



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS
LEGISLATION COMMITTEE

ESTIMATES

(Additional Estimates)

WEDNESDAY, 23 FEBRUARY 2011

CANBERRA

BY AUTHORITY OF THE SENATE

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SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS**LEGISLATION COMMITTEE****Wednesday, 23 February 2011**

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

Participating members: Senators Abetz, Adams, Barnett, Bernardi, Birmingham, 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, Bernardi, Bilyk, Cameron, Cash, Fisher, Marshall, Nash, Polley, Ronaldson, Wortley and Xenophon

Committee met at 9.03 am

EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS PORTFOLIO**In Attendance**

Senator Conroy, Minister for Broadband, Communications and the Digital Economy and Minister Assisting the Prime Minister on Digital Productivity

Senator 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

Ms Helen Willoughby Acting Deputy Secretary, Corporate and Network

Dr Michele Bruniges, Associate Secretary, Schools

Ms Jennifer Taylor, Acting 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

Ms Helen Willoughby, Acting Deputy Secretary

Mr Craig Storen, Chief Finance Officer, Finance and Business

Mr George Kriz, Chief Lawyer, Corporate, Legal and Investigations

Ms Robyn Kingston, Chief Internal Auditor, Audit Group

Ms Susan Monkley, Group Manager, Finance and Business

Ms Barbara Grundy, Acting Group Manager, Communication and Parliamentary

Mr Benjamin Wyers, Acting Group 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
Ms Lisbeth Kelly, 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 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 Joanna Stanion, 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 Rhyan Bloor, Branch Manager, National Schools and Youth Partnerships
Ms Helen McLaren, Branch Manager, National Schools and Youth Partnerships
Ms Louise Hanlon, 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
Mr Matt Davies, Branch Manager, Engagement and Wellbeing
Ms Janet Davy, Group Manager, Curriculum, Assessment and Teaching
Ms Margaret Banks, Branch Manager, Curriculum, Assessment and Teaching
Ms Alex Gordon, Branch Manager, Curriculum, Assessment and Teaching
Mr Tony Zanderigo, Branch Manager, Curriculum, Assessment and Teaching
Mr Craig Robertson, Group Manager, Infrastructure and Funding
Ms Oon Ying Chin, Branch Manager, Infrastructure and Funding
Ms Hilary Riggs, Branch Manager, Infrastructure and Funding
Ms Chris Woodgate, Branch Manager, 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 Jennifer Taylor, Acting Deputy Secretary
Mr Michael Maynard, Group Manager, Skills Group
Ms Katy Balmaks, Branch Manager, Skills Group
Ms Wendy Walker, Acting BM, Skills Group
Ms Jan Febey, Branch Manager, Skills Group
Ms Julie Yeend, Branch Manager, Skills Group
Mr Andrew Lalor, Director, Skills Group
Mr Daniel Owen, Branch Manager, Skills Group
Ms Kathryn Shugg, Branch Manager, Skills Group
Ms Maryanne Quagliata, Branch Manager, Tertiary Frameworks Group
Mr Linda White, Branch Manager, Tertiary Frameworks Group
Ms Leonie Horrocks, Branch Manager, Tertiary Frameworks Group
Mr Neil McAuslan, Branch Manager, Tertiary Frameworks Group
Ms Belinda Emms, Acting Branch Manager, Tertiary Frameworks Group
Mr Colin Walters, Group Manager, International
Ms Tulip Chaudhury, Branch Manager, International
Mr Jason Coutts, Branch Manager, International
Mr Vipin Mahajan, Branch Manager, International
Ms Di Weddell, Branch Manager, International
Mr David Hazlehurst, Group Manager, Higher Education Group
Mr Mark Warburton, Branch Manager, Higher Education Group
Mr James Hart, Branch Manager, Higher Education Group
Ms Julie Randall, Branch Manager, Higher Education Group
Ms Catherine Vandermark, Branch Manager, Higher Education Group
Mr Andrew Taylor, Branch Manager, Higher Education Group
Ms Lisa Schofield, Branch Manager, Higher Education Group
Mr Robin Shreeve, Chief Executive Officer, 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
Ms Jo Wood, Group Manager, Indigenous Economic Strategy
Ms Lynne Stevenson, Branch Manager, Indigenous Economic
Ms Katrina Fanning, Branch Manager, Indigenous Economic
Ms Tania Rishniw, Branch Manager, Indigenous Economic Strategies
Dr Alison Morehead, Group Manager, Social Policy and Economic Strategy
Mr Mark Roddam, Branch Manager, Social Policy and Economic Strategy
Ms Debbie Mitchell, Branch Manager, Social Policy and Economic Strategy
Ms Sue Dawson, Group Manager, State and Regional Services 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
Mr Stephen Moore, Group Manager, Employment Systems and Relationships
Ms Marsha Milliken, Group Manager, Income Support
Ms Margaret Sykes, Branch Manager, Income Support
Mr Derek Stiller, Branch Manager, Income Support
Ms Fiona Buffinton, Group Manager, Specialist Employment Services
Ms Ingrid Kemp, Branch Manager, Specialist Employment Services

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 Sarah Sullivan, Acting Branch Manager, Workplace Relations Implementation and Safety
Ms Meredith Fairweather, Branch Manager, Workplace Relations Implementation and Safety
Ms Susan Devereux, Acting Group Manager, Workplace Relations Policy
Mr Paul Mills, Acting Branch Manager, Workplace Relations Policy
Ms Colette Shelley, Acting Group 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
Mr Jeremy O'Sullivan, Group Manager, Workplace Relations Legal
Mr Henry Lis, Workplace Relations, Workplace Relations Legal
Mr David Bohn, Branch Manager, Workplace Relations Legal
Ms Elen Perdikogiannis, Branch Manager, Workplace Relations Legal

Australian Curriculum, Assessment and Reporting Authority

Dr Peter Hill, Chief Executive Officer
Mr Robert Randall, General Manager, Curriculum and Deputy Chief Executive Officer
Mr Peter Adams, Acting General Manager

Australian Building and Construction Commission

Mr Leigh Johns, Commissioner
Mr John Casey, Chief Financial Officer

Australian Learning and Teaching Council

Dr Carol Nicoll, Chief Executive Officer

Comcare

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

Fair Work Australia

The Hon. Geoff Giudice, President
Mr Tim Lee, General Manager

Mr Terry Nassios, Director
Ms Bernadette O'Neill, Director
Mr Brendan Hower, Director
Mr Dennis Mihelyi, Chief Counsel, Fair Work Ombudsman

Fair Work Ombudsman

Mr Nicholas Wilson, Fair Work Ombudsman
Mr Michael Campbell, Executive Director WR Policy and Education
Ms Janine Webster, Chief Counsel
Mr Mark Shapter, Director of Financial Operations
Mr Bill Loizides, Group Manager, Field Operations
Mr Alfred Bongi, Group Manager, Customer Service
Mr Steven Ronson, Executive Director Regional Services and Targeting

Safe Work Australia

Mr Rex Hoy, Chief Executive Officer
Ms Amanda Grey, Branch Manager
Ms Justine Ross, Branch Manager
Mr Wayne Creaser, Branch Manager
Mr Drew Wagner, Branch Manager
Mr Andrew Craig, Director
Ms Julia Collins, Director
Ms Julie Hill, Director

CHAIR (Senator Marshall)—I declare open this public hearing of the Education, Employment and Workplace Relations Legislation Committee. The Senate has referred to the committee the particulars of proposed expenditure for 2010-2011 and the related documents for the Education Employment and Workplace Relations portfolio. The committee must report to the Senate on Tuesday, 22 March 2011 and has set Friday, 8 April 2011 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 any 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 and which I now incorporate into *Hansard*.

The extract 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)

CHAIR—Officers called upon for the first time to answer a question should state their name and position for the *Hansard* and witnesses should speak clearly into the microphone. Please make sure that all mobile phones are turned off or to silent. The committee will begin today's proceedings with questions to portfolio agencies and will then follow the order as set out in the circulated program.

[9.04 am]

Comcare

CHAIR—I welcome Mr Paul O'Connor, Chief Executive Officer, and Mr Steve Kibble, Deputy Chief Executive Officer, and other officers from the portfolio agencies. Mr O'Connor, would you like to make an opening statement to the committee?

Senator Chris Evans—Excuse me, before he does could I just—

CHAIR—I forgot to welcome the minister. Sorry about that, Minister. If it is not written down for me, I am quite incapable of doing it myself.

Senator Chris Evans—I do not take any offence and I am happy to keep a low profile. I have spoken to you and to Senator Abetz and, unfortunately, I am going to have to excuse myself around 10 o'clock to attend a signing of some memorandums of understanding of the Mongolian government on behalf of the Commonwealth. Senator Conroy will more than ably represent me during that break and I will be back as soon as I can be.

Senator ABETZ—He didn't in your absence during question time, but we trust that he will on this occasion.

Senator Chris Evans—I understand he did a sterling effort, so I thank the committee for their cooperation. Thank you.

CHAIR—Mr O'Connor, do you have an opening statement?

Mr O'Connor—No statements, Chair.

CHAIR—We will move straight to questions. Senator Abetz.

Senator ABETZ—Media stories are always a good way to start estimates. There has been a suggestion that certain government bodies have to go to open tender for expenses over \$400,000 and that Comcare is one of them. The suggestion in the Sunday *Canberra Times* of 30 January is that, to overcome that restriction, what the innovative thinkers in various departments and agencies do is to just tell people, 'Instead of having a \$410,000 contract, we will split it into two of \$205,000 and that way we do not have to go to open tender.' Can you give us an assurance that Comcare does not engage in that practice?

Mr O'Connor—I can give you that assurance, Senator. There are some contracts that we have entered into for consultancy arrangements in the last year and a half that do exceed the \$400,000 but we take it in the aggregate; the total expenditure with that particular service provider.

Senator ABETZ—Can you give us an update in relation to the Lucas Heights reactor situation? I understand Comcare has been involved in that.

Mr O'Connor—Yes, we have—

Senator ABETZ—Or indeed not involved because the assertion is that there was a failure to notify Comcare.

Mr O'Connor—The latest is that Comcare has completed an investigation into a range of issues that involve the Australian Nuclear Science and Technology Organisation, ANSTO, and especially at its Lucas Heights facility. There were five areas of focus that our investigator was looking at in his review. That report has been finalised and shared with ANSTO. ANSTO have concerns with Comcare's findings, conclusions and recommendations. We are in the midst of undertaking what we call a professional services review. That is a process that Comcare has when people affected by reports can challenge the efficacy of that. ANSTO maintain that our investigator was unfair, that he was—

Senator ABETZ—There was a denial of procedural fairness.

Mr O'Connor—Correct. We have commissioned this independent professional standards review to test the efficacy and the accuracy of the investigator's report. That review is underway and we have invited ANSTO in writing, in person, on the phone to come forward to that professional services review and lay on the table the details of its concerns about that.

Senator ABETZ—ANSTO are cooperating or agreeing to partake in that process?

Mr O'Connor—At this stage the chief executive and the management team have assured me that they will participate in that. They have had concerns. They have raised them. I have given written assurances about their right to participation and their right to be heard. As at today, they have not yet put on the table the details of their concerns and we continue to encourage them to do so.

Senator ABETZ—All things being equal, which they never are, when would you anticipate this review to be completed?

Mr O'Connor—Our hope is that early in March 2011 we will have that concluded, provided we have got on the table ANSTO's concerns.

Senator ABETZ—You may recall that in previous estimates I have expressed concerns about the way the training courses are being conducted. I know that overlaps to a certain extent with Safe Work Australia. We now have some new guidelines for training providers—is that correct?

Mr O'Connor—Yes.

Senator ABETZ—As a result of those new guidelines, how many new courses have become available?

Mr O'Connor—I will get that detail for you.

Senator ABETZ—My advice is that there are in fact none, but one training provider has been ruled out. So there has been a contraction in the number of training providers. If I say 'service providers' you will know I mean 'training providers'.

Mr O'Connor—Mr Kibble can assist us with that.

Mr Kibble—One training provider, whose term expired, has been denied accreditation under the guidelines by the accreditation panel. There is a range of other accredited courses, which have got a range of accreditation dates, and the accreditation panel and Comcare are working with the panel members on those courses to ensure that they are consistent with the training guidelines.

Senator ABETZ—With the one trainer that has been denied, nothing has been found to be faulty with the training that was provided—which was accepted and used by a variety of Commonwealth departments and got very good results. It is the guidelines that have knocked this provider out. It is not the actual product that was delivered that has ruled out this provider.

Mr Kibble—That provider—and I assume we are talking about the same provider—

Senator ABETZ—Yes.

Mr Kibble—That provider was granted several extensions of their accreditation but, at the end of that process, have failed to resubmit a course for reassessment. They have advised

Comcare that they do not intend doing so as they do not agree with the requirements of the guidelines.

Senator ABETZ—We have laboured this previously, but we have got this ridiculous situation of one size fits all, which knocks out a proven training provider whose training has been accepted by a variety of Commonwealth departments. Nobody has questioned the training that has been provided. The people who have been trained have been of as high a standard as those trained by any other training provider. Yet, for this manic pursuit of a one size fits all, this training provider has been knocked out of the field for no good reason other than somebody saying, ‘It has got to be face to face for five days and if it is not face to face, it is not as good as somebody who might learn over the internet.’

Mr Kibble—Senator, as you mentioned earlier, and we have talked about this in previous Senate hearings, the Safety, Rehabilitation and Compensation Commission, in releasing the guidelines in April last year, did take account of the result of consultations with people within the Comcare jurisdiction—unions, HSRs and the training providers themselves. They also had regard for what other workplace safety regulators do around Australia. On this particular point, all the jurisdictions require face-to-face training for health and safety representatives. Most have adopted a five-day requirement for face-to-face training and in Tasmania, New South Wales and the ACT, they require four days of face-to-face training. The commission did take account of the results of the consultations and also took account of the practice in all jurisdictions to require face-to-face training for health and safety representatives.

Senator ABETZ—I understand that the unions were especially quite demanding of the five day face-to-face. In this modern age where we are talking about the National Broadband Network et cetera, all of a sudden that technology goes out the window and we have to have the old classroom five-day face-to-face training because that is the only way we can deliver safety training in Australia in the 21st century. Really, this is turning the clock back and I would have thought with modern technology et cetera that this demand was being driven by a certain element. I will ask you about the survey and consultations that were undertaken. It would be agreed that not everybody supported the five-day face-to-face training?

Mr Kibble—I do not have the details of the views of particular parties with me, but there were a range of views put forward about this particular issue that ranged across the spectrum.

Senator ABETZ—There was some support for the sort of training—let’s not beat around the bush—that Dr John Culvenor was engaged in?

Mr Kibble—There was some support for that, not least from Dr Culvenor himself. He put a submission into the—

Senator ABETZ—Of course, but if we want to make those smart comments, we can also make the smart comments that the unions were very anxious to have the five-day face-to-face consultations. What about the clients of Dr John Culvenor and his company—the name of which currently escapes me? There was no suggestion that the training that he and his company had delivered was in any way deficient.

Mr Kibble—I might just go back—my comment was not meant to be a smart comment.

Senator ABETZ—All right. Sorry, I may have been a bit oversensitive in that regard.

Mr Kibble—I wanted to make the point that Dr Culvenor, amongst others, had put a submission into the inquiry. In terms of the students of Dr Culvenor, we did conduct a survey of health and safety representatives and I do not have the detail of whether or not those student health and safety representatives participated in that health and safety representative survey, but I can take that on notice.

Senator ABETZ—If you could. Does the Safety, Rehabilitation and Compensation Commission fall under Comcare or Safe Work Australia?

Mr Kibble—No, they are a co-regulator of the Comcare scheme.

Senator ABETZ—I can ask these questions here?

Mr Kibble—Yes.

Senator ABETZ—Did the minutes of the meeting, as late as 15 September 2010, of the Safety, Rehabilitation and Compensation Commission include in it:

Commissioner Hoy advised that Safe Work Australia will be developing guidelines but not until early 2011. Safe Work Australia may put together a group to workshop this issue. He suggested that Safe Work Australia works with Comcare to develop some words on a rationale to include in a letter to Dr Culvenor.

As late as 15 September last year the rationale for knocking out Dr Culvenor had not been determined and had to be workshopped to try to justify this quite ridiculous decision. That is the reality and the minutes now prove that, do they not?

Mr Kibble—You will appreciate I do not have the minutes with me, but—

Senator ABETZ—Take it on notice and tell me whether my reading of those minutes is an accurate reflection of those minutes.

Mr Kibble—Yes, we will take it on notice.

Senator ABETZ—Thank you.

Mr Kibble—I would add we had had contact with all training providers, including Dr Culvenor, before the April 2010 issue of the guidelines and after that, to explain the changes to the guidelines.

Senator ABETZ—On 23 November 2010 we were still being told, ‘There is no policy guidance on the method of training as yet.’ That was the situation as at 23 November 2010, is that right?

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

Senator ABETZ—I refer to a letter from Janit Gardner, Director, Licensing, Audit and Monitoring, from 23 November. On the second-last paragraph:

We note that, under the proposed model occupational health and safety laws, there will also be a requirement for five days’ training, although there is no policy guidance on the method of training as yet.

Mr Kibble—To clarify that, Ms Gardner was talking about the new training arrangements under the new model health and safety laws, which are proposed to come into effect from 1 January 2012. Her reference to development and policy guidelines was in relation to the

model laws, which are still yet to come into effect. She was not talking about the current guidelines for the Comcare scheme, which are in effect at the moment.

Senator ABETZ—We still have not been told why the method by Dr Culvenor, in any way, shape or form, is deficient or has been proven to be deficient. Why would you rule out the diversity of training experiences that are available? Most educators say that one-size-fits-all does not work and that it helps to have a range of learning experiences for different people, just as long as the outcome is the same and the skills of the people trained are the same. There seems to have been no criticism of the training provided by Dr Culvenor and his company in relation to all the outcomes but he and his company are now going to be ruled out simply because this stovepipe, one-size-fits-all has been adopted. That is basically the summary, is it not?

Mr Kibble—The commission issued the guidelines. They asked Comcare to commission a consultative process to advise them about the content of the new guidelines in 2010. The commission, based on the evidence provided—surveys and views put forward by a range of parties on this particular issue—decided that the best outcome was that part of the whole training package would be the face-to-face training arrangements. I do add—

Senator ABETZ—Of course if you are one provider, providing a unique, different type of course and there are 90 per cent or 99 per cent of other providers providing something different—do you know what?—it is not surprising that the vast majority will say that their course is better than the one that provides a unique course. What has happened, clearly, is that the majority have been able to force out of the marketplace the one that had a unique training experience. From my perspective and, I would have thought, every Australian's perspective we are concerned about one thing and one thing only: it is not the training mechanism but the outcome—are they trained, are they proficient and are they able to do that which they have been trained for? And, if they are certified as being capable of achieving all the requirements, standards and qualifications, why would you rule them out, other than continually saying, 'Well, we had this investigation and the vast majority were on the side of a particular form of training'? Of course they would be, because everybody supports their own mechanism. I still do not understand the rationale, other than this sort of manic determination to pursue a one-size-fits-all.

I am finished with Comcare but I really do hope that you and the others involved will reconsider, even at this late stage, because it is unfair, it does nothing to improve safety in Australian workplaces, if the quality of the training and the outcomes are exactly the same as the other mechanisms and the old face-to-face classroom experience. A lot of universities now have online experiences where you can get university degrees without ever setting foot in a lecture theatre, and I would have thought Comcare and this safety training might have been able to catch up with that modern thinking.

Senator XENOPHON—Mr O'Connor, I have some questions arising out of the Commonwealth Ombudsman's report of March 2010 headed *Comcare and Department of Finance and Deregulation: discretionary payments of compensation*. Are you familiar with that report—

Mr O'Connor—Yes, I am.

Senator XENOPHON—and in relation to the case referred to as ‘Mr B’? I have the permission of the person to give his name, but you would probably be more circumscribed.

Mr O’Connor—Yes.

Senator XENOPHON—We know who we are talking about?

Mr O’Connor—Yes, we do.

Senator XENOPHON—He is a constituent I have seen and had a bit to do with recently.

Senator Chris Evans—Senator X is asking questions about Mr B.

Senator XENOPHON—It is a pretty shameful case, senator. This is a man—

Senator Chris Evans—It is useful not to use his name.

Senator XENOPHON—No, I understand, but we all know it because it was the subject of an Ombudsman’s report. This man was injured in August 1988. This man has been trying to get a just outcome from Comcare in relation to that. The Ombudsman’s report makes reference to a number of errors made on behalf of Comcare. Some of those errors include that his notional weekly earnings were incorrectly calculated, so that he only received less than half of his entitlements for something like 12 years; that there were numerous written requests by Mr B to review his normal weekly earnings rate and to include the marine allowances; that his file was lost up to five different times, and parts of the file are still missing; and that a number of misrepresentations were made in relation to his entitlements. What is the status of Mr B’s claim? This is a man who is now in his 60s, in very poor health and in very difficult circumstances, and yet he has not even received his proper notional weekly earnings.

Mr O’Connor—This case and another Comcare client from the Northern Territory—

Senator XENOPHON—That is ‘Ms A’.

Mr O’Connor—Ms A—were the subject of that report. Mr B has been persistent and patient to keep raising these issues. We were able to find—

Senator XENOPHON—I do not know about patient. I do not know how much longer this chap can keep going with what he has gone through and his personal circumstances but, anyway. Sorry.

Mr O’Connor—We conceded that mistakes were made and that was the subject of a public statement that I made early last year, because the Australian community and federal workers need to be able to have trust and confidence in Comcare and its decision making. The systems broke down. Mistakes were made. We concede and accept that and the organisation has apologised to Mr B, but that does not remedy that issue. We have found what we believe to be part of the solution to be able to remedy the financial implications of those mistakes. We are constrained under federal law currently to be able to implement what would be the normal processes for defective administration.

Senator XENOPHON—How do you mean?

Mr O’Connor—The normal scheme of compensation for defective administration—that is, administered through and with the guidance of the Department of Finance and Deregulation—does not apply to Comcare and the circumstances of these and other like cases.

Senator XENOPHON—The CDDA scheme does not apply here?

Mr O'Connor—That is correct. We believe that scheme, or a scheme like it, should, and we agreed with the then Commonwealth Ombudsman, Professor John McMillan, that we would be raising with our colleagues in DEEWR and the department of finance a solution to that so that workers who are affected by incorrect decisions, mistakes made by us or other determining authorities in the Comcare scheme—that is, the licensed self-insurers—could forget that mistake. The financial remedy that we have identified for this particular constituent does not address all of his financial claim, but there is a constraint to that because those payments under the Public Service Act are capped at \$100,000.

Senator XENOPHON—Which is only two or three years worth of back pay, without interest.

Mr O'Connor—Correct. The correct payments, I understand and am advised, have been made. The claim being made by this particular constituent relates to the financial impact of being out of his money for so many years.

Senator XENOPHON—That is right. I think one of the claims made was that he was paying off, well within his means, investment properties. He was not paid properly, as has been acknowledged, so the places were either foreclosed or had to be sold—a distressed sale.

Mr O'Connor—Correct.

Senator XENOPHON—I would have thought there was some causal link between an administrative error by Comcare and quite significant financial losses, wasn't there?

Mr O'Connor—And that is why—

Senator XENOPHON—You acknowledge that?

Mr O'Connor—Yes, and that is why I exercised my discretion under the Public Service Act to offer to this particular constituent, within the constraints of federal law, the maximum amount available there. We and the Commonwealth Ombudsman have advised the constituent about the efforts that are being made for us to set in train a new system that reflects, or replicates, the scheme for compensation for defective administration, because this is a gap, and we are working hard to fix that gap and be able to address those issues. We have offered to fund the cost of the calculation of those losses as well.

Senator XENOPHON—I outlined some of the administrative issues. I think there is an issue there of dilatory and deficient conduct: the losing of the files I have referred to, the errors made in notional weekly earnings, absolutely misleading information being given in terms of his claim. The Ombudsman I think vindicated many of those issues. Have there been any changes and any disciplinary action against any of the officers involved who clearly made some decisions that were not just poor but, I would go so far as to say, could be considered capricious in some cases.

Mr O'Connor—Senator, I would reject the assertion that they were capricious, but they were mistakes that were made.

Senator XENOPHON—Misleading information was given. Completely wrong information was given about this man.

Mr O'Connor—The mistakes that were made in this case by us and our colleagues at the Department of Finance, I have acknowledged on the public record the gravity and the seriousness of those mistakes and have been able to set in train within our organisation a review of the processes. The particular person who made those claims decisions is no longer with the agency; it was many years ago. We have also gone back to look at whether other people were affected at that particular time. What we need to do is to be able to celebrate these mistakes and be able to welcome the scrutiny, because it is then that we as a learning organisation will be able to look at what we have been doing and where there are gaps and deficiencies in that process and, in this case, those gaps and deficiencies and mistakes made were significant.

Senator XENOPHON—This bloke has been on this path for 23 years now.

Mr O'Connor—Correct.

Senator XENOPHON—Sorry, since 1988. Yes, 23 years. It is his 23rd year; his life has been completely wrecked. When will this be brought to a head? Is there any point? I will offer now: is it worth trying to sit down informally with Comcare, with Mr B and his representative, to see if something can be conciliated or dealt with? I have done a lot of worker's comp claims over the years and I have never seen anything as bad as this. This man is living on food scraps.

Mr O'Connor—Yes.

Senator XENOPHON—He is literally living on food scraps because the administrative errors that have been made over the years compounded.

Mr O'Connor—We would welcome the opportunity to be able to sit with the constituent, and through your good office, to be able to facilitate a better understanding of that. I have, within the constraints of what federal law allows me to do, offered every available opportunity and dollar value of compensation, plus the commitment of our colleagues at the department, the Department of Education, Employment and Workplace Relations as well as Finance to set in train a system that will make sure that this situation does not occur again in terms of this gap in the ability for people affected by the maladministration of ourselves and other determining authorities in the Comcare Scheme. That is an important and sustainable change that needs to be made. We will also be looking to make that new scheme retrospective as well, and we are working with our colleagues in other parts of government to make that happen.

Senator XENOPHON—This guy is just hanging on. He is really struggling. Can we just—

Senator Chris Evans—Senator Xenophon, can I just be clear myself to see if I can help at all?

Senator XENOPHON—Yes, sure.

Senator Chris Evans—I just want to understand between you and Mr O'Connor what is outstanding in the terms of his particular case? It is obviously a very distressing story, and Mr O'Connor has talked about changes to Commonwealth's capacity to deal with these cases, and

perhaps even retrospectivity. I know the parliament has always been very reluctant to look at retrospectivity, but—

Senator XENOPHON—This is quite exceptional, Minister.

Senator Chris Evans—Yes. I am just saying, there will no doubt be some challenges and all of that, but in terms of when you were saying you were looking to have conciliation with Comcare, I just want to be clear what it is we are now looking to conciliate. What is outstanding here?

Senator XENOPHON—There are a number of outstanding issues in terms of quantum, in terms of even issues of back pay and interest. I think that Mr O'Connor has quite correctly pointed out that there are currently constraints as to the limit that can be paid. I think the limit is \$100,000.

Mr O'Connor—It is correct.

Senator Chris Evans—Mr O'Connor has said that they will do the maximum they can under current law. You might like to ask Mr O'Connor whether that has occurred. Before we get any legislative change, is there anything we can do to conciliate or resolve those other issues?

Senator XENOPHON—Minister, I think there is. Mr O'Connor, I do not think you had anything to do with this decision back in 1988. I am sure you did not.

Mr O'Connor—No, but I am accountable as the CEO for the system.

Senator XENOPHON—Yes, I know. Please do not take this personally, but I understand this is a very distressed man, and I think with absolute justification, that we are dealing with. If there can be some quantification, notwithstanding the current statutory limits, but if there can be some clarity as to the level of his loss and acknowledgment of that loss, and if there is legislative change—and that was going to be my next question—is that foreshadowed at the moment in terms of changes to the act?

Mr O'Connor—There are two parts to that question. We also are keen to be able to address this particular constituent's challenges and the difficulties that he faces. My understanding is that we have made and have made for some time the offer to make the payment and have been in discussions with the lawyer representing this particular federal worker. But my understanding is—and I stand to be corrected—that payment has not been accepted. We want to make that payment, but we also are acknowledging that this particular constituent has had financial impact above and beyond the financial limits that I am able to pay under federal law. We have offered to fund the calculation of that with not Comcare people but independent experts to be able to come to a view about the quantum of that loss. The second part of your question was about where we are up to. We have, through Mr Kibble's scheme integrity group, been able to identify what we believe are a range of solutions, and we are currently working those through with our colleagues in other government departments who are affected by and involved with this.

Senator XENOPHON—I appreciate that, Mr O'Connor. For the minister's benefit, my understanding of the difficulty is that there is a concern that, if a payment is accepted, it would prejudice any future rights.

Senator Chris Evans—Now we are starting to get to the nub of it then. The question is—probably for Mr O'Connor—whether or not there is some way of us satisfying Mr B and his legal team that there is no prejudice in accepting the payment while the other issues are pursued.

Senator XENOPHON—I think so. Minister, his legal team consists of one lawyer, who I think has been advocating for many years on that basis. This is someone who has taken quite a compassionate view and who used to actually work as a lawyer for Comcare, and so knows his stuff.

Mr O'Connor—Yes.

Senator XENOPHON—I thought the first step would be to actually try and get people in the room on an entirely without prejudice basis.

Mr O'Connor—We are happy to make that commitment.

Senator XENOPHON—Yes. It is going to be a long day though, I think.

Mr O'Connor—This constituent has endured much that most in the community could not even tolerate, and we acknowledge the impact of that.

Senator Chris Evans—Senator Xenophon, I am prepared, if you like, to offer up the services of a conciliator or a convenor—someone to facilitate the meeting, other than the department—

Senator XENOPHON—Minister, I am very grateful for that. This is just a terrible anomaly, and I am really grateful for Mr O'Connor's response and the tone of his response. I am very pleased by that. It will have to probably be in Adelaide. I do not even know if he can get on a plane in terms of travel.

Mr O'Connor—That is not a difficulty for us to be able to sit with this constituent and his lawyer, who I do acknowledge has a deep and long understanding of this. Our aim is to get the money that we have committed to pay to this constituent into his account as quickly as possible, and we are trying to work through what are the barriers to that money being accepted.

Senator XENOPHON—I will be there, and it will bring back memories of those halcyon days of doing workers comp law. So if we can arrange that through your office.

Senator Chris Evans—If it is all right with you, Senator, I will see if someone from the department with experience in these matters might attend the meeting as well.

Senator XENOPHON—Yes.

Senator Chris Evans—That way I can get some independent feedback.

Senator XENOPHON—I think it is welcome. I just feel he has hit a number of brick walls over the years, and it is just a terrible state of—

Senator Chris Evans—We will commit to convene a meeting, I will have someone senior from the department and you, Senator Xenophon, Comcare and his lawyers, and we will try and get something together quickly.

Senator XENOPHON—Can I indicate to both to you, Minister and to Mr O'Connor, I am really grateful for the tone of the responses. Thank you.

CHAIR—Mr O'Connor, while I understand the context and the meaning when you said, 'We should celebrate our mistakes,' I am not sure that 'celebration' is the right word you should use.

Mr O'Connor—Yes.

CHAIR—I do understand what you are saying and I do acknowledge that. Since you have taken over there has been some significant improvement in the dealings with some of these cases, which brings me to the case that I have been talking about for many years too, which is Mr Emery, who now acknowledges, also personally, the your work and involvement, but I do make the point that it is still unresolved.

Mr O'Connor—Correct.

CHAIR—Why can we not get to actually finalising some of these cases?

Mr O'Connor—The situation that you raise with Mr Emery is similar to Senator Xenophon's constituent, a federal worker who is struggling to cope. He is focusing on the wellbeing of his family and trying to hold it together through the processes that he is going through at the moment—which are through ComSuper; it is a superannuation question that is the barrier or the blockage to resolution of Mr Emery's matter. We have done everything that we can to be able to support and help Mr Emery understand the entitlements that he has. We have raised with ComSuper the consequences of invoking his superannuation entitlements through ComSuper, should ComSuper agree in its medical panel and the determination. We are working formally and informally to be able to support Mr Emery so that he has closure on this. He is in his 60s and approaching retirement, and is interested in the welfare of his family. It is for his family and for his own wellbeing, and it is touch and go. He also has been through a long process.

We have done everything we can within the Comcare process and system, and his entitlements. It is about us encouraging and working with our colleagues at ComSuper, which we do, and I will be meeting with its CEO the week after next to be able to reinforce the importance of better and faster processes, especially when there is an incapacity and a superannuation entitlement involved in these cases. We are seeing not just in Mr Emery but in some other cases long delays. Those delays lead to uncertainty. The uncertainty makes it hard for these federal workers, recovering from workplace harm, to get on with their lives and cope with change, challenge and disability. It is not good enough and that is why we are working hard to try and fix that.

I do acknowledge that the use of the word 'celebration' is not meant in any pejorative sense. These people have gone through great ardour. It is an outrage they were harmed at the workplace to start with. At Comcare we are working to make sure that the systems and the processes that federal workers go through do not create needless disability in their own right, to make sure that people are able to recover their health and get back to work and return to independence, to the extent they can in the communities that they are involved in.

Mr Emery's case and the case raised by Senator Xenophon are examples of where the entire system of which Comcare is a contributor is letting these people down. We are

committed to make sure that those cases are identified. The context of celebrating mistakes was in fact the adage given by the former Commonwealth Ombudsman, Professor John McMillan, that as agencies we need to understand that, at the end of all of these administrative processes we have, there are vulnerable individuals and to make sure that we look at all of these mistakes that we make and take them as an opportunity to strengthen, improve and become a learning organisation. That is what we have embraced wholeheartedly. For example, with regard to your constituent, Senator Xenophon, we know that the commitments and the public statements we made actually led to another federal worker coming forward to share her circumstances and we have been able to address fully those anomalies. That is why, Chair, this is so important to get right.

Senator XENOPHON—Mr O'Connor, you will be hands-on in this particular case; you will be fully aware of what's going on?

Mr O'Connor—Absolutely. That is my commitment.

CHAIR—Does ComSuper come before estimates? I do not know.

Mr O'Connor—Within the Department of Finance, I suggest.

CHAIR—It is probably not really a question for you. When you are talking to the CEO there tell him to bring the file to the budget estimates and we will talk about it with him when we get there. If there are no other questions for Comcare, thank you, Mr O'Connor and Mr Kibble, for your presentation today.

[9.48 am]

Safe Work Australia

CHAIR—Welcome, Mr Hoy and other officers. Do you have any opening remarks you would like to make to the committee?

Mr Hoy—Thank you. No, I do not.

CHAIR—We will go straight to questions then. Senator Abetz.

Senator ABETZ—I start with the National Work Health and Safety Laws. Do you have any update in relation to New South Wales? Does your agency have any interaction with New South Wales in relation to that?

Mr Hoy—Yes, we do have interaction at the officer level. In terms of the political level, it is probably more appropriate to address that question to the department and the minister.

Senator ABETZ—What are you being told at the administrative level from New South Wales, that it is a no-go zone for New South Wales?

Mr Hoy—No. We are working with all the jurisdictions to have them enact the model legislation to come into operation on 1 January 2012. That is the COAG agreement and commitment, and certainly at officer level we are working along those lines.

Senator ABETZ—At the New South Wales officer level, they are still working with you for that outcome, despite the fact that the New South Wales Government has said it is no longer their policy. That is interesting.

Mr Hoy—New South Wales and other officials have been working with us, certainly for the last year and a half, in developing the model act. They are currently working with us in terms of developing the regulations to support that act. They will also be working with us on implementation, policy for compliance and enforcement and those sorts of things of the codes of practice. The political situation will unfold.

Senator ABETZ—Forgive me, I might have a very naive view, but I thought that departments actually work at the direction of the government and they do not simply dismiss the government's approach on this, or are they anticipating a certain result in about four weeks' time?

Senator Chris Evans—I can certainly assure you that in a range of other areas in terms of dealing with WA where there is a sticking point, not necessarily on this legislation but others, the work goes on in terms of a cooperative approach to try and get the rest of it right. There may be some argy-bargy between the governments as to the final outcome, but generally the bureaucracies continue to work away, knowing that final settlement on some of those issues are outstanding. The position of the New South Wales government on a couple of sticking points they have has been cleared.

Senator ABETZ—As I understand it, it is not just a couple of sticking points—and what you say, minister, makes perfect sense. As I understand it, Premier Keneally has already signed up but she will not honour the commitment of her signing up. It is not just that there is one outstanding issue. If I might say, I think there is one area with Western Australia where Western Australia has indicated it would not be agreeing but in all other areas it would be agreeing to the national scheme. In those circumstances, what you say, Minister, makes perfect sense. I understood the New South Wales position to be a lot starker than the Western Australian position. I understood the New South Wales position to be that they were no longer going to abide by the COAG agreement. Have I misunderstood that, Mr Hoy?

Mr Hoy—As I understand, based on comments the Premier has made, she has indicated that, in two areas, New South Wales would not be adopting the model legislation. That relates to union right to prosecute and reverse onus. As far as I know, but I could be mistaken, she has not said, 'We are not enacting anything.'

Senator ABETZ—In that case, that all makes good sense, then, that she has said that she would agree other than in those two areas.

Mr Hoy—Correct.

Senator ABETZ—Thank you for that, Mr Hoy. I accept that. By having one nationally, or relatively national, consistent set of laws, will there be one OH&S regulator?

Mr Hoy—No. Each of the regulators will continue to enforce the legislation that each of the particular states and territories and the federal government will enact.

Senator ABETZ—Would it make good sense—possibly this is more a policy question, Minister—to have one regulator rather than a disparate body of state-wide regulators?

Senator Chris Evans—As you know, the framework for these things is cooperative federalism and the Commonwealth is looking to work with the states. The key benefit from these changes, in my view, is that they work as a business. We will have one set of rules they

have to comply with. There will be clear understandings of those and significant savings to businesses who work across state boundaries in having one set of procedures to adhere to. The arrangements for the states is that they maintain the enforcement, but if we can get uniform legislation we will go a long way to ensuring better understandings of occupational health and safety laws, easier business compliance and significant business savings. As I understand it, the COAG arrangements are that the regulators will continue their work in the state jurisdictions.

Senator ABETZ—It is step forward. I have no argument about that. I think also not only is it going to be of benefit for businesses; it will be of benefit for workers as well. It will be a benefit across the board. It is just a question of whether, in an ideal world, it might be best just to have the one regulator, but I understand what you say.

Senator Chris Evans—As you know, I am not one to seek centralist powers, and you, I know, would support the rights of the states to continue to exercise their constitutional responsibilities.

Senator ABETZ—If that is what they have done, so be it. Mr Hoy, have you had any feedback from stakeholders in relation to the benefit or otherwise of having these disparate state regulators enforcing the national scheme, as opposed to having one national regulator? Has any feedback been had?

Mr Hoy—No, not specifically on that. It is a fact that for a number of years all the regulators have been working together to make sure that there is a consistent approach because, as you know, there are multistate firms and also workers who move between states. There has been that attempt. As the minister said, the whole approach with this has been to develop a model act which the states, territories and the federal government then actually implement. That was what COAG agreed. That was what premiers and the Prime Minister signed in 2008. As part of that there will be a consistent approach. Not only will the legislation be the same in each of the states and territories but the policies underpinning it will be the same. So we hope there is a consistent approach.

Senator ABETZ—Without asking you to engage in matters political—and I suppose with that introduction I have already put you on notice to be very wary about the question I am about to ask—a reverse onus of proof is a fairly fundamental difference, is it not, in relation to the administration of any law?

Mr Hoy—The only comment I can make is that a review report considered this. They recommended against it. Ministers considered that and they decided against it. There is no provision in the model act on a reverse onus of proof.

Senator Chris Evans—The Prime Minister has made it clear that our commitment remains the same and that we are seeking to implement that agreement.

Senator ABETZ—I understand the firmness of the Australian government, but I am talking about the New South Wales state government. They will not be agreeing to that.

Mr Hoy—I cannot say any more other than what the Premier has said in terms of that specific issue.

Senator ABETZ—I suppose we all keep our fingers crossed that there will be a change of Premier soon in New South Wales and then that will no longer be an issue. Moving from the state to the national scene—

Senator Chris Evans—Senator, I think from a federal point of view the colour of the government, persuasion of the government, does not necessarily remove issues with state-federal relations. I am not sure what the attitude of the New South Wales opposition is.

Senator ABETZ—Given that it would be against standing orders to offer you a wager, I will not. Can I say that if I were to do so I would be very confident of winning and that in the event the people of New South Wales change government the sticking point from New South Wales will be removed.

Senator Chris Evans—I am sure former Prime Minister Howard might reflect that he had more trouble from some of his Liberal governments than he had from Labor and I think Labor prime ministers might have similar views, but we will see how we go.

Senator ABETZ—I thought we were told that the blame game was over and it was all cooperative federalism with wall-to-wall Labor governments, but it looks as though the reality of experience has dissuaded you from that view.

Senator Chris Evans—What I would say to you is that I think we are making good progress on this front and I am hopeful of a fairly rapid conclusion.

Senator ABETZ—You are about to go, Minister, to engage in international matters, so that has turned my mind to international matters as well. Can we be told about the spend by SWA in relation to your international activities, because on your website you have a section dealing with international collaboration. Does it involve Mongolia?

Mr Hoy—It does not involve Mongolia.

Senator ABETZ—Or could the minister assist us in that regard?

Senator Chris Evans—It may be by the time I come back. That might be one of the reasons I am going.

Mr Hoy—No, it does not involve Mongolia. I will need to actually check the specific spend on international activities. What I actually do have are some figures for overseas travel in 2009-10. It was \$48,671.

