fair Work Australia?

Senator Chris Evans—As I understand it, that was a selection process as well.

Senator ABETZ—Let's move on to the Protected Action Ballots Scheme. In 2009 Senator Cash asked whether it was expected that there would be an increase in protected action ballots. Unfortunately I do not have the reference with me but the answer at the time was: no, there was not anticipated to be an increase. We now know that there has been a substantial increase. Mr Kovacic, you have provided us with an explanation as to that. Can you recall the evidence previously provided to Senator Cash?

Mr Kovacic—Vaguely, in the sense that you have indicated. As I said, it is very difficult to predict the number of applications for ballot orders that are likely to be made because it is cyclical and it is related to the stage of the bargaining cycle.

Senator ABETZ—If it was cyclical, why wasn't it foreseen in 2009 that there would in fact be an increase because of this natural cycle?

Mr Kovacic—Just because agreements expire or come up for renegotiation does not necessarily mean that employee parties or others will make application for protected action ballot. You cannot predict the extent to which parties are going to make applications for orders.

Senator ABETZ—Isn't it the case that the threat of taking industrial action is being used more in workplace bargaining?

Mr Kovacic—I can only reiterate what I said previously in the sense that certainly the number of applications for orders has increased but that has not been reflected in an increase in the level of industrial disputation. I am really unable to add to that.

Senator ABETZ—I thought we were told that the Fair Work Act was designed to create better bargaining conditions, without the threat of industrial activity hanging over the parties' heads.

Mr Kovacic—There are obligations in the act in terms of bargaining in good faith. Certainly the act also provides scope for industrial action in limited circumstances, and that is in the context of bargaining. But, as I said a moment ago, we are not seeing, despite the increase in the number of orders that are being made, an increase in the level of industrial disputation.

Ms Paul—Even though we are in part of the cycle which has led to more activity. We are in that part of the agreement-making cycle.

Senator ABETZ—If this is part of a cycle of more activity, can we therefore anticipate a lower number of protected action ballots next year?

Ms Paul—I do not think we are anticipating one way or the other. That is what Mr Kovacic just said. We made our answer—

Senator ABETZ—The increase is part of a cycle.

Mr Kovacic—I said it can be related to the cycle but—

Senator ABETZ—But does the cycle ever have a downturn?

Mr Kovacic—It can do. There are certainly peaks and troughs in the level of bargaining—

Senator ABETZ—When do we anticipate that?

Mr Kovacic—Equally, just because you may be in a peak in terms of the number of agreements that are up for renegotiation does not necessarily mean that you are automatically going to get in a real sense an increase in the level of applications for orders. It is a possibility, I admit that, but you certainly cannot predict that with any degree of confidence.

Senator ABETZ—So chances are that, on reflection, the predictions of Senator Cash should not have been made.

Mr Kovacic—The prediction was made in good faith and, in essence, it proved to be wrong. Certainly there was an increase in the number of order applications but, as I said, that has not been reflected in an increasing level of disputation.

Senator ABETZ—I am not asserting that the prediction was made in bad faith. It was a prediction that was made, or part and parcel thereof, that everything would be hunky-dory, that the Fair Work Act would operate well—

Ms Paul—I think a prediction is a prediction, Senator.

Senator ABETZ—Sorry?

Ms Paul—I think a prediction is a prediction and this one turned out not to be correct, and I think we cannot take this answer any further. I think Mr Kovacic has answered it.

Senator ABETZ—I suppose it was a very timely and helpful prediction in relation to how the Fair Work Act would operate, which has now been shown, as you have agreed, not to be the case. Do we have an understanding as to why the cost per ballot has increased by about \$400?

Mr Kovacic—My advice is that, in terms of the average cost, in 2009-10 for the full year is actually lower than the average cost in 2008-09. The figure in 2008-09 was \$1,881 and for last financial year the figure was \$1,720.

Senator ABETZ—So the average cost per ballot in this financial year—

Mr Kovacic—Yes, 2009-10.

Senator ABETZ—Was how much?

Mr Kovacic—\$1,720.