Senator ABETZ—Was that all for you, Mr Hoy, or was it shared around?

Mr Hoy—Sorry, no, it was not. I am pleased to say I did not go overseas in 2009-10.

Senator ABETZ—You are fortunate.

Mr Hoy—I am not sure why you say that, senator. The figure for 2010-11, to date, is \$44,642. That may not necessarily include the total spend on international activities.

Senator ABETZ—Take that on notice, please, if you would not mind.

Mr Hoy—Yes.

Senator ABETZ—So I get an understanding of the new national system, it has been put to me that business, or employers, will have a duty to consult workers; that is part of the regime? Is that correct?

Mr Hoy—Yes, that is correct.

Senator ABETZ—If I may, I will just step through this, step-by-step, to make sure that the information I have received is correct. There is a duty by the employer to consult with workers, and the way that that is to be undertaken is by the election of some workers to be representatives; is that also correct?

Mr Hoy—That is correct, yes.

Senator ABETZ—Then, when they are suitably trained to acquire expertise in OH&S, these representatives will conduct risk assessments and manage OH&S matters, injury prevention and matters of workplace health and safety within that business.

Mr Hoy—Amongst other things. They will also, when they are trained, be able to exercise powers under the act.

Senator ABETZ—Thank you for that.

Ms Ross—They would be consulted in the risk assessment process, yes.

Senator ABETZ—Yes.

CHAIR—Just to clarify: that is very different from managing it; they are not going to take responsibility in the business for these things?

Senator ABETZ—No, absolutely not, Chair, because the employer—and you have pre-empted my next question exceptionally well; it is a bit spooky when we are thinking alike, Chair—nevertheless has to comply with all of the acts and regulations, codes of practice and the many other standards. Therefore, what has been put to me is that they will still require the expertise of a work health and safety organisation, or occupational health and safety consulting company, to advise on and write procedure manuals.

Mr Hoy—I am not sure about the latter point. It is a fact that, under the act, there is a primary duty of care involving the person conducting the business or undertaking. How they actually undertake that and what sort of advice and assistance they get is a matter for them.

Senator ABETZ—Yes, but the prudent employer would still have that assessment done, independently of these—for want of a better term—workplace representatives.

Mr Hoy—Possibly, but that is not being mandated.

Senator ABETZ—Sorry?

Mr Hoy—That is not being mandated. What the act actually spells out is their responsibilities. We will be providing practical guidance about implementation of the act to assist all employers—if you like, an annotated version of the act, about what their responsibilities are. We will not actually be going out there, telling them they must hire this expertise or that expertise; that is a matter for them.

Senator ABETZ—Yes, that is interesting, and that is what is being put to me. That is quite right, other than that you are mandating that worker representatives be part of the process that I outlined initially. You are mandating that, but you are not mandating that they have procedure manuals or they get independent occupational health and safety experts into the workplace to provide manuals. But you do mandate worker representatives to be paid during the time that they are trained up, that they undertake their inspections et cetera.

Mr Hoy—Yes, there are provisions in there relating to the training of OHS representatives.

Senator ABETZ—Yes. And of course, on top of all that, there will still be no real control over persons holding a right-of-entry permit either.

Mr Hoy—There are provisions in there relating to right of entry for OHS purposes.

Senator ABETZ—Yes. Thank you for that.

Senator BILYK—Mr Hoy, one of Safe Work Australia's strategies in its operational plan is:

Report on and measure impacts of the intended operation of the model WHS Act and Regulations including improved work health and safety outcomes for workers and the reduction of red tape.

My question is: how well prepared is your agency to implement this program of reporting and measuring if the harmonised framework is in place by the end of 2011?

Mr Hoy—Senator, the act itself should be enacted and operating in all the states and territories in the federal system by 1 January 2012. At the moment we are working with the jurisdictions and other stakeholders to determine what sorts of measures we would be able to consider and introduce to enable us to monitor implementation of the act to test its effectiveness. So we are in the early stages of developing that framework.

Senator BILYK—Will you rely on your own data or will you collect data from the states and territories?

Mr Hoy—Our data actually comes principally from the states and territories, so, yes, we will be relying on that sort of data. At the moment it is a bit early for me to give you an outline of what the evaluation framework might be; in the coming months, we will be in a better position to do that.

Senator BILYK—Do you know if the states and territories have a uniform data collection process?

Mr Hoy—For years we have been working with the states, territories and the federal regulator to get more consistency in the data that they collect and make available to us. It is still an area that requires some work. We have made a lot of progress, but there is still some work we can do to improve that.

Senator BILYK—The annual report for 2009-10 also mentions that a number of speaking engagements have been undertaken to explain the model work health and safety laws. How widespread would you say the process of national harmonisation on provisions of the model WHS laws is amongst ordinary Australian workers?

Mr Hoy—In addition to the activities we have been involved in, each of the states and territories and, certainly, at the federal level, Comcare, have been involved in discussing and explaining the model legislation with their constituents. That will continue during 2011, because, as I said earlier to Senator Abetz—

Senator BILYK—Is that the workers or the employers they are explaining it to?

Mr Hoy—Both, in general seminars that are undertaken. There will be more activities undertaken over the balance of this year as we work up towards the implementation date. That

will involve Safe Work Australia and it will also involve our colleague state, territory and federal jurisdictions.

Senator BILYK—What is the work of the Communications Advisory Group?

Mr Hoy—I will get somebody to come and explain that to you.

Senator BILYK—Thank you.

Mr Hoy—Mr Wagner will be pleased to tell you all about that.

Mr Wagner—The Communications Advisory Group is a fully tripartite representative committee, with representatives from all of the states and territory jurisdictions, as well as industry and trade union representatives. One of the major roles of that group at the moment is looking at an implementation strategy, a communications strategy. All of the jurisdictions will be intending, over the coming months, to advertise and communicate all of the prospective changes that come with national harmonisation to all of the stakeholders in their jurisdictions. That group works together to make sure that there is a common approach to the message that gets out to all of the workers and to all of the employers in all of the jurisdictions. Some of the jurisdictions had started somewhat earlier getting all of their arrangements in place. The Communications Advisory Group allows those jurisdictions to share their experiences, possibly with some of the smaller jurisdictions, so that everyone gets to benefit from all of the activities across the states and territories.

Senator BILYK—What is the process of doing that? Is it talking to a group of people; is it pamphlets?

Mr Wagner—The communications strategy will encompass all aspects of communications. At the moment, what we have been coordinating are advertisements in all of the state and territory broadsheet newspapers, advertising about the public comment process and what has been involved. There is a series of at least three rounds of advertising so that people are aware out there that the call for public comment on the national model regulations is current and goes until early April, to give everyone an opportunity to get onto the websites, have a look at the information that is out there and provide their comment. Once we get into the actual strategy, probably from the beginning of this year, for six months, the process will be jurisdictional dependent. Some jurisdictions have had long-established communication approaches run by their WorkSafe or their WorkCover organisations and they will be building on those—in the same that, as you drive out to Tullamarine airport, there are banners across the road from WorkCover. They will be making those decisions about the best form of advertising to suit the stakeholders in each of the jurisdictions.

Senator BILYK—Thanks, Mr Wagner.

Senator ABETZ—You would be aware of the Safe Rates, Safe Roads campaign, if I can use that term?

Mr Hoy—Only generally.

Senator ABETZ—Only generally? So Safe Work Australia is not involved in that?

Mr Hoy—No.

Senator ABETZ—That is easy.

Mr Hoy—That is the department.

Senator ABETZ—That is easy; that is the department. Thank you very much.

Senator Conroy—What would you like to know?

Senator ABETZ—I will be asking the department, not a former trade union official who has never driven a truck.

Senator Conroy—I never would pass up the opportunity to learn, Senator Abetz.

Senator WORTLEY—Mr Hoy, would you be able to provide the committee with an update on Safe Work Australia's nanotechnology projects and research, in particular, engineered nanomaterials?

Mr Hoy—I will get my colleague Mr Creaser to give you an update on that.

Senator WORTLEY—Thank you. Mr Creaser, on your website there are a number of projects that are listed as current, so I am assuming that they are still continuing as well, so perhaps if you could, in your—

Mr Creaser—Yes, we do have a number of nanotechnology research projects that are still continuing. Most of our research work is let out to consultants, so we are basically awaiting reports from the consultants on those particular projects. Part of it is to progress a coordinated body of work around engineered nanomaterials, to better inform people that are using them, workers and regulators, as to what we need to do to properly manage these into the future.

Senator WORTLEY—I note that there are a number of drafts listed as well on the website. Are you able to provide any further detail on that?

Mr Creaser—Sorry, a number of drafts?

Senator WORTLEY—It was draft reports in relation to draft codes of practice that have not yet been implemented. Is that right?

Mr Creaser—Yes, that is correct. We have two draft codes of practice that are currently out with the current package of material for public comment: a code of practice on safety data sheets and a code of practice on labelling of chemicals. Within those two documents we have now included some guidance on how you may address information about nanomaterials—particularly if there is some view that they may have some potential to be hazardous—specifically in relation to safety data sheets and on labels.

Senator WORTLEY—When is that expected to be completed?

Mr Creaser—The public comment period closes on 4 April, along with the rest of the public comment period for the model regulations package. That will then be part of the package that will go forward, through Safe Work Australia to WRMC for signing off, with expected commencement of 1 January 2012.

Senator WORTLEY—Once it is actually signed off on, how will it be communicated to workplaces?

Mr Creaser—Once again, through the communication mechanisms that my colleague Mr Wagner outlined, so the jurisdictions then take responsibility for implementing it within the workplaces. We have a network of nanotechnology specialists within the regulators, so they

are having input into these processes. Also involved within that group are representatives from both the ACTU and industry sectors, so we are directly working with them. We also have liaison through the Department of Resources, Energy and Tourism back through their nanotechnology network specifically into nanotechnology workplaces.

Senator WORTLEY—Thank you.

CHAIR—I am wondering whether I should display my own ignorance and ask: what is nanotechnology?

Senator ABETZ—They are those little things.

Senator BILYK—That is the one that Mork and Mindy use!

Senator ABETZ—Just as well there is not a Greens senator in the room; otherwise you would be given a hiding—

CHAIR—I am getting a lot of correspondence about—

Senator ABETZ—as to the evils of nanotechnology.

CHAIR—Is it nanoparticles that I should be scared about being in my sunscreen, or something? I am getting a lot of correspondence on that.

Senator ABETZ—That is part of it, yes.

CHAIR—In 30 seconds, can you explain to me why I should be worried about this?

Mr Creaser—Perhaps not why you should be worried, but, in terms of what nanomaterials are, the generally accepted term is any molecules or particles that are basically between one nanometre, which is one by 10 to the minus nine metres, and 100 nanometres, but there are various definitions that work around the edges of that. Generally they are particles that are slightly larger than individual atoms in materials, so they may be very large very molecules in some cases. A lot of the materials that you are finding in sunscreens are actually very small particles of the likes of titanium dioxide and zinc oxide. There is a lot of research being done as to whether there are specific health impacts related to both of those materials, through application in sunscreens, and that information is constantly being built on. I do not have the up-to-date figures on it with me at the moment.

CHAIR—Thank you for that. Are there any other questions? Does anyone else want to embarrass themselves with their lack of knowledge?

Senator BILYK—I may as well. I just have one quick question I forgot to ask.

CHAIR—All right.

Senator BILYK—I was just interested in the definitions of ‘primary duty holder’. I understand that the states might vary in their definitions of ‘primary duty holder’, and I am wondering how that works in relation to trying to get national harmonisation.

Mr Hoy—Ms Ross will be happy to explain all that to you.

Senator BILYK—She does not look that happy about it, but I am sure she will do a very good job.

Ms Ross—The primary duty holder is the person conducting a business or undertaking, and I have not heard that the states will vary in the definition of who that person could be.

Senator BILYK—At the minute, would the states have a primary duty holder?

Ms Ross—Yes, they will adopt the primary duty holder as it appears at the moment in the model bill, so there is the primary duty, and that primary duty is placed on a person conducting a business or undertaking.

Senator BILYK—If I were in a workplace of 100 people, would I have one primary duty holder in that workplace?

Ms Ross—The primary duty holder would be the person at that workplace who was conducting the business or the undertaking.

Senator BILYK—The employer?

Ms Ross—Yes.

Senator BILYK—Right.

Ms Ross—Essentially, yes, you are talking about the employer.

Senator BILYK—I think I have asked this question before in previous estimates, and I do not think I got a very clear answer. If I were in a workplace that had different areas within it—a local government I think was the example I used last time, where there is a depot and an inside workforce and maybe a childcare centre or something like that—who then would be the primary duty holder?

Ms Ross—You could have a workplace where you could have contractors there as well. They would be primary duty holders because they would be conducting a business or undertaking. You could have a workplace where there are several primary duty holders because there are several people there conducting businesses or undertakings. The way that the act works is that it places duties on them, but it places duties on them to consult, coordinate and cooperate so they both can discharge the duty.

Senator BILYK—Would the local government organisation have to allocate duty holders—for example, one in the childcare centre, one in the depot, one in the office or administrative area?

Ms Ross—No, they would not have to allocate as such.

Senator BILYK—If I am a worker in local government and it has areas spread out, how do I know who the primary duty holder is? That is the real question I have.

Ms Ross—You would know that your employer who was employing you was the primary duty holder, the person conducting the business or undertaking. In the childcare centre—and I think I said this last time—it all depends on the set-up of the childcare centre and who is operating the childcare centre.

Senator BILYK—It is run by the local government.

Ms Ross—If it is run by the local government, then maybe it is just run by workers. So you do not allocate the primary duty holder to somebody in that local childcare centre.

CHAIR—Let us come at it from a different point. Let us just assume there is a large workplace that would have an operations manager, a general manager, then there is a CEO, then there is a board, and a managing director of a board. Who is the primary duty holder?

Ms Ross—In that situation you have a duty in the act on officers, so there would be a duty on various officers that they have to fulfil. They have a duty to exercise due diligence in that situation.

Senator BILYK—My concern is that, if I am an employee in local government and I have an accident, usually it is pretty hard anyway to deal with workers comp with accidents and things; a lot of buck-passing goes on. What I want to know is: how does the ordinary Australian average worker know where the buck stops? It is all right to have a definition, but the definition has to link to someone in person.

Mr Hoy—Senator, the question would be: who actually allocates work to them and who actually pays them? They are some of the tests that I would look at. Who is actually employing the person?

Senator BILYK—If they are employed by the local government?

Ms Ross—The local government situation in a sense is fairly easy because how it happens at the moment is that it is essentially who is employing them. As to the child care, I guess there are some childcare arrangements where—

Senator BILYK—I am talking about a childcare centre run by the local government, in this example.

Ms Ross—Yes. If that is run by the local government, then there is probably a worker there who is the director of that childcare centre.

Senator BILYK—Yes, but they do not employ them; the local government authority employs them.

Ms Ross—Yes.

Senator BILYK—That is what I am trying to get at. Is it the director who is the—

Ms Ross—No, the director is not the PCBU. The director is not a person conducting the business or undertaking; it is the local government.

Senator BILYK—Who is responsible for safety in those varying areas of workplaces where it is not just a one-office or a one-workplace set-up? Is it the responsibility of the—

Ms Ross—Of the PCBU.

Senator BILYK—To make sure that those workplaces are also safe?

Ms Ross—Yes, of course, and workers have certain duties as well.

Senator BILYK—Of course, I understand that—rights and responsibilities.

Ms Ross—But it is still the responsibility of the PCBU to ensure that the workplace is safe.

CHAIR—Are there any other questions for Safe Work Australia? On that basis, Mr Hoy and other officers, thank you very much for your attendance at estimates today.

Proceedings suspended from 10.24 am to 10.37 am

Fair Work Ombudsman

CHAIR—We now have before us the Fair Work Ombudsman. Welcome, Mr Wilson and the other officers. Do you have any opening remarks you would like to make to the committee before we go to questions?

Mr Wilson—No, I do not.

Senator ABETZ—I was going to start off with a question which we will have to put on notice, but I notice that the annual report of the Ombudsman was signed by Mr Wilson on 27 September. I then put a question on notice and I was told the report was received by the minister's office on 1 October, with the accompanying brief, signed by the minister, on 6 October 2010. I am just wondering when it then was sent out or tabled for senators and members of parliament. If I recall correctly, we did not have the annual report available to us for the Senate estimates that for this committee I think were on 20 and 21 October. It looks as though, in a timely fashion, Mr Wilson, you got it to the minister's office. It also seems the minister's office signed off on it relatively quickly, but then we had over a fortnight's hiatus. It might be that my office did not pick up on it, or it arrived at my office later, but, for my purposes, it was not available at Senate estimates. Having said that, thank you for all the questions that I put on notice that you have answered in the meantime. My request is more for the minister's office to answer.

I move on to a situation where one of your inspectors enters the operations of, for example, a transport company. What industrial records might they look at that are within the New South Wales jurisdiction? For example, can they examine records that might be required to be held pursuant to the New South Wales Industrial Relations Act 1996?

Mr Wilson—I do not have a direct recollection of the issues that the inspector can cover in respect of state jurisdictions; we would need to check on what they can ask for. It is possible, and we will need to check this, that there might be issues under state legislation which can be asked for. We will check on that. The other aspect to point out is that, when a visit commences in a workplace, you do not necessarily know what its history has been, so you might ask for pay records without necessarily understanding that there has been a straddling of the state and Commonwealth jurisdiction.

Senator ABETZ—What about, for example, long service leave matters?

Mr Campbell—We would generally have to have some sort of jurisdiction to inquire as to superannuation entitlements, or we would have to have a reasonable understanding that we have a jurisdiction over superannuation—

Senator ABETZ—Long service leave, not superannuation.

Mr Campbell—Sorry, long service leave—generally under an industrial instrument, like an award or a collective agreement.

Senator ABETZ—But if pursuant to state legislation there was an entitlement would you be able to pursue that and investigate documentation relating to that?

Mr Wilson—Unfortunately, my memory escapes me in terms of the detail of the Fair Work Act. There, of course, long service leave is made part of the national employment standard, but then there is a process by which the national employment standard defers the actual rights

and obligations to legacy state legislation where that applies. What escapes me in terms of my own knowledge about the Fair Work Act is the precision about who has the actual jurisdiction at any given time to investigate, but what I can do, of course, is to have that researched and provide you with the answer.

Senator ABETZ—I was wanting to know what your office's view is in relation to the interaction of the various rates payable under the General Carriers Contract Determination in New South Wales, of the standing rate and the running rate and whether they should be paid concurrently. If you are not aware as to the exact application of that, it might be appropriate for me to revisit this later on or, in fact, with the approval of the minister, seek a private briefing with you about the matters contained there.

Mr Wilson—Of course.

Senator ABETZ—I understand that the ombudsman's online service—chat room, for want of a better term—was cancelled during the course of the flood situation. Is the chat room up and running again as yet, or not?

Mr Wilson—My belief is that it is. The service that you are referring to, we—

Senator ABETZ—The website feedback service.

Mr Wilson—I was going to call it something else, which is Live chat.

Senator ABETZ—Live chat, yes.

Mr Wilson—That is up and running.

Senator ABETZ—It has been described as 'live chat, email and website feedback'. How long was it off air?

Mr Bonggi—The live chat was off air for four weeks and the web and email service was off air for 2½ weeks. However, the email service, while we put a message saying that it was off air, in actual fact we had it on all the time and we did receive—

Senator ABETZ—That is helpful for your customers.

Mr Bonggi—It slowed down some of the volume of work on that front.

Senator ABETZ—Would it be fair to say it slowed down the work considerably? Most punters, when they get to it and are told that it is off air, would not bother to try to break through, would they?

Mr Bonggi—That is correct; I think that is fair—but there were other avenues for people.

Senator ABETZ—Where were these people redeployed to, into which department?

Mr Bonggi—Centrelink; in three offices of Centrelink.

Senator ABETZ—Did they have to physically move or—

Mr Bonggi—Yes, they physically moved.

Senator ABETZ—Staff cooperation, et cetera, was all good in that regard? They accepted there was a national issue to be attended to, et cetera?

Mr Bongi—Absolutely. There was a strong motivation across people to want to help. We called for volunteers. We had 50 who volunteered in very quick order, and many more over the following two or three days while we asked for nominations.

Senator ABETZ—Were there any non-volunteers?

Mr Bongi—No. Everyone volunteered.

Senator ABETZ—Everyone volunteered and that is why the systems were completely closed down?

Mr Bongi—No, the systems were not completely closed down.

Senator ABETZ—Well Live chat, for example, was off air for four weeks.

Mr Bongi—Yes.

Senator ABETZ—That was, to all intents and purposes, closed down for that four-week period, but everybody that was involved in Live chat volunteered to go elsewhere.

Mr Bongi—No, the volunteers came from a variety of areas—different parts of our contact centre service, as well as a couple of other areas. What we did was to direct some of those Live chat people to telephone answering services.

Senator ABETZ—They were internally redeployed within your empire?

Mr Bongi—That is correct.

Mr Wilson—The wider context is that we have, from recollection, about 270 or so staff involved in the contact service, which has a number of different channels. What we undertook to do with Centrelink was to provide up to 50 staff. Mr Bongi then called for volunteers and they came very rapidly, but they were from another department.

Senator ABETZ—There is no criticism of that at all and in a national emergency these things occur. What are we going to do with employers and employees who may have sought advice during that time but for that four-week period were unable to get it and are now unwittingly in breach? Are we going to extend a degree of leniency to them? What is our attitude?

Mr Wilson—Before I get to that immediate question, what I would put on record is that the number of calls that we answered during January were high; they ranged from a low of about 10,000 in one week to 14,000 in another week. That is a heavy call volume for us. At the same time, what we noticed is that the searches which were undertaken on our computer pay-check system increased from a low of 21,000 to a high of about 35,000 completed searches in a week. That indicated to us that people were still accessing our information services, but what you would expect in the face of a queue is that people do shift from one service to another.

In terms of your question about what we are doing with people who cannot get information, we will certainly help them to obtain that information. We have the full complement of staff back now and we would most certainly welcome those calls and we would be able to assist them from there.

Senator ABETZ—There has been some criticism that the telephone advice that they may have been receiving was not as robust as it otherwise may have been—right or wrong, that is

a perception by some. As a result, they prefer the mechanism of the chat room because they can press the print button and then they have a record of exactly what they were told by the Fair Work Ombudsman. So that gives them a greater degree of comfort than just the telephone service. With that being off-air for four weeks, I am wondering what leniency, if any, is going to be offered to all stakeholders who were unable to access the benefits of the chat room during that period and, as a result of which, they are unwittingly in breach of the laws.

Mr Wilson—What I would encourage people to do if they have not obtained information and they do not believe they have got everything they want is to approach us and see what can be done. Ultimately, if someone has not got information and they are in breach of the law, then they are in breach of the law and the inspectors would not show leniency. But certainly we expect them to try to obtain services from us, their union or their industry association.

Senator ABETZ—Despite the fact they could not access your online service or chat room and they have therefore unwittingly broken the law, you are still going to say, ‘It is a breach of the law, bad luck’, and it will be pursued like normal? I would have thought that you might have been able to extend some leniency to those people who were unable to access information during that period of time.

Mr Wilson—Of course we do use our judgement on a daily basis and we will continue to do that. If someone puts a proposition to us that they tried in January but they were not able to get the precise dollar rate and that is why they are now in error, of course we will consider why that might be. But that is an exceptionally narrow issue. Usually we find people are not in breach simply because of that one issue; it is a multitude of issues.

Senator ABETZ—If it is, will leniency be extended to them? The sort of answer we just heard will spook a lot of people from now approaching the Fair Work Ombudsman because they will be in fear of prosecution after not being able to get the information when they needed it. They can now access the information and, unwittingly, they might disclose that they have been in breach and so they say, ‘Let sleeping dogs lie and let’s hope the Ombudsman does not inspect us.’ So that is the sort of perception that unfortunately, rightly or wrongly, some stakeholders have about the Fair Work Ombudsman. I would have liked to have thought that the Ombudsman’s office would be very anxious to break down that perception.

Mr Wilson—Of course we are anxious to break down that perception. It is not one that is put to me by the stakeholders that we speak to. We are more than willing to speak with the people who express those anxieties to you and to others. When we speak with employers and employees what we try to do is make sure that they understand their rights and obligations. It is not a common situation that someone is in breach in merely one pay packet, which the January circumstance would allude to. What instead occurs is that there is a compound of decision-making that leads to that breach and the activity that our inspector takes is to try to get the employer to the point of compliance. Whether we see that this week or at the end of December, it is still the same conversation, which is, ‘Look, this rate should have been paid and we are asking you, through a voluntary compliance process, to make sure that you do pay it.’ We do not prosecute people merely because they have not paid someone correctly and then they have rectified it. We do not prosecute someone for that.

Senator ABETZ—Did you provide a special service for businesses impacted by the flood?

Mr Bongi —We did by giving priority to all calls emanating out of Queensland. They jumped at the top of the queue.

Senator ABETZ—What about a flood-affected business in Tasmania?

Mr Bongi —No, we did not do anything—

Senator ABETZ—Or Victoria?

Mr Bongi —No, because—

Senator ABETZ—Or New South Wales?

Mr Bongi —No.

Senator ABETZ—Just Queensland?

Senator Chris Evans—Normal services were available, Senator. I think what the officer is indicating—

Senator ABETZ—No, they were not. The chat room was closed for four weeks, Minister.

Senator Chris Evans—Yes, and I will defend that on the basis that we directed resources to helping those people in Queensland. You cannot have it both ways.

Senator ABETZ—I supported that—

Senator Chris Evans—You either support it or you do not. The Fair Work Ombudsman made a perfectly correct decision, one which I endorse, to direct resources to Queensland by using officers from his office and certain arrangements had been made to reflect that resourcing demand. But services were still available. Priority was given to Queensland for a short period of time to meet the increased activity from there. But all services were still available for getting advice. I applaud the decision to direct resources for a short time towards Queensland's needs.

Senator ABETZ—Before you entered the room I fully agreed that it was appropriate in circumstances of a national disaster to redeploy people into Centrelink; that made good sense. We do have a situation where you cannot assert that all the services were still available when the chat room, for example, was closed for four weeks straight and where another service was closed—

Senator Chris Evans—The chat room is just one aspect.

Senator ABETZ—for two weeks—is that right?

Mr Bongi —The email for 2½ weeks.

Senator ABETZ—Yes. To blandly assert that all the other services were available just defies the evidence that the officers have given.

Senator Chris Evans—My point to you is you cannot have it both ways. You cannot say they did the right thing by redirecting resources and then criticise the fact that resources were not available in another area. I make that point to you.

CHAIR—I am not sure we have actually got to that point where Senator Abetz has made any criticism yet. I think we may have been going to get there, but we have not.

Senator ABETZ—No, not at all.

CHAIR—So let us wait and see.

Senator ABETZ—I want to know what protection was provided to those stakeholders during that hiatus period who were needing information, could not access it and, as a result, are unwittingly in breach that they will not be prosecuted in any way, shape or form. That is an important signal that should be sent out to the stakeholder community that the Fair Work Ombudsman serves. I think everybody would agree, and I will just repeat it again for the record: national disaster, redeployment, that is fine, but we should not then create another group of victims as a result of the flood because they have not been able to access the information that they need to be able to conduct themselves properly in the employment space and as a result unwittingly face prosecution. That is the only case I make.

CHAIR—Mr Wilson has responded to that. We are in a new round of questions. Senator Abetz.

Mr Bongi —If I could say, and I really do not want to prolong this any further than necessary, that it might help to put this on the record: the normal volume is around 600 live chats per week. At the moment, since we have opened the line we are getting 1,500. People who missed out are obviously coming to us and getting that information now. I have no doubt that very quickly we will catch up. People who want that service will have that and catch up very quickly.

Senator ABETZ—Let's hope that is the case and let's hope that nobody is put off from re-engaging with the Fair Work Ombudsman in fear of them being prosecuted. In relation to special service for people affected by the flood, priority was given to Queensland callers—

Mr Bongi —That is correct.

Senator ABETZ—but not to any other state that was impacted by flood and bushfire. Is priority still being given to Queensland? What about Cyclone Yasi?

Mr Bongi —I am not sure what the current state is, whether we have moved back to normality.

Senator ABETZ—If you could take that on notice and let me know when Queenslanders lost preference.

Mr Wilson—If I can come back to the question that Senator Abetz asked at the start about inspectors asking for information under state legislation. The advice that I have had is that the Office of Industrial Relations employees, who are the New South Wales public servants, are dual badged. They can ask for both state and Commonwealth documents. In regard to Fair Work inspectors who are employed directly by the Fair Work Ombudsman, if there is a reasonable belief that there has been a contravention of the Fair Work Act or a Commonwealth instrument and it is a national system employer then the inspector can ask for that documentation. That request is not restricted to documentation required to be kept under the Fair Work Act or Regulations. There is a process by which inspectors can ask for a wide pool of information, if I can put it that way.

Senator ABETZ—Thank you. That is helpful. What is the average length of time from the point a complaint or allegation of underpayment or non-compliance is made to the time that the case is closed or finalised? Do you keep statistics as to that?

Mr Wilson—We do.

Senator ABETZ—Is it in your annual report?

Mr Wilson—I am not sure the average is in the annual reports, but we will do our best to answer those questions.

Senator ABETZ—Without telling you how to suck eggs—and can I commend you on a very comprehensive annual report—if that were possible in future that might be a helpful statistic, if it is not too difficult to obtain.

Mr Wilson—We will take that question as it is posed and consider it. The key performance indicators which we have do not so much revolve around the average. Rather, they talk about the portion of matters which are finalised within a certain number of days and a different number of gates for those days.

Senator ABETZ—Yes.

Mr Wilson—No, we do not have the average information as such, but we can talk about the time that matters are passing the various gates that we do have.

Senator ABETZ—If you could provide that to us possibly on notice.

Mr Wilson—All right.

Senator ABETZ—That would be very helpful. Does the Fair Work Ombudsman have any expertise in the area of sham contracting?

Mr Wilson—We do.

Senator ABETZ—Do you pursue those matters?

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

Mr Loizides—Yes, we do investigate sham contracting breaches in the Fair Work Act.

Senator ABETZ—Do you have a special section or a few people with special expertise in that area?

Mr Loizides—In the field ops group we have a complex investigations unit. They do have expertise in the investigation of sham contracting allegations. However, staff in our regional services and targeting group also investigate sham contracting investigations as required.

Senator ABETZ—There is Australia-wide coverage in that regard.

Mr Loizides—Absolutely.

Senator ABETZ—That has been part and parcel of the Fair Work Ombudsman's charter since day one?

Mr Loizides—It is part of the legislative provisions that we administer and is part of the business that we undertake on a daily basis.

Senator ABETZ—On a daily basis and it is a matter of concern and of course there is a legislative framework dealing with sham contracting—is that correct?

Mr Loizides—Correct. There are provisions under the Fair Work Act that cover that.

Senator ABETZ—There is the independent contractors legislation as well that you deal with—is that right?

Mr Loizides—That is correct.

Senator ABETZ—When did that come into force?

Mr Loizides—The Independent Contractors Act?

Mr Wilson—It was in mid-2006.

Senator ABETZ—Yes, I thought it was towards the end of that golden decade of the Howard government, from my recollection. Has that legislation has been effective or assisting in dealing with the issue of sham contracting?

Mr Loizides—We have investigated a number of matters in regards to sham contracting. We actually have a number of matters before the courts, in a number of various areas, across different industry groupings—telemarketing, hotels, finance, and takeaway food. We have investigated a number of breaches of the legislation. I cannot comment on the policy of the legislation but I can comment that we have used those powers to investigate sham-contracting breaches.

Senator ABETZ—Good. It does not matter in what area you inquire into sham contracting? Do you have the broad spectrum to cover every area.

Mr Loizides—Except in the building industry.

Senator ABETZ—You cannot investigate that area?

Mr Campbell—It is a dual jurisdiction, but the ABCC has primary carriage of those matters.

Senator ABETZ—The legislation does allow you to inquire into sham contracting in the building area?

Mr Campbell—It does not prohibit us from inquiring into—

Senator ABETZ—Right, it does not prohibit you. Have you ever investigated any sham contracting in the building sector?

Mr Wilson—From knowledge, we have taken litigations which involve construction workers and involve contracting matters. From recollection, though, none of those have been for building industry participants within the meaning of the BCI Act.

Senator ABETZ—Yes, because the BCI Act does not cover the total field of what the average punter might understand as building and construction.

Mr Loizides—Sure.

Mr Wilson—The other thing to point is that that play-out, if you will, is consistent with the arrangement that I had with Mr Lloyd, the former commissioner, whereby issues associated with building industry participants were referred to the ABCC and the other matters were dealt with by us.

Senator ABETZ—Did you refer any to the ABCC?

Mr Loizides—Yes, we have. In regards to sham contracting?

Senator ABETZ—Yes.

Mr Campbell—I do not believe that we have.

Senator ABETZ—What is the cost of transcripts that the Fair Work Ombudsman obtains? Do we have an overall bill for transcripts?

Mr Wilson—We would have to take that on notice; I am pretty sure we do not have that.

Mr Loizides—No.

Senator ABETZ—With interviewing people et cetera, the information that is transcribed, if you could provide that to us?

Mr Wilson—Having said we will take it on notice, I do hope that our finance system will allow us to come down to that level of information.

Senator ABETZ—If you cannot, it is understood. Best endeavours would be appreciated. Does the Fair Work Ombudsman keep a record of how often it is in breach of court orders relating to timetables and submitting applications?

Mr Wilson—In the court system?

Senator ABETZ—Yes, in the court system.

Mr Wilson—I will call to the table Ms Janine Webster, who is the chief counsel.

Ms Webster—Senator, may I have the question again, please?

Senator ABETZ—Yes. Before I ask that I should ask: do you keep a record of circumstances in which your office is in breach of court orders relating to timetables set by courts, deadlines for filing of certain documentation?

Ms Webster—We do not have a particular table, if you like, or a collation of that information.

Senator ABETZ—You do not?

Ms Webster—No.

Senator ABETZ—You refer litigation to outside legal firms?

Ms Webster—In some cases we do.

Senator ABETZ—If those outside legal firms are in breach of a court timetable, you would not necessarily be notified?

Ms Webster—We would know about that.

Senator ABETZ—You would know about that?

Ms Webster—I would expect so.

Senator ABETZ—If it does not put you to too much work, if you could find out for us how often that has been drawn to your attention, I would appreciate it. Can you take on notice for us which legal firms you use around Australia and the amounts paid to each firm in the last couple of years?

Ms Webster—I can tell you the firms that we use right now, if you would like.

Senator ABETZ—All right. Good.

Ms Webster—We have a panel of 20 firms.

Senator ABETZ—Do not bother telling us; we will take that on notice, because reading out the name of 20 firms will take some time, so thank you for that, and the costs paid to those firms. Then can I ask whether the cooperation of witnesses in any matters is obtained by an indication to the potential witness that they themselves might be in breach of certain laws and therefore their cooperation would be most helpful in a particular matter and a blind eye might be turned to their oversight of the law?

Mr Wilson—Are you referring to a particular case, Senator?

Senator ABETZ—No, I am just asking whether, to your knowledge, that has ever happened or occurred, or is it a practice that is countenanced?

Mr Wilson—I think I would need more detail before we can answer that question; it is such a broad statement.

Senator ABETZ—As a Commonwealth agency, as a model litigant, I would have hoped that the answer would have been a straight-out no, that you would not have been doing those sorts of trades with potential witnesses who themselves might be in breach of the law. The fact that you do need detailed information, I must say, concerns me because I would have thought that as a model litigant you would not engage in that behaviour, unless you were to give them an official indemnity.

Mr Wilson—Before I answer that proposition, do you have any information which would suggest that we are doing this?

Senator ABETZ—With respect, the process of Senate estimates is that I ask you the questions.

Mr Wilson—I realise that.

Senator ABETZ—I am not going to divulge my source, but what I want to know is, at this stage: what principles do you apply to the gathering of information and obtaining witnesses for prosecutions? I would have hoped that you would have given me an emphatic no, that that behaviour is not engaged in, unless there is an official indemnity given.

Senator Chris Evans—I think Mr Wilson just found the scope of the question a bit broad and that is what he was querying, but perhaps if one of the officers takes you through their normal modus operandi, if you like, then we will move from there.

Senator ABETZ—I think I have an understanding of the normal modus operandi. This would be—

Senator Chris Evans—In terms of the issues you raise.

Senator ABETZ—I agree that the proposition I have put to you would be an exception, but I would hope that it in fact is not an exception at all. What control do you have in relation to the preparation of witnesses by the outside firms?

Ms Webster—Senator, I can perhaps address some of what you have asked Mr Wilson. From time to time, law enforcement agencies, including ourselves—and I understand that it is a fairly wide practice—will in fact offer, if you like, an indemnity of sorts towards particular

individuals in order to secure a prosecution against a particular wrongdoer. That is not unusual.

Senator ABETZ—So you do do it from time to time, with an indemnity—interesting word—of sorts. Does that mean an informal indemnity, which is the kind that I talked about: ‘You’re in breach here, matey, but we will turn a blind eye to it if you assist us in the prosecution over here’? I would have thought that if an indemnity is provided there would not be an indemnity ‘of sorts’ but in fact an official indemnity.

Ms Webster—Senator, as I am sure you can appreciate, where this happens it is highly confidential and it is not a specific matter that I could talk about in terms of the question that you have posed.

Senator ABETZ—I am not asking for names. If it does occur, is it an official indemnity, where it is taken to a higher authority and signed off that somebody is being given an indemnity, so that they actually have their letter of comfort, if you like, prior to them giving their evidence?

Senator Chris Evans—Senator, I have asked the officers to try and respond. It seems to me it is not unreasonable for you to ask the question about the practice that applies, not referring to individual cases. We can try and sort of tease out, in response to you, what broad practice or principles underlie how you would go about those sorts of prosecutions; that may get to the nub of what you are after.

Senator ABETZ—An official indemnity, for my purposes, I think I understand, but I am intrigued by the term ‘indemnity of sorts’, which sounds more to me like the informal nudge-nudge, wink-wink type of indemnity that I was in fact talking about, which does concern me.

Ms Webster—Perhaps it might assist if I were to talk to you about the circumstances where we might consider offering an indemnity.

Senator ABETZ—I can understand that certain circumstances would arise and that in seeking a prosecution it is appropriate to provide an indemnity from time to time. In criminal matters, that occurs on an unfortunately fairly regular basis. It is usually announced that somebody is giving evidence in criminal matters on the basis that they have been given an indemnity in relation to them running the risk of being prosecuted. Is the same sort of certificate or letter of comfort provided to those witnesses, or do you engage in what I describe as informal indemnities, such as, ‘Your assistance would be very helpful and we might not have a look at your indiscretion over here’? I want to know about the formality of indemnities.

Ms Webster—There is no specific policy that deals with the issue of indemnities. I cannot speak about any particular matter, but if someone expressed concern that they were not given any kind of formal exchange of letters or the like, I do not see why we would not do that.

Senator ABETZ—I suggest that you should have a formal basis on which to provide indemnities so that the allegation or assertion of the nudge-nudge, wink-wink situation does not occur and ‘indemnity of sorts’ does not occur, but that we instead have a very rigorous and robust indemnity process. I will leave that thought with you and will not pursue it any further here. If you can report to us informally about that idea or at the next Senate estimates—and if

my suggestion has no merits because it is completely impractical—by all means tell me with an explanation.

CHAIR—Senator Abetz, before you move on, I am just unclear: are there any outstanding questions that were meant to be taken on notice as a consequence of that or are we done with that?

Senator ABETZ—No, that is all good.

Senator Chris Evans—I think we have taken on board that Senator Abetz has an interest in how those indemnities are applied and I think the officers will be prepared to answer questions about that at the next estimates perhaps, and about how they might have responded to his concerns. If they are able to offer something in the meantime in an answer to a question on notice, we will try to do that as well.

Senator ABETZ—As I understand it, there is no actual formal laid-down policy and I am now asking, possibly on notice, whether the Fair Work Ombudsman would consider such a formal policy. If they can then respond to me as to whether it is a good, bad or indifferent idea, we will leave it at that.

Mr Wilson—I can answer that directly now. Of course we will consider that proposition. The objective we have is to be completely transparent in our decision-making and the processes and policies we exercise, so we are prepared to consider how we might be able to do this. I will ask Ms Webster after the hearings to consult with like agencies and the Attorney-General's Department just to see what models might exist in this regard.

Senator ABETZ—Good.

Senator XENOPHON—Whilst I know you cannot discuss specific cases, there are some general principles I wanted to canvass with you. I think it was about a year ago that out of a very helpful suggestion of Senator Abetz, a number of complaints from former members of the Church of Scientology were sent through to your office. I am grateful for a very comprehensive letter I received from you that was dated 14 February. Without breaching any confidences in the investigations that are currently underway, under current legislation how does Fair Work Australia differentiate between an employee and a volunteer, and what are the protocols in place for that?

Mr Wilson—Ultimately, that is a matter of legal determination by a combination of the inspectors and our legal staff. There are principles which need to be applied about the intention to form legal relations and if there is an intention to form legal relations, what the nature is of those relations—whether it is intended to be an employment exercise or whether it is some other exercise. Clearly, it is a matter of engaging with the particular complainant and the respondent and testing through that circumstance.

Senator XENOPHON—If there is any further information to provide on notice, I would be grateful. I think you have given a good outline there, but if there is anything further that you wanted to add about any criteria that you look at.

Mr Wilson—The criteria are set out to some extent within the Fair Work Act, which—

Senator XENOPHON—We do not need to do that now. I am just conscious of it.

Mr Wilson—Yes. That contains a definition of employee and that clearly is instructive. The other thing to consider is a High Court case that I referred you to in my correspondence, which is *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 2009 CLR 95. That case and others do set out some of the principles that would need to be considered. In some ways it is fairly rare that we need to test those principles, and clearly the cases you have indicated may require those assessments and that ultimately is a matter of the evidence of each particular complainant.

Senator XENOPHON—How does your office assess the credibility of contracts declaring that someone is a volunteer? For example, would the Church of Scientology asking its so-called volunteers to sign billion-year contracts to volunteer to work for the church, with the inclusion of a billion-year clause—it actually says a billion years—lead to your office rejecting the validity of such a contract.

Mr Wilson—We have not yet tested, and I do not know that we will test, that issue of validity with a contract. The issues that we are presently looking at are somewhat more basic. There was an allusion to that point in my correspondence to you, which was to indicate that in some but not all cases it might be—and I am yet to make my decision on these points—that they are simply not within time and therefore not capable of us investigating them in detail.

Senator XENOPHON—Time would be defined in what way? Is it a six-year statutory limit?

Mr Wilson—Correct.

Senator XENOPHON—Is that an absolute limit or is there an ability to extend time in exceptional circumstances, or if there is new material or information? Is the limit of six years a sudden-death thing or is there some ability—

Mr Wilson—My understanding of the Fair Work Act is that it is a sudden-death matter and that there is not a capacity for an inspector to bring an application to a court outside of that time.

Senator XENOPHON—There is genuine concern that in some jurisdictions with some actions you can do so if there is a mature fact. I am sorry, Mr Wilson, I did not mean to interrupt you.

Mr Wilson—It is difficult for me to answer that question without going to the precise matters which are under investigation. Ultimately, the investigation of whether a person is a volunteer or an employee is a test of a number of matters, one of which may well be the purported legal arrangement between the two. It may well be other factors as to what actually went on, and that point was to some degree made within the Greek Orthodox case that I referred to where the person was held to be an employee for the purposes of the long service leave legislation, notwithstanding that they had a religious connection to the community and a religious function within the community. It is not outside the realms of possibility that that same arrangement might occur in any other relationship between a volunteer and the organisation they are working for. It is equally possible that it not be consistent with those tests.

Senator XENOPHON—So a contract with something as ludicrous as a billion-year contract clause in it could still be deemed valid?

Mr Wilson—I do not have a view on that point and I do not think I need to have a view on that point right now. That is really all I can say about that matter.

Senator XENOPHON—But, in terms of general principles, if there is something that is patently absurd—contracts that actually say, ‘You are volunteering your services for a billion years’—it actually says ‘a billion years’—wouldn’t that set off alarm bells in terms of assessing the criteria?

Mr Wilson—That is a different question to the one that you asked. Your question was whether—

Senator XENOPHON—it would be deemed valid.

Mr Wilson—the contract would be deemed valid. That is a different question from whether or not such a term may well set off alarm bells. What Mr Ronson just indicated to me is that you look behind the contract in any arrangement, whether it be an employment arrangement, a volunteer arrangement or some other arrangement, and you look to how that is actually played out between the parties—the work that they did, the payments that were made, the controls and all the rest of it. What I have indicated to you in my correspondence is that we are still in the process of gathering information and assessing the nature of that information and that a determination will be made by me towards the end of March. You are inviting me to make decisions in advance of that and I do not think it is proper that I do that.

Senator XENOPHON—So a contract with a billion-year clause in it could or could not be valid—the decision could be either way?

Mr Wilson—I do not have a view on its validity.

Senator XENOPHON—I go to the issue of the expertise your staff have in assessing some of these claims. It is not in any way criticism; I just want to try and understand.

Mr Wilson—Sure.

Senator XENOPHON—When it comes to some of these issues, there is an issue of coercion. The question is: what expertise do your staff have in assessing whether someone has been psychologically coerced into signing a contract or accepting substandard conditions?

Mr Wilson—I will ask Mr Ronson to speak to that.

Mr Ronson—In this particular matter which I think you are referring to, the principal inspector in the investigation is someone with a psychology background, which we felt was appropriate in this particular investigation. The assisting inspectors are very experienced inspectors, and so we have ensured that they were appropriate for the nature of this investigation.

Senator XENOPHON—Apart from the expertise of the people that you referred to, are there any protocols in dealing with issues of coercion or assessing potential issues of psychological coercion?

Mr Ronson—I am confident that the inspectors who conducted this investigation were aware of extraneous issues or surrounding issues that, as you have described, may have been in place, or may not have been. They were alive to what are potential issues that are specific to this particular investigation.

Senator XENOPHON—On the issue of volunteer contracts signed by children—because I have had complaints in respect of that and met one young woman who was a minor at the time that she entered into this contract—how does your office treat so-called volunteer contracts signed by children?

Mr Ronson—Not just in this case but in other cases—and I know that it was followed in this case—it is very important that extra sensitivity is afforded and applied to those particular conversations. It is absolutely essential that parents are involved and, if that is the case, if minors have entered into contracts and their parents are aware of the nature of this investigation, that there is a level of comfort and so forth.

Senator XENOPHON—Sorry, perhaps I should clarify that: I mean if they are no longer minors but they were minors at the time they entered into this so-called volunteer contract.

Mr Ronson—Sorry, are you talking about child employment law specifically or just the nature of a conversation?

Senator XENOPHON—There is an argument as to whether it is an employment contract or, as I think the Church of Scientology says, it was simply a contract to be a volunteer. What is the policy, or how do you deal with cases, where a minor has signed such a contract to be a volunteer? What safeguards are there and what would that trigger in terms of any investigation?

Mr Ronson—There have been a number of cases where that occurs. I am confident that the training that we provide to our inspectors is sufficient to cover off what I suppose are the particular evidential difficulties that need to be tested with someone's memory, particularly that memory as a minor, and if they are remembering what they did and signed.

Senator XENOPHON—Perhaps we are talking at cross purposes. Let us assume, again as a general principle, that from an evidentiary point of view you have the evidence that there is a contract to be a volunteer and it has been entered into by a minor. What effect would that have and what role could your office have in those cases if there is a complaint about that, even if there has been parental consent? What would happen in cases in the absence of parental consent and in cases where there is parental consent?

Mr Ronson—I think as a general proposition it is fair to say that we would be requiring greater explanation on behalf of the employer or the engager of work to account for what was going on at the time, what the intentions of the parties were. There would be a more robust questioning of what the precise nature of the intentions between the parties was.

Senator XENOPHON—But what ability does a minor have to enter into a contract? There is that threshold issue, isn't there?

Mr Ronson—Correct. These are questions that we are dealing with on a daily basis, but in particular the investigation that you are interested in.

Senator XENOPHON—Sure. As a broader issue, Mr Ronson and Mr Wilson, about employers that drag someone in, whether they are a young adult or a minor, and say, 'Have a bit of work experience with us,' but in fact it is just cheap labour and it goes on for an extended period of time. I am sure that is quite a widespread thing that goes beyond this particular investigation that I am interested in.

Mr Ronson—Absolutely.

Mr Wilson—If I talk generally about our approach on that, that might flush out some of the issues. There are of course many thousands of minors who are employed quite properly and ethically. What you do find, for example, in the large fast-food chains they are very conscious of the need to make sure that there is parental consent and so on, and that is done quite properly. Equally, there are cases where we see employment having commenced without necessarily that parental consent having been given. The role that we exercise in that is to make sure that people are not exploited and that they are paid the conditions and entitlements they are entitled to.

When it comes to things like work experience or other volunteer arrangements, they fall into a number of categories. There are of course the bona fide work experience and volunteer arrangements, which are quite proper and ethical. Then there are some where they are just outright exploitation of holding out jobs with no pay at the end of that work experience period. On those issues we certainly take quite a strong line and make sure that underpayments are rectified. The kind of issues that you are talking about—

Senator XENOPHON—Mr Wilson, just in relation to that. There must be a case where you cross this threshold where someone is at first instance doing work experience but it becomes unpaid labour, and there sometimes could be a hybrid of the two, could there not? Initially it could be properly characterised as work experience and then it turns into something else.

Mr Wilson—I will call upon Mr Campbell, who has some experience in this area.

Mr Campbell—We do observe cases where employers attempt to engage people through work experience arrangements to gain access to what you describe as free labour. Where those matters come to our attention, we look at the facts of the case and at the intentions of the party but also whether the employer has gained benefit from having that person involved in that work during that period of time. If we assess that they have, and we come to a view that there was an intention to create a relationship, and perhaps an employment relationship, then we will enforce the minimum wage that would apply to that role. That could be whether or not the person was a minor or otherwise. It would be up to ultimately a court to decide whether that individual was capable of entering into the contract that we say existed between the parties. We could argue that it did, but it would again be a court who had to decide.

Senator XENOPHON—So it is a question of degree and the facts of each case?

Mr Campbell—Yes.

Senator XENOPHON—Without referring to any specific case, if there are issues of coercion looking at the nature of the relationship between the parties, would they be relevant factors?

Mr Campbell—They would be factors that would ultimately have to lead in court to convince a judge or a court that there were certain behaviours by the employer that led to a relationship being created that may not have been the choice of the individual employee or volunteer that you refer to.

Senator XENOPHON—What happens in cases where initially it appears that there was free choice but it then becomes apparent as a result of a number of factors that that free choice is no longer there? Is that something that is taken into account?

Mr Campbell—Generally it could be and again it will go down to whether or not the individual involved received a benefit from the work of the individual. For all intents and purposes, if there is an employment relationship then we can enforce entitlements based on that view. Again, it is the case that we can put before the court and our ability to argue the facts to the court that will determine whether or not we are successful in proving that a person was an employee.

Senator XENOPHON—As a general principle, if a minor enters into a volunteer contract without the consent of their parents, would such a contract be valid or not?

Mr Campbell—I could not provide a general principle on that because it is a volunteer arrangement.

Mr Wilson—The other distinction to be made is under the Fair Work Act; our jurisdiction obviously is in respect of employment arrangements. To take an extreme case, let's say my daughter, who is almost 15, decided to volunteer for the local Red Cross without telling me. That might be wrong and there might be consequences under whatever the volunteer arrangements are for that organisation. But there would not necessarily be a jurisdiction invoked for this organisation to investigate unless it was of the view that the arrangement was not that of a volunteer but instead an employment relationship.

Senator XENOPHON—Yes, it is different if it was a case of your family member being there 60 or 70 hours a week and having to work around the clock on direction and being told that they would be eternally damned or whatever if they did not keep doing it. That would change the nature of the relationship, would it not, potentially?

Mr Wilson—It might. That is the struggle of course that we have and ultimately that can only be answered by the facts of each individual case.

Senator XENOPHON—So it is a hybrid of really common law and statutory law?

Mr Wilson—It is, yes.

Senator XENOPHON—Thank you for your time.

CHAIR—Senator Fisher.

Senator FISHER—Some questions about annual leave loading and the issue that has been in the press over the last couple of days. Can you explain the ombudsman's approach to the issue of annual leave loading?

Mr Wilson—We talked about this to some extent in the last Senate hearings in October. At that time, we reported to the Senate that we had become aware that there is a possible issue between the Fair Work Act and what was the face of some awards, and that we were engaging the industrial relations parties in discussions about those issues. We have since been down that journey. My belief is that in late December last year and also January this year we went through the process of informing the industrial parties that our view was that the provisions of section 90(2) required that annual leave loading be paid upon termination for accrued leave.

Senator FISHER—Upon what are you basing that view?

Mr Wilson—That view, as we have taken the industrial parties through, is, first of all, some legal advice that we received from the Australian Government Solicitor.

Senator FISHER—Can the committee have a copy of that, Mr Wilson?

Mr Wilson—Yes.

Senator FISHER—Thank you.

Mr Wilson—I do not have it with me, but we can make that available. It was circulated to the industrial parties. We then went through a process of seeking their response to that and there was a series of correspondence backwards and forwards which I suppose put the view, without verballing them, that that might not be all of their policy aspirations, but there was not spirited opposition on the legal point, put it that way. Certainly the view was put that the policy view was not consistent with some of their views. Following that, we obtained some senior counsel advice which confirmed the earlier Australian Government Solicitor view and we again put that to the parties.

Senator FISHER—Can the committee be provided with a copy of the senior counsel advice?

Mr Wilson—Yes, most certainly. I have it here.

Senator FISHER—Thank you.

Senator Evans—I just want to make it clear that this is not precedent-setting, Senator Fisher. You will not be getting the same cooperation from me about legal advice, but Mr Wilson is obviously easier to deal with than me.

Senator FISHER—Minister, I am sure you take each request on occasion by occasion and judge it on its merits.

Senator Evans—Not generally, no, but—

Mr Wilson—In fact, that is a useful point for me to explain that we obtained this advice to circulate to the industrial relations parties and it is, to some extent, in the public domain already. So I am happy to table it here.

Senator Evans—I understand that.

Senator FISHER—Thank you for that qualification, Mr Wilson.

Senator Evans—It was useful that all the parties had access to the advice in terms of facilitating the discussions.

Senator FISHER—Did you have anything to add? I think I interrupted your answer.

Mr Wilson—Following the receipt of that advice, which I think was late December, we again went back to the parties. They did not necessarily thank us or even agree with that advice. We did not expect that.

Senator FISHER—Indeed.

Mr Wilson—We did form the view that, whereas there might be different views about the policy, there was at least an acceptance that we had obtained the advice and that this was the

process which we are following on. The context of all this is that we need to have a prosecution policy in respect of all parts of the legislation; we need to know exactly what that view is.

Senator FISHER—You need to know the law.

Mr Wilson—We need to know the law.

Senator FISHER—As do employers, as do employees.

Mr Wilson—Indeed, that is the second part of it as well, that we provide advice to people about their entitlements. Having noticed that there was a difference of opinion within the parties, we sought to try and bring them together with our view. That ultimately was unsuccessful. The fact that it was unsuccessful does not change the fact that we have to be able to articulate a view. I do not think it would be good enough that we said we do not have a view because there is spirited disagreement amongst the parties.

Senator FISHER—What is the effect of that advice? What is the legal position now, in your view?

Mr Wilson—The effect of that advice is that senior counsel very strongly puts the view that section 90(2) does require that annual leave loading is paid on termination to people who have accrued entitlements and, in fact, if annual leave loading is then contained within their relevant award or instrument. The other point I would make is that—

Senator FISHER—Sorry, does that mean they are only entitled to annual leave loading on their accrued entitlements if their award or industrial instrument provides in the first place for the payment of annual leave loading?

Mr Wilson—That is correct. The analysis we have is that all but 10 of the 122 modern awards include annual leave loading. Twenty-nine either explicitly or implicitly provide that annual leave loading is not paid, nine provide that annual leave loading is paid out on termination and 74 are silent.

Senator FISHER—Let us explore that point, please. Where that vast majority of awards say annual leave loading is payable, then, in your view, it is therefore payable on accrued annual leave for resigning and retrenched employees?

Mr Wilson—In a broad statement that would be correct, yes.

Senator FISHER—You outlined there are three categories of awards and there are a couple in the minority of categories. They said it was not payable, did you say? What happens in those cases in the context of your advice from senior counsel, and what happens in cases where the awards are silent as to the issue in the context of your advice from senior counsel?

Mr Wilson—I will try and take you through those different sets. In total, there are 122 modern awards. Ten of them do not include annual leave loading so people working under those awards or the employers obviously have no obligation.

Senator FISHER—So they are silent?

Mr Wilson—No, they just do not include annual leave loading.

Senator Chris Evans—There are no entitlements to annual leave loading.

Mr Wilson—There is no entitlement to annual leave loading. When you go on annual leave, you receive your regular pay, and nothing more.

Senator FISHER—They do not rule it out?

Mr Wilson—They rule it out.

Senator FISHER—They do rule it out?

Mr Wilson—No. I do not have examples with me, but they do not provide for annual leave loading. There are then 112 modern awards which include annual leave loading in some way. Twenty-nine, either explicitly or implicitly, provide that the annual leave loading is not paid out on termination; they are clearly the ones that are we are concerned about. Our understanding of the advice we have had from senior counsel would indicate that the employers and employees in those industries, upon termination, do need to make annual leave loading payments.

There are then nine which provide that annual leave loading is paid out on termination; we are quite happy with those, there is no inconsistency. Then there is a wider group of 74 which are silent about whether annual leave loading is paid out on termination. In those ones, clearly, we would be advising that, given that you have annual leave loading within your award, you need to make that payment on termination.

Senator FISHER—Is the actual award entitlement that we have been discussing the entitlement to the payment of annual leave loading to a retiring or retrenched employee, or the entitlement to annual leave loading from the very beginning, irrespective of circumstances?

Mr Wilson—The part of the legislation that we are talking about is section 90, in particular subsection (2), and that sets out a scheme for payment upon termination. The contention that we have come to is that, because of that section, for awards which do contain annual leave loading requirements for those workers and employers there is an obligation to make payment of the annual leave loading upon termination. Then you have a number of awards that I took you through and they are effectively in four different categories. Ten do not have annual leave loading at all, so the entitlement on termination is no different from when you actually go on leave, because there is no annual leave loading to be paid. There are then 112 modern awards which have three different categories, and those 112 awards all contain annual leave loading clauses; 29 say that annual leave loading is not paid on termination, nine say that it is paid, and 74 are silent.

Senator FISHER—Some may call me silly, but I would be no sillier than many in the employer and employee community. You are trying to unpack this for me. How are you expecting that you will go unpacking this for the workplace community so that they are understand what is now, on your explanation, a turning-on-its-head of a large part of accepted custom and practice, at the very least, in the workplace relations community?

Mr Wilson—I am not certain I accept that last part of the proposition. The turning-on-the-head, if you like, was the formation of the modern awards, which commenced on 1 January, and the Fair Work Act six months prior to that.

Senator FISHER—Indeed, it was the Fair Work Act in March 2009 that actually did the turning-on-its-head, it would now appear, would it not, except you did not realise it until now, or you did not act on that turning-on-its-head until now?

Mr Wilson—There are always matters of interpretation that arise from time to time. That is where we are now and, obviously, that is what occurred in September last year.

Senator FISHER—But the turning-on-its-head was the passage of the Fair Work Act.

CHAIR—Let us just get some answers to some questions first.

Senator FISHER—Sure.

Mr Wilson—The point that I was trying to get to was to say that, at any given time, there are always matters of interpretation between ourselves and the legal community, the industrial community, and we try to resolve those as best we can. Many times we are successful and on a few occasions we are not. In this particular instance, unfortunately, it seems that we have a difference of opinion, which does not mean that we should not have an opinion; we need to have that opinion, which we have expressed, obviously, to all concerned. There are different ways that we expect that to be dealt with in the community. Clearly, the reach of unions is very large and we would be expecting them to assist; so too, the reach of the industrial and employer associations is very large, as well. Beyond that, we are making sure that, through our own contact centre, as people ask us questions about these matters, we are giving them the precise answer, within the context of our advice, about their particular award.

Senator FISHER—This is to some extent premature because I presume you will now start to get inquiries about this issue following publicity, but, on notice, can you provide the committee with the number of inquiries you have about this issue and the number of claims that you will then go on to deal with, made in respect of, or on behalf of, various employees. Perhaps you can provide that at various stages, given that we are talking about the future.

Back to Mr Wilson. This entitlement that we are talking about for, even on your description, the vast majority of workers covered by the majority of modern awards, kicked into gear with the passage of the Fair Work Act in March 2009, complemented by the passage of each relevant modern award. But the trigger has to have been the Fair Work Act, based on your advice.

Mr Wilson—It is a combination of both the Fair Work Act and the commencement of the modern awards.

Senator FISHER—The Fair Work Act sets the environment for the creation of the modern awards. The creation of the modern awards was just a timing thing. The scene was set with the passage of the Fair Work Act and section 90(2).

Senator Chris Evans—I am not clear in my own mind; Mr Wilson may be. There is no doubt that the act provides the context for striking modern awards. I just want to be clear: are you saying, though, legally, the entitlement began with the passage of the act or do you consider that it starts with the award?

Senator FISHER—No, that is my next issue to explore. I expect not, but, put it this way, were there no section 90(2) of the Fair Work Act, this entitlement would not be an issue,

would it? It is only because of the passage of section 90(2) of the Fair Work Act that we are even discussing this.

Senator Chris Evans—Would that not depend on what the old award said?

Senator FISHER—Maybe. Mr Wilson, can you answer my question?

Mr Wilson—I was going to say something fairly similar to the minister. It is going to depend on a combination of whatever the preceding legislation said and whatever the preceding awards might have said.

Senator FISHER—Nonetheless, it is section 90(2) of the Fair Work Act that has changed the situation, however it has changed it—is that right?

Mr Wilson—In tandem with the awards, that is correct.

Senator FISHER—Thank you. To the extent that some employers may now find themselves exposed to an obligation of which they may not have been aware and to the extent that some employees may now find themselves entitled to something which they did not expect, when would that obligation and entitlement actually start to have effect? What decides that?

Mr Wilson—The obligation would commence from, most probably, 1 January 2010.

Senator FISHER—In most cases, that is most likely to be the earliest commencement?

Mr Wilson—Yes. There might be some variation around that, but I cannot recall any at the moment.

Senator FISHER—Let us go to the clauses which deal with annual leave loading but do not expressly provide for it to be paid—category 29 of your 112. Does section 90(2) create an entitlement in respect of industrial instruments, or is it only in respect of modern awards?

Mr Campbell—It does include industrial instruments.

Senator FISHER—If there were an industrial instrument which, like the 29 of the 112 modern awards, does not, expressly or impliedly, talk about annual leave loading being paid, what is the outcome there? What is the effect? Does annual leave loading have to be paid to retiring and redundant employees?

Mr Campbell—I am going to try and assist you with this answer, so I apologise if I do not get it right the first time around. If an industrial instrument provides for annual leave loading, our argument is that it is therefore payable on termination, redundancy or retrenchment, whatever you like to call it, irrespective of any other clause in that industrial instrument.

Senator FISHER—Even if a party at the negotiating table did not bargain for workers to be paid annual leave loading on retirement or redundancy, they are going to get it, even though a party at the bargaining table did not seek it from 2010? That is the effect of your ruling. Employees, lucky them, are going to receive, potentially, entitlements that their representatives did not bargain for and did not get—is that right?

Mr Campbell—Firstly, we have not issued a ruling; that is not our job. We have been asked to give an interpretation by the industrial parties and we have.

Senator FISHER—You have, and you quoted, Mr Campbell, as trying to reassure that employers would not be prosecuted retrospectively. You say, ‘We will deal with the matter through voluntary compliance.’ Potentially, a raft of the employer community faces claims for back pay and, potentially, a raft of employees face entitlements that they did not even expect. What do you mean by voluntary compliance? You saying, ‘Okay, we will not prosecute,’ but how do you enforce voluntary compliance if you are not prosecuting? How is that reassurance for employers?

Mr Campbell—We will attempt to resolve the matter through voluntary compliance.

Senator FISHER—If that does not work, what will you do?

Mr Campbell—I expect that it will work.

Senator FISHER—It will be what?

Mr Campbell—I expect that it will work.

Senator FISHER—Voluntarily. What if it is not? What will your approach be? Will you prosecute? That is your only outcome; that is your only way to get the dough—is it not?

Mr Campbell—There is a range of mechanisms we can use to recover money. Again, you are asking me to entertain a hypothetical and I am trying to reassure the community that, where we identify these contraventions, we will deal with them through voluntary compliance.

Senator FISHER—You have addressed a hypothetical, reportedly, in the *Australian*, the Ewin Hannan article on 22 February, because you have done the hypothetical. You said:

Where we do find an employer in the future relying in good faith on previous advice—

which you are conceding is likely to have been your advice about the law, because prior to this you had a different set of advice for employers. You are referring reportedly to a hypothetical by saying:

We will be fair and flexible and deal with the matter through voluntary compliance.

Mr Campbell—That is what I said to you.

Senator FISHER—You put yourself on the record—

Mr Campbell—I have.

Senator FISHER—in a hypothetical.

CHAIR—Senator.

Senator Chris Evans—Please—

Senator FISHER—I am asking you: what if the voluntary compliance does not work, Mr Campbell, what are you going to do?

Senator Chris Evans—Can I just make a comment there?

Senator FISHER—Minister..

CHAIR—Listen for the answer, please.

Senator Chris Evans—The vast majority of employers go to great lengths to comply with their award or other industrial obligations.

Senator FISHER—If they know what they are.

Senator Chris Evans—Certainly. That is right.

CHAIR—Can you just wait for the answer, maybe.

Senator Chris Evans—That is why the Fair Work Ombudsman and others spend a lot of time—

Senator FISHER—Up until now they have not.

Senator Chris Evans—trying to run education campaigns and work cooperatively. The vast majority of employers are committed to paying the appropriate wages and conditions. The experience of the Fair Work Ombudsman, as I understand it, is that the vast majority of employers who, when confronted with a proposition that they have failed to pay correct wages and conditions, rectify the matter.

Senator FISHER—If they can, minister. For many of them, it may be a bill of tens of hundreds of thousands at a time when they are trying to recover from the GFC. They may be impacted by natural disasters. Many of them may not be able. If they cannot voluntarily comply, what will you be expecting them to do?

Senator Chris Evans—Your normal style is to be forensic and balanced. That sort of dramatics perhaps leave to other senators, because it does not assist us.

Senator FISHER—Come on, Minister, can you answer, please?

Senator Chris Evans—We are dealing with the percentage of employees that have retired or resigned from organisations that may be covered by those modern awards. I suspect we are talking about relatively small numbers of people. Then we are dealing with a subset of those employers who then refuse to comply with their obligations.

Senator FISHER—Not many would have been made redundant in the fallout from the GFC?

Senator Chris Evans—We were very lucky that very few were made redundant compared to many other industrialised countries. Credit goes to employers—many of whom made strenuous efforts to keep people on unlike in previous downturns. The point I am making is that you are talking about a subset of people that is quite a small subset of a broader picture.

Senator FISHER—You are but I do not necessarily accept that.

Senator Chris Evans—I can get the officers to take you through who would be affected if you like.

Senator FISHER—On notice would be good, because I have taken a lot of time.

Senator Chris Evans—Sure. They are not going to be able to give you every figure, but we have gone through the number of awards. You then have to narrow that down to the number of potential employers affected and then you have to identify those employers who refuse to or are unable to meet their obligations. Quite frankly, I think we are dealing with a very small number of people.

Senator FISHER—On notice, could the Ombudsman expand the figures to which the minister is referring? They will be hypothetical but since the minister is making an assertion based on those figures, I would ask you to do that.

Senator Chris Evans—I am not sure that I will be able to provide you with the figures, but we can certainly run through the logic.

Senator FISHER—Minister, you were quoted as saying that:

Employees should not be disadvantaged for not taking their accrued annual leave before their employment ends.

If that is your view, what do you say about employers who are potentially disadvantaged for not having paid an obligation of which they were not aware until now and for which the employees' bargaining representatives may not have even sought? What is your view of them?

Senator Chris Evans—Whether or not a bargaining representative sought or not sought them, the fact is that the law is the law.

Senator FISHER—If they forgot?

Senator Chris Evans—The motivation or engagement is not a relevant factor. If we have a modern award, and there is an entitlement under the modern award, the law requires that we pay it.

Senator FISHER—If there is an industrial instrument that does not expressly provide 'Thou shalt receive,' from the evidence given from your officials at the table, there are nonetheless going to be some employees with entitlements when the industrial instrument does not so provide. What do you say of employers in that community?

Senator Chris Evans—As the officers have made clear to you, there is a need for clarity. That has been sought and the major employer organisations have engaged with this issue. Whether people agree or not, the legal advice has been prepared. The Fair Work Ombudsman has been clear to parties that it is operating on that advice. There may not be agreement, but there is an understanding of what rules will be applied and what attitude the Fair Work Ombudsman will take. Then people will have to cut their cloth accordingly.

There is an issue about education and awareness, of which the industrial organisations and unions and employers have a contribution to make. I stress that where there has been confusion the Fair Work Ombudsman works with employers to make sure that the appropriate entitlements are made. The vast majority of employers comply as they can. I think we are dealing with a small subset. The Fair Work Ombudsman will apply the normal approach they do to such matters—which is to engage with them first to see that they are rectified without recourse to prosecution. I think they have been highly successful at having those positive engagements.

Senator FISHER—Can you guarantee that employers who do not resolve this matter through voluntary compliance will not be prosecuted? Can you guarantee that?

Senator Chris Evans—It would be totally inappropriate to ask the Ombudsman not to apply the law.

Senator FISHER—The officers are unable to tell me what will happen in the event. Mr Campbell says, ‘We will be flexible and deal with the matter through voluntary compliance.’ I have asked, ‘What if voluntary compliance does not work?’ I have not got an answer to my satisfaction. To me you are saying, ‘You have no choice but to prosecute.’ I am asking you to rule out prosecution in that scenario.

Senator Chris Evans—I would be very clear with the Fair Work Ombudsman that I would not expect him to rule out applying the law as part of his charter.

Senator FISHER—Then Mr Campbell’s very well-intended reassurance to employers, and to workplaces generally, is trite reassurance because the Sword of Damocles still hangs over in terms of prosecution. The Fair Work Ombudsman does not own pursuit of entitlements for workers, does it? What is the situation for employees who may seek performance of their entitlements, now that they know about them, outside of the Fair Work Ombudsman?

Mr Wilson—Any party or their representative can take an action under the Fair Work Act.

Senator FISHER—Yes, so their employers may well be prosecuted, might they not?

Mr Wilson—That is possible.

Senator FISHER—Yes, by other than the Fair Work Ombudsman.

Senator CAMERON—I note that the ABCC has now described sham contracting in the building and construction industry as endemic. This has moved from a position where the former commissioner, John Lloyd, could not find any sham contracting. I see that you are part of the inquiry that the ABCC is convening, and they have set out a proposed terms of reference. What is your view in general of the industry and what do you think is happening in the context of these issues? What is the extent and nature of sham contracting in industry generally? What factors are relevant in determining whether a worker in general industry is an employee or a subcontractor? You may want to take some of these on notice. How well are the differences between subcontractors and employees understood in general industry? How would the Ombudsman assist stakeholders in industry to ensure labour hire practices are both fair and efficient? Those are the parameters that the ABCC are looking at and I think it is appropriate to be asking the same questions in general industry, especially given the experience we have had in South Australia with Odco and young school girls being forced onto individual contracts and other self-employment approaches.

Mr Wilson—I am happy to answer some parts of those questions now and take some parts of them on notice. It also connects with a set of questions which Senator Abetz was asking us this morning. With respect to that first term of reference, certainly the Fair Work Ombudsman does come across sham contracting arrangements a lot. At any given time it has matters investigating the contractual arrangements. As to being able to quantify the scale of the problem, I am not sure that I can go as far as Mr Johns; he has obviously done more research than I about the matter. What I can indicate to you is that as at mid-February, we had 26 matters being investigated which concerned potential contraventions of the sham contracting provisions, particularly under section 357 of the Fair Work Act.

We had a further 137 matters which relate to the general underpayment sections for assertions that a person is a contractor and not an employee. To give you some sort of scale, that is within the context of about 5,800 matters on hand in total. It is a small number, but I

certainly do not wish to say, by extrapolation from that, that sham contracting is a small issue—that is certainly not what I am saying. Instead, what we are saying is that at any given time we have a significant number. We also recognise the need to do a lot more work in this field and, because of that, Mr Loizides and the inspectorate have been working on a project to commence quite a significant amount of auditing over the next few months. I will ask Mr Loizides to speak to that. I am sorry, I then forget the other terms of reference that you alluded to.

Senator CAMERON—The nature and the extent and the factors in determining whether a construction worker is an employee or a subcontractor. How well the different—

Senator Chris Evans—Senator, why don't we do one at time?

Senator CAMERON—Sorry, sure.

Senator Chris Evans—Mr Wilson is very happy to give you what he can now.

Mr Wilson—It might be best if I ask Mr Loizides to speak to that within the context of the project on sham contracting, which is almost about to be implemented.

Mr Loizides—Because concerns have been raised by some stakeholders, including you, my group is in the process of undertaking consultations into the conduct of an operational intervention into sham contracting. We are seeking some advice in terms of particular industries. We have also got some intelligence from our own resources, in terms of previous auditing work, where we have identified potential sham arrangements which we would like to go into in more depth. Post the stakeholder conversations, we will be doing that intervention hopefully in April-May this year, across Australia, in a number of different industries. Adjoining the operational intervention, there will be significant educational material developed. Our website—if you have had a chance to have a look at it over the last couple of weeks—has had some additional information put on it. That will be further embellished over the next couple of months as well, determining the multifactor test, providing that information to all the participants, and providing some information in terms of what, in our view, constitutes a sham arrangement and a bogus arrangement as well.

Senator CAMERON—Do you want to deal with these other issues now, or do you want to take them on notice? I am comfortable either way.

Senator Chris Evans—Perhaps, Senator Cameron, if there is a particular issue you would like a response on now in general, the officers will give it, and if you want the extra detail then they will take that bit on notice.

CHAIR—I am happy to wind up with the officers before lunch, which is only 10 minutes away. But we may not quite get to that point.

Senator CAMERON—Yes. That is why I say I am happy to take them on notice.

CHAIR—Yes, okay.

Senator CAMERON—Can I just ask about one other issue as my last question: 457 visas. In past years, and certainly before Senator Evans had some responsibility for it, there were huge problems with 457 visas; some of the worst exploitation I have ever witnessed in this country. Given that the government has now said there is going to be some fast tracking of

457 visas arising from the labour shortages due to the cyclones and the flooding, is the ombudsman doing anything to address the exploitation of vulnerable workers on 457 visas?

Senator Chris Evans—Just before Mr Wilson answers: there certainly was a lot of work done about joining up agencies' response, including Immigration, the Fair Work Ombudsman, state authorities, et cetera. Mr Wilson and I have spoken about these issues. I would like to make a point to you that is often not picked up: just because a worker is foreign does not mean they are on a 457 visa. What we have seen in a lot of these instances is that they are students being exploited or they are people on working holiday visas.

Senator CAMERON—What, illegal immigrants?

Senator Chris Evans—Yes, and I think, because of the tightening around 457, the extra protections in there—and I do not pretend to be across the latest detail that Minister Bowen has available—in the more recent cases I have seen, people have actually been on other visa classes. I know that recently in Perth there were some issues. I think some of those workers were actually on working holiday visas. I just do not think people ought to automatically associate foreign-worker-issue exploitation, or what have you, with 457 visas because it is generally not correct now. Most of the incidents seem to involve workers on other types of visas.

Senator CAMERON—Equally, the point I was making, Minister, is that in previous years I have had personal experience of workers being cruelly treated under 457 visas. As I said, I recognise—

Senator Chris Evans—Senator, as you know, I certainly accept that, and when we came to government I was quite shocked by the level of it. Construction was one of the areas; manufacturing, quite frankly, was probably worse. We have done a lot. To be fair to the Fair Work Ombudsman's office, they have done a lot in prosecutions—I know there were very successful cases up in Kalgoorlie et cetera—and trying to clean it up. I just want to make that point because we often get reports and people say, 'They are all on 457s.' The other thing we often have is that an Australian citizen of non-Anglo descent is often identified when in fact they are an Australian citizen. I had a bloke going off to me about this Chinese worker. The bloke had been here 20 years and was an Australian citizen of long standing—but anyway.

Senator CAMERON—So he did not have an Aussie accent—

CHAIR—Like yours!

Senator CAMERON—Again, given the time, I am happy for you to take that question on notice and come back to me with some views on what checks and balances you will be looking at on 457 visas.

Mr Wilson—Thank you.

CHAIR—Contrary to my efforts, you will be coming back after lunch. Senator Wortley, you had a question?

Senator WORTLEY—At the last Senate estimates we spoke briefly about the *Fair Work Ombudsman: exercise of coercive information-gathering powers* report. Mr Campbell, I think there were five areas and you addressed two of those areas. I am just wondering—there were

a number of recommendations that came through—if you can speak to the other three recommendations.

Mr Campbell—I am prepared for that question this time and I apologise for not being able to better address it last time. You are correct that there were five recommendations made by the Commonwealth Ombudsman into the Fair Work Ombudsman's use of coercive information-gathering powers. We have directly dealt with four and one remains a matter of consideration within the organisation. I will work through them for you.

Senator WORTLEY—Thank you.

Mr Campbell—The first recommendation goes to the burden we put on employers when we request documentation through the use of notices to produce documents, an instrument under the Fair Work Act. It is being hard-wired now into our operation manual and into our training that an inspector is to take a moment and speak with their team leader to assess which documents are really critical to assessing a contravention of workplace laws. That is a direct response.

Another recommendation went to a suggestion that Fair Work inspectors be given some direction on using their judgment when determining the length of time an employer or any respondent to an investigation should be given to provide documentation. Again, that is something we have now hard-wired into our training manuals and our internal operating procedures.

The Commonwealth Ombudsman suggested that we review the blurb that we use to introduce witnesses to interviews and amend it to suggest that we remind them that it is a voluntary experience, that they do not have to provide information, that they can refuse to answer our questions if they want to. Again, that has been built into our script, so that has been dealt with. Again, the Commonwealth Ombudsman suggested that we review our internal procedures to ensure that we keep in regular contact with parties to our investigations and that we suggest that we commit to a time frame. We have used guidance note 8, which is a public document about our processes and procedures, to give that sort of confidence to the community that there will be regular communication.

The matter that remains outstanding, or that we are continuing to deal with internally from an operational point of view, is a recommendation going to guidance given to inspectors about how they might talk to an employer or engage with an employer about what would be a reasonable excuse for failing to comply with one of our notices to produce documents. The reason it remains a matter of not debate but consideration within the agency is that they really go to a case-by-case circumstance. Some employers do not have an excuse not to provide very basic documentation, whereas other employers might, and it might also relate to any other industrial participant as well, perhaps a union.

What we try and do is again encourage judgment on behalf of the inspectors to consider the circumstances, consider the documents they are trying to acquire from the individual and then make a decision about what might be a reasonable basis which an employer or a union or any person might have to fail to comply with that notice.

Senator WORTLEY—Thank you, Mr Campbell.

CHAIR—Senator Bilyk.

Senator BILYK—Mr Wilson, your role is to ensure compliance with workplace laws through investigation and litigation. Could you tell me how many complaints you might have received during the past year or so?

Mr Wilson—I will defer to Mr Loizides on that matter, if I may.

Mr Loizides—This financial year we have received just over 11,000 complaints.

Senator BILYK—That would be made up from telephone inquiries and written inquiries?

Mr Loizides—No, telephone inquiries are separate.

Senator BILYK—Additional to?

Mr Loizides—Most definitely.

Mr Wilson—You want the number of telephone calls?

Senator BILYK—If you have got them.

Mr Wilson—Yes. For 2010-11 financial year, 1 July 2010 to 12 February, there have been 803,520 calls. That compares with the full year in 2009-10 of about 1.1 million.

Senator BILYK—How many complaints would you have followed up from those inquiries?

Mr Wilson—The process which we run is that the 1.1 million phone calls is broken roughly into one-third from employers, around 60 per cent from employees and then the rest are undetermined. They are purely questions about what is going on—what am I entitled to, those sorts of questions. Some of those questions obviously include within them an assertion that people are not being paid correctly. What we say to those callers is that you must now either speak with an inspector or you must fill out a complaint form, which they do. It is only at that point that it shifts into Mr Loizides' field. It is a bit difficult to know how many of those calls turn up.

Senator BILYK—Fair enough. Can you tell me how many complaint forms have been filled out then? Do you need to take that on notice?

Mr Wilson—No.

Mr Loizides—That was the 11,021 this financial year. Last financial year, 2009-10, it was 23,698.

Senator BILYK—How many of those 11,000 have been resolved?

Mr Loizides—To date, we have resolved 11,305 complaints, but some of those may be a legacy of the 2009-10.

Senator BILYK—What would be the percentage of those that have been resolved that have had to end up with legal action?

Mr Wilson—It is a bit difficult to tell you the exact percentage. I do not think I have that calculated, but what I can tell you is that in 2010-11 so far we have initiated 22 proceedings out of all of those 11,000 or so matters.

Senator BILYK—Sorry, 22 out of the over 11,000?

Mr Wilson—Yes.

Mr Campbell—Well less than one per cent.

Senator BILYK—Fairly miniscule.

Mr Wilson—It is. That compares with 53 filed during 2009-2010.

Senator BILYK—Are you able to tell me how much money has been recovered for employees during the past year?

Mr Loizides—This financial year we have recovered \$12,795,000. In the last financial year, 2009-10, we were able to assist complaints with just over \$26 million in recoveries.

Senator BILYK—Thank you.

Senator ABETZ—How much is currently in your trust account and how much is outstanding three months, six months, nine months and 12 months-plus? If you do not have that with you, take it on notice.

Mr Wilson—No, I have it with me, I just need to find it.

CHAIR—You might be able to give it to us straight after lunch.

Senator ABETZ—It would be convenient if it is in the same part of *Hansard*, that is all.

CHAIR—We will now adjourn for lunch

Proceedings suspended from 12.32 pm to 1.29 pm

CHAIR—We will now resume these estimates hearing with further questions to the Fair Work Ombudsman. Senator Abetz.

Senator ABETZ—Can I revert back to the issue of where officers have dual licensing. What is the term I am looking for?

Mr Wilson—I refer to the term dual badge.

Senator ABETZ—Dual badge, yes. That will do it. Can you provide me with details of the dates, times and locations where officers of the Fair Work Ombudsman were provided training in relation to the provisions of contract determinations pursuant to chapter 6 of the New South Wales Industrial Relations Act of 1996? If they are dual-badged that would be part of their responsibility.