Senator ABETZ—So the answer you have provided, No. 20, to questions on notice refers to 31 May—

Mr Kovacic—That is correct.

Senator ABETZ—So the average cost to the month of June will reduce that figure now—

Mr Kovacic—The factors to take in here that impact on cost would be the size of the organisation and the geographic spread.

Senator ABETZ—Would that represent an increase in the cost of stamps?

Mr Kovacic—It depends whether it is done by way of postage or whether it is done by hand. A range of factors go into that. One of the other responses to questions on notice, and I cannot recall precisely which one, spelt out some of the factors that impact on the cost of the ballots. It is EW0018_11.

Senator ABETZ—Thank you for that. Do we have any other people on 5.2?

CHAIR—No-one has indicated to the secretariat that they do.

Senator ABETZ—In that case, I will move to some general questions on outcome 4.

CHAIR—We have sent the officers for outcome 4 home.

Senator ABETZ—Yes. I had a private discussion with Ms Paul and the minister to say that I would try some questions with only her in case we did have time. There will not be many, and if Ms Paul cannot answer them I fully understand.

Senator Chris Evans—If Ms Paul does not know it is not worth knowing.

CHAIR—I was not advised of that.

Senator ABETZ—My apologies, Chair. That is quite right. I did not advise you.

Senator Chris Evans—There was a dirty side deal done by Senator Abetz, me and Ms Paul

Senator ABETZ—That is an oversight.

CHAIR—I am used to dirty side deals, as you well know, Senator Evans.

Senator ABETZ—Keep that to your caucus—too much information for me. Can I say thank you to the other departmental officials. In the last estimates, Ms Paul, without verballing you, I understand you claimed that the relocation of job seekers from the eastern states to the west had not been a success last time it was trialled by the department. Is that correct?

Ms Paul—Yes. It was quite a long discussion, as I remember, and I think I said that there were many issues with the previous scheme which we would seek to change with any future scheme.

Senator ABETZ—Our evaluation found that it was not a cost efficient or successful way of trying to support mobility.

Ms Paul—That is right.

Senator ABETZ—It is on page 48 from Monday, 31 May. Can I ask whether any advice was sought or provided prior to the calling of the election for the government about relocation of job seeker funds for such mobility?

Ms Paul—I will probably take on notice whether we provided advice prior to the election. I know that in the past we would have provided advice arising from evaluation, but whether we provided advice before the election campaign I will need to take on notice.

Senator Chris Evans—Wasn't there a House of Representatives committee?

Ms Paul—There was. There were a range of things. Quite a lot of work has been done over the last couple of years, particularly on the deficiencies of the previous scheme.

Senator Chris Evans—My recollection is that one of the House of Representatives committees did a bit of work on the issue in one of their inquiries and people got a bit more optimistic that they might be able to design a scheme that would actually—

Ms Paul—That is right.

Senator Chris Evans—This has been a big issue in WA for many years. Successive state governments of both political persuasions have had a number of cracks. I know I live in the best part of Australia, but despite the attractive lifestyle—

Senator ABETZ—Now you are leading the committee yet again. There is just no end to it.

Senator Chris Evans—We have had real trouble in internal mobility movement to Western Australia. It is interesting because we attract a lot of overseas migrants very easily, but we have had real difficulties with internal mobility. Successive governments have had goes at campaigns and what have you without much success.

Senator ABETZ—I recall Mr Abbott making a suggestion which was at the time criticised. Ms Paul, are you aware that the government committed to offering up to \$6,000 per job seeker to relocate or \$3,000 for those relocating to cities?

Ms Paul—Yes.

Senator ABETZ—How does that proposal differ from previous schemes?

Ms Paul—I may need to take some of the precise differences on notice.

Senator ABETZ—Of course.