Mr Wilson—I might have misled you so maybe if I can clarify. In relation to that question, the answer is that we have not provided such training. If I can elaborate a little bit further. The dual-badging comes in not because of our own staff but because of people who are state public servants. That office holds appointments as inspectors under the state legislation. There are people who hold those positions and also positions of Fair Work inspectors. They are not employed by this agency. Within our own agency we have, as far as I am aware, only people who are badged as Fair Work inspectors.

The question that you were asking me before lunch was to do with occasions where Fair Work inspectors exercise responsibility for information about state legislation. As far as I am aware, that does not extend to issues such as the New South Wales legislation that you have referred to.

Senator ABETZ—That is for people employed by the Ombudsman?

Mr Wilson—By the people employed by us, the Fair Work Ombudsman.

Senator ABETZ—Are there any officials employed by the state authority in New South Wales that are dual-badged that have the capacity to look into matters federal under the Fair Work Act?

Mr Wilson—I presume there are, but I will take that on notice.

Senator ABETZ—If that is the case, who provides them with their training in relation to the provisions of the Fair Work Act?

Mr Wilson—Again, we will take that on board.

Senator ABETZ—Thank you.

Mr Wilson—Before you move, another question you asked me before lunch was to do with the costs of taking transcripts and the like. We have that information. The total amount that we paid in 2009-10 was \$193,110 and in 2010-11 to date only \$162,637. By way of clarification, that payment is used to pay for not only the preparation of statements and transcriptions of conversations and so on, the costs of interpreters who are used from time to time—roughly \$200,000 last year, \$162,000 this year.

Senator ABETZ—That is an interesting figure. Given interpreters are involved as well, on notice can you just let us know what component is made up for interpreters and in what languages?

Mr Wilson—Certainly.

Senator ABETZ—Thank you. Has there been any feedback to either you, Mr Wilson, or the Minister that people who are prosecuted by the Fair Work Ombudsman make commercial decisions that it is better to cop it sweet, plead guilty and pay the fine, rather than defend themselves and end up with a legal bill which will be double or treble the size of the penalty they are seeking to fight. Have you had any of that feedback? Minister?

Senator Chris Evans—I have not received that feedback. The point I would make is that the numbers are very small as a percentage of what they do and the engagement that they have with employers. The question about prosecution and fines will arise in a proportionately small number of cases, but I will let Mr Wilson argue that.

Senator ABETZ—How many cases have you lodged with the courts in the last financial year? Do you have that figure with you?

Mr Wilson—Yes, I do. I am sorry, I am not as organised as I should be. In 2009-10, there were 53 proceedings filed and 22 in 2010-11 to the end of December.

Senator ABETZ—Have you had any feedback?

Mr Wilson—No, I have not had any feedback on that subject.

Senator ABETZ—No feedback?

Senator Chris Evans—I think it is fair to say that if it gets to the point where the Fair Work Ombudsman is looking to prosecute them, other avenues have been exhausted and you are dealing with recalcitrants.

Senator ABETZ—In an ideal world, everything being perfect that would be the case, Minister, but where humans are involved unfortunately from time to time things are not as perfect as they may be.

Senator Chris Evans—There is a small number who get to that really pointy end of prosecution at the end.

Senator ABETZ—It has been put to me just recently when I met with somebody with whom you are engaged in legal activities who said that they have been advised as to what the legal bill is going to be and at the end of the day the actual fine if they were to roll over and plead guilty would be about one-third. So they are scratching their head, simply from the perspective of a commercial proposition, as to what to do. It is not as though they suffer a criminal conviction against themselves or their company if they are prosecuted by the Fair Work Ombudsman. They are getting into what is often discussed in the unfair dismissal area as ‘go away money’ to roll over and pay the fine so the thing goes away, rather than spending days giving evidence, et cetera and possibly winning the case but then being financially and time-wise substantially out of pocket.

Senator Chris Evans—It might be useful if Mr Wilson gave you the figures on their success rate in prosecutions that go to hearing because, as I understand it, it is very high.

Senator ABETZ—How many plead guilty and do not contest would, in fact, be the real figure.

Senator Chris Evans—Both would be.

Senator ABETZ—That is what we would be interested in.

Senator Chris Evans—I would be interested in both.

Senator ABETZ—Fine. I would be happy to switch places, Minister, any time.

Senator Chris Evans—As Senator Hill always said to me ‘I like estimates because I find out what my departments are up to and whether what they have been telling me is different to what they say at estimates.’ I am sure that is not the case with Mr Wilson, but I am interested in his answers.

Mr Wilson—Unfortunately I will not—

Senator ABETZ—I only ever did that once, set up a backbencher to ask questions of the department to get them to change their mind at the table when I could not do them in the confines of my office.

Mr Wilson—Unfortunately, I cannot help you on the percentage that are successful. I do not have those figures with me. We would take those on notice. What I can say is that the overwhelming majority of matters are determined in our favour and that most often parties to some description agree. There is a statement of facts which are agreed and those statements of facts which are tabled in the court have varying degrees of admission about culpability. I cannot speak to the motives for people to enter into those statements of claim or the agreed statements of facts, but what I can say is obviously that the courts have to apply the usual sorts of sentencing procedures over and above the trial which is conducted before them. One of the issues they take into account is the remorse exhibited by the party who is being prosecuted and the timing within the investigation when they commenced cooperating with

the authorities. Whether or not that moves into a commercial decision, I really cannot say. That is for the parties who speak to you to say.

Senator ABETZ—It is not a plea of guilty as such, is it? What do they enter?

Mr Wilson—Correct. It is an admission that the offence has actually been committed. It is a civil proceeding, obviously.

Senator ABETZ—If you can let us know whatever the civil equivalent is, that would be helpful. I received a letter from the Fair Work Ombudsman, Tasmanian state office, by Mr Jordan who, if I might say, seems to be doing a good job in Tasmania. In that letter of 3 November 2010, he tells me that the Fair Work Ombudsman is the independent agency responsible for protecting and enforcing the workplace rights of workers and employers under Commonwealth workplace laws. I assume you do not disagree with that statement?

Mr Wilson—I fully agree with it.

Senator ABETZ—In fact, rather than speak in the negative, you have positively endorsed it, so thank you for that. What auditing does the Fair Work Ombudsman do in relation to workers and unions against employers as opposed to auditing of employers in relation to workers' entitlements?

Mr Wilson—In a strict sense, as to auditing, in the sense of acting without complaint and going and checking, we do not do any, but obviously what we do is to monitor complaints or monitor potential breaches of workplace laws by all duty holders, including employees and unions.

Senator ABETZ—That is if they are drawn to your attention. What proactive undertakings are there in relation to the other side of the ledger?

Mr Wilson—The proactive undertaking is in a couple of ways, the most significant of which is when there is a formal exchange of information from Fair Work Australia to Fair Work Ombudsman which is required to be given about orders which are given by Fair Work Australia. Once we receive those orders, we, in a proactive sense, check whether those orders are being complied with.

Senator ABETZ—Can you repeat that for me, please?

Mr Wilson—I apologise. That may have been a bit muddled. There are industrial action orders issued by Fair Work Australia. When those orders are issued there is a formal notification, if you will, to the Fair Work Ombudsman under a regulation—which escapes me for the moment—and that indicates to us that an order has been made in respect of a particular set of industrial actions concerning particular parties.

Senator ABETZ—But that is, once again, a matter that has been drawn to your attention on this occasion rather than Fair Work Australia being a party to it. What do you do of your own volition?

Mr Wilson—As I said in an earlier answer, in a strict sense, we do not audit—

Senator ABETZ—You do not. Thank you. Can I take you to some questions that you have kindly answered on notice for me, and we will just quickly work through some of those? I was asking about the Australian Medical Association. Was it successful in receiving funding?

You said yes. As at 3 December 2010 the SIAP funding agreement has not yet been signed. Do we have an agreement signed as yet with the AMA? And if you do not know, take it on notice. The EW reference is 0459.

Mr Wilson—We do.

Senator ABETZ—EW0574, this is our hardware store in Terang that gets the odd mention at these estimates. In the question I asked last time, I asked, among other things, who instructed this inspector to make the phone call? Can you tell me where in the answer that was provided I am given a meaningful response to that very direct question?

Mr Wilson—You are referring to 574, Senator?

Senator ABETZ—574, third line down, ‘and who instructed this inspector to make that phone call?’

Mr Wilson—We obviously have not answered that, Senator.

Senator ABETZ—Are you willing to provide us with an explanation as to why that has not been answered? This has now been pursued over a number of estimates in an effort to get this sort of detailed information?

Mr Wilson—No, I am not able to provide you with an explanation. Three would be an officer, I would imagine—.

Senator ABETZ—All I can do is register my displeasure, Chair, and ask that it be put on notice yet again and trust that we will be given a meaningful answer. If I can take you to EW0272, I asked, and I was very polite:

Can you please give me the time when, on 5 February, the first contact was made by the department with your office?

I am given the very helpful answer of ‘on the morning of 5 February’.

Mr Wilson—This was referred to in exchanges between you and me and Mr Campbell on the last occasion we were here. I refer you to that answer, and I do not have anything further to add.

Senator ABETZ—So this is an official that is able to tell us that he—I assume it is a he—rang Terang hardware store at 2.14 pm on 5 February 2010, so keeps a meticulous record of that, but this official somehow does not keep a record of when he or she was instructed to make that phone call.

Mr Wilson—That is different to the question you just asked. You referred me to EW0272 which is ‘Can you please give me the time when, on 5 February, the first contact was made by the department with your office?’ There was then an exchange between yourself and Mr Campbell and also me on 20 October, and I believed that that particular question, which is different to the one you just posed, was answered at that stage.

Senator ABETZ—All right. If I withdraw all that, and let us go to what your proposition is you cannot give any greater particularity other than it happened some time in the morning.

Mr Wilson—No, we cannot, and the reasons behind that were discussed on 20 October as well.

Senator ABETZ—With great respect, there were no genuine reasons from my perspective given.

Mr Wilson—I cannot add to what we have said, Senator.

Senator ABETZ—I find that unbelievable. I assume it is not wilfully withholding information, and if it is not wilfully withholding information, it would suggest that the recordkeeping is not as good as it ought to be, because there is no doubt that this matter arose as a result of the Prime Minister's appearance on, I think, the Neil Mitchell program that morning and things were sent into a flurry of activity, and we do know at 2.14 pm the phone call was made to the Terang Home Timber and Hardware people but nobody seems to know who initiated, what initiated and when it was initiated until that 2.14 pm phone call. Methinks that there was some political involvement in the commencement of your activity, but if we do not know how all this activity started, I have to accept that answer, but I have to say it leaves many of us concerned that you are unable to give any greater specificity about how that activity started on 5 February.

CHAIR—Have there been any other compliance issues with this particular employer?

Mr Wilson—Not that I am aware of. There could be, but none spring to mind at the moment.

CHAIR—If you could take that on notice that would be appreciated.

Senator ABETZ—Now, can I take you to 0556? A number of issues were raised, but the second-last paragraph of the first page, where we are told:

58 of these inquiries related directly to rates of pay. Of these, 31 have resulted in a change to the online tools ...

Is 'change' a euphemism for the word 'correction'?

Mr Wilson—No, I think 'change' is a euphemism for 'change'. There may well be—

Senator ABETZ—Why did you change them? Did you think it would be nice to change them or was something drawn to your attention that required it to be changed? If that is your answer, in relation to each of those 58 can you please take on notice why the change was made and what the change was. We will see how euphemistic the word 'change' actually is.

Mr Wilson—Sure.

Senator ABETZ—Just so I understand the first part of the answer better:

There are more than 50,000 individual classifications linked in the Fair work Ombudsman's pay and classification database ...

That is correct?

Mr Wilson—That is.

Senator ABETZ—And when you say 'more than 50,000' are we able to quantify that with some exactitude?

Mr Wilson—We will have to take that on notice. I do not want to sound evasive, but I do not know exactly whether we track every single classification or whether we do the majority. But if we can be precise with the number, then we will give it to you.

Senator ABETZ—I would have hoped that you could track each one. Ultimately, if you pluck a figure like 50,000 one would hope that that has some exactitude. I would like to know whether we are talking about 50,000 and a few hundred. More than 50,000 takes us from 50,000 to infinity, and so if you can provide some specificity that would be helpful. Please take that on notice, because I understand that this supports more than 100,000 individual transitional pay rates. So I am comforted that this new system is clearly into simplification, with only 50,000 individual classifications and 100,000 individual transitional pay rates—but of course, it is ‘more than’, so if you can also provide some specificity to the number ‘more than 100,000’ as well, please.

Mr Wilson—Certainly.

Senator ABETZ—Can I take you to 0463?

Mr Wilson—Senator, can you remind us of 463? We do not seem to have it.

Senator ABETZ—It deals with secondment arrangements between the ABCC and FWA.

Mr Campbell—Senator, just to confirm whether that bit is to us or the ABCC? I do not have a record of that answer at all. I am happy to—

Senator ABETZ—Do you know what? You are absolutely right, Mr Campbell. That is how you earn your money, well done. That was a question to the ABCC, but the reason I put it in this file was that I do want to ask you—

Senator Chris Evans—Nice save, Eric.

Senator ABETZ—No, no. Praising the official, Minister. Praising the official.

Senator Chris Evans—No, the reason it was in this file.

Senator ABETZ—There is a secondment arrangement between the two agencies, which I have been told was started in September 2009. There is an MOU. There has only been one secondment. Is that correct?

Mr Wilson—I will ask Mr Loizides to answer that question, please.

Mr Loizides—That is correct; there was only one secondment.

Senator ABETZ—So you would hardly call it a raging success if there has only been one secondment since its inception.

Mr Loizides—In the agreement between us and the ABCC, it is open to voluntary application. There has only been one so far. We only ask for applications every six months, so we are about to go again through that exercise.

Senator ABETZ—Are you in discussions with the ABCC to try to reinvigorate this program?

Mr Loizides—Because of the acts that we administer and the investigatory processes, we do view that as an opportunity to share skills and learn. So I would be encouraging that, yes.

Senator ABETZ—Are you engaged to reinvigorate this memorandum of understanding? Are you engaged in that? Or is it just sitting there and if somebody wants to volunteer for a secondment then it will be considered? Or is it being actively promoted within the Ombudsman’s office that it is a career opportunity that should be partaken of? Does Mr

Wilson, for example, tap somebody on the shoulder and say, 'Look, I think you have got great career prospects and it might enhance your career prospects to do a secondment to the ABCC for 12 months'?

Mr Wilson—We have a very good relationship with the ABCC and also with Fair Work Australia—indeed, other agencies as well—and we do periodically try to make sure that those kind of human resource development opportunities are identified—

Senator ABETZ—That is the term I was looking for.

Mr Wilson—and given life to. At any given time, there are a number of things being talked about with the ABCC. It is not purely just the exchange of staff, but there are also conversations we are having about collocation of offices and also exchange of working protocols and so on between the two organisations. So in truth, the relationship is much more than simply an exchange of one person.

Senator ABETZ—Yes, but there is a specific document—the memorandum of understanding, Mr Wilson, have you or anybody within the Ombudsman's office that might be charged with human resource development, actively sought out individuals that might partake of this secondment process?

Mr Loizides—We do. We publish it on our intranet. It is also part of ongoing performance discussions with our staff who are looking at further career opportunities, and can be built into that if they wish to take advantage of that.

Senator ABETZ—Yes, it can be built in and it is put on the internet, but are you actively pursuing it?

Mr Loizides—On the six-monthly cycle, we do actively encourage staff to consider it, but as I said earlier—

Senator ABETZ—Is it face-to-face or just on the internet or in the emails that you press 'delete' on?

Mr Loizides—No, this comes to the attention of the management who then identify staff that it might be an activity that might be of benefit to them. It is brought to their attention. But as I said earlier—

Senator ABETZ—How? Via the internet or personally?

Mr Loizides—The supervisors would discuss it with their staff if there were any opportunities, and the supervisors would be aware of that because they would have performance discussions with their staff in their agreements.

Senator ABETZ—So all this has been happening since September 2009 and we have had the success rate of one.

Mr Loizides—That is correct, Senator.

Senator ABETZ—Any in the pipeline?

Mr Loizides—I cannot answer that question at the moment.

Senator ABETZ—Take it on notice. So are you doing anything to try to enhance the program, or is it business as usual that you will keep raising it on a six-monthly basis?

Mr Loizides—I would have to say it is business as usual—

Senator ABETZ—Thank you for that.

Senator FISHER—I want to ask some further questions on the issue of annual leave loading. In particular, I have asked the secretariat to circulate, with the approval of the committee, an extract from the Road Transport and Distribution Award 2010, and I would like to take the committee and the ombudsman to clause 29.2.

CHAIR—I do not think any of us have it yet.

Senator FISHER—No, you do not, because I have only just asked because I have only just been given the opportunity.

CHAIR—I do not know if you can take them to a document they have not got yet.

Senator FISHER—While we are waiting for that to come to hand, can you confirm, Mr Wilson, that prior to the Fair Work Ombudsman receiving legal advice and then counsel's advice, you had been advising employers in the situation about which we are speaking that they were not obliged to pay leave loading for terminated employees?

Mr Wilson—That is my understanding for those affected awards.

Senator FISHER—So the Fair Work Ombudsman had been advising employers that they did not have to pay, and employees that they were not entitled, if they so asked, prior to getting this legal advice.

Mr Wilson—Yes.

Senator FISHER—Are you also able to comment on whether in fact your new advice is at odds with, many years prior to the Fair Work Act, custom and practice in workplace relations? You have been around in workplace relations in various guises for a long time. I am sure you can venture a comment. Are you able to venture an opinion on that, that effectively the advice you are now giving employers and workers on this issue is at odds with the custom and practice in workplace relations over many years?

Mr Wilson—This is going to sound an inadequate answer. I just am not completely aware of the custom and practice. I am certainly aware that the advice that we are giving today is at odds with the advice we might have been giving earlier in the year or last year. The fact of the matter, though, is that with the Fair Work Ombudsman, and indeed every part of the industrial system, all of the advice that we are giving today is to some degree different from what would have been given two years ago.

Senator FISHER—Let me recast that. Obviously in terms of this issue the advice that the ombudsman is giving today is different from the advice that the ombudsman would have been giving prior to the Fair Work Act, and is also different from the advice you would have been giving in respect of the Fair Work Act and since the operation of the Fair Work Act in 2009.

Mr Wilson—Because the law has changed, yes.

Senator FISHER—In 2009, in your view.

Mr Wilson—Yes.

Senator FISHER—Nonetheless, the advice is different and that means that some employers and some employees would have been in receipt of different advice from your organisation, whilst the law was actually the same—that is, from 2009 to today. The law has not changed since that time. The Fair Work Act is the Fair Work Act. The modern awards were made. The new employment standards were legislated. The law has not changed since that time, but your view of the law, on advice from lawyers, has changed. That is right, isn't it?

Mr Wilson—Yes, that is correct.

Senator FISHER—I take you to, as I said, clause 29.2 of the Road Transport and Distribution Award 2010. This is a modern award, is it not, made under the Fair Work Act?

Mr Wilson—I hope so.

Senator FISHER—I am informed it covers a large sector of the transport industry in terms of workers and businesses. Clause 29.2, and I am going to ask you about it in a minute, reads:

During a period of annual leave an employee will receive a loading calculated on the minimum wage rate in clause 15 of this award. Annual leave loading payment is payable on leave accrued and taken but it is not payable on leave paid out on termination.

So clause 29.2 of this award says annual leave loading is not payable on leave paid out on termination. What, today is your advice to an employer who employs a worker under this award, who terminates a worker via redundancy, for example; what is your advice to that employer when he says, 'The clause in this modern award says annual leave loading is not payable on leave paid out on termination. Do I have to pay annual leave loading on termination?' What is your advice?

Mr Wilson—Our advice there is that, yes, you do have to pay annual leave loading and that the reason that that comes about is because there is a conflict between the act's national employment standards and the words of the award and for the reasons articulated in the advice we circulated this morning, that takes precedence and that part of the clause is not actionable.

Senator FISHER—So the bottom line to an employer, though, is he says to you, 'I've got an award that governs me made by the Fair Work umpire, Fair Work Australia, earlier in 2010 that says annual leave loading is not payable on leave paid out on termination,' but the bottom line for that employer is your organisation, for the reasons you have just espoused, feels the need to say to that employer, 'You have to pay it.'

Mr Wilson—Of course that situation is not especially new. The circumstance that arose with most awards after the decision in the Electrolux matter had similar effect, that parts of the agreements were not particularly operable any longer, and then, of course, the same sort of thing occurred after the passage of the Work Choices legislation and the pre-existing parts of the award which were in black and white were not operable after that as well. The situation we face today is that in different ways those instruments still have effect, and so all the time we are saying to employers and employees that, even though the instrument has that clause in black and white, that does not apply to your circumstances, for whatever reason, and obviously this is a new issue but it would fall in the same category.

Senator FISHER—Had an employer in the same circumstances contacted the Fair Work Ombudsman prior to your receipt of all this legal advice and said, ‘This award says annual leave loading is not payable on leave paid on termination,’ what would your advice have been?

Mr Wilson—As we have said, we would have advised to follow that particular clause.

Senator FISHER—Sorry?

Mr Wilson—I understood your question to be, ‘What would we have said prior to receiving the advice?’

Senator FISHER—Yes.

Mr Wilson—And the answer is that we would have said, ‘You need to follow precisely what the second sentence of 29.2 says.’

Senator FISHER—So the award stands and you do not have to pay leave loading on termination?

Mr Wilson—That is right.

Senator FISHER—Prior to your legal advice the award clause stood: no leave loading payable on termination. Now you have your legal advice you are trying to tell everybody about it and you are saying: ‘The lawyers have told us the law is now different from what we may well have told you it was before. Now you have to pay leave loading.’ Mr Wilson has also said earlier in evidence that this comes with the advent of the Fair Work Act 2009, and the new employment standards and modern awards. Now that we have also established that you can have advice from the Ombudsman saying you do not have to pay and that you can have an award from the industrial umpire saying you do not have to pay, yet employers can now be told today, ‘Sorry, that was wrong; you do have to pay backdated to as early as January this year.’

Now that we have established that and now that we have established that they risk being prosecuted because of that, during to the passage of the Fair Work Act did the government raise this issue with any of the stakeholders—for example, through the National Labour Consultative Council or through your industrial consultative committee? Did the government raise this issue with any of the stakeholders with whom it was having extensive and confidential discussions? Did the government raise this issue during parliamentary debate?

Senator Chris Evans—The first thing to say is that I was not the responsible minister at the time.

Senator FISHER—But you are better than that, Minister.

Senator Chris Evans—I will have to take that on notice because the simple answer is that I do not know because I was not party to those proceedings. I think Mr Wilson’s answer to you was that just like when the Work Choices legislation was introduced, the legislation caused a situation where some conditions in the award were overridden by prescription in the legislation and that therefore, on a reading of the award, one could get the wrong impression as to the legal entitlements. That obviously is totally undesirable in any system. People ought to be able to go to the award and be confident that that is their first point of contact and they should be able to rely on the award. No-one sees this as desirable.

Senator FISHER—Minister, can you fix it and legislate so that the award stands?

Senator Chris Evans—What I am saying to you is that I think we all agree that that would be a more desirable position. As Mr Wilson has indicated—

Senator FISHER—Legislating to fix it would be more desirable.

Senator Chris Evans—No, so that the award reflects the legal position.

Senator FISHER—Indeed. The award done by the industrial umpire.

CHAIR—Can you just wait for the answer to be completed?

Senator Chris Evans—I might have to start again because I am losing my track.

Senator FISHER—Sorry.

Senator Chris Evans—I think we all agree that the award, which is broadly available, ought to reflect the conditions for both employers and employees to be able to go to the award and say, 'Those are the rules.' Clearly we have had a series of situations where that is not the case and where the legislation overrides elements of the award. Having received that legal advice, the Ombudsman's office have done what they can to spread education about that and the fact that, as you would expect, they are going to interpret in accordance with that legal advice and the understanding of the law.

Senator FISHER—In more than half of modern awards, by Mr Wilson's figuring.

Senator Chris Evans—To be fair, they have identified it, they have engaged with the industrial parties and they have made the legal advice broadly available. Now it is clear to at least those major players where we stand. If your criticism were to be that maybe that has not filtered down everywhere, I would concede that and hope it does.

Senator FISHER—What are you going to do? What will the government do about it? Will you legislate to make it so the awards and the clauses in industrial instruments stand? Agreements that have the same clause and have also been passed under the Fair Work Act can leave people with exactly the same confusion. Will the government legislate to say that the law is whatever you say in your award or your agreement?

Senator Chris Evans—I am not sure about that, but what I would prefer we did is have a discussion about that when departmental officers are at the table so we can talk through what the department's engagement with this issue is. It is an important issue. As I say, I understand from Mr Wilson's evidence that this has occurred before. If you are asking me what my view is, it is that the award ought to be a source of information that can be relied upon by employers and employees. How we get there and how we overcome this or other instances, I would like the department and Mr Wilson to provide advice and update us on where all that is at.

Senator FISHER—I would like to revisit this with the department. Given that this outcome is at odds with advice given in the past by the Fair Work Ombudsman and at odds with what is lore until now in workplace awards and agreements, and given that it is the Fair Work Ombudsman that is telling people, 'Sorry, scenario changed; law changed,' isn't the government at this stage letting the Fair Work Ombudsman be the fall guy for the government's failure to say what it wanted during the passage of the Fair Work Act?

Senator Chris Evans—As a point of reference, I will go back and see what occurred under Work Choices and what government action was taken then to correct similar scenarios, and I will use that to inform my view. But as I said to you, I will—

Senator ABETZ—Sorry, you will use Work Choices to inform your view?

CHAIR—Yes. That is on the *Hansard*. Thank you for that.

Senator FISHER—And highlighted in orange.

Senator Chris Evans—You can be sure that Work Choices had a big impact on my view of the world, as it did with most of the Australian electorate. What I am saying is we should have that discussion about the precedents and policy options with the department. We know there has been a problem with annual leave loading. It has been broadly discussed among the parties; it has been openly discussed and information shared. In terms of policy solutions and what action has been occurring in that field, I am happy to have that discussion with the department here. It is also clear, I think you will understand, that Mr Wilson and his office have the obligation to act in accordance with the law and pursue their statutory obligations, but it is also the case, as I said to you earlier—

Senator FISHER—Did someone say ‘fall guys’?

Senator Chris Evans—They do not look like fall guys to me. It is also true that I think they have developed a reputation for acting with common sense in dealing with these matters. As always in industrial relations, as you know, common sense is not very common but it is always the best solution.

Senator FISHER—In preparation for the discussion with the department this afternoon, given that you were not minister at the time, can you ascertain what the government’s intention was in section 92 of the Fair Work Act, in respect of this issue, at the time that the government legislated the Fair Work Act?

Senator Chris Evans—I am sure officers are listening and we will see what we can do when we get to it.

Senator FISHER—Thank you, everybody, for your indulgence. This is an issue that potentially affects thousands of workers and many hundreds of workplaces.

CHAIR—The effect on workers is that you wish to seek for them to not have their annual leave loading. So yes, in that respect it does affect them.

Senator FISHER—Sorry, no. They get what they had been expecting, Chair, and what they understood were their entitlements.

Senator ABETZ—That is both undignified and inappropriate from the Chair, if I might say.

CHAIR—The proposition was being put. Thank you, Mr Wilson, for your participation today.

Mr Wilson—Thank you.

[2.20pm]

Fair Work Australia

CHAIR—Thank you. We welcome the officers from Fair Work Australia, Justice Giudice and Mr Tim Lee. Thank you. Do you have any opening remarks you would like to make to the committee before we move to questions?

Mr Giudice—No, thank you.

Mr Lee—Not from me, thanks.

CHAIR—Thank you. We will move straight to questions. Senator Abetz.

Senator ABETZ—Thanks, Chair, and thanks to members of Fair Work Australia. Mr Giudice, we have got before us the annual report of Fair Work Australia, signed by you on 4 October 2010, to the minister. I am wondering if anybody from Fair Work Australia can advise when that would have been communicated to the minister's office. If you do not know, we will take that on notice. Also, could I ask the minister's office when they received it and when they tabled it, because if my recollection is right, by our Senate estimates, which were on 20 and 21 October last year, we still had not actually been provided of a copy of the annual report. So, given that Mr Giudice had signed off on it on 4 October, there were 16 days to be able to get it to members of parliament and senators prior to the estimates hearing. So if both Fair Work Australia and the minister's office can take on notice the various dates of dispatch, delivery and then sending out, that would be very helpful. It seems to me, with the time frame, it could have been made available—and if it was made available, then clearly it is something in my office that meant I had not received it.

Mr Evans—Senator, are you suggesting you did not get it until after estimates?

Senator ABETZ—Yes.

Mr Evans—That was last year?

Senator ABETZ—Yes.

Mr Evans—I got the Fair Work Ombudsman—I think you asked about the Fair Work Ombudsman, which was provided in time. In fact, I received it on Friday, which was the first day of the month, and signed off on the Sunday; that is how diligent I was. I do not have the information you seek at the moment, but I will get that.

Senator ABETZ—Yes. With the Ombudsman's, you signed off on it, but we need to know when it was actually tabled and provided to the Senate for senators to actually be provided with it.

Mr Evans—The Ombudsman's was tabled at 6 October, three days later.

Senator ABETZ—On 6 October?

Mr Evans—That is what my information is. This is the Ombudsman's report. I will stand to be corrected, but my information was it was received from the Ombudsman on Friday, 1 October in my office. I signed off on it on Sunday, which was the third.

Senator ABETZ—After having read it all weekend.

Mr Evans—Yes. Anyway, I will come back to you on both of those.

Senator ABETZ—Yes, all right.

Mr Lee—Likewise, I do not personally have any recollection of those particular dates, so I am happy to take it on notice.

Senator ABETZ—Understood, and as I said with the Ombudsman's report, the fault may well lie in my office. I was just wanting to track that down. If I can go through the report briefly, on page 7 we are told, under the heading '1.8 Staff'—and, Mr Lee, you might be able to assist us with that—that there are various branches in Fair Work Australia, including an unfair dismissals branch. Is that correct?

Mr Lee—That is correct.

Senator ABETZ—And then we are told that there is further information on pages, I think, 42 and 45 in relation to detailed statistics, but I do not think that those detailed statistics tell us how many are employed in each branch or, if we are told that, I have missed it, and can you draw my attention—

Mr Lee—How many staff are employed in each branch?

Senator ABETZ—Yes. I do not think that is included in pages 42 and 45.

Mr Lee—It may not be, but—

Senator ABETZ—Yes. A lot of other very interesting and detailed information is. I am just wondering if you could please take on notice for me, then, to supply how many are employed in each branch.

Mr Lee—I am happy to do that.

Senator ABETZ—Thank you very much for that. Mr Giudice, you signed off on this report in your capacity as President of Fair Work Australia.

Mr Giudice—Yes, Senator.

Senator ABETZ—Yes, thank you.

Mr Giudice—Yes, of course—in no other capacity, I can assure you.

Senator ABETZ—Thank you. In that document, we are told on page 16 about take-home pay applications, and it reads:

An employee whose take-home pay has been reduced as a result of the introduction of modern awards may apply to Fair Work Australia for a take-home pay order to preserve their existing take-home pay while they remain in the same job.

And, Mr Giudice, that is your understanding of the law in relation to take-home pay orders?

Mr Giudice—Well, it is probably a broad paraphrase of quite a lengthy provision in the—

Senator ABETZ—Of course.

Mr Giudice—transitional act.

Senator ABETZ—Yes. Thank you for that. Further down on the page under the heading, 'Modern awards and expense-related allowances' we are told in the very last sentence on page 16:

Draft determinations were prepared and published by 8 June 2010 to allow for comment and final determinations were prepared, published and incorporated into modern awards by 29 June 2010.

Were those draft determinations made pursuant to an application that draft determinations be made, or was that from Fair Work Australia's own volition that it thought it wise to make draft determinations for comment and final determination?

Mr Giudice—I am not sure I can answer that, Senator, as to whether there is any requirement to do so. My general understanding of the provisions is that the tribunal is required to vary modern awards to take account of the results of the annual wage review. As to whether there is any requirement to publish a draft, I am not too sure.

Senator ABETZ—All right. Can you take that on notice for us to advise, in the broad and in particular with the modern awards and expense-related allowances, whether those particular draft determinations were as a result of a request being made or from Fair Work Australia's own volition, if I can use that term?

Mr Giudice—I will have to look at it, Senator. I am just not sure whether there were things said during the conduct of the review that might have led to it or not, so I will have to look at it all.

Senator ABETZ—Yes, I understand that. So if it was by application or request, or if it was from Fair Work Australia's own volition, I would be interested if you could let me know. Mr Lee, this is possibly a question for you. Does Fair Work Australia use Carlson Wagonlit Travel for passenger air travel services?

Mr Lee—I believe that is the firm we use. Yes, we do.

Senator ABETZ—Can you tell us, if you have it handy, what your annual air travel budget and actual expenditure is?

Mr Lee—I would not be able to do that quickly. I can take it on notice, though.

Senator ABETZ—Take it on notice. Does Fair Work Australia have any policies or guidelines with regard to the use, class, and entitlement to air travel?

Mr Lee—The use and the entitlement to air travel is governed, for many, by Remuneration Tribunal determinations, but as to any—

Senator ABETZ—Is the class of travel, also, by the Remuneration Tribunal?

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

Senator ABETZ—Yes, of course. Thank you. How many applications are there currently, and have there been, seeking an extension of time for unfair dismissal claims?

Mr Lee—I might Ms O'Neill if she is able to help with that.

Ms O'Neill—I will have to take that on notice.

Senator ABETZ—All right. I suspect you will have to take the next question on notice as well. What is the average time sought for the extension? In other words, what period of time are they seeking in relation to the extension? Say, is it just one or two days, or is it weeks or months? Would that be available from the data?

Ms O'Neill—You were right; I will have to take it on notice, Senator. I am not confident that without looking at each particular application I would be able to break it down to that degree.

Senator ABETZ—All right. I will rely on you, Ms O'Neill, to make a value judgment. If there are not too many of them, if you could look through and find that statistic for us, that would be helpful. You may or may not recall, but when this legislation came up under a previous regime—whose name I dare not mention—I think it was 21 days that were allowed for filing an unfair dismissal. It was then proposed in the Fair Work Bill to be only seven days, if I recall correctly, and then the Senate amended it to 14 days. What I am trying to get a handle on is whether this new regime of 14 days is the appropriate time period or whether it is lending itself to a lot of applications for the gap between 14 and 21 days or 28 days, just so we can get an understanding as to how that 14-day cut-off is working. That is the background to my question. If you could assist me with that, Ms O'Neill, I would be much obliged.

How are venues chosen for hearings of matters in regional areas? In particular—and I will get to the specifics of it—are court buildings deliberately chosen? The reason I ask that is that a number of people have indicated to me that they find the use of court buildings somewhat confronting, and the suggestion has been that less confronting facilities might be helpful. Can you shed any light on that for us? Who wants to take that one?

Mr Nassios—I think it would be fair to say that traditionally we would use court buildings for proceedings. That would be because we have simply developed a relationship with various state jurisdictions in terms of being able to borrow their particular buildings. There are alternatives to that. I can recall, for example, having hearings in hotel rooms and so on, but I would have to say that they would be the exception.

Senator ABETZ—Mr Giudice, you have never engaged in hearings in a hotel room?

Mr Giudice—Not of the kind you are interested in, Senator!

Senator ABETZ—Very good response! Has any consideration been given to the fact that these court buildings might be seen as somewhat confronting for hearings or does it come with the territory that it is a formal process?

Mr Lee—We tend to be always be responsive to the needs of stakeholders. I am personally not aware of any, but I can take on notice if there has been any particular issue raised with those participating in those forums. In any case, as Mr Nassios has said, we always have to judge the ability to hold these events in an environment which is able to be provided for one matter and has the appropriate facilities, so that will always be a significant factor in our decision.

Senator ABETZ—Mr Giudice, what requirement is there, if any, for expeditious decisions being made in relation to preliminary questions or substantial questions in cases of unfair dismissals? The point I am getting at is if there is a jurisdictional issue or some preliminary matter that has to be argued first, for example, whether an extension of time should or should not be granted, for example. The person that is seeking justice for an unfair dismissal may then have to wait a substantially long period of time for that preliminary matter to be sorted prior to then going on to claim their compensation, if that is the determination. So is there any guideline, any requirement, that these decisions be brought forward expeditiously?

Mr Giudice—There is no requirement other than the provisions of the legislation. I cannot quote what they are in relation to unfair termination, but it is obviously the duty of members dealing with matters to deal with as expeditiously as they can. It would depend on the circumstances, what the other matters are they might have to attend to at a particular time and so on. But there is no attempt to govern, if you like, in any way the way in which members carry out their statutory responsibilities.

Senator ABETZ—Ms O'Neill, are we able to access the average length of time between the last day of the hearing of a matter and a decision being handed down? Would that be available from the records of Fair Work Australia?

Ms O'Neill—I would have to take that on notice.

Senator ABETZ—Yes.

Ms O'Neill—There is information in the annual report on the time frame from lodgement to finalisation of matters but not the particular events that you have referred to.

Senator ABETZ—A number of people have indicated to me that there have been lengthy gaps between the final day of hearing and a judgment. Can I tell you that the complaints I have had about Fair Work Australia do not match some of my complaints with certain jurisdictions in my home state of Tasmania when I practised. When the matters were completed, even in the matter of the Court of Requests, one could wait for 12 months for a determination to come down. I have not heard anything as bad as that in relation to Fair Work Australia, but I would be interested in the statistical data.

Ms O'Neill—Perhaps just on that, Senator, I know it is not precisely the question you asked, but for the last financial year 85 per cent of unfair dismissal matters were finalised within 87 days from lodgement.

Senator ABETZ—Within 87 days from lodgement. Do we have a break-up of that figure as to how many of those were settled at a conciliation hearing?

Ms O'Neill—What I can say is that the average time from lodgement to the conciliation—and the overwhelming majority of matters go through that stage—for both the first and second quarters of this year is an average of 25 days. From lodgement to the conciliation is an average of 25 days. If a party lodges a jurisdictional objection, they may elect not to participate in the conciliation until that threshold issue has been dealt with, but that is a very small proportion of matters. So if you start with 87 days to finalisation, or something of that order, that perhaps gives you a bit of a sense of the time frame.

Senator ABETZ—With the jurisdictional issues, are you able to identify how many have dealt with the issue of jurisdiction and then, once that has been resolved, how long it has taken for that specific category to be determined?

Ms O'Neill—I do not have that break-up.

Senator ABETZ—No, but do you understand the question? I hope I have made myself clear.

Ms O'Neill—Where there has been—

Senator ABETZ—No, Mr Lee is shaking his head and saying no, so allow me to try to clarify. It is one of those things: I always know what I mean to say, but I do not necessarily express it as I ought. So, with those unfair dismissal cases that claim jurisdictional issues, how long does it take them from lodgement to completion? Also in that, could you tell us, once the jurisdictional issue is determined, how long it takes from that point to completion—if the data in Fair Work Australia allows you to—

Ms O'Neill—I will have to take it on notice, because, for example, there are some jurisdictional objections which by their nature are dealt with at a preliminary or an initial hearing conference, and there are others where, by the nature of the objection, they are dealt with or listed to be dealt with at the same hearing or conference as the substantive matter.

Senator ABETZ—I would invite you to use your best endeavours and let me know, Ms O'Neill. I would be obliged. At the last estimates, Mr Giudice, I raised the issue of whether members of Fair Work Australia are required to resign from their union, employer organisation or political party, and you indicated it is not a matter of regulation at all. There is no direction about it, and that is, with respect, as I understand it, correct. But do you accept that best practice would require people in Fair Work Australia—not all people but people who are commissioners in Fair Work Australia—to resign from any such organisation?

Mr Giudice—It is a very difficult issue to make a general statement about, as I think I tried to indicate on the last occasion, and whether there is a conflict of interest in a particular case depends upon all the circumstances and the application of the relevant law to those circumstances. I would not want to commit to some general proposition which might not hold true in all cases. Conflict of interest is an interesting thing, and it is largely a matter of perception, as you say, but whether the perception is the reality is a different question, so I would not want to commit to any general propositions about it.

Senator ABETZ—It was in the *Guide to Judicial Conduct* which was published for the Council of Chief Justices of Australia by the Australasian Institute of Judicial Administration Inc. I fully accept that there is a difference between the judges or the courts and Fair Work Australia, but in that document I am advised in paragraph 3.2:

There are some well established principles:

- Although active participation in or membership of a political party before appointment would not of itself justify an allegation of judicial bias or an appearance of bias, it is expected that, on appointment, a judge will sever all ties with political parties.

I am just wondering whether the same standard is being applied in Fair Work Australia.

Mr Giudice—I suspect I referred to the publication to which you refer on the last occasion I was here.

Senator ABETZ—That is right.

Mr Giudice—And I think I said—and, if I did not, I should say it now—that that publication is made available to all members of Fair Work Australia and it is their responsibility to ensure that they observe the appropriate standards.

Senator ABETZ—So you do not take any personal responsibility as the president to inquire as to whether or not individual commissioners have abided by these standards?

Mr Giudice—No, I assume they do.

Senator ABETZ—So you just assume that they do, because this was, for whatever reason, published for the Council of Chief Justices.

Mr Giudice—Yes. It is not strictly applicable in the sense that I was involved, for example, in the editorial committee in a way chief justices of the curial jurisdictions were, but nevertheless it is obviously a very useful guide.

Senator ABETZ—A very useful guide, and I would have thought it should be rigorously adopted by—

Senator Chris Evans—I find myself unclear on what you are saying about a judge. It is a guide which you provide and recommend to people, but it is not a requirement? How do you describe the—

Mr Giudice—It is one of a number of pieces of information which are made available in a sort of professional development sense, a collegiate sense, so that people are aware of developments and trends and principles that are applied by people in quasi-judicial positions.

Senator ABETZ—The introduction says there are some well established limitations and principles—so they are well established—to consider in relation to extrajudicial activity, and that is what I—

Mr Giudice—I think it is the first time that there has been an attempt to codify those sorts of issues.

Senator ABETZ—Yes.

Mr Giudice—Indeed, I am not aware of any decision of a court which has upheld any part of that publication as the basis for a finding that there was or was not a conflict of interest in a particular case, so it really comes into the category of legal advice, albeit from very eminent sources.

Senator ABETZ—I am not aware if these matters have in fact been litigated and whether the issue of somebody's alleged membership of a political party or trade union or whatever has ever been contested in the courts, but given that this eminent body to which you refer has said that it is a well established limitation and principle for judges and others to consider, whilst you do not personally go around knocking on doors of your fellow commissioners asking them if they are abiding by it, your expectation is that they are aware of this document and therefore would abide by the 'well established limitations and principles' contained in it.

Mr Giudice—I think you are putting words into my mouth there, Senator.

Senator ABETZ—If I am, you tell us in your own words.

Mr Giudice—All I have said is that I have made it available, along with other relevant professional development material, to people and I would expect that they would take note of it, but whether they do, the extent to which they have read it and what parts they have read are not matters that I inquire into.

Senator ABETZ—I thought that was what I faithfully repeated. I am not sure how what I said was in any way, shape or form putting words into your mouth.

Mr Giudice—If that is so, Senator, I apologise, and hopefully the transcript will clear up any difference.

Senator ABETZ—Excellent. I thought Senator Ronaldson was wanting to—

CHAIR—Did you want to break for a little while?

Senator ABETZ—I am more than happy to continue but, as I have said, I am here all day, so it does not matter when I ask my questions.

CHAIR—Senator Fisher, did you have any questions?

Senator FISHER—I do, but I am happy for Senator Abetz to continue, or I can flick to—

Senator ABETZ—Do not be shy, Senator Fisher.

Senator FISHER—Sure. Thank you one and all for attending. I have a couple of questions, once I can find them, coming out of a couple of answers given to questions on notice from you, Senator Abetz. One of the questions asked of Fair Work Australia by Senator Abetz—and I think I shall take you first, if I might—is DEEWR question number EW—

Senator ABETZ—Senator Fisher, would you mind—sorry, Chair. Senator Ronaldson does have other commitments. Would you mind if Senator Ronaldson went straight away?

CHAIR—Sure. Is that okay with you, Senator Fisher?

Senator FISHER—That is totally fine. Thank you.

CHAIR—Senator Ronaldson.

Senator RONALDSON—Thank you. I would like, please, to return to a matter that I understand was not raised at the last estimates but certainly had been raised by me in relation to the matter of a member for Dobell, an investigation from Fair Work Australia, and particularly my previous discussions with Mr Nassios. Are we able to proceed with those now?

Mr Nassios—Yes.

Senator RONALDSON—Yes. Thank you very much. I understand that according to the AEC, who I queried about this matter in finance and public administration estimates on Monday, the Fair Work report has been finalised. Is that correct?

Mr Nassios—I am sorry, I coughed at the inopportune time. I did not hear the last word.

Senator RONALDSON—I understand that the report has now been finalised, according to the Australian Electoral Commission. Is that right?

Mr Nassios—No, there has been no report finalised. I am not sure what they are referring to, but if they are referring to a point that I would have drafted I certainly have not drafted—

Senator RONALDSON—Your ongoing report has not been finalised yet?

Mr Nassios—Correct.

Senator RONALDSON—Right.

Mr Evans—Senator, for the Hansard and for my sake: you referred to the member for Dobell. I presume you meant the former member. But would you mind specifying what we are talking about, just for my understanding and for the *Hansard*?

Senator RONALDSON—Mr Craig Thomson. It is Dobell, is it not?

Mr Evans—Sorry, I had something else in mind. Okay.

Senator RONALDSON—No, no. I can assure you he is very much the current member for Dobell.

Mr Evans—Sorry. I thought you were you asking about a case of an employee of his.

CHAIR—You ask with the deepest regret, Senator Ronaldson, no doubt.

Senator Chris Evans—Are you asking about a case of an employee of his?

Senator RONALDSON—No, I am sorry, Minister. Mr Nassios is aware that this is a Fair Work Australia investigation that has been going on in relation to the Health Services Union. Mr Thomson's former position was in the Health Services Union, and there have been audits. Chair, I do take your intervention and I say it gives me no joy to see the potential for a colleague in this place—if, indeed, what has been alleged is correct, Senator; I take no joy from it at all. Mr Nassios, I think you moved to a formal investigation. Was it in March last year?

Mr Nassios—Correct.

Senator RONALDSON—Yes. From recollection?

Mr Nassios—Yes.

Senator RONALDSON—So the AEC is wrong, is it? Paul Pirani was wrong—I think it was Mr Pirani—when he said he thought your report had been finalised?

Mr Nassios—If he is referring to anything that I have done, then it would not be correct. If he was referring to something else, I would not know. I can tell you—

Senator RONALDSON—So—

Mr Nassios—I could tell you where I am.

Mr Evans—Perhaps if the officer tells you where he is up to, and then we can—

Mr Nassios—If I tell you where I am up to—

Senator RONALDSON—Okay. I thought we were on the same page. Just to make sure we are, we were talking about the Fair Work inquiry being conducted by you, which was being done in effective tandem with an inquiry that was being undertaken by the Australian Electoral Commission, which, as you are probably aware, ended up in a reference to the DPP. So, when they were referring to the Fair Work Australia investigation, they were clearly referring to your investigation in relation to this matter. They were under the understanding that, indeed, it had been finalised. You are saying that is not correct?

Mr Nassios—Well, Senator, I have not been working in tandem with the AEC. I have got to make that clear.

Senator RONALDSON—No, I did not say that. I said—

Mr Nassios—Well, I certainly—

Senator RONALDSON—I said these inquiries were running in tandem into the same—

Mr Evans—Chair, I think it is important that we actually ask the officer, perhaps, to just say what he knows, or update you, Senator, because at the moment he is responding to things you say someone else said, and that is not his view of the world. So perhaps in fairness to the officer, and to help you, he could give you an update as to where his inquiries are in relation to this matter.

Senator RONALDSON—Minister, I am not suggesting it has been. I am just quoting.

Mr Evans—No, I think we start there. It is fairer to the officer, and you can then pursue it.

CHAIR—Well, I think that is a good idea, Mr Nassios.

Senator RONALDSON—Yes.

Mr Nassios—To date I have interviewed 12 persons. One of those persons has been interviewed on two occasions. I am making arrangements at the moment to interview for the second time a person that I have previously interviewed to follow up some of the information that I have obtained.

Senator RONALDSON—Sorry, Mr Nassios. Just so I am clear: you have already interviewed one of those 12 twice and you are seeking to interview a second person twice?

Mr Nassios—Correct.

Senator RONALDSON—Okay. Thanks.

Mr Nassios—I have issued a number of notices in terms of documentation and the like. Currently there are two that are outstanding, in the sense that I am awaiting replies to those very, very shortly. As you would be aware, there are also proceedings in the New South Wales Supreme Court, involving Mr Thomson and Fairfax newspapers in a defamation action. Reading those newspaper articles, it does appear that Fairfax may have information that I do not have. Once I collate everything I have and have conducted my interviews, and if there is information that I believe they might have, while I have absolutely no powers to compel them to provide that information to me, it is my intention to at least seek advice as to whether I ought to go to Fairfax and ask for any material that they may possess.

Senator RONALDSON—And, indeed, the nature of the allegations in the Supreme Court of New South Wales, I assume, without putting words in your mouth, would potentially form an important part of your investigation—

Mr Nassios—Well, some of the issues are the same issues. So, certainly, yes.

Senator RONALDSON—or, sorry, the outcome of that examination. Anyway, you believe it is appropriate to wait for the outcome of that before you finalise your report?

Mr Nassios—No, no. At this stage, I am trying to await the outcome of everything that I have. It is a huge number of—

Senator RONALDSON—Including the Supreme Court case, I assume?

Mr Nassios—Well, I have not gone to them yet, but my intention is to ascertain what I do possess. If there is something that I believe they may have that may be useful to me, then it is my intention to at least ask whether I can acquire that information. As I say, I have no powers to compel production.

Senator RONALDSON—Particularly, I presume, there was evidence given of activities or expenditure or otherwise that you had been told had not occurred. If there was evidence that it had, then I presume that would form a part of your investigation as well.

Mr Nassios—If it relates to the Health Services Union, then, yes, that is correct.

Senator RONALDSON—And those associated with it, including Mr Thomson.

Mr Nassios—Well, Mr Thomson's connection with the Health Services Union—I have to make that clear.

Senator RONALDSON—Yes, that is right. I appreciate you are being very cautious, but you will appreciate that I just want to state the obvious on occasions so that it is on the public record and not just you and I understanding it. I will go to the BDO Kendalls report and the Slater and Gordon report. Was Slater and Gordon's a formal report as such, do you know?

Mr Nassios—I think that the BDO Kendalls report is what is referred to as the Slater and Gordon report, but—

Senator RONALDSON—Look, I was just wondering. I thought that also, but I just saw something when I was having a look through this again that indicated there might have been two reports. But I think it was the one report.

Mr Nassios—I have seen so many documents. If there was a difference, it is not coming to mind.

Senator RONALDSON—Do you mind taking on notice for me whether there were two separate reports.

Mr Nassios—Certainly.

Senator RONALDSON—You obviously have the BDO Kendalls report, and that has formed part of your inquiries.

Mr Nassios—Correct.

Senator RONALDSON—Just to go back, under your powers, which you outlined to me at the May estimates last year, I think, you had the power to subpoena, effectively, individuals and documents, didn't you? Is that right?

Mr Nassios—Yes, so long as there is a connection to that service.

Senator RONALDSON—I understand. If there was not I am sure you would find yourself in another jurisdiction somewhere justifying your decision to issue the subpoena. And the written subpoenas you said before numbered how many?

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

Senator RONALDSON—Can you take it on notice for me.

Mr Nassios—Yes.

Senator RONALDSON—I understand that you cannot do it. There are some issues from a timing point of view with the Australian Electoral Commission where, indeed, there is a statute of limitations which expires on 10 March. And I will not be overtly political except to say that someone would be very happy about that when that date expires. I presume it is probably unlikely you will have your report finalised by 10 March.

Mr Nassios—Not likely, no.

Senator RONALDSON—No. Have any subpoenas been issued from the Supreme Court to Fair Work Australia for any documentation?

Mr Nassios—They have.

Senator RONALDSON—What were those subpoenas seeking?

Mr Nassios—The first one was for the BDO Kendall report. I think that was around July to September of last year or something like that. The latest one we have received is in relation to the transcript of interviews of the witnesses and other documentation that I have received.

Senator RONALDSON—Could you table that at some stage for me?

Mr Nassios—Yes.

Senator RONALDSON—Thank you. Have they been responded to by Fair Work Australia?

Mr Nassios—The BDO Kendall report was provided under some conditions of confidentiality. I cannot recall the specific details in relation to that. Currently I am seeking advice from the Australian Government Solicitor as to whether there may be some public interest immunity claim in relation to the second subpoena.

Senator RONALDSON—And when did you seek that advice?

Mr Nassios—A couple of weeks ago, I would think.

Senator RONALDSON—Have you asked for a time frame to be put on that?

Mr Nassios—Currently the returnable date has been pushed back and back, so to the extent that we need to respond we are not at that point yet.

Senator RONALDSON—That is the returnable date from the Supreme Court?

Mr Nassios—The subpoena. Correct.

Senator RONALDSON—What is the last pushback date?

Mr Nassios—Off the top of my head I cannot recall; I am sorry.

Senator RONALDSON—Clearly, Mr Nassios, your attitude in relation to some of my questions has changed since last May, and I have got to say that I am very pleased about that. There are some things you have advised me today about which you would not have last time, so on the back of that—I assume that they were questions asked along the same vein—would you now advise me whether you have interviewed Craig Thomson, Pauline Fegan, Criselee Evans, Matthew Burke and Jeff Dickson?

Mr Nassios—Certainly if we could go one by one.

Mr Evans—I just ask whether we take advice about whether we should be detailing who you have interviewed in a current investigation. I would have thought that was a bit unusual to be providing publicly who you were interviewing if an investigation is continuing. Has that been done in the past?

Mr Nassios—I cannot recall it being done in the past. When the senator was asking me these questions last time I felt that it would not be helpful to my investigation to divulge that sort of detail. I certainly cannot say it would hinder my investigation at this point.

Mr Evans—I think it would be best if we got some advice as to whether you made those lists of witnesses that have interviewed available. I am not trying to be difficult, but there is an ongoing investigation, there are ongoing court cases and those records of interview have apparently now been requested in a subpoena. I would like to get some advice before the officer made available details as to who has been interviewed.

Senator RONALDSON—Minister, you and I know each other very well. These questions were through you, Chair. These questions were asked of Mr Nassios last May. I respected his decision at that stage in relation to his interpretation of privilege on the back of his investigation. Presumably, it was not said to be of public interest. We are now in late February of 2011. Mr Nassios has quite clearly answered a number of questions that I put to him last year that he claimed privilege for fully, including this very question that I have just asked now. Clearly, in relation to this matter there is no longer a claim on behalf of this officer of privilege in the sense of an investigation, interfering with his investigation, or in the public interest. If the government now wants to override this Minister in relation to this matter to protect the member for Dobell then that is a decision for the government.

But can I urge you, Minister, to go back and look at Senate estimates last year, look at my discussions with the chair, look at my discussions with Mr Nassios and look at the fact that we were generally agreed in relation to this matter. I indeed, as the chair will remember, did not pursue this matter by way of seeking a full statement and then a discussion from the committee. I am afraid that I would view this as a significant political interference in the process of this committee if this witness was not able to answer this question, particularly in light of questions that were asked in May estimates last year.

Mr Evans—I appreciate that you may want to form that view. That is, obviously, something for you, but I think you admitted that the officer has attempted to be constructive and helpful, and I have been perfectly at ease with the officer giving you details of where the investigation—

Senator RONALDSON—Until a question about your colleague was made.

Mr Evans—Shall I answer the question or respond or do you want to keep interrupting?

Senator RONALDSON—I actually was not asking you a question. I was asking Mr Nassios the question.

Mr Evans—I will take the question on notice. There you go.

Senator RONALDSON—I will now ask you a question. You are now refusing to allow this officer to answer the question.

Mr Evans—What I am saying to you is I want to take advice. The officer has been constructive and helpful. You are now asking him for detailed information about his investigation which is ongoing and I think we have reached a point where it would be useful for us to get some advice as to whether it is appropriate for that amount of detail to be provided given that it is an ongoing investigation. But, secondly, I am concerned now with the

aspect that the transcripts of those interviews have been requested in a subpoena in relation to an ongoing court case, and on that basis I think we ought to take some advice as to whether providing you with information you are seeking now is appropriate.

And that is why I want to just get some advice before we go that far. The officer has been really helpful to you in terms of meeting his obligations in terms of Senate estimates for the accountability. The sort of detail you are now going to in relation to a live investigation and its impact also in a live court case seems to me a good reason for us to just get some proper advice.

Senator RONALDSON—It was actually 1 June last year. I appreciate that you were not here. What you are obviously blissfully unaware of—and your colleague of the chair will appreciate this—is that I have asked the same questions again today that I asked Mr Nassios in May last year in relation to how many people had been interviewed and whether the BDO Kendall report had been received by him. Mr Nassios actually volunteered a lot of it. These are all the same questions that were asked in June of last year that the officer at the table—and at the time, I thought, legitimately—made a decision that it may interfere with his inquiries. And the claim for privilege was on that basis. He is now saying that that is now not the situation.

Minister, this matter is so serious and I view your intervention so seriously that I think this committee should take a short recess while you make a decision because, quite frankly, I am not prepared to get this taken on notice so that, when this hearing is finished and done and dusted and Hansard is finalising its process in relation to this, we are then put off until May next year. This is, I put to you, a deliberate intervention by a government minister in relation to the member for Dobell, Mr Craig Thomson, to protect him. In light of last June's Senate estimates, I think that is an outrageous intervention, and I seek from you, Chair, a five-minute break while the minister seeks that advice.

CHAIR—The only—

Senator Chris Evans—Can I say before we get there, Chair, that there is no point in having a break. Obviously you can take that. What I am suggesting to you is we will take those questions on notice and we will make a decision about whether that information ought to be provided. I am not making a public interest immunity claim at this stage. I want to take advice. As you quite rightly say, Senator, and I take your word for it, you have asked these questions before and you did not push the point when the officer said he was pursuing his investigation. I accept that, and I am sure that is right.

Senator ABETZ—Can I just—

Senator Chris Evans—Just let me finish. The officer today has said his investigation has not concluded. As is often the case in estimates, he gave you the numbers of witnesses and where he was in terms of proceeding, but he also made it clear the investigation was continuing, so the officer has not completed his investigation. The second point, as I say, is this aspect of these records of interview now being subpoenaed by a court, and I think that is another reason why we ought to take pause to seek advice. Senator, in terms of your political accusations, I, of course, reject them, but it seems to me obvious to the least interested observer that there are certain key people who would have been interviewed, and that goes

without saying. But I am concerned that we just get proper advice before we go down the path that you are seeking. So I will take that question on notice in order to get that advice.

Senator RONALDSON—I know my colleague wants to say something but, Minister, can I state the bleeding obvious to you in relation to your first point. This inquiry was continuing last year when the decision was made not to give the information. So the fact that it is continuing and the officer is prepared to do it now I do not think you should be drawing any comfort from, because a refusal was made last year while it was continuing, and it has not been refused this year and it is still continuing.

Senator Chris Evans—I think the officer might want to reflect on that and we might want to get proper advice, so what I am saying to you is that, while the officer is trying to be helpful, I think—and I was perfectly happy with him giving you the information he has given you, but I think we have now reached a point where the detail that you are seeking causes me some concern and I want to get some advice as to whether or not we should be providing that detail.

Senator RONALDSON—Through you, Chair. Minister, the officer made the decision last year that my inquiries might prejudice his inquiry. He has been in a formal process for 12 months. He was in an informal process for at least six months—I think closer to 12 months in an informal process. So this process has been going on for two years. This officer made the value judgment in May last year that my questions may interfere with his inquiry. He has made a decision today, 23 February, that the re-asking—the continuation of those questions—of those questions will not interfere with his inquiry. How can you possibly make that determination for him that it might, which is effectively what you are trying to do?

Senator Chris Evans—Senator, the minister at the table is ultimately responsible, and what I am saying to you is I would prefer to take those questions on notice because I am not sure that what the officer may or may not have intended to do is appropriate, particularly based on two facts: (1) that his investigation is ongoing; (2) that we now have a subpoena for the transcripts of interview in a court case that is proceeding. I just want to seek some advice on that. If the advice is that there is no impediment to that being provided, it will be provided. If the advice is that we ought not provide it, that will be followed. I want the opportunity to get that advice because I think we have reached a point that the level of detail of information requested may impact on either his investigation or the court proceedings. I am not refusing you the information; I am just indicating to you that I want to take advice as to whether or not we provide that.

Senator RONALDSON—Chair, as you well remember—

CHAIR—Actually, just let me say something. There is a distinct difference between seeking a report on the progress of an inquiry and then crossing a line into asking for details of the inquiry itself. Whether or not giving the names of people involved in an investigation crosses that line is a matter for people to determine and make a judgment on. The minister has indicated that he wants to take some advice on that. That is not a refusal to answer the question. It is not a claim for public interest immunity. It is simply a matter of taking some advice before the question is answered. I think, given the discussion that I have heard, I am quite happy to accept that that is a legitimate position for the minister to take. I do not know if there is much more benefit in having a discussion over it. If you want the committee to

determine that matter formally, I am happy to accommodate that, but that is the position I would be prepared to take.

Senator ABETZ—Can I just ask, Minister, from whom would you seek the advice that you are seeking, and why would you not accept the advice of the director of Fair Work Australia, Mr Nassios, who is sitting at the table right here and now. He seems to be seized of the matter. He seems to be aware of the matter, and I would have thought his professionalism would have been sufficient for you to be advised as to whether or not Senator Ronaldson was crossing any line which occasioned discomfort to Fair Work Australia and Mr Nassios.

One wonders to whom else you would have resort other than a highly qualified professional such as Mr Nassios in these circumstances. Given that, I cannot help but agree with Senator Ronaldson's concerns as to why you are seeking this extra advice, from whom we do not know, but what it is suggesting that you are not prepared to accept Mr Nassios' judgment in relation to that matter, and that is a matter of concern. Having said that, Chair, if I might say, with respect, what you have just said is technically absolutely right, and there is nothing we as an opposition can do about it, if that is the minister's desire, that not allowing the official, who is quite qualified, to make comment and make a professional judgment in this area—yes, if he was some, with respect, sort of a junior official who might not necessarily be capable of exercising such judgments, I would say fair enough. But we have got some fairly seasoned campaigners, if I can use that term, at the table, who would be able to exercise a good professional judgment in relation to this matter.

CHAIR—I would rather give the minister now an opportunity to respond to that. I have told people what my view is. If people then want to test that at the committee, we will do that, or then we should simply move on.

Senator Chris Evans—I would just like to respond to Senator Abetz, if I can. I am quite confident in the competence of Mr Nassios from what I have seen of his performance. What I am doing is exercising my responsibilities as minister to seek advice, and I suspect we will get this from the government's legal representatives, as to whether it is appropriate for such information to be provided, given both Fair Work's interests and the interests of the courts in this matter. So I am going to take the question on notice, seek that advice, and we will make a judgment about what information ought be made public at this stage of the inquiry and legal proceedings.

Senator ABETZ—If Mr Nassios has already divulged too much, are we going to be told what that legal advice says?

Senator Chris Evans—If Mr Nassios has divulged too much then he is in strife.

Senator ABETZ—Be very careful what you seek and what you wish for.

Senator Chris Evans—I am quite comfortable with him having been helpful to Senator Ronaldson's inquiries in terms of the progress of his investigation. What we have come down to now is a question of individuals, naming who has been interviewed, and I think that is traditionally where the Senate has not sought to seek information about individuals when looking at ongoing inquiries. Particularly now some of his information has been subpoenaed by the Supreme Court, I would like to take some advice before we answer that question.

CHAIR—I would like to move on now. I am looking with anticipation to you, Senator Ronaldson.

Senator RONALDSON—I fully accept what you are saying. Can I just ask, though, Chair, as a non-continuing member of this committee, whether as a matter of courtesy, if indeed the Minister or someone on his behalf is going to report back, the courtesy could be extended to me to have the opportunity to at least be here for that?

CHAIR—On this matter I will ask the secretary to make sure that you are looped in to any information.

Senator RONALDSON—Thank you.

Senator Chris Evans—I will buy you a cup of coffee and take you through it when I have got it. If I am just telling you no it might not take long. We can talk about the football or something.

Senator RONALDSON—Now I am getting very nervous. Mr Nassios, finally, there were the BDO Kendall orders. Was there also a separate Health Services Union order in relation to these matters that you are investigating?

Mr Nassios—I think that was the BDO Kendall report. I do not think there was a separate one. In terms of the Slater & Gordon material that you are referring to, I just cannot recall what specifically that is.

Senator RONALDSON—That was my recollection as well, but it has been put to me that there is another audit being undertaken by a Michael Williamson, who I think was a former national president of the Health Services Union and indeed a mentor of Mr Thomson's who was also conducting an audit. That, I would have thought, would be a massive conflict of interest, but are you aware of whether that is a separate audit being done?

Mr Nassios—I am certainly not aware of any audit conducted by Mr Williamson.

Senator RONALDSON—On 10 February last year in this committee, my recollection is you said you had not received any official audited Health Services Union financial statements from the national office for the last two years because they did not exist. Is my recollection of 12 months ago right?

Mr Nassios—I certainly hope I did not say they did not exist, but I certainly would have said that we had not received any. That is correct. We have to date not received any, for the last two or three years.

Senator RONALDSON—Have they been received by you?

Mr Nassios—No.

Senator RONALDSON—So they have not. To your knowledge they have not been done, or if they have you have not received them?

Mr Nassios—Certainly we have not received them.

Senator RONALDSON—Have you asked for them since our discussion 12 months ago?

Mr Nassios—Yes, Senator.

Senator RONALDSON—And you still have not received them?

Mr Nassios—I recall that one of my staff has had a discussion with the auditors of the Health Services Union. Again, I would be remiss of saying when that discussion would have taken place, but it was certainly in terms of asking where the audited reports are.

Senator RONALDSON—Could you take on notice when that last request for those audited statements was made by Fair Work Australia?

Mr Nassios—Yes, Senator.

Senator RONALDSON—There is an organisation called Coastal Voice which Mr Thomson set up to help with his election. They have not lodged returns under the New South Wales Associations and Corporations Act, as required, for at least two or three years. Has that formed part of your investigation or not?

Mr Nassios—Not that aspect, no. We have certainly asked questions about Coastal Voice, but not in that regard.

Senator RONALDSON—What is the nature and extent of those questions in relation to Coastal Voice?

Mr Nassios—Whether any Health Services Union finances were expended in relation to some sort of activities that Coastal Voice were conducting.

Senator RONALDSON—Were those inquiries made of Mr Thomson?

Mr Nassios—Yes.

Senator RONALDSON—Have you had a response to that?

Mr Nassios—In the interview, yes.

Senator RONALDSON—Are you able to tell me what that response was?

CHAIR—I would be most uncomfortable if Mr Nassios tried to do that, because that clearly goes to the detail of the investigation.

Senator RONALDSON—I suppose for the record you are refusing to answer that on the basis of privilege or it might impact on the outcome of your—

Senator Chris Evans—I would have thought an officer commenting on evidence given to him in an investigation that is ongoing was a yard or two too far.

Senator RONALDSON—I am always fascinated to hear your interventions, but I actually would like to hear it from the officer who is the one that would need to claim it, given that I have asked him the question.

Senator Chris Evans—He does not need to claim that; he just needs to make it clear he has got an ongoing investigation and he will not be discussing evidence given to him.

Senator RONALDSON—Would you like to let him say that so that it is on the public record? Why are you refusing to answer that question?

Mr Nassios—Senator, I think that goes very much to the discussion that you and the minister had previously, I have to say. Again, from my perspective as an investigator I do not believe it would jeopardise my investigation but I certainly do think in view of the discussion that was had it falls squarely within the realms of that discussion.

Senator RONALDSON—Given that, can I then ask you whether you are now prepared to answer the question?

Mr Nassios—Senator, I do not think I would be able to answer the question for the simple reason I actually could not recall the answer.

Senator Chris Evans—Let us make it clear, Senator: the officer first of all indicated he did not have the detail in front of him so he did not want to answer on that ground, but I make it clear to you I would want to seek advice before I allowed the officer to discuss evidence given to him by witnesses while his investigation was ongoing. I would regard it as highly improper unless I am advised to the contrary. I would seek advice on that. I certainly will not be allowing the officer to discuss evidence given to him by witnesses in an ongoing investigation. I would be completely taken aback if that was considered by anyone to be appropriate.

Senator RONALDSON—You are now taking it on notice and will come back as to whether the officer will be allowed to answer that question, similarly to the previous matter?

Senator Chris Evans—Certainly my view would be that he should not, but I am happy to take it on notice.

Senator RONALDSON—And you will seek advice as well?

Senator Chris Evans—Yes, I will seek advice, but I would need to be persuaded that officers of any investigative authority ought to be discussing current cases and evidence of witnesses to them in their current cases.

Senator RONALDSON—This is a separate matter to the one we raised before, as part of that inquiry will you take into account the fact that the officer at the table acknowledged that he was happy to answer it and it would not interfere with the conduct of his inquiry? Will that form part of your brief when seeking advice on this? I would hope so.

Mr Evans—Whether the officer is happy or not quite frankly is not central to my consideration. His view about whether or not it has any impact on his investigation is a relevant consideration.

CHAIR—Again, let me intervene here because it is not normal practice for questions to be asked of officers about the details of investigations. While the officer has indicated that it may not affect his investigation, it may well affect other investigations that are going on which you have alluded to, too, which I think you might not want to jeopardise either. So it is not general practice for a whole range of reasons, and I have indicated that it is not an appropriate question to be put to the witness when it is so clear. So I would like us to move on.

Senator RONALDSON—Look, I do not think I can pursue the matter, but I just want to make it absolutely clear—so we are all clear about this—that the minister is taking two sets of advice in relation to two matters as to why it would not be appropriate for this officer to answer a question that he is happy to answer, and also take into account the discussions at the last Senate estimates.

CHAIR—I think the minister is taking it on notice and getting advice before he answers the question. That is what the minister is taking on notice. Are there any other questions on this matter? If not, we will go back to Senator Fisher.

Senator RONALDSON—Thank you.

Senator ABETZ—If Senator Fisher takes five minutes, we will be finished by 6 o'clock.

Senator RONALDSON—I again thank Senator Fisher for her indulgence—and you, Chair.

CHAIR—That is just for the first question!

Proceedings suspended from 3.31 pm to 3.46 pm

CHAIR—We will resume these estimates hearings, and we are presently questioning Fair Work Australia.

Senator FISHER—If I can continue, as I was attempting to do before, to refer you an answer to a question on notice from the estimates prior to last in relation to a question from Senator Abetz on 1 June. I do not know if you can retrieve that, but it is your answer to question on notice EW0283_11. Let me talk you through it, and if you want to have a copy of the answer, then perhaps I can return to it at an appropriate time. Senator Abetz asked Fair Work Australia as follows:

Can we have a list of the commission members and the number of cases they have dealt with since 1 January; the category of case—let us say unfair dismissal, a collective agreement, full hearing or whether they sat on an appeal—and the outcome of each case ...

The response that Fair Work Australia provided had a couple of arms. The first arm was:

It is not administratively practical to compile such a list as individual cases may have been allocated to more than one Member. This may arise, for example ...

And the answer goes on to give examples. I accept that, so I do not wish to ask Fair Work Australia about that aspect of the response. But the last sentence of the response is as follows:

The provision of such a list also has the potential to improperly influence the conduct of proceedings before individual members.

Can I ask what is meant by that part of the response?

Mr Giudice—I think this was raised last time as well, Senator, was it not?

Senator FISHER—I can indicate that last time Senator Abetz said—if I can read from *Hansard* this might help you, President. He says:

... 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 cases or matters that each commissioner dealt with.

I am reading now from EW0578-11, and Senator Abetz went on to say:

You considered that that might be inappropriate and might interfere with the judicial process. I will not pursue that further today, other than to—

So, yes, Senator Abetz did raise the issue last estimates, but he did not ask Fair Work Australia about what I am now seeking to do, which is while Senator Abetz referred to your response or your consideration that providing such a list might be inappropriate and might interfere with the judicial process, he did not, to my knowledge—I stand corrected—ask you about how that might be so. I now want to ask Fair Work Australia how that might be so. Can Fair Work Australia explain that, please? So, even if such a list were provided, how would, as in the

response to Senator Abetz suggested in May 2010—how would the provision of such a list also has the potential to improperly influence the conduct of proceedings before individual members?

Mr Giudice—Senator, I would refer you to the answer that I gave to you on page EEWR-100 and following in the October estimates. I think you asked me the same question.

Senator FISHER—I stand corrected.

Mr Giudice—I think that you said, after I had given an answer, you accepted that, and you then went on to ask whether, as a matter of internal management, such information was collected.

Senator FISHER—All right. That may be so. I am now asking Fair Work Australia how the provision of a list of commission members and the number of cases they have dealt with—as imperfect as that list might be, noting that there is overlap et cetera—has the potential to improperly influence the conduct of proceedings before individual members.

Mr Giudice—I am not entirely sure what the question is, because the question seems to have shifted a couple of times as to exactly what list was contemplated. Could you just define for me what you mean by ‘list’?

Senator FISHER—I guess the difficulty is, President, that I am trying to quote from Fair Work Australia’s answer. It might help if a copy of that from which I am reading is given to you.

Mr Giudice—Somebody has retrieved that for me. I have that.

Senator FISHER—So my question is what does Fair Work Australia mean by the last sentence of that response?

Mr Giudice—Yes. I did give the explanation on the last occasion.

Senator FISHER—Be that as it may, can you try me again?

Mr Giudice—I have not finished. I did give an answer on the last occasion, and there is a difficulty in trying to paraphrase or restate what has already been said, but I will do my best. In general terms, my concerns were about the focus on individual members in the provision of information and the potential that that will lead to conclusions being drawn by members of the public or people who might appear before the tribunal as to the way in which a particular member might or might not deal with a particular matter, and indeed, if that member is totally unaffected, as I would hope they would be, by the fact that they have appeared on some list in the Senate, nevertheless, the possibility is always open that a party or a member of the public could draw the conclusion that they had been affected by the publication of such a list. There is a full answer on the pages I gave you, Senator, and I thought you had accepted my explanation.

Senator FISHER—These things are always temporal, I suppose, President, but thank you for that answer. Then I want to take you to the response from Fair Work Australia to Senator Abetz’s question EW0578_11 from October 2010, to which we referred some minutes ago. In the second half of that question on notice Senator Abetz says:

... other than to draw your attention to the annual—

I presume that means ‘annual report’ —

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.

I am wondering whether we could refine the request to the number of days that each commissioner sat. Your response was:

Fair Work Australia does not have any acting members ...

So, presumably, the reference in the District Court annual report was to acting judges. Your response continued:

... and therefore the reporting practice of the District—

I presume you mean ‘District Court’ —

of New South Wales, referred to by Senator Abetz, is not a relevant consideration.

Can Fair Work Australia explain why that is a response to Senator Abetz’s question?

Mr Giudice—I took Senator Abetz, rightly or wrongly, to be accepting, at least in part, my explanation for not wanting to provide individually based information, but drawing my attention to the practice of the District Court, which presumably was an example he was able to find of individual sitting days reporting and saying, ‘Does that effectively change your view, because here is the District Court doing it?’ My response was simply to point out that the information is provided because they are acting appointments, so in a way, it is like saying, ‘They are part-timers and they work 20 hours a week,’ or something.

Senator FISHER—So it is chalk and cheese. So, really, Senator Abetz’s example was not an appropriate example?

Mr Giudice—I did not see it as a basis to review the view I have taken about it.

Senator FISHER—Okay.

Mr Giudice—I am sorry if it was too cryptic, but that was—

Senator FISHER—I must say I presumed that was the intent behind that. I am, nonetheless, wondering why Fair Work Australia has not responded to Senator Abetz’s substantive question in that question, which seems to me to be his refined request, if you like. I am wondering whether we could refine the request to the number of days that each commissioner sat. Accepting that it is difficult to indicate a number of cases et cetera, can Fair Work Australia so refine the question, as Senator Abetz asked, to the number of days that each commissioner sat?

Mr Giudice—I would not think it appropriate to do so, Senator; no.

Senator FISHER—Can I ask why not?

Mr Giudice—Yes, you certainly may. My view about it is relatively simple. From a budget and a management point of view, aggregate information is obviously important about the amount of work that is generally carried out by the tribunal. Once you start to focus on individual members and differentiate between them, you inevitably raise the prospect that people will make judgments based on that differentiation. Somebody will say, ‘This member worked X number of days per year and this member worked Y number of days per year,’ and

that there is some reason for that difference, which reflects the competence or otherwise of one or other of the members. That is the essential vice in producing individual information, which will really be quite damaging, no matter how well understood it might be by you, Senator, or by others. In fact, it will be used to draw comparisons. So the rationale for the approach is the same approach I took to the question of publishing the outcome of cases as to how many applications a particular member upheld and how many they declined.

Senator FISHER—But, if I understood you correctly, you were suggesting that that would, in your view, lead members of the workplace relations public to conclude how a particular member may determine a particular case or not—

Mr Giudice—In that case, yes.

Senator FISHER—Whereas here, you seem to be saying that it may lead members of the workplace relations public and others to conclude how hard one commissioner is working versus another.

Mr Giudice—Yes. But you cannot minimise the data collection issue either. I know you passed over it and said, ‘We understand it is difficult.’ There are a variety of circumstances which will affect how the workload, if we can use that expression, is calculated. For example, if there are in some industries a number of applications dealing with the same issue, they can all be part of one listing. The number of days one sits does not measure the length of time one sits. One person might sit on every day of the week for half an hour and one person might sit on one day of the week for eight hours.

Senator FISHER—If I were to re-ask that question, I would ask for the number of days or part thereof—or hours, if you wish—to deal, obviously, with that issue—

Mr Giudice—Yes, but it still does not solve the problem, Senator.

Senator FISHER—I would expect that it would not deal with your concerns.

Mr Giudice—One would have to ask the question: what is the information for?

Senator FISHER—I hear you have raised two issues, and I will go to those in a minute, if I may. I thank you because the difficulty from my perspective, sitting as part of a Senate estimates committee, is that I am of the view that we are, in part, responsible to do our best to ascertain the expenditure of public moneys and the efforts put to by those who are the recipients of public moneys, like us. As part of parcel of that, I consider that it is part of the job of this estimates process to attempt to ascertain that public resources are being put to their maximum use. So it is for that purpose, which is, in my view, an entirely appropriate purpose of the estimates process, that I am seeking that information. If there is another way to provide it, you might indicate, President, whether there is another way to satisfy that need in an empirical and transparent way, which, in my view, is what estimates is about.

Mr Giudice—Your objectives, I would suggest to you, Senator, can be met by aggregate information.

Senator FISHER—What would you suggest that aggregate information should be?

Mr Giudice—Aggregate information can be supplied about a whole range of issues. I think the annual report already provides information about the number of hearings. It may

also provide information about the number of conferences; I am not sure about that. Aggregate information of that kind can be obtained.

Senator FISHER—With respect, President, that aggregate information suffers from a very similar deficiency to what you have suggested: a list of commissioners and the number of cases they have dealt with, for example. You indicated that I should not minimise the data collection issue. Can you explain what you mean by that? Did you mean by that what you went on to talk about in terms of the various factors influencing workload of commissioners, or were you referring to something else in terms of minimising data collection?

Mr Giudice—I am suggesting to you that the information, if it were simply the number of sitting days, would be potentially extremely misleading as to the amount of work or time spent. It is not even work; it is the time spent in hearing.

Senator FISHER—It is like saying, for example, ‘How many days are you in parliament?’

Mr Giudice—I do not know if it is. If you look at changes in the nature of a jurisdiction, for example, there are thousands of workplace agreements that are approved. Most of the work in relation to workplace agreements does not take place in hearing; it takes place in chambers. Depending upon the industry in relation to which a member is assigned, they may have a very heavy agreement workload or they may have a very light agreement workload. There is so much ambiguity in this material, and the suggestion that somehow some judgment is going to be made about individual members based on that material is, I might say, quite distressing.

Senator FISHER—President, are you suggesting that that suggestion is coming from around this table?

Mr Giudice—I cannot see any other purpose for the information, if it is individual information. Aggregate information is a totally different thing.

Senator FISHER—In asking these questions I restate my purpose in seeking it.

CHAIR—Can we do that and then maybe move on?

Senator FISHER—Yes, Chair.

CHAIR—I do not want to cut you off, but we are struggling for time. It is fine to ask the questions, get an answer and express some displeasure with the answer that you are getting, but I think we are at the point now where we are simply arguing about it.

Senator FISHER—I was attempting to explore.

CHAIR—Of course you can put anything you like.

Senator FISHER—There is a question I will put on notice, but I can do it later. I will put my final question on notice; I can do it later.

CHAIR—Thank you.

Senator ABETZ—I am going to quickly ask a few follow-up questions. As I understand the record-keeping and public record-keeping of Fair Work Australia, every single appeal decision is publicly available. That is correct?

Mr Giudice—Yes, as a general proposition that is correct.

Senator ABETZ—So if I were to ask, for example, an intern to do a research project to get every single appeal decision from Fair Work Australia and then make a list of each commissioner who has had his or her decisions upheld or dealt with otherwise, that information could be gleaned and then used in the public domain, could it not?

Mr Giudice—It could.

Senator ABETZ—To avoid an error being made by an intern in undertaking such a task, would it not be better for Fair Work Australia itself to undertake that task and provide it to the community on an official basis?

Mr Giudice—You are asking another question now, I think, Senator.

Senator ABETZ—Yes, and that is the purpose of these estimates. We engage in dialogue and we ask further questions.

Mr Giudice—I do not think it would be desirable, for all the reasons that I have advanced, Senator. I think that it is unfortunate enough that I am subject to this political process and I would not want to expose any of my colleagues to the same process.

Senator ABETZ—Mr Giudice, the problem is that on Wednesday, 20 October I asked the minister a question about a matter, and do you know what he said?

Senator FISHER—Let's remind him.

Senator ABETZ—‘That question should be addressed to Justice Giudice, the President of Fair Work Australia.’

CHAIR—What is the question, though?

Senator ABETZ—Sorry?

CHAIR—Is it the same question you just asked?

Senator ABETZ—About the President's appearance here. So what we have then is the minister saying—

Senator Chris Evans—Just say to be fair to everyone, could you refer to your question so we all know what we are talking about?

CHAIR—Yes. That is the point I was making.

Senator ABETZ—On page 130 of the *Hansard* of Wednesday, 20 October 2010 Senator Evans said:

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 ...

CHAIR—All right, but what was the question? That is the answer.

Senator Chris Evans—This is in relation to the document they put on their website.

Senator ABETZ—Yes. Is this or is this not a formal submission to Fair Work Australia? We will get there later, but we have now got a situation where the minister says, ‘I am not going to answer that; you ask the judge,’ and then the judge says, ‘I do not want to appear here.’ If that were to be occurring we would not get anybody answering our question.