Ms Paul—The nature of the support is different, and then the incentives to stay in the place are different. In my recollection—and I will check this—what we found the first time round was that if there was not enough support, for example, from the receiving employer or the Job Services Australia provider, the job seekers would move there but then move out of that job fairly quickly and back into unemployment or back to where they came from. The new scheme addressed that in a couple of ways. The new scheme, for example, delivers a payment of \$2½ thousand to the employer. So, exactly as you say, it is up to \$6,000 for the person, depending on where they go—more if they go regional; less if they go metro—and then \$2½ thousand for the employer. That is an important part of it, to try to get it to stick—to get the job to stick—from the employer's point of view. And then in addition to that, under the recently announced scheme, if the job seeker leaves the new employment they have moved to, within the first 26 weeks, they actually lose 12 weeks of Newstart. So it is another part of the incentive to get the person to stick in the job. Both those things are things we found the first time round.

Senator ABETZ—The \$2½ thousand is the wage subsidy. You said it made it, I think, 'stick'. I am sure that is not a technical term, but I know what you meant.

Ms Paul—That is right—a deeply technical term!

Senator Chris Evans—You understand it and I understand it.

Senator ABETZ—That is all good—it is getting late. Why do you say that makes it a more viable scheme?

Ms Paul—It makes it more attractive to the employer and gives them the incentive to offer the job seeker the support that they need to stick in that job.

Senator ABETZ—But the employers want these people. They are crying out for them, aren't they?

Ms Paul—They do.

Senator ABETZ—Why do they need an incentive to keep that which they desperately need?

Ms Paul—Because what we found the first time round, in part, was that the job seeker had quite a fragile attachment to the employer and the attachment was easily broken, and they returned. I am not saying that is the employer's fault, but we think, in a policy sense, it is good to deliver an incentive to the employer, to be a really clear incentive for them to support that employee to stay.

Senator Chris Evans—If you think about the sort of person, too, Senator, they may not have been connected to the workforce for a long time. You are not getting your highly skilled, highly paid person coming into a career job, you are getting people reconnecting with the workforce.

Ms Paul—They need quite a lot of support.

Senator ABETZ—Yes, but, as I understand it, these are circumstances where employers, in general terms, are crying out for workers. They are desperate for workers. They need workers. It is not that they have been shedding employees. I thought usually you would pay an incentive for, let us say, an apprenticeship where an employer might be reluctant to take on an apprentice, so you say, 'We'll make it easier for you.' As I understand it, in the West in particular, we do not have 'incentivise'—to use that terrible word—the employer to take on employees. They basically are willing to take on anybody—just as long as they are willing to get to the destination.

Senator Chris Evans—That is not right, Senator. As you know, from talking to employers, that is not necessarily right. While they are desperate, nevertheless they have to invest in that person in on-the-job training and making them a part of the culture et cetera. I think employers will often say, 'They just didn't quite fit,' or 'They didn't quite work out,' for whatever reasons. People have to be comfortable and it takes a bit of effort on the employer's part to make it work, particularly if you are a small business and you are busy and all those things. The shortage does not necessarily lead to direct job matches, is what our experience has been. I think a lot of employers would say that. They say that they do not have the social skills or are not good at customer service. It is a complicated thing.

Ms Paul—And these are long-term unemployed people.

Senator ABETZ—One wonders, though, whether it would be more successful if, let us say, you slung the potential employee \$8½ thousand. Anyway, time will tell.

Senator Chris Evans—As you know, it is a fairly small program, Senator, and we are going to give it another crack, basically.

Ms Paul—Yes.

Senator ABETZ—Ms Paul, the last time around you said that the scheme was not a cost-effective way to fill jobs. This scheme is going to spend more money per job. So, on the face of it, it is likely to be even less cost-effective, other than for those—if I might describe them this way—nuanced differences. We will, of course, have to wait and see. When do we expect the first placements to be made? Do we have to legislate for this or regulate?

Ms Paul—I have a few comments to make. The things said about cost effectiveness in the earlier scheme were to do with outcomes. It would not really matter how inexpensive it was if you are not getting any job outcomes. The problem with the first scheme was that these jobseekers were not remaining attached. Indeed, one of the findings from the first try was that jobseekers were not given enough support. In terms of cost effectiveness, that has been addressed in this design. In terms of legislation and so on, I imagine there will be amendments needed to the Social Security Act. We are going to try to trial this from 1 January 2011. That is our aim at present.