Senator Chris Evans—Senator, the answer to that is that if Fair Work Australia were not appearing before us I would not have referred you in that way, but they do and they are here.

Senator ABETZ—And it is proper for me to ask.

Senator Chris Evans—The matter we were discussing at the time is proper for you to ask them about.

Senator ABETZ—Exactly. Can I also ask you, Mr Giudice, as to whether the court lists or sitting lists for Fair Work Australia are publicly available?

Mr Giudice—That is so.

Senator ABETZ—So once again using my example—

Mr Giudice—I have been corrected. There are some matters that are confidential under the legislation and they are not publicly available.

Senator ABETZ—How many sitting days are allocated to confidential matters? Could you possibly take that on notice for us.

Mr Giudice—It would be a small number.

Senator ABETZ—Yes, very small. So once again using my example of this poor, hapless intern that did not know what he was getting himself in for when he applied to my office for an internship and I sent him or her away to the Fair Work Australia registry, the intern could find out exactly how many days each commissioner presented themselves for hearing days or official sitting days. That would be obtainable, would it not, from the public record?

Mr Giudice—Clearly.

Senator ABETZ—So all this information is there available for the public. It is now, I suppose, simply a question of whether Fair Work Australia makes that available or whether we get an intern or indeed the Parliamentary Library to undertake the task to get that information for us. I would have thought that if it were so offensive to all consideration of the due judicial process the gleaning of this information would be outlawed and not allowed, but it is allowed, it is there and nobody has suggested in the past that it offends some sort of public policy. I understand your position, and I think we are agreed that the information is available on the public record, but Fair Work Australia will not assist in providing that information—or will not gather that information for us.

Senator CAMERON—Chair, can I ask a question—

Senator ABETZ—Just wait till we get an answer to it.

Mr Giudice—My position has not changed, Senator.

Senator ABETZ—I thought as much.

CHAIR—Senator Cameron, did you have a question on the same issue?

Senator CAMERON—In relation to the number of days the commission sits or an individual commissioner, deputy president or a judge, that is only one measurement of the work that a commissioner or judge does, isn't it?

Mr Giudice—Yes. A point that I was making earlier about—

Senator CAMERON—I am sorry if I missed that.

Mr Giudice—It is the difficulty, really, of taking one component and drawing comparisons or conclusions from that.

Senator CAMERON—Because as I understand it, judges and commissioners will have research work to carry out, decisions to write, transcripts to read, analytical work and as I have been told from time to time, when the commission is sitting, that is basically the tip of the iceberg. Would that be a fair proposition?

Mr Giudice—It depends on the nature of the application, obviously, but more and more there is work being done outside of formal sitting. Cases are more complicated, there is more evidence, appeal cases are more difficult. So as a general proposition there is a poor correlation between workload and sitting days.

Senator CAMERON—Thanks.

Senator ABETZ—Fair Work Australia commissioned TNS Social Research for a project dealing with Fair Work Australia unfair dismissal, conciliation research, you are aware of that document?

Mr Lee—Yes.

Senator ABETZ—Thank you. Without taking you through it, it is a very interesting document—I am not even sure how I came across it. However, I did come across it, and it is a very helpful piece of information, and I think gives everybody a great insight into the unfair dismissal jurisdiction. Without going through everything in it, I will just concentrate on page 53. Do you have the document with you?

Ms O'Neill—Yes.

Senator ABETZ—Good. Without trying to verbal this report, is it a fair summary of the information on pages 53 and 54 to say that most applicants settle because they think their case won't stand up, whilst most employers settle to avoid costs. Is that sort of a layman's summary of these findings?

Ms O'Neill—No, I would not characterise the information on those pages in that way. The pages that you are talking about reflect a series of questions about the influences on the various parties in arriving at their decision to settle. They are not mutually exclusive, so multiple influences are relevant and the results are as set out on those pages, but as I said, I would not characterise it in the way that you put it.

Senator ABETZ—Figure 35, Influence on settlement, has the question: 'Feeling my case would not stand up if it went further'. We are told in the very last paragraph on page 53:

Figure 35 also shows that 42% of applicants, 14% of respondents, and 66% of representatives reported that a feeling that their case would not stand up if it went any further had a medium or high influence on the decision to settle.

So sure, there may be overlap with other considerations, Ms O'Neill, but if it was medium or high influence to settle, that would suggest that the paucity of the original case as lodged was a real problem.

Mr Lee—If I could just intervene, the report is a comprehensive report.

Senator ABETZ—It is.

Mr Lee—I agree with your summation. It puts together material canvassing a range of aspects to do with the process. It will be difficult for Ms O'Neill to try to, I guess, paraphrase that. The report very much speaks for itself in what it found about the process.

Senator ABETZ—All right. Can we be given some updated figures? I think you provided them last time, and if we have now gone a sufficient period of time to give us figures, let us say, for the calendar year 2010, as to the number of cases that were lodged, settled, and whether the settlement included a payment of money, and if it included a payment of money, I forget what categories we agreed upon last time, but—

Mr Lee—There was a range detailed in the *Hansard*.

Senator ABETZ—Yes, below 2000, then 2000 to 4000, then above whatever figure. If you could provide us with updated statistics that would be helpful.

Mr Lee—Certainly, Senator.

Senator ABETZ—Thank you. I will not take that any further. In relation to the lodging of collective agreements, have you received any complaints that sometimes it takes 12 months or longer before a response is received by the applicant as to what Fair Work Australia's determination is?

Mr Lee—I would have to take that on notice as to whether we have had any of that order.

Senator ABETZ—All right. Because without going into the detail, and I will be asking the minister about this, a specific letter was written by the member for Groom to the minister on Christmas Eve, or signed at least on Christmas Eve last year, expressing some concerns about the delays.

Senator CAMERON—Hopefully he wished the minister a Merry Christmas!

Senator ABETZ—Do you know what? Not only did he not wish the minister, he sent me a copy without wishing me a Merry Christmas either, so I think we can both be offended at that, Minister.

Senator Chris Evans—So that is a letter to me on the 24th.

Senator ABETZ—Of December.

Senator Chris Evans—Just so I can fish it out before we get to it.

Senator ABETZ—Good. Can I take you to EW0579? This is a question in relation to the unfortunate non-appearance of the transitional schedule N, the Supported Employment Services Award of 2010. The question: are we still trying to get to the bottom of how this occurred was then taken on notice, and I am given a detailed answer about all the appearances et cetera, which I appreciate, but we are still not told as to how this occurred.

It seems that, on 14 August 2009, the parties went off the record when the transitional provisions were discussed, but nevertheless, on 25 September, which was later that same year, the draft modern award published for comment did include the model schedule. And then we are told that, on 14 December, there was an application to have the schedule to insert the model transitional schedule. So I am still wondering what happened between 25 September and 14 December as to how this omission of the transitional schedule occurred, because from

what I can glean between the lines, it was not by application of any of the parties that the transitional schedule should not be included.

Mr Hower—From all of our research on this issue, Senator, there is nothing—or it is just unclear from the public record, as we have said in our answer—as to why the schedule did not appear. There were several modern awards that did not include a transitional schedule.

Senator ABETZ—But was that by deliberate decision of the parties, requesting that that be the case?

Mr Hower—I would presume so.

Senator ABETZ—Yes, whereas in this case, there is nothing on the public record suggesting that any of the parties wanted that to be the case, and if the public record discloses nothing to suggest that was the case, why should we not conclude that it was simply an error within Fair Work Australia? I am the first one to admit that I make mistakes and my office makes mistakes; there is no shame in admitting to making mistakes. But the only explanation on the face of it is that it was a clerical or whatever error within Fair Work Australia.

Mr Lee—What we have sought to do with that answer—I think the president would like to say something about it—is to faithfully represent, to the extent that we could in a helpful way, what had occurred in respect of that particular proceeding. We cannot do any more than that, I am afraid.

Senator ABETZ—Mr Lee—sorry, did you want to say anything further, Mr Hower?

Mr Hower—No.

Senator ABETZ—So did you make any inquiries within Fair Work Australia, Mr Lee, as to how this occurred, given that it has been raised at estimates?

Mr Giudice—Can I, perhaps, say something about this? As both of the officers have indicated, you have been provided with the public record. The proceedings were proceedings before a full bench of the Industrial Relations Commission, but I may be wrong about that. I am just not too sure about the timing. And it would be inappropriate to make any addition to the public record in relation to those proceedings. They are contested proceedings involving decision of the tribunal. They are not appropriate matters for discussion, in my respectful view, here.

Senator ABETZ—Sir, are you saying that the inclusion of the transitional schedule was a contested matter in relation to this particular award?

Mr Giudice—I am not saying anything about the specifics of the schedule. I wish to make it clear I do not wish to add in any way to the public record, and if anything I have said does do that, I withdraw it. It would be quite inappropriate for me to comment on the decision-making process.

Senator ABETZ—But you see, I want to know whether or not it was an accurate reflection of the decision, or whether it was simply a clerical error in, for want of a better term, typing up the award after the decision was made, that the transitional schedule was accidentally left out and it was not, if I might say, checked thoroughly before it was signed off and made into an award. And once again I say there is no shame in this; mistakes happen where humans are involved. It just seems to me, though, it would be good practice, in the event that Fair Work

Australia believes it might bear some responsibility for the schedule's non-appearance, to put up their hand and say: 'Look, regrettable. Although we dealt with 122 modern awards very quickly, best endeavours, unfortunately something did slip through.' I do not think there is any shame in that, but we are being told that an error occurred, but nobody seems to be responsible. The parties to this award, as I understand it, all wanted the transitional schedule included, so that was not contested. That was not argued about. It was agreed it should be in there, but somehow it did not end up in the final document.

Mr Giudice—I am not agreeing or disagreeing with your version of events. All I am saying is I do not think it is appropriate for me to add to the public record. There are very many decisions made by full benches and by single members. It would not be appropriate for me to canvass why those decisions were made. It is simply an inappropriate thing for me to do.

Senator ABETZ—You know, there are such things as slip rules and other things which, if judgments are made or orders are made which accidentally do not include something, allows them to be corrected. In this situation, as I understand it, the Australian Business Industrial lodged an application to vary to include the transitional schedule, and I understand that that was not opposed. It begs the question, though: if an error has in fact occurred within a registry, why should a party to the proceedings have to bear the costs of bringing an application et cetera to vary and incur those costs when the need to vary had its genesis in an error, albeit an administrative error, within the registry?

Mr Giudice—Well, I am not prepared to canvass the basis of that decision. It would simply be inappropriate for me to do it.

Senator ABETZ—I am not asking you to canvass the decision, Mr Giudice. I am asking you if you are satisfied that the modern award, as printed and as provided on the public record somewhere between 25 September 2009 and 14 December 2009, was a deliberate decision of Fair Work Australia to not include the transitional schedule? Are you saying that that was a deliberate decision of Fair Work Australia not to include the transitional schedule? Because I do not think, with respect to the bench, that it would have been.

Mr Giudice—I am not prepared to canvass the reasons for the decision. It would be inappropriate for me to add to the public record.

CHAIR—I am just wondering whether you are able to take this any further, Senator Abetz.

Senator ABETZ—Yes. So you are confident that that which appeared as the modern award reflected accurately the determination of the bench in the supported employment services award?

Mr Giudice—I think I have made my position clear.

Senator ABETZ—It accurately reflects—

Mr Giudice—Senator.

Senator ABETZ—I am asking you, does it—

Mr Giudice—My position has not altered from the time you commenced these questions. My position is I will not canvass reasons for decision. It is entirely inappropriate for me to do so.

Senator ABETZ—I am not asking you to canvass the decision. I am asking you whether the official record actually reflects the actual decision, and it must be either yes or no.

Mr Giudice—I am not prepared to answer that question, and I rely on the privilege and immunity in section 580 of the Fair Work Act.

Senator ABETZ—All right. So, in relation to every single modern award, Mr Giudice, you are unable to tell this committee whether the modern award as determined, as brought down, actually reflects accurately the decisions made by Fair Work Australia. That is the corollary, is it not, of your previous statement, Mr Giudice?

CHAIR—Well, that is not actually what Justice Giudice has said.

Senator ABETZ—I am asking him a question.

CHAIR—Justice Giudice has made it very clear many times that he is not prepared to go to the reason behind any decisions or the decisions themselves. He is not prepared to canvass them. I know you have been diligently trying to get to that point, but Justice Giudice has been very consistent in that answer. I do not see it changing and I am just wondering whether we need to move on.

Senator ABETZ—In your experience, Mr Giudice, has there ever been an error made in a registry that you have been involved in where the formal document does not necessarily reflect fully and accurately the judgment that was delivered from the bench?

Mr Giudice—It has occurred from time to time, yes. That is inevitable.

Senator ABETZ—Good. Thank you for that. Now that we have agreed that this does occur from time to time and we are willing to admit that, can I ask: did that occur in this instance in relation to the Supported Employment Services Award of 2010?

Senator CAMERON—Sorry to interrupt, Chair, but this is repetition.

Senator ABETZ—Oh, Johnny-come-lately!

CHAIR—Let's just see where we go. We are getting to the point but I am just wondering whether we are playing tennis on different courts.

Senator ABETZ—Let's see if we have an answer.

Senator CAMERON—I am glad you noticed I was here.

Senator ABETZ—You will get your TA for today now that you are on the *Hansard* record, Senator Cameron.

Senator CAMERON—Is that the best you can do?

Senator ABETZ—Wasn't that a good cheap shot? Given that we now recognise that it is known in the president's personal experience, as it is in my personal experience, that sometimes from the judgment to the official document errors occur in the registry so that the judgment made is not accurately reflected in the documentation. We accept that that occurs. Do we accept that this occurred in relation to the Supported Employment Services Award 2010 where no reason, rationale or explanation has been provided as to the mysterious non-appearance of the transitional schedule that all parties wanted in that modern award?

Mr Giudice—It would not be appropriate for me to answer that question.

Senator ABETZ—So we agree that in theory these errors occur, but we will never identify in which individual cases this has occurred? This is unfortunate, Mr Giudice, and I do not think, with respect, reflects well on the administration. As I have said before, errors occur. You and I have agreed that in our own personal experiences we know these types of errors occur. We are all human; we all make mistakes. But the fact that Fair Work Australia is not willing to say, ‘Chances are the reason the transitional schedule did not appear in this particular modern award was because of an error in the registry,’ I just find disappointing. I would have thought that there is no shame in acknowledging that that may have occurred. In fact, from all the evidence, it seems very likely it did occur. Let’s move on.

Mr Giudice—I make no assumption one way or the other as to the reasons why the schedule was not included. Let me make that clear.

Senator ABETZ—If that is your response, allow me to respond. We are agreed that none of the parties opposed the transitional schedule from being in the modern award and, as soon as it became apparent that the transitional schedule was not in the modern award, an application was immediately brought to have it included which was not opposed by any of the parties. All the parties wanted that.

Mr Giudice—I have no comment on what you have just said.

CHAIR—Let’s move on.

Senator ABETZ—I think the facts and public record now speak more than sufficiently in relation to this matter, so let’s move on.

Mr Giudice—I wonder, Chair, if I can just clarify my position.

CHAIR—Yes, certainly.

Mr Giudice—Perhaps it is already clear, but I regard it as inappropriate for me, holding the position I do, to canvass or comment in any way other than in the broadest of paraphrasing on decisions made by Fair Work Australia and the reasons for or against a decision. In my view, it opens me up to the charge that in some way I have potentially been influenced by Senate estimates in the way in which I deal with matters in the future based on the questions I have been asked in these meetings. Rightly or wrongly, that is my view. I try very hard to draw a distinction between the proper functioning of the tribunal—hearing submissions, making decisions, publishing decisions and giving reasons—and things which might be more of an administrative nature which we are as cooperative as we can be in providing for the Senate. I will defend as long as I am the President of Fair Work Australia its independence from the political process. As I say, rightly or wrongly, I have tried to explain the view I take about the significance of these issues for the independence of Fair Work Australia from the political process.

CHAIR—Thank you.

Senator ABETZ—Just for the record, all we were canvassing is in fact the administrative matters within the registry. When I asked whether or not the modern award as published actually reflected accurately the decision of the bench in that particular case you were not willing to answer.

CHAIR—There is a divergence of views, clearly.

Senator ABETZ—It is a bizarre situation because most courts would say, ‘Yes, this is the decision that we made.’

CHAIR—Senator Abetz, you have made your position abundantly clear. It is all on the public record. Justice Giudice has made his position very clear. There is a divergence of views about this; it is not going to be resolved here, so let’s now move on to another subject.

Senator ABETZ—All right. Let’s deal with the issue of superannuation. We know that default funds are included in most, if not all, modern awards. We were told by the AIRC on 12 September 2008:

We have drafted a model superannuation provision to be included in modern awards ...

In September 2009 the AIRC said:

A number of funds have since made applications to be included as named default funds ...

I think I have asked previously about what examination Fair Work Australia undertakes in relation to the inclusion of superannuation clauses. Tell me if I am wrong, but I think I was told that that is basically done on the application by the parties and there is no real examination as to whether they provide value for money because that is not considered to be part of Fair Work Australia’s brief. Is that a rough layman’s summary?

Mr Giudice—The question of superannuation has been dealt with in a number of decisions, as you are aware. Applications to vary awards in relation to superannuation are dealt with by the member or members to whom they are allocated on the basis of the submissions and the material before the member and a decision is given.

Senator ABETZ—Do you agree that in none of the cases there has been examination as to the quality of the default superannuation fund?

Mr Giudice—It is not a matter that would be appropriate for me to make any comment about. You are asking for me to make some general statement about what the commission or Fair Work Australia has taken into account in dealing with applications. That is a matter that is on the public record and is potentially misleading and would potentially exclude me from some future application if I express any views about it.

Senator ABETZ—There has been the suggestion made to me that, in relation to the issue of superannuation, the Minister for Superannuation and Corporate Law wrote to you as president. Unfortunately I do not have a date on the letter, but it was signed by Senator Sherry in his then capacity, and in the third paragraph of that letter to you he said: ‘The award modernisation process provides a valuable opportunity, some 20 years on from the establishment of the award based superannuation system, to consider the appropriateness of the default superannuation funds specified in awards.’ Then in the third-last paragraph: ‘I urge the commission to ask the parties to awards to consider the performance of the superannuation fund specified in their award when they conduct consultations for the award modernisation process.’ Do you recall that letter?

Mr Giudice—I do recall that letter, yes.

Senator ABETZ—Yes, you do?

Mr Giudice—I do, yes.

Senator ABETZ—Thank you. Then can I ask: were the minister's urgings attended to, namely when he urged the commission to ask the parties to awards to consider the performance of the superannuation fund?

Mr Giudice—All of the consultations both before the exposure draft and after the exposure draft were transcribed.

Senator ABETZ—Sorry, what?

Mr Giudice—Transcribed, transcribed.

Senator ABETZ—Transcribed; thank you, yes.

Mr Giudice—There is a public record of all of those consultations. It would not be appropriate for me to go beyond the public record.

Senator ABETZ—Possibly I can ask you, Minister: is the government concerned that some of the funds that are included in the awards reflect a union industry fund bias and self-interest of the industry union funds, because the organisations that appear before Fair Work Australia are in fact also often partners in these superannuation funds?

Senator Chris Evans—I am not sure I understand the question, Senator.

Senator ABETZ—Well, you might have a trade union and an industry body that in fact partner in an industry super fund and—surprise, surprise—the joint recommendation is that their particular superannuation fund is the one or one of the ones that should be included in the modern award.

Senator Chris Evans—Obviously those are decisions for those particular super funds or industrial organisations, but in broad terms I think the industry funds have been a tremendous success at driving positive outcomes for employees and superannuation, and I welcome their continued involvement in the market. But obviously they make their own decisions about what they submit to—

Senator ABETZ—Your ministerial colleague, if I might say so, quite rightly drew the then President of the Australian Industrial Relations Commission to the importance of consulting and considering the performance of various superannuation funds. There is one in particular, the MTAA, which I think, out of 49 super funds, came in last for rate of return but is nevertheless jammed in there as a default super fund. One wonders what robustness actually went into determining that that one was worthy of inclusion in a modern award.

Senator Chris Evans—Senator, I have not had the benefit of seeing the former minister's letter, so I think I will have to give you a response on notice to that.

Senator ABETZ—Are you aware, Minister, that the government committed to asking the Productivity Commission to review the selection of default funds in modern awards during the campaign?

Senator Chris Evans—Senator, I would prefer to try and answer questions, if you want to pursue this line of questioning, when the department is present.

Senator ABETZ—That is fair enough.

Senator Chris Evans—I just do not want to mislead you, but I will basically end up taking them on notice, I think, otherwise.

Senator ABETZ—That is a reasonable request, and we will revisit that. Can I ask what the rules are in relation to protocol and the general public being allowed to sit in when Fair Work Australia is sitting? Is it an open court, generally, so that any member of the public can sit in the gallery?

Mr Nassios—It would depend on the type of matter. For example, while that would be the general proposition—but, for example, if you have unfair dismissal—

Senator ABETZ—Can I rephrase my question: to full bench proceedings.

Mr Nassios—To full bench proceedings?

Senator ABETZ—Yes.

Mr Nassios—I would say the court would be open on all occasions except for any occasion in which—

Senator ABETZ—Unless a specific ruling is made that it is a closed court?

Mr Nassios—Correct.

Senator ABETZ—Thank you for that.

Senator Chris Evans—I do not think they draw the sort of huge crowds that Senate estimates draw, but no doubt they draw interested observers—is that right, Judge?

Mr Giudice—Some.

Senator ABETZ—Is there a requirement for persons in the public galleries at Fair Work Australia to provide information about themselves?

Mr Nassios—If you do not mind, you may have to give me some details. I am certainly not aware of—

Senator ABETZ—For example, if Joe Bloggs were to wander in and sit in the back of the court because he is interested in the proceedings, do the staff of Fair Work Australia seek to identify as a matter of course everybody that is sitting in the back?

Mr Nassios—There is certainly no procedure to do that.

Senator ABETZ—No.

Mr Nassios—They may try to identify the persons that are party to or in some way part of the proceedings, but certainly there would be no process that we go through to in some way vet who comes into a courtroom.

Senator ABETZ—Alright. Specifically, can you take on notice an incident that has been reported to me—and I do not know about its veracity or not—on 24 October 2010, where it is alleged that the associate of Senior Deputy President Acton asked at least three people in the public gallery for their name, address, occupation and employer. These people resisted, but the information was demanded and it was then reluctantly provided.

Mr Nassios—Would you know the type of matter it may have been?

Senator ABETZ—No, other than 24 October and Senior Deputy President Acton. I assume he was—he, she?

Mr Nassios—She.

Senator ABETZ—Yes, I was thinking it was a ‘she’ when I said ‘he’. She would not have been in too many places on that day, so hopefully you can identify—

Mr Nassios—I would have to take it on notice.

Senator ABETZ—And once again I want to stress on the public record that I am only going on information provided and I make no allegations whatsoever in relation to that matter. Chair, I have just come to some further questions which have written on top of them ‘put on notice’.

CHAIR—Are there any other questions of Fair Work Australia?

Senator BILYK—Mr Lee, hello; how are you? Fair Work Australia has three key performance indicators. I was wondering if you could just go through each one and see how you are tracking against them. The first one is:

- improve or maintain the target for the time elapsed from lodging applications to finalising conciliations in unfair dismissal applications

Are you able to answer these now or do you want me to put them on notice?

Mr Lee—It might be better if we take them on notice.

Senator BILYK—I am happy with that. It is just against the key performance indicators you have.

Mr Lee—Yes. It is probably more structured to do it that way.

Senator BILYK—Yes. Can you tell me, now that all states except Western Australia have signed up, how many employees the Fair Work Act now covers? Are you able to tell us that?

Mr Lee—I would certainly have to take that on notice.

Senator BILYK—That one is on notice too. Fair Work Australia had a large number of applications in 2009-10 compared to the AIRC the previous year, which is hardly surprising given the new regime, and there were obviously a large number of enterprise agreements due for expiry then. How many applications have you received for the current financial year?

Mr Lee—For enterprise agreements?

Senator BILYK—Four. Okay.

Mr Lee—No. Can you restate the question, sorry?

Senator BILYK—Basically, there were a large number of applications in 2009-10 compared to the previous AIRC, and that is hardly surprising given that it was a new regime and a number of enterprise agreements were due for expiry, so I am wondering how many applications Fair Work Australia has received for the current financial year.

Mr Lee—The total lodgements that we have received at FWA from 1 July to 31 January are 21,521, from 1 July 2010 to 31 January 2011.

Senator BILYK—Sorry, July 10 to January, was it?

Mr Lee—To 31 January 2011.

Senator BILYK—You may need to take this on notice. Am I able to get some sort of breakdown of categories of those applications?

Mr Lee—Yes, absolutely. That can be supplied.

Senator BILYK—Would you prefer that on notice?

Mr Lee—Yes, it would be easier to do it that way.

Senator BILYK—That is great. Thanks. That is all that I wanted, thanks.

Senator ABETZ—Mr Nassios, there are many different ways you can try to skin a cat and I will try another one. I think I am about on the 100th in relation to this one. Coming back to the Supported Employment Services Award and the mystery of that missing transitional schedule: was there any discussion or any inquiry undertaken within the registry and registry staff and staff involved in transcribing this particular award as to the non-appearance of the transitional schedule?

Mr Nassios—It is an easy one for me to answer, Senator. Mr Hower is the person that is responsible for that area.

Senator ABETZ—In that case, a hospital pass to Mr Hower?

Mr Nassios—Absolutely.

Mr Lee—Can I just intervene there, being involved in the answer that you have received on notice, Senator. Mr Hower was involved in helping to put that answer together, and we cannot add any further to the answer that we have provided. That is the sum total of our knowledge about what occurred in that and to go any further we return to the area that has been well traversed between yourself and the president about what may or may not have occurred.

Senator ABETZ—Mr Lee, with great respect, no, not at all. This is a completely fresh question and only deals with the administrative side as to whether or not there have been any discussions or questions within the registry about the missing transitional schedule in the Supported Employment Services Award.

Mr Hower—Within the Modern Awards Team we went through all our records, looking for any various versions of documents and things like that, and we have not been able to confirm anything other than what we have put in the answer to your questions.

Senator ABETZ—Has there been discussion between staff as to how this occurred?

Mr Hower—Certainly within the team we did.

Senator ABETZ—Yes. And are you satisfied that that which appeared at the end is a faithful replication of that which was the decision of the bench?

Mr Hower—I am not sure that I can add anything more, Senator.

Senator ABETZ—You must know, Mr Hower. The fact that we are not getting any further, I think, makes the case even clearer as to how this occurred. Thank you.

CHAIR—People are entitled to make any assumptions they like, I suppose, but—

Senator ABETZ—Absolutely.

Senator FISHER—How does Fair Work Australia allocate work, however you may choose to define ‘work’, to commissioners? I take it from earlier discussion about work that it may be hearing cases; it may be a variety of things. How does Fair Work Australia allocate work to commissioners? In answering that question, could Fair Work Australia describe the basis upon which work is allocated or any criteria used to determine the allocation of work and, secondly, the positions—not people by name, but the position or positions—of those who participate in the decision about that allocation?

Mr Giudice—Senator, I gave an explanation of the allocation of work on the first occasion on which I appeared here.

Senator FISHER—Can you answer the question?

Mr Giudice—I will try to. On that occasion, I think, I had prepared some information for the committee and it was probably reasonably well researched, so on this occasion perhaps it might be a bit briefer, but you could always refer back to that answer. Work is generally allocated on a panel basis. There are industry panel heads and there is a panel head responsible for the termination-of-employment cases. The industry panels have a number of members of the tribunal allocated to them, and each panel is responsible for a number of designated industries which appear on the website.

As applications come in they are more or less automatically allocated to the panel head, who will then, on the basis of their judgment as to the nature of the matter, the location and any other relevant consideration, allocate the file to a member of the panel to be dealt with. In relation to termination-of-employment matters, generally speaking all of those applications which have not been successfully conciliated are allocated to members on a state-by-state basis for determination.

Senator FISHER—Thank you. Is the sum of applications which are distributed amongst the panels and termination-of-employment applications the sum of the work of commissioners? I had thought not.

Mr Giudice—Apart from some matters which are the responsibility of the tribunal to initiate, the only one I can think of at the moment is the annual wage review and some other reviews of modern awards. I think all other proceedings are initiated by application of a person who wishes to take advantage of some provision in the act. So certainly the basis for work, if you like, can be gauged by reference to applications.

Senator FISHER—The basis of the work—let me ask that another way. Is the only work that commissioners do the result of an application to Fair Work Australia?

Mr Giudice—Generally speaking that is correct, yes.

Senator FISHER—So the only work that a commissioner does is work that results from an application to Fair Work Australia, and that is allocated—from what you have said, and please correct me if I am wrong—in one of three streams by virtue of applications through the panel system, by virtue of termination of employment state by state, or somehow as a result of an application that the commission itself might initiate of its own motion.

Mr Giudice—Yes, that is a limited number.

Senator FISHER—Yes, I appreciate that. Nonetheless, you might also detail—and I am happy for you to do it on notice—the basis of allocation of those applications.

Mr Giudice—I can try to answer it and you can let me know if it is adequate, but I should mention one of the categories of work, which is appeals, and appeal benches are constituted by me on a more or less regular basis, and I allocate the appeals to a particular bench. Going back to your question of the basis on which matters are allocated, generally speaking in relation to termination of employment cases, the allocation is on a state basis and for the metropolitan areas would probably be fairly random in the sense that they would be allocated on a what is referred to as ‘off the clock basis’ which does not mean a great deal, but in fact means that the next person in the line gets the next application.

Senator FISHER—How do you get to be next in the line?

Mr Giudice—There is just a list of members and the cases are allocated along that list so that everybody, in theory at least, will get the same number of applications in that state. Where regional areas are concerned it may be slightly different because efforts are made to rationalise the amount of work in a particular regional location that someone is travelling to, so there may be some judgments made there.

Senator FISHER—So in respect of the city it is largely ‘off the clock.’

Mr Giudice—This is termination of employment.

Senator FISHER—So there is, if you like, a rotating system, so that, from what you have said, would not necessarily have regard to how many previous termination of employment matters are still on foot before a particular commissioner. If that particular commissioner’s name comes up next on the clock, they get the job. Is that right?

Mr Giudice—Generally not, but the process is managed to some extent. Let us say somebody has a big bank-up of decisions, that might be a reason why they did not get further allocations. They may have had an inordinate number of cases which require judgment. They might be on holidays or long leave, so there might be all sorts of reasons why there were minor departures.

Senator FISHER—Indeed. How are those considerations fed into the decision about allocation of the metropolitan, for example, termination of employment applications, and who participates in those decisions?

Mr Giudice—It is basically under the control of the panel head, who is a senior member of Fair Work Australia, but there is obviously input from other people, other officers of Fair Work Australia, that would be the means by which some of this information is communicated.

Senator FISHER—So is it the case that also with termination of employment cases the panel head would be the head of the corresponding industry panel?

Mr Giudice—No.

Senator FISHER—So to what panel are you referring in the context of termination of employment applications?

Mr Giudice—The termination of employment panel.

Senator FISHER—Thank you.

Mr Giudice—Perhaps the confusion arises this way. The termination of employment panel does not have particular members allocated to it. Most members are allocated termination of employment cases, but that is in contradistinction to the industry panels where usually, in some cases in smaller states from time to time, a member is only in one industry panel.

Senator FISHER—Thank you. Is the head of the termination of employment panel a static person? Is it a particular person at any point in time?

Mr Giudice—It is one person, yes. There has been no change.

Senator FISHER—Even though the composition, from what I understand, of the panel itself is.

Mr Giudice—The composition of the panel is based on the total membership almost.

Senator FISHER—Yes, is a pool. What is the mechanism for feeding the regional considerations into the decision about allocation and who makes that decision, the ultimate decision?

Mr Giudice—It is a combination.

Senator FISHER—Termination of employment obviously.

Mr Giudice—I would not like to be definitive about it because it is—you are talking about a reasonably small organisation and there can be quite a deal of exchange and feedback between the head of the termination of employment panel and the members in the particular state about what the other commitments of the members might be, and there are some rostering arrangements, so in Far North Queensland, for example, there may be a roster so that each member in Brisbane might go regularly to Rockhampton or somewhere else. I do not have the details of that, but that is, in concept, the way it works. As I say, there may be variations because if a member has to go to a remote location for an industrial dispute, it might be that they will fill up their time by picking up some termination of employment arbitration that has to be dealt with in the same location. So it is really a question of some management of the process, even though there is a broad system there.

Senator FISHER—Is it the panel head who manages that, the termination of employment panel head?

Mr Giudice—Ultimately, yes.

Senator FISHER—So while the state by state is a consideration, I gather from what you have said it is not necessarily the case that an application made by a worker in New South Wales will necessarily be heard by a commissioner who is based in New South Wales, for example. There will be a crossing of borders.

Mr Giudice—We would definitely try to do it on a state basis because of the travel cost otherwise.

Senator FISHER—Indeed.

Mr Giudice—And there are variations. For example, we have two members who are also members of the Industrial Relations Commission of New South Wales who have a permanent location in Newcastle, so they would tend to get more Newcastle work because they are on site.

Senator FISHER—Yes. Thank you. I think you said you determine the particular appeal benches. Are you able to describe the basis upon which you determine that or the criteria?

Mr Giudice—There are no criteria, it is a matter for my discretion. But as a matter of practice generally they are constituted in advance and people have a rostered appeal sitting.

Senator FISHER—In advance of?

Mr Giudice—Well, people know six months or more in advance that they will be required for an appeal sitting in a particular city on a particular date. We have quite regular appeal sittings in Melbourne and Sydney and less regular in other states.

Senator FISHER—So is that done in advance of and irrespective of which particular appeals might get notified for that particular city?

Mr Giudice—That is the idea, so that you do not constitute a bench when the appeal arrives and then have the three members of the bench work out what day they are available. So you try and create the availability in advance.

Senator FISHER—So hypothetically, at least, there might be some occasions upon which an appeal bench is created for a city, yet no appeal is there to be heard, I suppose.

Mr Giudice—Yes. The previous week they might be told to release the dates because there does not appear to be any.

Senator FISHER—I guess the bottom line of an allocation system is ultimately we are all human beings and we have to be able to cope with the workload that is before us, and I do accept that the prospect of using sitting days is a very crude measure of workload. In your words there is a poor correlation between sitting days and workload. Senator Cameron suggested that sitting days were, in fact, the tip of the iceberg. So if you accept that sitting days are effectively the tip of the workload iceberg—

Mr Giudice—I am not sure that I agreed with that proposition.

Senator FISHER—Okay. Thank you.

Mr Giudice—I think I said it depends very much on the application. If you take a termination of employment arbitration, depending on the number of witnesses that can be very intensive in terms of the court time or the hearing time and also pretty intensive in terms of decision writing. You have to deal with disputed questions of fact and law and so on. If you are dealing with an application for certification approval of an agreement it may be almost entirely time spent in chambers going through the relevant statutory tests and the parties would, in very many cases, not be required to even attend a hearing. So it really depends very much on what you are talking about.

Senator FISHER—Thank you. I will reflect on those answers for next time, so thank you very much.

CHAIR—I think that is it for Fair Work Australia. No other takers. So thank you, Justice Giudice and Mr Lee and other officers of Fair Work Australia for your attendance at estimates today. If I can just advise people, we will now commence with the ABCC. For those that have not caught up with the program we will break for dinner from 5.30 and amend the finishing time for dinner until 6.30. But at 6.30 we will commence at outcome 4.1. We will then return

after a little while to the ABCC after that and then complete the ABCC and go back to the rest of the program as scheduled. This has been conveyed to the department, so I hope that satisfies everybody else.

[5.13 pm]

Australian Building and Construction Commission

ACTING CHAIR—Welcome. Do you have any opening statement that you want to make to the minister?

Mr Johns—Deputy Chair, I have an opening statement which I wish to table with your leave, which I then just wish to make some very brief comments about.

ACTING CHAIR—Thank you very much. That is in order. So I invite you to speak to that briefly, Mr Johns.

Mr Johns—Thank you. Acting Chair, senators, since taking up my appointment and appearing before the committee last October I and my officers have been unrelenting in our focus on ensuring fair and productive building construction work for the benefit of all building participants. It has been a particularly energising time as the agency broadens and deepens its role as a full service regulator, but there continues to be a certain level of rhetoric around the ABCC's operations. Indeed, my officers were subjected to a very public and unjustified attack last week. I assure the committee that our important work continues and that I have great faith in the ability of my officers to perform the duties set down for them by the parliament in the way it engages respectfully with the public we are tasked to regulate under the BCIA Act.

This includes expanding our geographical field of operations to reach a wider community through new offices in Canberra, Darwin and, subject to recruitment, the Pilbara region; revising and updating the exercise of information gathering powers entrusted to me under section 52 of the BCIA Act; new processes to service workers who bring to us issues of underpayment of wages and entitlements; working with the Queensland Reconstruction Authority and relevant Victorian agencies to ensure orderly productive rebuilding work in the wake of recent natural disasters; and a renewed focus on stamping out the practice of sham contracting in the building and construction industry.

All of this has been achieved without the ABCC diverting from pursuing our usual compliance activities concerning unacceptable levels of unlawful industrial action, breaches of freedom of association and coercion. The focus on sham contracting includes instigating a national inquiry and a series of round tables, out of which I will report on actionable suggestions for an effective regulation that will support greater workplace fairness, support for the competitive advantage of decent employers, address tax inequity issues and stamp out shonky operators. I have tabled the report and I welcome the opportunity to answer questions from the committee.

Senator ABETZ—Thank you and welcome, Mr Johns. Has the organisational chart that is displayed on the website altered since late last year? In particular, am I correct to detect a number of changes to the top structure and specifically Director Operations Northern?

Mr Johns—Yes, Senator.

Senator ABETZ—What has happened to that position?

Mr Johns—It has been abolished.

Senator ABETZ—So what has happened to the person who used to hold that position?

Mr Johns—The officer who was formerly in that SES band 1 position has accepted a demotion to an EL2 position.

Senator ABETZ—And has any money been paid to that officer, which is interesting, in compensation for that demotion?

Mr Johns—I do not believe so, but I am happy to take the question on notice.

Senator ABETZ—If you could, because one assumes there is less remuneration attached to the demoted position. Am I correct in that assumption?

Mr Johns—I would need to check. It might have been that he was already at the top of the EL2 band which crossed over in terms of relativities with the bottom of the SES band 1.

Senator ABETZ—That is right.

Mr Johns—So it might be that there has not been a change. I am happy to take it on notice.

Senator ABETZ—If you could. All I want is Director Operations Northern, so the person's name is not unnecessarily put into the *Hansard*.

Mr Johns—Yes, of course.

Senator ABETZ—Or, indeed, on any answer you might provide to us. So whether that position has been abolished, the holder of that position has been offered and accepted a position at a lower level, whether that has meant less remuneration and if it has whether any compensation or other payment or other inducement may have been paid to that person to encourage him or her to make that switch. What has happened to the legal manager position?

Mr Johns—The Legal Manager Northern position I have moved to Perth. So the person who was in that role was offered the opportunity to take up the position in Perth. They declined and they have been made redundant.

Senator ABETZ—And how much did that cost?

Mr Johns—I will take that on notice.

Senator ABETZ—We have a Legal Manager Northern position, or did have, which has been abolished?

Mr Johns—That is correct, yes. So the two SES positions relating to the northern region were abolished because I merged the northern region with what was called the south and eastern region. So rather than have three separate regions of managerial control I now have two. I have a central western region and an eastern region. So the two operational positions northern, both the field operations position and the legal position, were abolished.

Senator ABETZ—If you can then tell us what compensation was paid.

Mr Johns—Yes.

Senator ABETZ—Having abolished those positions, we now have a new position: Executive Director Public Affairs.

Mr Johns—That is correct.

Senator ABETZ—When did the occupier of that position commence?

Mr Johns—Bear with me one moment, please. The person commenced on 29 November 2010.

Senator ABETZ—When did you take up your position?

Mr Johns—On 11 October 2010.

Senator ABETZ—That was a relatively quick appointment. When was that position advertised?

Mr Johns—The position has not been advertised. The person who is filling the position is there in an acting capacity. The intention is that the substantive position will be called in due course. I asked for that to be done this week.

Senator ABETZ—Wait a minute. So this is an acting position that has been going now for more than two months but we still have not advertised for it?

Mr Johns—No, I asked for the advertising to occur. On Monday I asked for the advertising to occur.

Senator ABETZ—So this acting position was filled but the advertisements for that position had not been placed for over two months?

Mr Johns—Yes, Senator.

Senator ABETZ—Where was this person drawn from within the ABCC? Was this person an ABCC officer before their appointment?

Mr Johns—No, Senator. I made a decision when I came to the role that our public affairs capacity needed to be increased because I thought that we needed to have a greater emphasis on our advice and education to industry participants. I made a decision that that should be at an SES position. The person who is filling that on an acting role is someone that I knew from outside the organisation and I invited them to accept the acting role before I advertised it substantively. If they apply for it they apply for it, but others will be open to apply for it in an open merits selection.

Senator ABETZ—Who is undertaking the selection process for this position?

Mr Johns—There will be a panel appointed which will include three SES.

Senator ABETZ—Will you be on the panel?

Mr Johns—I have not decided. The position reports directly to me so it would be acceptable, I think, for me to be on the panel. But as the delegate who then signs off on the appointment, it may be that I should not be on the panel. I have asked for some advice from my HR group on Monday about what should be the panel arrangements. There will, of course, also be on the panel a representative of the Australian Public Service Commission so there will be at least one external panel member.

Senator ABETZ—Did this person resign any previous position to take on this new role?

Mr Johns—I would have to take that on notice. They were employed; I do not know whether they finished up their position early or whether their contract terminated. I would have to take that on notice and get the exact circumstances.

Senator ABETZ—When did you first discuss the possibility of this person's appointment in an acting capacity with that person?

Mr Johns—I started on 11 October and I would have to try and determine when that was, Senator.

Senator ABETZ—One would imagine if the person had a previous job they would have been required to give at least four weeks notice, if not possibly six weeks notice, which would bring it very close to the day of your appointment.

Mr Johns—When I left my position at the FWO I think it was three weeks as between the two. There are different arrangements for different people.

Senator ABETZ—Yes, of course there are, but it makes it exceptionally close. When did you decide to abolish the position of Director Operations Northern?

Mr Johns—I started on 11 October and I reviewed the situation of my SES complement and what I thought needed to occur. I certainly had formed some prior views from when I was the Deputy Commissioner about the operational structure because, of course, that field operations group did report directly to me at that time. In fact, I had previously given advice to the former Commissioner that it was my view that there should not be three field operation SES, so I had previously had that view before I became the Commissioner.

Senator ABETZ—You did not discuss the possibility of this appointment of an Executive Director Public Affairs with the person as a possibility prior to your appointment as Commissioner?

Mr Johns—That is not my recollection; I will have to check.

Senator ABETZ—If you could take that on notice.

Mr Johns—Yes, I am happy to.

Senator ABETZ—Be very careful about the answer. That would be appreciated. Are you going to be opening an office in Canberra?

Mr Johns—I opened it last night.

Senator ABETZ—My invitation must have been lost in the mail.

Mr Johns—I am pretty sure you are on the invitation list.

Senator ABETZ—The chances are whenever estimates is on all invitations are apologised for.

Senator Chris Evans—I assume I was, but I did not know this either, Senator. I suspect because of estimates the same thing.

Senator ABETZ—I daresay Senator Cameron is still finding his way back from the function. How do we justify that office?

Mr Johns—Some 70 per cent of Australian government directly funded work is occurring here in the ACT. The importance of the national code and guideline is particularly significant

here in the ACT because of that funding. We have been servicing the ACT out of Sydney because we have not had an office here, and certainly the economics of having two offices here and the ability to better service the ACT because of the work that we have on here made it a very good decision for us to have offices here in Canberra. It is the same basis, essentially, that I have formed the view that we should have offices in Darwin and why we are going out to a recruitment round to see if we can secure offices for the Pilbara region. My hope is that they will be in either Port Hedland or in Karratha.

Senator ABETZ—Do you decide on these offices on the basis of building and construction activity generally or because there are hotspots that might needed to be attended to and a degree of lawlessness which is unacceptable?

Mr Johns—All of those things go into the mix. As I have said in the opening statement which I have tabled, the reasons behind the Canberra office opening is the level of the directly funded work and also the importance of implementing the national code and guidelines here in the ACT and to further inform our investigative activities around issues of sham contracting and foreign worker issues which have been particularly prevalent here in the ACT and have taken up a lot of the time of our Sydney offices.

Senator ABETZ—What is happen to the position of Group Manager Field Operations?

Mr Johns—Sorry, Senator?

Senator ABETZ—Let me ask: is there a position Group Manager Field Operations?

Mr Johns—Yes.

Senator ABETZ—What is happening to that position?

Mr Johns—Nothing.

Senator ABETZ—That is being maintained as is and will not be operating out of Canberra?

Mr Johns—The person who is in that role is a resident in Canberra and they do work out of the Canberra office from time to time and they also work out of the other offices as per the requirements of the job.

Senator ABETZ—That person will continue to conduct business as usual from Canberra and travel as required?

Mr Johns—I expect so.

CHAIR—We are now going to a break, and most disappointingly for you, Mr Johns, you will not be joining us straight after the dinner break. I suspect you will be back at around seven o'clock.

Proceedings suspended from 5.30 pm to 6.30 pm

CHAIR—We will resume these estimates hearings. Welcome to Ms Paul, the officers and Senator Ludwig. Thank you for your indulgence and cooperation in the change to the schedule. It will be a little bit ad hoc for a little while yet, but we will try and get back in the water and see if we can plough through the rest of the program for tonight. We are going to start with questions in 4.1 before we go back to the ABCC, and Senator Bernardi has some questions.

Senator BERNARDI—Thank you. Ms Paul, I will address this to you. Is it normal practice for Job Services staff to direct their clients to parliamentarians' offices indicating to their clients that parliamentarians will provide them with money to attend training courses?

Ms Paul—I have not heard of an instance like that, so we would be interested to know the details, if you have some.

Senator BERNARDI—Someone else might have heard about it.

Ms Paul—I might ask my colleagues to comment.

Senator BERNARDI—Thank you.

Ms McKinnon—I understand that you and a member of your office wrote a letter to a member of the Job Services Australia group indicating that a job seeker had come to your office seeking training funds, so I am aware of that issue. I am just trying to find the brief to get the exact details. We were concerned about that. I understand from your letter that the job seeker approached your office on the understanding that the office or you would personally provide the job seeker with money to undertake a training course. We invited your staff member to provide details on that so that we could look into the matter raised, because it is concerning for us, and we did investigate that specific case. We have no other members of parliament indicating that this is a problem.

What had happened was that the job seeker named was unhappy because his provider would not provide assistance for him to undertake a course to become a security guard. The Job Services Australia provider quite appropriately assessed that the job seeker first needed a driver's licence as a kind of prerequisite to the employment and he also needed to improve his level of English sufficient to undertake the security licence course.

The job seeker was obviously unhappy with that advice and contacted the DEEWR customer service line. We have a process for that service line to follow and, as far as we can ascertain, they did follow it. I think the misunderstanding was with perhaps the level of comprehension of the job seeker because, having exhausted all the options available to the department, our normal practice is that we suggest that the job seeker contact the local member of parliament, but at no time does the script suggest that the local member of parliament can actually provide the funds. So we apologise for that happening. We have reviewed the guidelines and made it perfectly clear that that is not an option.

Senator BERNARDI—Thank you, Ms McKinnon. I appreciate that explanation. My concern is that this did not happen only once. The first time we excused it as a misunderstanding. The second time, when the client turned up insisting that he had been promised that I would give him money for his training course and had written down my details—which he claimed he had been given over the telephone by the Job Services provider—I did write to Mr David Goodbody from DEEWR. I received an acknowledgement of that on 15 December and have had no follow-up. I was really interested because it has happened twice. I am in a Commonwealth office building which houses ministers and other members of parliament. How does it happen that they are just directed to me?

Ms McKinnon—As I explained, there is a cascade of options that the customer service line goes through, and that is an option of last resort. I understand it only happened on a

limited number of occasions. As I said, we do not see a recurrent pattern of this happening and we have reviewed the guidelines to ensure it does not happen again.

Ms Paul—Senator, I am sorry we did not get back to you more quickly with a letter. Would you like us to do so? I know we now have the explanation of the incident on *Hansard*. Nonetheless, I would be more than happy to write a letter to you, if it would help, setting out what we have done in response in particular.

Senator BERNARDI—Thank you, Ms Paul. Ms McKinnon, you said it has happened on a limited number of occasions, yet I understood that I was the only member of parliament who had raised this.

Ms McKinnon—To clarify, I think it happened twice, or perhaps three times, from your office. Because of the circumstances, your staff were only able to give us the details of the job seeker name on one occasion.

Senator BERNARDI—That is correct, yes.

Ms McKinnon—So we were not able to follow the other two, but I think they happened within a fairly short of time. We have not had an approach from any other member of parliament. I apologise for the inconvenience, but I think we have kind of quarantined it and rectified it.

Senator BERNARDI—Ms McKinnon, contrary to what the government may say about me, I am very sensitive and I am more sensitive about the distress that it causes to the job seekers who are clearly people struggling at the margins, in this particular instance, and the agitation that it causes for them is deeply distressing. It is also very difficult for members of my staff, who are at the front line of this, to explain that this is a stuff-up.

Ms Paul—Of course we did not say that.

Senator BERNARDI—You did not say that, I am sure!

Ms Paul—We said that we understood there was a misunderstanding perhaps by the job seeker. Nonetheless, we probably cannot take it too much further other than to say we have obviously reviewed our scripts and approaches.

Senator BERNARDI—Thank you. I will look forward to the letter.

Ms Paul—Sure.

CHAIR—Thank you, Ms Paul. I have a few questions around Job Network and funding the needs of migrants and particular ethnic groups. Can you start off with a broad description of how funding is allocated to support ethnic groups within the community.

Ms Parker—If we are talking about employment services provided—

CHAIR—Yes, sorry.

Ms Parker—any funding to a job seeker is not on the basis of ethnicity or background, it is on the basis of a range of characteristics. When they come to Centrelink and ask for income support, they are assessed according to their needs. If they are job-ready, then the employment services provider can provide them with a certain level of services. If they have particular specific needs that mean they are put into a vulnerability set of categories, they will receive higher levels of service. It depends entirely on the individual circumstances of the job seeker.

There are not specific amounts set aside, for example, for migrants under the employment services program.

CHAIR—Do we do it under any other program that links into finding unemployed people from particular ethnic groups any extra support?

Ms McKinnon—There is AMEP which is in the DIAC portfolio, which is the Adult Migrant English Program. In terms of Ms Parker's answer, the amount of funds available to assist a job seeker through a Job Services Australia provider is determined by what stream that job seeker is placed into, their length of time in Australia, their educational qualifications and whether English is their first or second language. They are all characteristics that go to the level of stream they are in. Broadly speaking, a migrant or a refugee would have a number of characteristics that would put them into a higher stream unless, of course, they were an English-speaking migrant.

Ms Paul—For example, a migrant might access AMEP on arrival. As you are probably aware, that is part of the settlement package that would come from DIAC. If they then become a job seeker in our system, they might well be directed to the Language, Literacy and Numeracy Program—LLNP—and receive some assistance there too. The new structure of Job Services Australia allows much more flexibility for the provider to package up precisely what that job seeker needs. It could be a bit of literacy—English language support—or it could be related training before being able to be job-ready enough to walk into employment.

CHAIR—All right. Let me just describe the problem that I have; then I want to explore how this is actually dealt with. I met with a group of African men last week, primarily from the Horn of Africa. Every one of them had qualifications obtained in Australia. Every one is proficient in English, some of them to a PhD level. When they attempt to use the Job Services network, the first and only job that they are offered is a cleaning position. They say that is because they are black and Islamic. Not once, they claim, have they ever been offered a position or supported to get into a position for which they are educationally qualified.

I want to explore whether there is racism happening here through the Job Network providers, so I want to know how we break down and see what ethnic groups are offered jobs within their qualification band, in the first instance, and compare that to different ethnic groups so that we can be assured that a white, Anglo-Saxon, English-speaking male is not simply looked after in terms of his qualifications at the expense of others and that there is an equality of treatment across the board here. That is a problem I have. I want to know what we do as a government to ensure that people are being treated fairly and equitably through the Job Network providers.

Ms Paul—They were not, to your knowledge, referred to Trades Recognition Australia to get recognition of their prior qualifications?

CHAIR—No. Most of them have either accountancy or scientific qualifications.

Ms Parker—That is quite disappointing, I have to say. One of the things that providers are required to do is to talk to individual job seekers and develop an employment pathway plan with them. That is to take into account what qualifications they have and then to work out what they think is appropriate for that job seeker. That is negotiated between the employment services provider and the job seeker. The job seeker is not a passive person here. They should

be able to say what they have and what they think they need. If the employment services providers are not taking that into account, that is very disappointing.

I think the only way we would be able to find out what their background is would be if it were in the employment pathway itself, because we do not require providers to put into the system, for example, what their educational background is. But we certainly require them to say what they have negotiated, what training they have recommended and on what basis—that is, why they have chosen to recommend the job seeker in that way.

We also have specialist providers. We have seven providers who focus on culturally and linguistically diverse job seekers, including refugees. One of the options is to refer them to those kinds of job providers; and they can choose. Clearly, if there is not one in their region then it is going to be more difficult, but all providers are required to service all job seekers who come to them. So, if you have specific details, we would be very interested in talking further.

Ms Paul—Yes, we would not mind knowing where, because I am told that the seven providers that specialise in people from non-English-speaking backgrounds are at 27 sites, so they have probably attempted some coverage. We could certainly look into it. If their report to you is that they are experiencing racism, I would not mind knowing more so that we could look into the providers in that particular area—not necessarily now, but it certainly would help us work with those providers.

CHAIR—Is there any way of establishing, based on ethnicity, the result of their pathway plan achieving a job within their qualification against a different ethnic group not achieving a job within their qualifications band?

Ms Parker—We do monitor the quality of the plans. Part of that is: what happened with the job seeker? We do post-program monitoring where we talk to job seekers and ask: ‘Did your job seeker help you get a job? Did the plan they negotiated with you work? Do you have a job now? What are you doing now?’ We do that three months after they have exited Job Services Australia services. They are contacted, interviewed and asked for that kind of information, so we have that. But, in terms of those specifics, that is a bit harder.

Ms McKinnon—If we are talking culturally and linguistically diverse or refugees, I have the figures for both if you are interested, since the start of Job Services Australia.

CHAIR—I am happy to have those figures but they are probably not quite relevant to what I am talking about, because some of these people have been here for over 20 years.

Ms Paul—Some of the people in the set you are talking about have been here for over 20 years?

CHAIR—Yes.

Ms Paul—And they have never used the qualification?

CHAIR—That is right, so I am also interested to know whether we capture information from job networks about why some people they have assisted to get interviews in their area of qualification do not get that job, because again, in the few instances where they have in fact achieved some interviews in the area of their expertise, they claim that they are not being treated equitably.

Ms Paul—By the employers?

CHAIR—By the employer. So do the Job Network providers try to capture that sort of information?

Ms Parker—If they are on a job placement, if they have left income support and are now employed, there is no relationship between the job seeker—

CHAIR—No. Just so we know what we are talking about, most of them have actually left the income support system totally because they do not want to be cleaners. For a whole range of reasons, they find that quite difficult, given the expectations that they have had. So they are doing things like driving taxis to support themselves. But ultimately they are keen to utilise the qualifications that they have achieved over a long period of time in this country. There is no question about foreign qualifications and recognition of prior learning. These are all qualifications from proper universities—RMIT, to name one—and they still find themselves unable to even get to the first interview point. So I was wondering how we deal with that, because this is one of the things we expect of people, isn't it—to study and get involved?

Ms Paul—It sounds like you are also touching on the workplace relations system now. If some of these people are actually in jobs and have left the income support system then you are now talking about the realm of activities which, for example, the Fair Work Ombudsman might undertake, and rightly so, to try to address any instances of racism in the workplace.

CHAIR—That is a completely different argument. This is really about how people get into work in the first instance.

Ms Paul—Yes, through JSA.

CHAIR—One of the complaints that they have is that, in the communities in which they live, the children have an expectation that their parents will work. It is a respect-type thing. The children are not listening to the parents because they are unemployed. They are, of course, very concerned about what we all know to be the fact that, if we do not break that cycle of unemployment, often it will continue with the children too. It is a concern of mine to see a particular ethnic group so obviously distressed about having formal Australian qualifications but being unable to utilise them in the workplace in areas where I thought there were some of the skills shortages that have been identified.

Ms Paul—As I said before, it is something we care about, obviously, through the Job Services Australia network, which is why we have seven providers specialising in this area and covering 27 sites, so we would be more than happy to pursue this particular area. If it is a regional matter or whatever, I would be more than happy to pick it up with those providers.

CHAIR—All right. Let's leave it there and I will be in contact with you. We may see if we can get an officer with them and myself and pursue it.

Ms Paul—Yes. It is important. The whole point of the employment pathway and the fund that goes with it is to try to get people to achieve their potential. So, if there are some instances like this, we would like to know.

CHAIR—Thank you.

Senator BACK—I just have one question. Regarding employment services providers, was it 1 July 2009 that we had the significant changeover?

Ms Parker—Yes.

Senator BACK—Can you tell me what the outcome has been? Have the new providers met the department's expectations? What has been the impact on those who were previously providing these services in terms of related services—whether they are still providing them or whether they have died on the vine.

Ms Parker—Our analysis is that, as you say, since 1 July 2009 the new service, Job Services Australia, is performing well. We can provide a whole range of statistics on that in terms of job placement. The measurement we use is the number of job placements and we compare it between jobseekers, so the job-ready jobseekers right up to the very disadvantaged jobseekers, and how they are performing.

Senator BACK—What I am particularly interested is how it is performing under the new arrangements—

Ms Parker—Compared to the old?

Senator BACK—in comparison or contrast to the past, yes.

Ms Parker—There is some caution. The caution in comparing to Job Network is that we do have a different program. Under JSA the government combined seven programs into one and the program itself was changed. However, we are able to do some analysis taking into account those caveats. It is not apples and apples exactly. Our analysis is that JSA is comparing favourably to Job Network if we compare like periods. In the first 18 months of Job Network, for example, we had 557,600 job placements. If you compare that to a similar group of jobseekers in JSA, we had 615,500, so around a 10 per cent increase. That is taking into account that there are more jobseekers as the population increases. In general terms we would say the system is working well.

Ms Paul—We also know from our comparisons that one of the main policy directions for Job Services Australia is to better serve those who are most disadvantaged, with multiple barriers to employment. Although this area is harder to compare, nonetheless our comparisons suggest that job outcomes are better under Job Services Australia, and this is no surprise to us. You might recall Job Services Australia rolled seven programs into one. Job Network was the big program and some of the smaller ones were helping those most disadvantaged people, but they did not necessarily even have job outcomes as an incentive. So it is no surprise that we are getting better results when JSA is all about jobs, including for those people, and we are pleased about that.

Given that in the middle of 2009 and into 2010 there was a dip in the economy in response to the global recession, even so we have seen a better pick-up of those at the most disadvantaged end. The funding was rejigged to backload the funding towards those groups—what we call stream 4.

Senator BACK—And it continued in the workplace?

Ms Paul—Yes, because that is how we count outcomes. When I say outcomes, I mean 13 weeks, 26 weeks et cetera, and that is the same measure as before.

Ms Parker—In terms of the providers themselves, we have a star rating system. There was a star rating system under Job Network.

Senator BACK—There was.

Ms Parker—It does use a different measure than previously. The distribution methodology has changed through feedback and analysis through an industry reference group. At the moment we have 82 per cent of contracts at three stars or more, where there were 70 per cent of Job Network contracts at three stars or more for a comparable period, but again—

Senator BACK—It is a different measure.

Ms Parker—the caveat around it is that it is a different measure.

Senator BACK—When do they come up for tender advertisement again?

Ms Parker—The contracts expire on 30 June 2012. Backdating it, the tender would be around August this year.

Senator BACK—So not that long away. Thank you.

Senator ABETZ—Assist me if I venture into other outcomes. Are we dealing with all of outcome 4 or just 4.1?

CHAIR—We are trying to deal with 4.1.

Senator ABETZ—If I stray, just tell me which area I can put it under. There is a very good shadow minister in this area in Sussan Ley, so I do not necessarily have to acquaint myself with the detail as she does.

Ms Paul—I understand.

Senator ABETZ—Are family centred employment projects under 4.1?

Ms Paul—Yes.

Senator ABETZ—How many families have currently engaged in the family centred employment project in Goodna?

Mr Roddam—In Goodna, as at 15 February 2011, 58 families have been referred to the family centred employment projects. There are 30 families eligible for the family centred employment projects and 21 families have commenced family centred employment project servicing.

Senator ABETZ—So 58 have been referred, 30 have been found to be eligible and 21 have engaged?

Mr Roddam—That is correct.

Senator ABETZ—What about Broadmeadows?

Mr Roddam—In Broadmeadows 27 families were referred to the family centred employment projects. 20 of those families were found to be eligible for the family centred employment projects and 17 families commenced family centred employment project servicing.

Senator ABETZ—Are Mansfield Park and Angle Park separate or combined?

Mr Roddam—They are combined.

Senator ABETZ—So for Mansfield Park and Angle Park, what are the numbers, please?

Mr Roddam—For Mansfield Park and Angle Park, four families have been referred to the family centred employment project. Three of those families were found to be eligible for the family centred employment project and three families have commenced family centred employment project servicing.

Senator ABETZ—Who is delivering the program in South Australia? If that is not readily available, take it on notice.

Mr Roddam—I do have it. The South Australian government established the Building Family Opportunities program with a wraparound services approach to addressing family joblessness.

Senator ABETZ—It is the state government, is it?

Mr Roddam—We have partnered with the state government to deliver the family centred employment projects. We formalised a collaborative approach to managing that through a funding agreement which we have entered into with the South Australian government. Under the funding agreement DEEWR retains program consistency and oversight of the family centred employment project in Mansfield Park and Angle Park. However, the South Australian government is responsible for selecting and contract managing a service provider and providing practical on-the-ground support in conducting the family centred employment project in Mansfield Park and Angle Park.

Senator ABETZ—Thank you for that detail. How many participants have gained employment as a result of this project to date?

Mr Roddam—Across the three areas?

Senator ABETZ—Yes.

Mr Roddam—There have been eight employment outcomes. There have also been four education outcomes and seven social outcomes.

Senator ABETZ—What does ‘outcome’ mean? Does it mean that somebody has got a job?

Ms Paul—An employment outcome is 13 weeks, 26 weeks—the normal division.

Senator ABETZ—Thank you. Are star ratings 4.1?

Ms Paul—Yes.

Senator ABETZ—Of the one-star providers, the majority appear to either specialise in Indigenous employment, youth at risk, ex-offenders or homelessness. Can the department explain why that is the case? Is it perhaps that the weighting is inaccurate or have the providers just been performing below standard? What is our reasoning, rationale, experience in relation to that?

Ms Parker—I am sure you will be pleased that there has been a significant improvement in our proportion of one- and two-star contracts. Those providers are improving and we are working closely with them. Ms McKinnon, do you have some detail?

Ms McKinnon—There has been a marked improvement. From memory, a lot of the specialist contracts were new to the JSA model and in fact to the Job Network mainstream employment programs, and we have noticed a marked improvement of every star rating. So we now have 61 per cent of our specialist contracts at three stars and above.

Ms Paul—In other words, we thought there were some transitional issues for those providers.

Senator ABETZ—That sort of obviates the next question as to what action the department is taking, because you were concerned about it and you have been engaged with them and the figures have improved.

Ms Paul—Yes, it has all changed.

Senator ABETZ—Relocation pilot? That was due to commence on 1 January. Has it commenced?

Ms Parker—Yes.

Senator ABETZ—How many job seekers have relocated to date? First of all, did it start on 1 January?

Ms Parker—Yes, it became available to applicants from 1 January.

Senator ABETZ—How many job seekers have relocated?

Ms McKinnon—Currently eight job seekers are in the phase of relocation so they are participating in the program.

Senator ABETZ—As of what date is that?

Ms McKinnon—18 February.

Senator ABETZ—Are you able to tell us, given it is only eight, from whence they come and whence they are going, if that is the correct terminology?

Ms Parker—Yes. We have six New South Wales, two Queensland. That is moving from. Moving to, we have quite a variety; two New South Wales, two Queensland, a Victoria, two NT and an ACT.

Senator ABETZ—So there were two Queenslanders seeking to relocate. Is that right?

Ms Parker—Yes, that is right.

Senator ABETZ—Are those two Queenslanders relocating within Queensland?

Ms Parker—One is.

Ms McKinnon—One is not.

Senator ABETZ—Where job seekers relocated prior to the pilot commencing, what was the average cost paid by the Employment Pathway Fund? Do you have that handy?

Ms McKinnon—I do have that. Within the life of Job Services Australia—so 1 July 2009 to 31 December 2010—1,866 job seekers were assisted to relocate.

Senator ABETZ—And the average costs?

Ms McKinnon—The average cost per job seeker was \$516.

Senator ABETZ—So the total would be 1,866 multiplied by \$516. Is that right?

Ms McKinnon—\$963,000; a little over \$963,000.

Senator ABETZ—You have got the answer for me; that is even better. Thank you. Moving to local employment coordinators, at the last estimates the department indicated that no

decision had yet been made on extending contracts for local employment coordinators. Has that now been resolved?

Mr Griew—The situation has not changed. The government has made a commitment to the extension of the priority employment area and job expo program, and the detailed arrangements for that are still being worked through.

Senator ABETZ—So when were these contracts—and this is for my own personal interest—due to expire?

Mr Griew—The local employment coordinators' current contracts finish up at the end of June.

Senator ABETZ—And we still have not decided whether their contracts will be extended?

Mr Griew—There is a decision that is to be made here in the budget context.

Senator ABETZ—So a lot of people are going to live with a lot of uncertainty—and chances are the good ones will say, 'If there is no guarantee of a job up until then and I might miss out'—and they might be seeking employment elsewhere. Is that a possibility?

Ms Paul—Not necessarily.

Senator ABETZ—I know it is a recurrent question and it used to happen under our government as well, but I saw it at the time as a problem and I was hoping with a new government things might be able to be resolved in this area, but it looks as though that is not so. Where local employment coordinators were previously officials or staff from the departmental staff, has any commitment been given to the staff about having a job in the department on conclusion of their local employment coordinator contracts?

Ms Paul—I do not think we have many in that circumstance anymore. When we started up, when we ramped up, we certainly drew on departmental expertise. We do have a few. I will hand that over to my colleagues.

Mr Griew—There are a small number of the local employment coordinators who are in that context and, if they were granted leave without pay prior to taking this position up, they would have a right of return.

Senator ABETZ—Without naming who or in what areas, do we know how many there are?

Ms Kidd—Four of the local employment coordinators are in that situation.

Senator ABETZ—Are there any previous departmental officials or staff who are local employment coordinators that are not in that position because it was not part of the deal?

Ms Kidd—Any previous staff?

Ms Paul—Do you mean how many are on leave without pay?

Mr Griew—So are there some who resigned to take the position? Is that the question you are asking?

Senator ABETZ—As I understand it, a number of staff crossed over to become local employment coordinators. I have been told that there are four that have an agreement, on leaving the department, that they could come back.

Ms Paul—No. I think what we are saying is that there are four all up, and there is a subset of those—

Senator ABETZ—Four all up that originally came from the department. Out of those four then, can I ask—

Ms Paul—How many are on leave without pay?

Senator ABETZ—How many of those would be entitled to come back into the department?

Mr Griew—I need to clarify an answer I gave. I was not wishing to represent that those four had, within their contract of engagement as a local employment coordinator, a right of return. It would simply have been that they had been granted leave without pay, as we might grant an employee leave without pay to do a degree or work for a non-government organisation, yes.

Senator ABETZ—Yes, understood, but how many—

Mr Griew—How many of those four?

Senator ABETZ—Yes. I think we are agreed that out of all the local employment coordinators, there are only four that originated, immediately before their appointment, as departmental staff. Is that correct?

Ms Kidd—That is right.

Senator ABETZ—Out of those four, how many are entitled to go back to the department should they so desire?

Ms Kidd—All four.

Senator ABETZ—National Green Jobs Corps: how many job seekers have completed the 26 weeks in the program?

Ms McKinnon—As at 31 December 2010 there are 2,249 participants actively participating in projects, and as at the same date 3,803 participants had exited National Green Jobs Corps.

Senator ABETZ—In what period were those three thousand and something?

Ms McKinnon—The program commenced on 1 January 2010, so up to the end of December is a year.

Senator ABETZ—So how many since 1 January 2010 have enrolled?

Ms McKinnon—4,752 commenced places.

Senator ABETZ—And 3,803 have exited after 26 weeks of training?

Ms McKinnon—859 participants had completed and graduated from the program, so I think that is the 26 weeks.

Senator ABETZ—Only 859 had done the full 26 weeks?

Ms McKinnon—Yes.

Senator ABETZ—Of the 3,800 that exited, they did so before the completion of 26 weeks. Is that right?

Ms McKinnon—We have around 2,900 that exited prior to completing a full 26 weeks. That was either to move into employment, education or other training, or failing to participate.

Senator ABETZ—Forgive me, I was never good at maths, but 2,900 plus 859 would give me a figure of about 3,700, but there were 4,700 starters. How many are still in the program?

Ms McKinnon—2,249.

Senator ABETZ—Now I no longer get the correct figure, do I?

Ms McKinnon—I will take it from the top. Sorry.

Senator ABETZ—Can you please take them on notice?

Ms McKinnon—Sure. The end date is 31 December 2010 and we have had 6,052 commenced participants. There are 2,249 currently in the program and we have had 3,803 exit. Of those 3,803, 859 completed the full 26 weeks. But I am happy to give you those in writing through notice.

Senator ABETZ—All right.

Ms Paul—The rest of them lead into jobs; other employment outcomes that they achieve earlier, or training.

Senator ABETZ—Are there any current programs in operation in the Australian Capital Territory?

Ms McKinnon—There are three active NGJC projects.

Senator ABETZ—As we speak?

Ms McKinnon—As we speak.

Senator ABETZ—That is an improvement from August last year when it was zero. What about my home state of Tasmania?

Ms McKinnon—There are 12.

Senator ABETZ—Excellent, because at August last year it was also zero.

Ms McKinnon—Sorry, can I correct that? The zero number of projects in both the ACT and Tasmania were Green Corp projects.

Senator ABETZ—Sorry. Yes, you are right. Why don't we flip over to Green Corps projects and tell me about them in the ACT and Tasmania? So, undoubtedly, there is something different between National Green Jobs Corps and the Green Corps.

Ms McKinnon—In Tasmania, in this month, a JSA provider will commence an activity for 10 jobseekers that involves the construction of walking tracks on Mount Wellington.

Senator ABETZ—So in Tasmania we have now got one project?

Ms McKinnon—Yes.

Senator ABETZ—Yo! And that is about to commence?

Ms McKinnon—Now, as we speak—in February.

Senator ABETZ—So between August when we got the last figure and February this year, were any projects started in Tasmania?

Ms McKinnon—There were a number of environmental projects started under Work for the Dole.

Senator ABETZ—No, Green Corps.

Ms McKinnon—No.

Senator ABETZ—Thank you. Do you know where this one project is going to be, doing these walking tracks?

Ms Parker—It was Mount Wellington, you said, didn't you?

Ms McKinnon—Yes.

Senator ABETZ—On Mount Wellington? Green Corps has done excellent work over many years on the Mount Wellington walking tracks and really improves the amenity. All the various groups that have participated in it thus far should be very proud of their achievements, and the people of Hobart appreciate the activities, so we look forward to a further enhancement sometime this month. So we thank you for that. Now the ACT?

Ms McKinnon—It is a similar story. This February there will be an activity commenced in the ACT which is around the Tidbinbilla Nature Reserve.

Senator ABETZ—I cannot vouch for that, but I am sure Senator Humphries will be able to. Between 31 August last year and 1 February, were any projects commenced?

Ms McKinnon—Green Corps projects? No.

Senator ABETZ—So this will be the first. Thank you for that. 'Connection failures: no show, no pay'—does that make sense to you?

Ms McKinnon—Yes.

Senator ABETZ—Good. How many connection failures have been applied to jobseekers in the last six months?

Ms Parker—The last six months?

Senator ABETZ—If you have figures that are to the end of the calendar year or end of January—

Ms Parker—I imagine we will.

Senator ABETZ—Whatever the most convenient and up-to-date figure is.

Ms Parker—Sure.

Ms Milliken—In the six months from July to December last year, 93,681 connection failures were applied.

Senator ABETZ—How many no show, no pay failures have been applied? I understand that might be something different to a connection failure.

Ms Milliken—It is. In the same six-month period, so from July to December, 17,322 no show, no pay failures have been applied.

Senator ABETZ—Do we have a state breakdown of those figures? If you do, if you can provide that to us on notice, I will not—

Ms Milliken—No, I do not have a state breakdown with me.

Senator ABETZ—But it is available?

Ms Parker—We will be able to get it.

Senator ABETZ—If you could. Thank you very much, I would be obliged. Of these 17,322, how many were due to jobseekers failing to attend job interviews?

Ms Milliken—Of the 17,322, 2,113 were due to a jobseeker—sorry, I do not have that.

Ms Parker—Failed to attend an interview?

Ms Milliken—No, I do not have it by applied.

Senator ABETZ—Look, take that on notice, then. Would a connection failure also potentially apply for a jobseeker failing to attend a job interview?

Ms Milliken—No.

Senator ABETZ—Thank you. I am being educated along the way as well, so thank you for that. I assume that would be no show, no pay failures. How many were due to jobseekers failing to attend a work experience activity? If you do not have that readily available, take that on notice, please.

Ms Milliken—Thank you.

Senator ABETZ—I assume again that a connection failure is not a failure to attend a work experience activity.

Ms Milliken—No, that would be a no show, no pay failure.

Ms Parker—It would be a provider.

Senator ABETZ—Can the department, on notice, provide a breakdown by each failure type? We have got failing to attend a work experience activity, failing to attend job interviews. Are there any other activities?

Ms Parker—Inappropriate conduct in an employment—

Senator ABETZ—Yes. But there are classifications that the department has?

Ms Parker—Yes.

Senator ABETZ—Without taking us through them now, if you can provide me with a list of that and the numbers, that would be very helpful. How many financial penalties have been imposed in this six-month period?

Ms Parker—36,478 for that same period.

Senator ABETZ—Is that from 1 July to 31 December last year?

Ms Parker—Yes.

Senator ABETZ—As I understand it, if you have a financial penalty imposed, you can convert that by doing 25 hours of intensive compliance instead.

Ms Parker—Yes.

Senator ABETZ—How many of those 36,478 opted for that option?

Ms Milliken—The capacity to undertake a compliance activity instead applies to eight-week non-payment penalties. It does not apply to all financial penalties. It does not apply to the short financial penalties.

Senator ABETZ—Thank you for that clarification. Can we then break up that figure of 36,478 into the various categories for which financial penalties were applied?

Ms Milliken—Yes. Would you like that now or on notice?

Senator ABETZ—Take it on notice, yes.

Ms Milliken—Absolutely.

Senator ABETZ—For those financial penalties where you can convert to 25 hours of intensive compliance, could you indicate how many opted for that option?

Ms Milliken—Yes, we can.

Senator ABETZ—And you will take that on notice as well.

Ms Milliken—Absolutely.

Senator ABETZ—Thank you. How many jobseekers have had their income support suspended for the full eight weeks in that six-month period?

Ms Milliken—I will look that up for you. In terms of the number who undertook a compliance activity where they had a serious failure applied, there were 1,502 jobseekers of 2,920 who had the eight-week non-payment period. In terms of those who served the entire duration of the non-payment period, we do not have that information with us today.

Senator ABETZ—If you could take that on notice for me, I would be obliged.

Ms Milliken—Absolutely.

Senator ABETZ—Chair, could we have an indication as to when the minister might be returning, because I am becoming somewhat concerned that, with the department as well, we may run out of time.

CHAIR—Other senators have indicated that they will put their questions for outcome 4.3 on notice; you are the only one with verbal ones. So let's dispatch with outcome 4. Then we will go to the ABCC, because we have a minister. I was actually expecting that we would not have a minister at all.

Senator ABETZ—Right. Senator Ludwig, I do not know why your colleagues were not confident in you. I was.

CHAIR—I am sorry I had not made that clear to you.

Senator ABETZ—These things happen. In that case, if I may, with no disrespect to outcome 4 and officials from outcome 4, I will stop outcome 4 here at this stage and then revert to the ABCC.

CHAIR—We have finished with outcome 4? We have already got rid of 4.4, so it is just 4.3. There are other senators who were going to ask questions, but they are going to put them on notice. So it is really only you.

Senator ABETZ—I will make an executive decision. They will all go on notice other than, if I may, question on notice EW0612. We were talking about the success rate of relocation schemes. Senator Evans very kindly suggested that a 75 per cent success rate of people staying for 12 months sounded a bit high; it would be a very good outcome under the previous scheme. The question on notice provided an answer which told us that it was 77 per cent, which means that the two pilots of 2006-07 and 2007-08 were exceptionally good because the figures tell us 77 per cent and 81 per cent. Is that right?

Ms McKinnon—From memory, that is correct.

Senator ABETZ—Does somebody have that written answer there in front of them? At the time of the discussion, on the *Hansard* page that I have of 20 October, page 167, you said, 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.

Then we asked about the level, and it looks as though we had a fairly high success rate of attachment with that initial scheme. I punted for a figure of 75 per cent and it looks as though we delivered a figure of 77 per cent.

Ms McKinnon—You are correct.

Senator ABETZ—Is my interpretation of all that correct, Ms McKinnon?

Ms McKinnon—Yes. I have a copy of EW0612.

Senator ABETZ—All right. In that case, I have no further questions.

Ms Paul—I probably should make a comment, given that you were just quoting me from *Hansard*.

Senator ABETZ—Yes, of course.

Ms Paul—Our answer EW0612 went on to talk about the evaluation finding:

... a key factor reducing the cost effectiveness of the pilot was that many of the participants, who were only required to have been unemployed for four months, would have found employment without moving.

Whereas, under the current scheme, we are requiring the person to have been unemployed for 12 months.

Senator ABETZ—With respect, that is just a good educated guess. You do not really know that they would have got a job without moving, given that they had moved.

Ms Paul—That is actually what the evaluation found. We actually had it evaluated.

Senator ABETZ—Yes, but they had moved and got employment elsewhere. You cannot prove for an absolute fact that, if they had remained somewhere, they in fact would have got a job. You cannot say that employer X would have employed this person in this particular area, so it is an educated guess at best.

Ms Paul—I take your point, of course—individual by individual—but the evaluation made that finding.

Senator ABETZ—Who undertook that evaluation?

Ms Paul—I do not have that in front of me.

Senator ABETZ—With respect, Ms Paul, this was another layer that was provided after our discussion to try, if I might say, to justify why the previous scheme, which in fact had been very effective, was not proceeded with. But I do not seek to delay any further, other than—

Mr Griew—Again, it might be worth stressing that not only was the program evaluated; it was in light of the finding about the likelihood that the cohort of jobseekers who moved were fairly job-ready compared to the pool of jobseekers that the scheme being implemented at the moment is considerably more targeted. It is jobseeker by jobseeker. It is always impossible to know but, looking at the cohort and therefore the policy question, there is a difference between the two schemes in terms of the greater degree of targeting of this scheme.

Senator ABETZ—Of course.

CHAIR—I agree with you, though, Senator. We should move on.

Senator ABETZ—Yes, let's move on.

CHAIR—That does conclude outcome 4. We are now going to return to the ABCC and then we will come back to outcome 5. Senator Cameron has some questions.

[7.28 pm]

Office of the Australian Building and Construction Commissioner

Mr Johns—Sorry, Chair. Before Senator Cameron asks his questions, I was wondering if I could correct an answer that I gave before the dinner break.

CHAIR—Yes, you should.

Mr Johns—In answer to some questions from Senator Abetz I was giving some evidence about my decision to call for ongoing appointment for the positions of both the executive director legal in the central west region and the executive director of public affairs. I am told that I indicated that I had made that call on Monday. That is an error. I made the call at 11.36 am yesterday. I was out by a day; I am sorry.

CHAIR—Thank you.

Senator CAMERON—Mr Johns, you have responded to some questions on notice in relation to the Western Australia Police issue. That is EW0584_11 and EW0585_11. I asked whether you contacted the police in Western Australia. It was an incident in which you indicated there was some concern about public safety in Western Australia. Do you remember the incident?

Mr Johns—I do remember the incident. I stand to be corrected, but I think I said that the police were in attendance. You would have to direct your question to the police as to why they were in attendance, but it might be that they were there for traffic reasons or safety considerations.

Senator CAMERON—Sure. In your response to me at EW0583_11 you indicated that a statement from Sergeant Thomas was received by a solicitor from Clayton Utz representing the ABCC.

Mr Johns—Yes.

Senator CAMERON—That was done in the presence of two ABCC inspectors. Who instigated the giving of that statement? Was it the ABCC or the police?

Mr Johns—My understanding is that we asked for the statement to be given.

Senator CAMERON—When you asked for the statement, you sent a lawyer with two officers.

Mr Johns—It is not uncommon for us to engage external legal providers to assist in the drafting of witness statements.

Senator CAMERON—Do you remember the date of that incident—not the date of the meeting but the date of the actual alleged incident?

Mr Johns—The meeting which we were investigating occurred on 30 November 2009.

Senator CAMERON—When was the interview with the Clayton Utz lawyer?

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

Senator CAMERON—If you do not know, I am happy for you to take it on notice, but in general terms would it have been a month, six months, nine months?

Mr Johns—I do not know. I note that the meeting was on 30 November. I would not be surprised if there was some investigation work done in the course of December and I would not be surprised if then there was a hiatus over the Christmas period, so it might have been February or something.

Senator CAMERON—That is fine. So you will come back to me with date, but it was within weeks of the incident?

Mr Johns—I am not going to commit to the time. I do not know.

Senator CAMERON—Can I bring you back to contrast this to another incident, which was the firebombing of the CFMEU offices in Lidcombe. The firebombing took place on 13 May 2010.

Mr Johns—That is correct.

Senator CAMERON—There was a report in the newspaper on 14 May where Andrew Ferguson, the state secretary of the CFMEU, said that he believed that it was done by a disgruntled contractor in a dispute over migrant workers. So it was public knowledge that this firebombing might have been a problem because of a disgruntled contractor. Inspector Chris Hill from Flemington police also was quoted in that article as saying, ‘We will take statements from the union.’ Did you send officers to talk to the police in Flemington?

Mr Johns—We first wrote to the CFMEU New South Wales branch on 31 May.

Senator CAMERON—Mr Johns, that is not what I am asking.

Mr Johns—We then wrote to the New South Wales police on 1 November 2010 asking them for information.