Senator ABETZ—I am pleased to hear that. If it is an amendment to the social security legislation, will not have to do it in the Senate.

Ms Paul—The amendments to the legislation are to do with cessation of payment for 12 weeks if they have not achieved 26 weeks. So, fortunately, we have a bit of time. It does not become relevant until 26 weeks after 1 January. That is the process.

Senator ABETZ—As I understand it—and correct me if I am wrong—it is starting at 1 January next year, so nobody has been relocated under the scheme and it will all only start then?

Ms Paul—That is right.

Senator ABETZ—I understand that the previous scheme—

Senator Chris Evans—Could I just say, Senator, that is the objective. Given the long caretaker period, I have not been briefed in recent times, but I must admit that when I first thought about it I thought it was a pretty tight time frame. The objective is 1 January.

Ms Paul—That is when we could potentially start.

Senator ABETZ—You are a can-do government, surely.

Senator Chris Evans—We are. I am just conscious that the timetable is pretty tight for 1 January. That is all. But, if the secretary says we can do it in time—

Senator ABETZ—What is the success rate—if I can call it that—of the previous scheme? Is understood it, about three quarters stuck with a job for 12 months?

Ms Paul—I cannot recall. I will have to take it on notice.

Senator ABETZ—It was relatively high, wasn't it—the previous scheme?

Ms Paul—I will have to take that on notice. I do not have it here.

Senator ABETZ—If you could. It depends on how you determine success, but, if one were to say that a person had remained in the job for 12 months, that would be—

Ms Paul—That is a success.

Senator ABETZ—Yes—a success. We can agree on that. So, roughly—you can take this on notice—if 75 per cent of remained in a—

Senator Chris Evans—Senator, I would not argue, but that sounds a bit high, from my recollection. I could well be proved wrong, too. It just seems that that would be a pretty successful scheme if you had 75 per cent staying for 12 months.

Senator ABETZ—Tell us then: what benchmark would you have for this new scheme so that it would be described as successful?

Ms Paul—To the extent that the previous scheme had good, long-term outcomes like that, there were still some elements of it which we thought needed to be redesigned. I would need to take that on notice and get that out for you.

Senator ABETZ—The money for this is coming out of social security or the Employment Pathway Fund?

Ms Paul—The Employment Pathway Fund.

Senator ABETZ—That will undoubtedly be topped up?

Ms Paul—At the moment the providers are spending at a rate of about 59 to 60 per cent, so in actual fact it probably is available.

Senator ABETZ—There is money to spare.

Ms Paul—There is money available under the current—

Senator Chris Evans—Finance for everybody.

Senator ABETZ—Let's hope Senator Wong isn't lurking in the corridors!

Ms Paul—The point of the employment pathway fund, as you know, is to be as flexible as possible, so it is certainly a purpose to which it can be put.

Senator ABETZ—Undoubtedly you will require officials in relation to the no show, no pay and how that is working.

Ms Paul—How it is working at the minute?

Senator ABETZ—Yes.

Ms Paul—I do not have any of the figures with me but I am more than happy to take it on notice.

Senator ABETZ—I appreciate that.

Ms Paul—I presume you want just the statistics.

Senator ABETZ—Yes. Can you tell us anything about star ratings?

Ms Paul—It depends what you want to know. In the broad, I might be able to tell you. Try me.

Senator ABETZ—I understand that there were 646 sites that only had a one-star rating for stream 1 job seekers.

Ms Paul—I will have to take that on notice.

Senator ABETZ—I understand that.

Ms Paul—Basically with the star ratings there was a pretty clear bell curve in terms of ratings from 1 to 5. I cannot recall the proportion of one-star ratings but it was either five or 10 per cent, a pretty small proportion, and the same at the high end too. It was basically what you would expect.

Senator ABETZ—You have got a figure there?

Ms Paul—The information I have just been given here says about 72 per cent of sites or 78 per cent of contracts were at three stars or above.

Senator ABETZ—On additional redundancy support, I understand \$298.5 million was made available to JSA—

Ms Paul—Job Services Australia providers.

Senator ABETZ—Thank you—for people made redundant during the GFC. Was or has all this money been utilised?

Ms Paul—I need to take that on notice. Basically what that is is allowing retrenched workers into stream 2 immediately. So it was the difference between our estimate of how many would have gone into stream 1, which receives lower amounts of supplementation to stream 2, and that that accounted for that costing. How much has actually been used I will need to take on notice. Certainly it has been very popular and has been used for precisely that: that retrenched workers have had access—

Senator ABETZ—Yes. I suppose I am interested in the take-up of it, so if you could take that on notice.

Ms Paul—Yes. My recollection is that its take-up has been basically more or less as we predicted. I do not think we have had any surprises with it, but I will get you the precise figures.

Senator ABETZ—Of the structural adjustment places offered for insulation workers, how many were taken up?

Ms Paul—We have had pretty good take-up on the insulation places. I might have that with me, otherwise I will take it on notice. The last report I had was that they had been taken up to quite a high extent. I have got information here on the scheme but not on take-up, so I will need to take that on notice.

Senator ABETZ—All right. With the jobs compact, I understand the New South Wales and Queensland state governments need to provide what their activities are involving the compact with young Australians.

Ms Paul—Not that I am aware of. I will need to check that out. I am not quite sure what the question is.

Senator ABETZ—The suggestion is that there was a compact with young Australians, and New South Wales and Queensland are allegedly dragging the chain.

Ms Paul—Not that I am aware of. We seem to have had good cooperation across the board, but let me check that out for you. They all came on board under the auspices of a COAG agreement, actually. The only thing I can think of there is that each state is required to guarantee a place for young people of a certain age in education, whether that be to finish

school or in a TAFE setting. But every state signed up to that through the IGA. I have had no information that would suggest that it is not working. If there is something in a particular state, which could be a particular instance—but I do not think we have any problems globally.

Senator ABETZ—Do they have to report their activities?

Ms Paul—They would need to do so, yes.

Senator ABETZ—And I think that is what it is claimed Queensland and New South Wales have not—

Ms Paul—Been dragging the chain—not that I have heard but I will check it out.

Senator ABETZ—Take it on notice. How many of the local employment coordinators are ex your staff members?

Ms Paul—Not very many, actually. It would be well under half of them. Most of them came out of community development. Most of them are very well known locally. Some of them came out of chambers of commerce and so on. When we started it—and we started it fast; it was one of these stimulus measures that got under way really quickly—we used our own people to start with and then we went through a couple of rounds of selection processes.

Senator ABETZ—So were they appointed direct or did they go through Hudson recruitment as well?

Ms Paul—We plugged the spots with our people but then everyone who wanted these jobs had to go through the recruitment process, which was a normal sort of merit based recruitment process.

Senator ABETZ—So that had to go through Hudson?

Ms Paul—Yes. They are under contract to the department; they are not departmental employees.

Senator ABETZ—I daresay you cannot tell us the KPIs against which each local employment coordinator is being measured so we will put those on notice.

Ms Paul—They are getting really good results, actually, but of course the results are unique to every area. But they are doing very well. We receive regular reports on all the areas and what the local employment coordinators are doing by way of matching job seekers or retrenched workers to employers, and it seems to be going well.

Senator ABETZ—These contracts are going for two years—is that right?

Ms Paul—Yes.

Senator ABETZ—How long have they run already?

Ms Paul—I think they will run into the middle of next year but there is, I think as part of the agreement with the independents, a possible extension.

Senator ABETZ—You have pre-empted my next question or two about that. Minister, are you able to shed any light on that as to the likelihood of that two-year contract being extended and funding made available for that?

Ms Paul—This will basically be a matter for the budget, actually. It is something which would be considered in the budget context.

Senator Chris Evans—That is right. The other thing I am going to have a look at is just to see whether the areas that have been targeted are, after a reasonable period, still priorities, in a sense, because most of them are in areas where clearly we had high unemployment. But if we have really, really good progress then you might want to think about it. I went to one of the jobs expos last Friday in Mandurah. There was tremendous community support and lots of job seekers. I think employers put 600 jobs up on the boards. I was very impressed because it was really working. There was really good local government and other support. Obviously you would want to just see how things were going in each of those areas, but there is a commitment to extend and we will be—

Senator ABETZ—There is a commitment?

Senator Chris Evans—Yes.

Senator ABETZ—It is obvious that if it is a two-year contract and it expires on 30 June next year and we are only going to be told about this in the budget, you might find people getting a bit nervous and twitchy, and potentially good people—

Senator Chris Evans—Do you mean the local employer—

Senator ABETZ—Yes.

Senator Chris Evans—It is always a problem, particularly in this community sector where we have short-term funding, as you know.

Senator ABETZ—Exactly.

Senator Chris Evans—It is one of bugbears.

Senator ABETZ—If they can be advised without, and I do not mean this in a pejorative sense, hiding behind the ‘considered in a budget context’ if a policy decision has been made to extend it then I think—

Senator Chris Evans—One of the things we do not do well is this annual or two-year funding. People start worrying about their jobs halfway through and their efficiency and effectiveness drops and they start applying for other jobs.

Senator ABETZ—Exactly, and it was the same under our government—

Senator Chris Evans—It is the bane of the funding cycle.

Senator ABETZ—I share that concern. I turn now to the National Green Jobs Corps. How is that going and have we got many jobseekers who commenced?

Ms Paul—I think it is going well. I will see whether I have something on that. I may have to take that on notice. As far as I know it is going really well.

Senator ABETZ—Does that mean that all the available positions have been taken up or are being taken up?

Ms Paul—I will need to take that on notice.

Senator ABETZ—Or that there are not many that have been withdrawn. I will put a lot of these on notice.

Ms Paul—That is fine.

Senator ABETZ—I have questions about green jobs and green skills training places. I understand that some 50,000 were to be made available.

Ms Paul—This is taxing my memory—this goes back a while. Basically part of this was particular jobs like through the National Green Jobs Corps and so on and part of it was through apprenticeships and so on. So one of the things that has been going on through the National Green Skills Agreement with all the states and territories is that every single training package developed by every industry skills council for apprentices and so on has to have a ‘green’ component, as it were. So, for example, in plumbing how do you do plumbing for greywater and so on. That sort of question is now going into every single piece of vocational education training, which is a really big thing.

Senator ABETZ—If you could take on notice how many of the 50,000 places have been taken up, that would be appreciated.

Ms Paul—Sure.

Senator ABETZ—And how many green jobs have actually resulted, and then what the total cost of the program is.

Ms Paul—I know it will be quite hard to count the green jobs but we will give it our best shot.

Senator Chris Evans—I appreciate that, because of the timing issues, it has not gone as smoothly as you might well have liked. We will take these questions on notice. But if you want me to ask Ms Paul to organise a briefing for you on the employment programs as a separate briefing then I am happy to do that.

Senator ABETZ—Thank you very much. I will pass that on to Ms Ley, who has specific responsibility—

Senator Chris Evans—I am happy to extend that invitation to her, because I know what it is like when you pick up a new portfolio—it is good to have the officials talk to you for a couple of hours to get your head around it.

Ms Paul—With the National Green Jobs Corps, for example, we have committed to 10,000 places over two years for young people aged 17 to 24. It started on 1 January and runs to the end of 2011. What I do not have is the take up right now—the snapshot—so that is what I will get for you.

Senator ABETZ—So what about that figure of 50,000 places?

Ms Paul—I also took that on notice.

Senator ABETZ—Yes, but how does that relate to the 10,000?

Ms Paul—I think the 10,000 was part of that overall commitment.

Senator ABETZ—I turn now to the innovation fund. When are we going to be announcing the successful tenderers for round 3?

Ms Paul—I will take that on notice. I think it is close but I really do need to take that on notice.

Senator ABETZ—I understand. In relation to the innovation fund was this apartment satisfied with the performance of innovation fund panel members? Are you able to give us an insight into that?

Ms Paul—I am personally not aware of any problems with it and certainly I know of some terrific projects that have come out of it. It was a \$41 million fund which was part of Job Services Australia—this current contract. We created a panel of providers like Mission Australia or Brotherhood or whatever who can do innovative things to support jobseekers like social enterprises and so on. Maybe there were one or two issues but certainly I have not heard anything systemic.

Senator ABETZ—Some of these questions may well be asked again on notice.

Ms Paul—I understand that.

Senator Chris Evans—If you have anything that you want to put on notice, given the way that this has gone, we are happy to take it. We will offer the briefing if you want to take that up as well.

Senator ABETZ—Thank you. Some of this information we would want, however, on the record.

Senator Chris Evans—The factual stuff, yes.

Senator ABETZ—How successful have the family centred employment projects been in engaging at least one family member from a jobless family into paid employment?

Ms Paul—This is quite a small trial approach, and so far we are pretty happy with how it is going, but I will take that on notice as well. Something I am very keen on, for very long-term unemployed and very disadvantaged, is to take a whole-of-family approach to that situation rather than just deal with the jobseekers themselves. I think it is a very positive move but it is only on a pilot basis. The thing with that sort of approach might be that today's problem is not that I do not have a job, today's problem is that my car just broke down and I cannot even get to Centrelink or Job Services Australia. The point of taking out a whole-of-family approach is to try to deal with all those problems—not that you just need a job and we are just going to turn on our normal sort of service for you.

Senator ABETZ—What was the rationale to bring responsibility for the job capacity assessments into Centrelink?

Ms Paul—Because they go to Centrelink and CRS.

Senator ABETZ—Sorry, CRS?

Ms Paul—Commonwealth Rehabilitation Service, now just called CRS Australia. It is still part of that portfolio.

Senator ABETZ—Yes, I should have known that.

Senator Chris Evans—Senator, there is a world of acronyms in this portfolio. Unfortunately, they are a whole new set for me to learn as well.

Ms Paul—So the notion here is basically to streamline job capacity assessment into those two organisations. Basically, job capacity assessment is an allied health assessment and there are currently 18 job capacity assessment providers. We are working with them on this

transition. Mind you, most of them would also be providers in other areas too, so at the moment transition seems to be going quite smoothly.

Senator ABETZ—Do you accept that there is a duplication between the Job Capacity Account and the Employment Pathway Fund?

Ms Paul—There was a duplication and that is why there has been an announcement of rolling those things together. The Job Capacity Account will now be funded out of the Employment Pathway Fund.

Senator ABETZ—And that was the announcement of 14 August?

Ms Paul—Yes.

Senator ABETZ—We were told that that would provide savings—

Ms Paul—That is correct.

Senator ABETZ—of \$79.5 million. I am on the right page there. So how do we think those savings will be made? Just by simply getting rid of duplication?

Ms Paul—That is correct. So at the moment \$79 million over four years is provided to this Job Capacity Account. Yet the Employment Pathway Fund, when you think about it, is this very flexible fund with capacity to do exactly what this is doing—that is, purchase an allied health assessment and mental health assessment, whatever it takes. So that is exactly what is going to happen. So from 1 January the funding will come from the Employment Pathway Fund. It is possible to fund it now actually. It was a duplication.

Senator ABETZ—On 11 May the then Deputy Prime Minister announced that there was going to be reform of the assessments for disadvantaged jobseekers. Can you remember that?

Ms Paul—I am not quite sure what the detail of that one was.

Senator ABETZ—Unfortunately I do not have the media release.

Ms Paul—There have been several announcements; I am not really sure which one this would have been, but 11 May was the budget.

Senator ABETZ—This was linking people with disabilities to financial support. Does that ring any bells?

Ms Paul—Not yet, but if I had a few more keywords I would probably get it.

Senator ABETZ—What research supports this decision. The media release also states that DSP applicants will need to prove they have been unable to gain employment through an employment services provider or through Vocational Rehabilitation Services. Does that help? No?

Ms Paul—Not entirely. I am not sure whether it is us or whether there is a crossover. DSP is not ours, although you say it was the Deputy Prime Minister then saying it. But DSP is in Minister Macklin's portfolio. There certainly have been a range of changes to tighten up the gateway into Mr Deputy Speaker, and that could be part of that, but I would probably need to read the media release to remind myself.

Senator ABETZ—There is something coming your way that might—

Ms Paul—I have the announcement here. This was an announcement with Minister Macklin and Bill Shorten, and it mainly goes to the assessments for DSP.

Senator ABETZ—So how will they speed up the process for linking people with disabilities to financial support? That was the question, if that is readily apparent from the statement? I think the reason the question is asked was that it was not readily apparent from the media statement.

Ms Paul—It is not so much speed; it is that appropriate employment services and income support are provided. It is the nature of the assessment, if you like. There has been a sense that, to some extent—they talk about the impairment tables. The impairment tables and so on have been insufficient to link with the correct type of support—it is not so much the timing of support, but that you match the person's need much more finely to what assistance they end up getting. And it is about that. If you like, I will take on notice a description of how it is unfolding.

Senator ABETZ—Yes.

Ms Paul—It is talking about a new assessment regime, and that is to do what I have just said, which is to try to match better someone's need. Our part of this is through disability employment service and the capacity to say, 'Purchase the right assistance or equipment or whatever for someone entering the workplace'. But this also goes to people on DSP, which is outside my province.

Senator ABETZ—Moving right along. This is to both the minister and the secretary. A number of disability service providers—Senator Fifield has provided me with a letter from one in Victoria, I know in my home state of Tasmania as well that the introduction of the modern award system is imposing significant financial problems on these organisations. Are you aware of that?

Ms Paul—I am not aware of that, but I am happy to take it on notice. If you want to provide any representations on Senator Fifield's behalf or whatever, I am happy to look at the particulars.

Senator Chris Evans—What sort of problems?

Senator ABETZ—That the wage increases, the salary levels under the new award, are significantly higher than those under, in this case, the Victorian disability services award. In fact in Tasmania the local industrial commission had created one award for all the services. Now they are split between two modern awards. Also, with wage increases, which represent an increase in this particular organisation, it is the case of an extra 15 per cent in their annual staff costs. Similar circumstances in Tasmania, and if you know these organisations, everything is run to a very, very tight budget, and a 15 per cent increase and yet they will not be able to necessarily pass on through costs. Let us say they bottle mineral turpentine, for example, or methylated spirits and then sell that. The marketplace will—

Senator Chris Evans—We will take it on notice, but if you want to forward any of the representations directly to me, we will reply in writing. So you or Senator Fifield might want to drop me a note saying, 'Can you respond to this?' You might like to write to me; it might be a more efficient way of dealing with it. But we will take it on notice.

Ms Paul—I would probably in general terms draw attention to the five-year transition period, but I do not know the details here and I think we should have a look at it.

Senator ABETZ—Unfortunately, it is an increase in wages, and it will not be going down during the transition. If anything, it will be stepping up. It is a real concern that has been provided to many people who have links with the disability sector.

Senator Chris Evans—I have a reasonable links and it has not been raised with me, but that is not to say it is not a problem. I am happy to have a look at it.

Senator ABETZ—I think Western Australia might be somewhat different in that area and I think they were quite innovative from what I can gather in the way they dealt in that area.

Senator Chris Evans—The other thing about this sector is they have very strong advocates.

Senator ABETZ—As much as I hate to say it, I think it was under a former state Labor government in fact that they undertook some substantial reforms.

Senator CHRIS EVANS—They did do quite a lot on the disability, and one of the things they did was to appoint a former Liberal leader as chairman of the disability commission, Mr Barry MacKinnon, who has made a huge contribution to disability in Western Australia over many years.

Senator ABETZ—What a great place, being in heated agreement over matters disability, to conclude the hearing because nobody else has any other questions.

Committee adjourned at 10.42 pm