Senator CAMERON—I am asking you: did you ever send any officers and lawyers to the Flemington police station to interview the police about this incident?

Mr Johns—No.

Senator CAMERON—Why would the commission send two officers and a Clayton Utz lawyer to investigate an incident in Western Australia, yet when there is a firebombing incident in a union office linked to contractors in the industry, you do nothing? I am not saying you, Mr Johns.

Mr Johns—I know, but it must be the case that the executive director of field operations in the west made a different operational decision. There was a position called ‘manager northern’ which I had a discussion with Senator Abetz about earlier, but that officer made a different operational call.

Senator CAMERON—So the ‘different operational call’ in New South Wales was to do nothing until 1 November.

Mr Johns—I reject that. The ABCC wrote to the CFMEU on 31 May to seek further information about the matter. We received no response from that.

Senator CAMERON—So that was two weeks later.

Mr Johns—Two weeks after the event. We received no response from the CFMEU.

Senator CAMERON—Did you expect a response from the CFMEU?

Mr Johns—Yes. I always expect a response from correspondence.

Senator CAMERON—You are very optimistic, I think! Have you ever received a response from the CFMEU?

Mr Johns—There was an allegation made in a newspaper about there being an industrial motivation to the bombing. So, responsibly, within two weeks we had written to the complainant, being the CFMEU, asking them for information about the industrial motivation and—

Senator CAMERON—But in Western Australia—

Mr Johns—Let me finish. You have asked me about New South Wales. I would like to finish.

Senator CAMERON—Yes.

Mr Johns—We received no information from the CFMEU that might assist us in our investigations, so in November we wrote to the police asking them for information. They wrote back to us on 1 December. We wrote a second letter to the CFMEU on 14 December informing them of the correspondence that we had had with New South Wales police, and to that second correspondence we have had no response. The people who are complaining, whom we have offered our assistance to, have chosen not to engage with us.

Senator CAMERON—So this is about offering your assistance and not engaging. That is not what you did in Western Australia, is it? That was a ‘different operational decision’, wasn’t it?

Mr Johns—They were different matters. The matter in Western Australia was entirely an industrial matter. The matter in New South Wales was primarily a criminal matter. I do not have jurisdiction over criminal matters. It was entirely appropriate for my office to write to the CFMEU and say to them, ‘You’ve made an allegation about industrial motivation. Please tell us about that so that we can investigate that aspect of it.’

Senator CAMERON—I do not have much time, so I will ask you to take on notice the reasons for the difference in the operational decisions.

Mr Johns—I am not prepared to take it on notice, because I have explained it. The reason for the difference is that they are different matters. One involved an industrial matter; the other involved a criminal matter.

Senator CAMERON—So you are going to decide what you will answer and what you will not answer. Is that correct?

Mr Johns—No, but that is going to be my response, Senator.

Senator CAMERON—Is that the position you are putting to me? You will answer what you want to answer?

Senator Chris Evans—That is certainly not appropriate. If he has to, Mr Johns will take it on notice, but I think what he is saying to you is that he has answered the question and you will get that answer in writing.

Senator CAMERON—Minister, if you would just let me finish—

Senator Chris Evans—Sure.

Senator CAMERON—I want to ask a slightly different question. I need to understand why the ABCC took the operational decision to write one letter two weeks after a very serious incident and then did nothing till November on an issue that was publicly linked to the building and construction industry. Take that on notice and come back to me on that issue.

Mr Johns—I will take it on notice.

Senator CAMERON—Now can I move to the issue of the death of Myung Yeol Hwang.

Mr Johns—Yes.

Senator CAMERON—I asked you did you take steps to investigate the matter and again you said, ‘We’ve written to the CFMEU.’ I assume you would not have had any response from the CFMEU on that either.

Mr Johns—No. We have written to them on two occasions and received no response. The problem for us in terms of investigating that matter is that none of the media reports identifies who the notional employer was and there is nothing more that we can do with the matter. We have written to the CFMEU to ask, ‘What information do you have about who the employer is so that we can investigate the matter?’ and we have received no response.

Senator CAMERON—Mr Johns, how many former New South Wales police and Federal Police do you have employed in New South Wales at the ABCC?

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

Senator CAMERON—You do have former investigators from New South Wales police and Federal Police employed in New South Wales, don't you?

Mr Johns—I would have to take it on notice. I do not know the make-up of all of my inspectors and their backgrounds.

Senator CAMERON—I am asking what steps you took, other than to again write to the CFMEU and, as I read it, turn a blind eye and say, 'No response from the CFMEU, not our problem.' Why don't you investigate? Use these resources that you have in New South Wales—trained investigators—to try and at least track down who the employer was. Did you try to track down the employer?

Senator ABETZ—Are you saying the employer—sorry, I am with you now.

Senator CAMERON—I am asking whether the ABCC took any steps to try and track down the employer other than write to the CFMEU? It is a fair question.

Mr Johns—I do not think we did.

Senator CAMERON—Why not? This is the death of a worker on a construction site.

Mr Johns—Yes, but the occupational health and safety aspect of that is not within my jurisdiction to regulate.

Senator CAMERON—I might put some questions on notice to you.

Mr Johns—Yes, please do.

Senator CAMERON—It is a very serious issue. I cannot understand, with the resources you have, that you cannot take some steps to investigate a very serious incident with a migrant worker who was obviously exploited. If the ABCC cannot do that, what can you do?

Mr Johns—I can assure you that, if you told us who the employer was, that would greatly assist our investigation.

Senator CAMERON—It may greatly assist, but is this the practice; is this the operational approach: if there is a problem for a worker or a problem for a union, you write to them; they do not write back; end of story? Is that the position?

Mr Johns—We always approach people who are complainants to ask them to provide us with information. The unions and workers are treated no differently in that regard.

Senator CAMERON—I will come back to you on that. I noticed that there was an article on 8 February where you indicated that sham contracting is endemic in the industry. I am drawing your attention to the fact that your predecessor, John Lloyd, had indicated to me on a number of occasions that sham contracting was not a problem. Can you explain why it has gone from not being a problem to being endemic?

Mr Johns—I cannot, Senator. My comments are based on just the statistics that are before me. We have 14 investigations on foot. We have, through our legal department, 19 matters where there are breaches. That is 33 matters which are currently sitting with us. That is a

quarter of our work. I characterise that as significant, and that is why I characterise it the way I do. I said on 10 February that I thought it was rife in some parts of the industry. There is a lot of legitimate contracting that goes on in the building and construction industry but my principal concern from a regulatory perspective is in relation to the finishing trades—painting, plastering, formwork and those types of trades—where it does appear to me that sham contracting is not unique.

Senator CAMERON—Are you aware of the Independent Contractors Australia website?

Mr Johns—Yes, I am.

Senator CAMERON—I thought you might be. I thought it might have come up on your radar. They have an article headed ‘Sham contracts’ and they have a warning, ‘ABCC and shams’. They are warning people about becoming formally involved. Have you had any discussions with Independent Contractors in relation to this article?

Mr Johns—I have not.

Senator ABETZ—Senator, are they right, these suggestions? Did you come forward with an allegation—

Senator CAMERON—I am going to come to all of that.

Senator ABETZ—All right.

Senator CAMERON—I am happy that you asked the question.

Senator ABETZ—No, that is fine.

Senator CAMERON—They said they are highly supportive of the ABCC and then, having a real go at you, they said:

... the structure, processes and assumptions underpinning the approach of the inquiry are deeply flawed and that they create significant risks ...

Have you assessed whether that is the case?

Mr Johns—I announced the architecture of the roundtable and inquiry on 19 November. In announcing that I did make the point that I had very much based the process and the architecture on the royal commission that was conducted into the bushfires in Victoria. The process I put in place has great integrity and I stand by it.

Senator CAMERON—Is there protection from litigation of participants?

Mr Johns—No. If you look at, for example, the experience of the Cole royal commission, people who gave evidence before that were not granted a general immunity from prosecution. I indicated very openly, when I announced the architecture on 19 November, that, if people gave evidence or gave my office information about the existence of sham contracting, it might lead to that becoming an investigation and it might lead to prosecution. If people wanted to approach me and say, ‘I have information to give you and I’d like an immunity from prosecution,’ that is something that could be discussed.

If you look at our litigation policy, you will see that we talk about assistance being provided to the regulator as a consideration in determining whether or not to commence proceedings against someone. In any case, it would be possible in the course of an

investigation for me to conduct a section 52 examination. As a right, when I conduct those investigations, they provide a use immunity to people who give that information.

Senator CAMERON—You have looked at this website. Do you know that they are using photographs of Joe McCarthy?

Mr Johns—Senator, can I just say to you—

Senator CAMERON—McCarthyism.

Mr Johns—that I did look at the article that I assume you are looking at. I did not recognise the photograph.

Senator CAMERON—That is McCarthy. That is the anticommunist hearings in the US. For someone who claims that they are a respectable organisation, Independent Contractors Australia, to put that up is quite a challenge for the ABCC, isn't it?

Mr Johns—As I say, I reject the criticism of the integrity of the process. I also note that there was a criticism about the obligations that people who submit to the website are meant to sign up to and there was a criticism of my disclaimers. I note that the disclaimer on the website of Independent Contractors Australia is as significant or restrictive as the one that is on my website.

Senator CAMERON—I will finish and put this on notice, because it may be that Senator Abetz is aware of this as well and may be asking these questions when I have gone.

Senator ABETZ—But it is nice to hear you defending the ABCC for once.

Senator CAMERON—I think the ABCC should be axed immediately.

Senator ABETZ—I've never heard that before! Really, is that your policy?

Senator CAMERON—Yes, and we certainly should go, as a first step, to the legislation the government has in place, and that would be the fair and reasonable thing in Australia.

Senator ABETZ—I am just preserving the economics committee from Senator Cameron's appearance.

CHAIR—Let us get back onto questions, because time is precious.

Senator CAMERON—Mr Johns, I will finish on this. Can you take on notice to come back to the committee or to me in relation to the allegations that have been made about the process that you have put in place—that is, no protection from litigation of participants; open-ended and unclear inquiry rules leading to potential risk exposure; silencing online debate of participants; and (a) the inquiry lacks a clear focus; (b) the inquiry has the appearance of being assumption driven rather than fact driven; (c) pretence of narrow investigation but actually very broad; and (d) the inquiry is looking at issues that are beyond ABCC's jurisdictional authority. I am going to leave it at that and ask you to come back to us in terms of those very serious allegations that have been made in relation to the inquiry. Thanks.

Senator ABETZ—I was going through some administrative matters previously. Can I ask, in relation to you, Mr Johns, where is your home base?

Mr Johns—I live in Sydney.

Senator ABETZ—So your home base is Sydney and therefore for any movement you claim travel allowance in Melbourne?

Mr Johns—No, I do not.

Senator ABETZ—Do you claim any travel allowance?

Mr Johns—I am in Canberra now and I will claim my travel allowance.

Senator ABETZ—I was just trying to figure out what your home base was for the purposes of travel allowance.

Mr Johns—My home base is Sydney.

Senator ABETZ—Yes, your home base is Sydney, but you do not claim travel allowance if you are overnighing in Melbourne?

Mr Johns—That is correct. I have chosen to forgo that.

Senator ABETZ—I will not go any further. That is fine. Can I move on to the Pluto strike?

Mr Johns—Yes.

Senator ABETZ—That was, I think we can agree, a protracted strike by hundreds of workers in January 2010?

Mr Johns—There were two instances of unlawful industrial action: one in December 2009 and one in January 2010.

Senator ABETZ—You are aware of the strike. Did the ABCC investigate the strike?

Mr Johns—Yes.

Senator ABETZ—And it intervened in court proceedings arising from the strike?

Mr Johns—Yes.

Senator ABETZ—So what is the current state of play of those proceedings?

Mr Johns—Those proceedings are ongoing. In relation to the January matter, we are a party in our own right. In relation to the December matter, we are an intervener.

Senator ABETZ—Do you intend to continue in those roles for the two cases?

Mr Johns—Yes.

Senator ABETZ—Are you able to tell us the number of investigations that have been commenced since 1 October 2010? If not, take it on notice, please.

Mr Johns—I will take it on notice. I can tell you that we currently have, as I said in my tabled opening, 129 matters on foot.

Senator ABETZ—Can you let us know how many since 1 October through until 1 February or whatever is a convenient date and how that compares with other periods?

Mr Johns—Yes, I am happy to do that.

Senator ABETZ—In relation to the NBN, is the NBN construction activity subject to the national code and implementation guidelines?

Mr Johns—Yes.

Senator ABETZ—Have you or your officers met with the NBN Co.?

Mr Johns—Yes, I met with the NBN Co. I can give you the date of that.

Senator ABETZ—If you have met with them, that is good. From your understanding, they fully understand their obligations and requirements?

Mr Johns—Yes. We spoke about ensuring that our code officers went and made presentations about the obligations under the national code and guidelines. Because there will be subcontractors along the way in different areas, what we have spoken about is making sure that our code officers educate those subcontractors and the like about the code and guidelines and their obligations under it.

Senator ABETZ—You have undoubtedly seen the article of 14 February that was posted on AAP, where a certain union official took aim at the ABCC in relation to the huge reconstruction—if I can use that term—work that is required in Queensland, and where we were told:

The construction workers in our union, who will be the people building this infrastructure, putting our country back together, do not want the evil of the ABCC hanging, menacingly, over their heads.

I am sure Senator Cameron could not have said it better himself. Have you seen that article?

Mr Johns—I have. Can I say in relation to the NBN, just to tie off on that, I met with the NBN on 30 November.

Senator ABETZ—Thank you for that. But you have seen that article and I assume you and your officials are not evil?

Mr Johns—I think I made reference to the statement in my opening remarks. I reject utterly the characterisation of my office or my officers.

Senator ABETZ—In EW0462_11, a question on notice, you indicated to me that in the absence of a deputy commissioner only the ABC Commissioner is empowered to conduct a section 52 hearing?

Mr Johns—That is correct. That is how I read the act.

Senator ABETZ—Does section 52(1)(e) allow an assistant to undertake an examination?

Mr Johns—It does, but when I say that, let me just pull my legislation up if I can.

Senator ABETZ—It is a lot quicker when you have got the old-fashioned booklet of the legislation in front of you.

Senator Chris Evans—Yes. What is the world coming to when lawyers even will not pull up the act!

Senator ABETZ—Yes.

Mr Johns—I have got the act.

Senator Chris Evans—Yes. No, it is not the same.

Mr Johns—Sorry, you were referring to again?

Senator ABETZ—Section 52(1)(e).

Mr Johns—Yes:

To attend before the ABC Commissioner, or an assistant, at the time and place specified in the notice ...

Senator ABETZ—So do you still stand by your answer that under the legislation the only person empowered to conduct a section 52 hearing is the commissioner, in the absence of a deputy commissioner?

Mr Johns—I do. I might need to take on notice my answer to that. There is a cross-reference with—

Senator ABETZ—What is the definition of ‘assistant’ for the purpose of 52(1)(e)?

Mr Johns—I do not think it is defined, but I am pretty sure that, if we go back to the start of the act where it talks about the appointment, there are certain things that I cannot delegate, and one of them is the conduct of the investigation under 52, but (4) to a deputy commissioner, and in that regard the assistant being spoken about in 52(1)(e) is the deputy commissioner. That is my understanding.

Senator ABETZ—Could you review it and see whether, after the review, you still stand by your answer.

Mr Johns—Yes, I am happy to.

Senator ABETZ—Thank you for that.

Mr Johns—The cross-reference is section 13 subparagraph 2:

Powers or functions under section 52 may only be delegated to a Deputy ABC Commissioner.

So I could not delegate those functions to anyone other than a deputy ABC commissioner, and the ‘assistant’ referred to then in 52(1)(e) is meant to be the deputy ABC commissioner. I cannot delegate that power except to a deputy ABC commissioner.

Senator ABETZ—And we have got rid of the deputy commissioner. Is that right? Do we have a deputy commissioner?

Mr Johns—There has been a selection process undertaken and questions about that should be directed to outcome 5.

Senator Chris Evans—I do not think it has been finalised yet. It is under way.

Senator ABETZ—In relation to 463, the secondment program with the Ombudsman, how is the reinvigorating of the program going?

Mr Johns—I think I would have to concede it is slow. There have been two meetings. There was a meeting on 29 November 2010 attended by the executive director of the complex investigations of the FWO, the executive director of the regional services and targeting area of the FWO, and the executive director of HR of the FWO, with officers from the ABCC, and there was a follow-up video conference on 2 December 2010. I am sad to report there has not been much action since then.

Senator ABETZ—Because the Ombudsman was not all that aware of reinvigoration occurring in relation to—

Mr Johns—I saw Mr Loizides’s testimony and he clearly was not aware of these two meetings which have occurred.

Senator ABETZ—It does not seem to have filtered through, but that is fine. Mr Johns, were you aware of the outcome of the assault in St Kilda Road by a union organiser against your predecessor?

Mr Johns—Yes.

Senator ABETZ—Did you put out a press release to say that you had welcomed the outcome where the fellow pleaded guilty and was ordered to pay court costs of \$500?

Mr Johns—I do not think I did.

Senator ABETZ—No. Any reason why not? I would have thought people in your position should be spared from that sort of conduct and, if they are confronted with it, I would have thought that—just to keep morale up within the commission as a minimum—there would be some sort of statement saying that this is the sort of difficult job that your people undertake and it is good to see the rule of law applied.

Mr Johns—Certainly the decision was reported internally within the organisation, so the staff were made aware of it. I did make the decision not to make a public statement about it because it was a determination in a proceeding not brought by me and it is my practice to comment only on proceedings that my agency is involved in, not others.

Senator ABETZ—But you did comment when you were critical of somebody calling police to a particular building site—but we will get to that later. You kindly wrote to me on 20 December, indicating amongst other things that you had voluntarily adopted the recommendations of the Hon. Murray Wilcox. This was a matter that I thought was of some dispute because Mr Wilcox was suggesting something which Ms Gillard then, if I can use the term, converted into ministerial direction. That is correct, isn't it?

Mr Johns—There was certainly ministerial direction. I do not recall how close the ministerial direction was to the recommendations of His Honour.

Senator ABETZ—That ministerial direction, you would be aware, was disallowed by the parliament.

Mr Johns—That is correct.

Senator ABETZ—So, if you then implement these things which were disallowed by the argument, that could be interpreted by some as you wilfully flouting the wish of the parliament in relation to this. The parliament had specifically rejected these measures and yet you now just sidestep and say: 'Hey, Minister, you don't have to direct me. I'll just do this voluntarily and we can give a middle-finger salute to the Senate, who had disallowed that direction.' I must say, I view it with some very real concern that you have embarked upon that path. Did it weigh on your mind that you were rejecting the will of the Senate by doing that?

Mr Johns—No.

Senator ABETZ—Did you even consider it?

Mr Johns—No. In my role as the commissioner, as the person who exercises section 52, I think it is for me to determine how best to exercise those functions. There is considerable public concern about the existence of these powers. I have said on a previous occasion that I think that they are necessary powers and that I will continue to exercise them. In fact, I signed

off on three statements of support, which will lead to notices under section 52, in a recent week. But it is, I think, important to try and build public confidence in what I think are important laws, and I formed the view that adopting these measures might go some way to improve the public confidence in these laws.

Senator ABETZ—So the Senate was unable to determine what the public might have confidence in and the public expression of confidence in certain measures in legislation is best determined between your two ears rather than by a collective vote of the Senate?

Mr Johns—I did not form that view and to the extent that—

Senator ABETZ—That is the practical outcome of it, though, isn't it? The Senate has specifically rejected these measures in the ministerial direction, so you just very conveniently say: 'We can ignore the Senate. I'll just take it upon myself to do so.'

Mr Johns—That was not my intention and I mean no disrespect to the Senate.

Senator ABETZ—Can I tell you that that is how it has been interpreted by many people. Given your role in the ABCC and you being aware of the Wilcox report, of the ministerial directions and of the Senate vote, all those things must have been agitating within your mind and considered when you decided to reject the view of the Senate in relation to that. So nobody asked you to adopt those particular criteria?

Mr Johns—No.

Senator ABETZ—The minister did not have any private discussions with you?

Mr Johns—No.

Senator ABETZ—When did you first inform the minister and how did you inform the minister that you would be adopting the criteria in Ms Gillard's previous ministerial direction that had been rejected by the Senate?

Mr Johns—I think that I made reference to this in my opening statement on 20 October. If I am right about that then I would have informed the minister's office at around that time.

Senator ABETZ—Can you take it on notice and let us know when you did?

Mr Johns—Yes, I am happy to do that.

Senator ABETZ—And whether or not the minister responded or acknowledged your advice or made any comment in relation to that—whatever you are allowed to tell us.

Mr Johns—Yes, of course.

Senator Chris Evans—As I understand the report in the paper today, it was that you intended to write to me, was it, Mr Johns?

Mr Johns—That is in relation to a separate matter.

Senator Chris Evans—Was it?

Senator ABETZ—Yes. So could you take on notice for us, possibly, what differences there are between the disallowed ministerial direction of Ms Gillard and the changes that you have instituted.

Mr Johns—Yes.

Senator ABETZ—In the same letter that you wrote to me on 20 December 2010, you also told us, ‘All this has been achieved without the ABCC being diverted from pursuing its usual compliance activities concerning unacceptable levels of unlawful industrial action.’ So is there within your mindset an acceptable level of unlawful industrial action?

Mr Johns—No, I think all unlawful industrial action is unacceptable.

Senator ABETZ—So, if you were to rewrite this letter, the terminology of ‘unacceptable’ would not find its way in there, as you find all unlawful industrial action unacceptable?

Mr Johns—Yes. It is possible it is a tautology and I apologise for that.

Senator ABETZ—It is not a tautology if you think that there is in fact an acceptable level.

Mr Johns—Yes.

Senator ABETZ—So your view is zero tolerance of unlawful industrial action?

Mr Johns—There should be no unlawful industrial action.

Senator ABETZ—Thank you. I am glad that that one has been cleared up. I might at this stage then go to the sham contracting situation, being aware of its terms et cetera. If a company reveals allegations about circumstances involving allegations of sham contracting, are they protected from prosecution?

Mr Johns—Sorry—about themselves engaging in sham contracting?

Senator ABETZ—Possibly, yes.

Mr Johns—Not as a right, no. But, as I said in answer to a question from Senator Cameron, they could approach me about that. It would be within the parameters of the guidance note on litigation policy for those discussions to occur and, in any case, they could invite me to issue them with a section 52 notice which, as a right, provides them with a use immunity from prosecution.

Senator ABETZ—I would have thought that it would not be possible to have only one person engaged in a sham contract. To have a contract one would, by definition, need at least two parties, one would imagine.

Mr Johns—Yes, but the definition of sham contracting in the Fair Work Act only places the responsibility, or the liability if you like, on the party who would otherwise be the employer in the relationship.

Senator ABETZ—You make reference to the Fair Work Act. Do you have power to do this under the Fair Work Act?

Mr Johns—Yes. My responsibility is to administer Commonwealth workplace laws in relation to the building and construction industry, so I administer both the Building and Construction Industry Improvement Act and the Fair Work Act. For example, the right of entry matters that we litigate on a regular basis are litigated under the Fair Work Act.

Senator ABETZ—That is a fair comment, yes. I accept that. Is it still the case that the unions are not cooperating with you in the sham contracting inquiry?

Mr Johns—That is my understanding.

Senator ABETZ—As I understand it, the Fair Work Ombudsman has expertise in the area of sham contracting.

Mr Johns—They have dealt with a number of matters. When I was the chief counsel, I think I litigated the two successful matters which have been litigated in the courts.

Senator ABETZ—That suggests that that may have whetted your appetite, but it still begs the question: why would you not let the Fair Work Ombudsman pursue them and the inquiries, or the Department of Innovation, Industry, Science and Research? They still have responsibility for the Independent Contractors Act and have a specialist division in that area dealing with sham contracting?

Mr Johns—Sham contracting is not a part of the Independent Contractors Act. The Independent Contractors Act deals with misleading conduct in relation to contracts that are actually legitimate. Sham contracting is in the Fair Work Act and deals with arrangements which should be employment arrangements. My inquiry into sham contracting does not cut across the Independent Contractors Act at all because the Independent Contractors Act is about legitimate contracting.

Senator ABETZ—What are the deficiencies of the Independent Contractors Act?

Mr Johns—I am not inquiring into that. I do not have a view about the Independent Contractors Act.

Senator ABETZ—But that was one of the reasons, was it not, that we legislated as a parliament in 2006, if I recall, to try to do away with sham contracting?

Mr Johns—Yes.

Senator ABETZ—That was one of the issues.

Mr Johns—Yes, but the Independent Contractors Act in that regard amended the then Workplace Relations Act and put the sham contracting aspects into the Workplace Relations Act, which has been replicated in the Fair Work Act. So the sham contracting arrangements sit exclusively within the Fair Work Act and not within the Independent Contractors Act. If you like, that aspect of the Independent Contractors Act in 2006 has done its work because it amended the then Workplace Relations Act.

Senator ABETZ—Yes, with those provisions.

Mr Johns—Yes.

Senator ABETZ—What is the deficiency in the provisions that were incorporated in the Independent Contractors Act which are now in the Fair Work Act?

Mr Johns—I am conducting an inquiry into these matters and I am asking people to make submissions to me. If they think that there are deficiencies in that provision then they should make that submission. I have not prejudged my view about the operation of section 357 of the Fair Work Act—it would be improper for me to do so—but if people think that section 357 is deficient then they should make those submissions and I will consider them in the course of the inquiry.

Senator ABETZ—In relation to your website and in relation to this sham contracting inquiry, is it correct that the ABCC can change any of the terms of the agreement at any time

at its sole discretion and that the participants agree to be bound by the changed terms. That is on your website?

Mr Johns—Yes. It is in relation to the agreement to make a submission in terms of the IT arrangements and so forth. It deals with that. It does not refer to or relate to the terms of reference of the inquiry and I think that is the misunderstanding in the criticism that I have seen.

Senator ABETZ—So what you might do, or any comfort you might provide to somebody, cannot be changed halfway through?

Mr Johns—For an example, one of the conditions of making a submission is that you will not breach copyright by using the submissions of other people. What that contractual term is saying is that I might make a decision that, okay, people can use it, and one of the criticisms of me in that article is that I say it is a term of the agreement that you cannot use the submissions of other people in the public domain. I could change that condition, I guess. I do not plan to. But it is actually no different, as I said earlier, to the disclaimer that the independent contractors association have on their own website.

Senator ABETZ—Yes, but anything I might say to them may not necessarily lead to a situation where the independent contractors have a legislative power to prosecute me.

Mr Johns—Yes, I accept that.

Senator ABETZ—Whereas you do. Therefore somebody might provide some information or something and then later on you change the rules on them and thereby create a potential unknown liability for them.

Mr Johns—No, sorry, I do not accept that. The terms and conditions that the association is referring to are the terms and conditions between the people who submit and the basis upon which they put in their submission. I have not indicated that people get an immunity, so I could never remove it. I cannot see the loss or the concern. I just do not get it.

Senator ABETZ—How many submissions have you had to date?

Mr Johns—We have not had any so far. The closing is 7 March.

Senator ABETZ—When did it open?

Mr Johns—The public website, I think, opened on 17 January. It was around that time.

Senator ABETZ—So we have been going for 50 per cent of the time of the inquiry without a submission.

Mr Johns—Yes, and in the interim I have been meeting with interested parties to talk about their submissions. I am meeting with one large stakeholder group on 1 March. They are finalising their submission after that in order to meet the deadline of 7 March, I have been told by them.

Senator ABETZ—So you are now actively out there in the marketplace seeking submissions because they are not seemingly coming in on an overwhelming basis? There does not seem to be a huge community demand despite the publicity that has been generated by our new public affairs adviser?

Mr Johns—It is not that I am newly out there meeting with people about this. I have been having meetings since 22 December with interested parties who have said, ‘Can we come and have a conversation with you first before we put in our submission?’ and I have said, ‘Yes, of course you can.’

Senator ABETZ—Who are those interested parties, out of interest?

Mr Johns—The party that I met with on 22 December is the RCSA—the Recruitment and Consulting Services Association. I met with their workplace relations working group.

Senator ABETZ—Did you approach them or did they approach you?

Mr Johns—They approached me. I have had meetings with the MBAs in all of the states except Tasmania.

Senator ABETZ—Did they seek those meetings to discuss your inquiry or did you seek the meetings, or did it just come up?

Mr Johns—It just came up in the meeting.

Senator ABETZ—So it was not specific.

Mr Johns—You will appreciate that, since taking the position in October, I have been trying to meet with a whole range of stakeholder groups and one of the things that we talk about is—

Senator ABETZ—As you should, so there is no criticism. If I were to put a submission up, would that be publicly available on the website?

Mr Johns—Yes.

Senator ABETZ—So if I were to say on that website that Joe Bloggs is a bad egg, could Joe Bloggs then, on the website, quote what is said about him and then defend himself without breaching your copyright rules?

Mr Johns—Can I just explain the process? Submissions are put in. In circumstances where someone in their submission makes a personal allegation of unlawfulness, we would excise that from the report and it would be referred to our investigation unit for them to investigate, or we would approach the submitter and say, ‘Wouldn’t it be better that you put this in the form of a formal complaint?’ Our concern is obviously that people should not be defamed and so forth, so we would excise those bits from the report.

Senator ABETZ—To participate in this inquiry you have to answer 11 questions.

Mr Johns—You do not have to; we invite you to answer them.

Senator ABETZ—The suggestion has been made that all people must answer those 11 questions.

Mr Johns—No, that is not true.

Senator ABETZ—That is not right? All right, thank you. Did you consult with Treasury or the Australian Taxation Office before the release of your discussion paper?

Mr Johns—No, I did not.

Senator ABETZ—Will you feel in any way constrained from making recommendations at the conclusion of the inquiry about tax arrangements applying to independent contractors?

Mr Johns—It is not my jurisdiction to make suggestions about the Income Tax Assessment Act.

Senator ABETZ—But have you made any comment in relation—

Mr Johns—The discussion paper does not touch upon tax laws.

Senator ABETZ—At all?

Mr Johns—One of the problems in the sham contracting area is that there are different rules for tax, different rules for fair work—

Senator ABETZ—Exactly!

Mr Johns—different rules for occupational health and safety, so it refers to the fact that there are different rules, and people might want to make submissions about that being problematic.

Senator ABETZ—So your inquiry will potentially be canvassing the issues of taxation?

Mr Johns—I will not be making any recommendations about changes to tax laws. The highest I might go is to say it would be more desirable for there to be a single test that reduces the regulatory burden on people who have to try and comply with these laws.

Senator ABETZ—It sounds as though you might be already drafting some conclusions.

Mr Johns—Not at all.

Senator ABETZ—Let's hope that is not the case, then. But you would accept the unions have had a strong and long-held dislike of independent contracting and labour hire?

Mr Johns—Yes.

Senator ABETZ—Senator Cameron would be an example par excellence of that.

Senator Chris Evans—Senator, there is a difference between one's view on contracting and one's view on sham contracting. I would have thought all of us had a concern about sham contracting.

Senator ABETZ—Absolutely! And that is why I asked whether there was a strong dislike, amongst unions, of independent contracting and labour hire, and Mr Johns has indicated that that is the case and that is the experience of many of us. That is why, if Senator Cameron and others had their way, basically any independent contractor would be seen as engaged in sham contracting. I will not go there.

Senator Chris Evans—You ought to withdraw that, Senator. It is quite unreasonable to besmirch Senator Cameron like that, particularly when he is not in the room.

Senator ABETZ—So we do not delay, I will withdraw.

Senator Chris Evans—I am happy for you to have a crack at him when he is here.

Senator ABETZ—The ministry is very sensitive in relation to—

CHAIR—The point is well made, so let's move on.

Senator ABETZ—Yes.

Mr Johns—Can I just tie up on that, Senator? I do make this very point in the discussion paper. I draw the distinction between sham contracting and legitimate contracting, with which there is absolutely no issue, and the fact that the on-hire of employees through labour hire is not, by definition, sham contracting.

Senator ABETZ—Is independent contracting in the building and construction sector different from other industries?

Mr Johns—There is certainly a higher proportion of it.

Senator ABETZ—But the nature of it?

Mr Johns—I don't understand.

Senator ABETZ—Not the incidence of it but the qualitative nature of the independent contracting.

Mr Johns—The project nature of work in the building and construction industry means that it does lend itself more to contracting arrangements. That probably explains the higher incidence.

Senator ABETZ—Sham contracting is a contravention of the law. Those engaged in it should be prosecuted. Are you saying that there is a failure with the current legislative regime?

Mr Johns—I am conducting an inquiry into these matters. As I said earlier, I have not prejudged whether or not section 357 is effective.

Senator ABETZ—So why did you decide on sham contracting for a special inquiry as opposed to a host of other issues that you could have inquired into?

Mr Johns—Because when I looked at the work patterns or the incidence of complaints and claims coming into the ABCC, there was an increase in sham contracting. This is not something that I have started. There were a number of sham contracting matters that were being investigated. The first sham contracting litigation commenced by the ABCC was commenced by the former commissioner. When I looked at the figures, they told me that there was an increasing incidence in the complaints. Certainly the evidence before me was that it was more significantly involving vulnerable workers in particular sectors. I thought it was important that we try and come to a real fix for the issue of sham contracting, which not only hurts workers but decent employers, tax equity and those types of issues.

Senator ABETZ—Tax again is coming up.

Mr Johns—Tax equity in the sense that if people are engaged in sham contracting—if they are the worker in that arrangement—they might have opportunities to minimise their tax that I as an ordinary pay-as-you-go employee do not have, so the tax burden on me is higher than the tax burden on someone who is involved in these arrangements. That is the tax equity issue.

Senator ABETZ—And so, as a result of your inquiry, it is quite likely that something might happen in relation to tax issues. We have canvassed that before. Is the report in the *Australian Financial Review* of 8 February 2011 correct when it says on page 60:

He—

that is, yourself—

is alleged to have said, ‘How it can be suggested that a labour-only form worker or a labour-only plasterer is running a business of their own account and is an independent contractor is beyond me.’

Mr Johns—I did say that.

Senator ABETZ—How many Australians are so engaged? Do you know?

Mr Johns—I do not know. When I look at the matters that we are investigating, when I look at the workers in those matters, they are not people genuinely running a business on their own account. They turn up for work, they are directed in how they perform their work. All the indicia of the employer-employee relationship applies to them but there is a piece of paper that says they are an independent contractor. The incidents that I see are particularly in these types of areas of the finishing trades and formwork, where the most vulnerable workers are being required to go and get ABN numbers and are really being exploited. The question I pose is, how can a labour-only formworker be said to be running a business of their own account? That is the test for whether or not they are an independent contractor. That is the test applied by the High Court and that is the inquiry we have to make.

Senator ABETZ—That is what the law currently requires.

Mr Johns—Yes.

Senator ABETZ—I am still wondering what needs to be tightened up or changed in the current law. But time is getting away, so can I ask you about the 11 questions about sham contracting. Does your website tell us:

The following 11 questions about sham contracting are required to be answered by each participant in the sham contracting inquiry.

Mr Johns—I do not have the website in front of me. It was my understanding that people were invited to answer the questions. If the website says they have to, then that is not my understanding of what we had intended.

Senator ABETZ—What I have in front of me is what I have just read to you, with the word ‘required’. If I am required to do something, then that is a must, isn’t it?

Mr Johns—I have to accept that. That will be changed, if that is the case.

Senator ABETZ—Thank you for that. So you have got a term of reference in the sham contracting inquiry and it tells us—this is the discussion paper of December 2010 on pages 1 and 2:

1.1 Terms of reference

The matters that will be considered in this inquiry include the following:

And it is the first bullet point on the top of page 2:

- The evasion by workers in the building and construction industry of taxation and other responsibilities ...

That is a term of reference, but you are not going to discuss anything in relation to taxation in your findings.

Mr Johns—I am not going to make recommendations for changes to tax laws.

Senator ABETZ—So in relation to—

Senator Chris Evans—Senator Abetz, just so I can help: it seems to me that everyone understands that one of the motivations for sham contracting is avoidance of tax. I do not think that is disputed. I think what Mr Johns is saying is that his inquiry is focused on the things within his remit. Certainly this government is pursuing an examination of what we can do in terms of tax laws to strengthen avoidance and stamp out sham contracting. You keep referring to taxation matters: yes, they are part of the debate, but I think Mr Johns has made it clear that he is not intending to recommend in that sphere because that is outside of his area of expertise and responsibilities. But there is no doubt that you cannot have a discussion about sham contracting without mentioning the word ‘tax’, because that is one of the big incentives for people to enter into them.

Senator ABETZ—That is fine. But it is up to Mr Johns as to which way this is going to be dealt with. Taxation, you are now saying, is front and centre of an inquiry into sham contracting, so that, I think, highlights the concern that I was expressing. But I do not want to engage in—

Senator Chris Evans—You have attempted to verbal witnesses and now you attempt to verbal me. What I said is on the *Hansard*.

Senator ABETZ—That is right.

Senator Chris Evans—What you said does not represent what I said.

Senator ABETZ—Yes, and the *Hansard* will disclose that. You indicated before that labour hire arrangements were appropriate, Mr Johns?

Mr Johns—What I said was that the on-hire of labour employees is, by definition, not sham contracting.

Senator ABETZ—That is labour hire? Is that right?

Mr Johns—No, because with labour hire, you could have labour hire on-hire employees or you could have labour hire on-hire of contractors or subcontractors. In relation to the on-hire of subcontractors, there might be sham contracting there, but the point I make is that the on-hire of employees through labour hire is, by definition, not sham contracting. There are two aspects of it.

Senator ABETZ—Is competition a good thing in the building and construction sector, do you think?

Mr Johns—I think competition is a good thing in all economic sectors.

Senator ABETZ—Excellent. So why do we talk about ‘competition’ and ‘undercutting’ in the same breath in the terms of reference?

Mr Johns—If the competition is based on an unfair or a lower cost base because you are engaged in sham contracting, then it is bad competition. The concern I have is this—

Senator ABETZ—Yes. But what is the matter with the current of definition of ‘sham contracting’? We already have a definition that is well established in law, so what is the problem with the current definition? That is what I am trying to get at.

Mr Johns—The legislation actually does not have a definition. The legislation refers to the common law.

Senator ABETZ—That is right, and it is well defined in common law, is it not?

Mr Johns—The stakeholders that I speak to say that they struggle in working their way through the list of indicia to work out whether someone is an employee or an independent contractor.

Senator ABETZ—Who are those stakeholders?

Mr Johns—Many people. For example, I spoke at the annual general meeting of the Master Plumbers Association last Thursday and, in the course of talking about sham contracting, they said to me that they do not understand the rules. They said to me, ‘Yeah, and we know that when we go out to compete who down the road is engaged in this practice and winning the jobs because they’re not paying the right rates.’ These are hard-working, decent contractors who are suffering a competitive disadvantage because of people who are doing the wrong thing and we ought to support them to do the right thing.

Senator ABETZ—You issued a press release yesterday that you were going to apply the new safeguards to a few things, including that you will invite the Commonwealth Ombudsman to investigate each exercise of the section 52 powers. How many exercises of the section 52 powers are there each year historically?

Mr Johns—In the past five years there have been 203 uses of section 52.

Senator ABETZ—So that is about what, 40 per year, in rough terms?

Mr Johns—Yes, I think that is the maths.

Senator ABETZ—Has the Ombudsman agreed? Has the Ombudsman been approached?

Mr Johns—No. What I plan to do is, after the exercise of section 52, to write to the Ombudsman and say, ‘I have exercised these powers. I invite you, if you so desire, to have an own-motion investigation into my use of these powers.’

Senator ABETZ—Yes, but did the Ombudsman find out about your intentions courtesy of the media release, or have you had previous discussions?

Mr Johns—I have not had any discussions with the Ombudsman’s office.

Senator ABETZ—You have had no discussions at all?

Mr Johns—No.

Senator ABETZ—I would have thought it might have been wise to at least alert the Ombudsman to the fact that his office might be mentioned in public and he might be asked to respond to this suggestion. What does the Commonwealth Ombudsman do when he is told, ‘Look, the media release has just come out suggesting that you should be looking into the exercise of section 52 powers,’ and the Ombudsman could have said, I would suggest, much to your embarrassment, ‘Well, that’s the first I’ve heard about it.’ But, anyway, that was your decision and you made that call, so be it.

Mr Johns—Can I just explain: as I have said, I believe in the need for these powers and we will continue to use them. I think that they have been used appropriately in the past and I am not fearful of scrutiny of my use of these powers.

Senator ABETZ—Yes. I do not think any previous commissioner was concerned either, but I would have thought it would be prudent to let the Ombudsman know that you were going to do this. But let's move on; time is very short. You provided an industry update on 23 December 2010.

Mr Johns—Yes.

Senator ABETZ—On the second page, I think, of that document—it is not numbered—you announce:

The government's agenda currently features a specific focus on areas including:
and you go through what the government's agenda is. Then you say:
Just as these issues are the focus of the national agenda, they have been identified as a major focus of ours.

Mr Johns—I absolutely believe that the work of my agency is intimately connected with the need to increase participation and productivity in the Australian economy. It is absolutely connected with responding to the demands of the mining boom and investment in infrastructure. I absolutely believe that my agency is intimately connected with the work of the government.

Senator ABETZ—Who identified them as 'a major focus of ours'? You did? As a Labor Party member, you identified the ABCC's focus and concerns—

Mr Johns—No.

Senator ABETZ—as those of the Labor government?

Mr Johns—What I was doing was explaining the context of our work within the government's agenda.

Senator ABETZ—Can you tell us how you are going to be focusing on extending market reform in carbon through the ABCC?

Mr Johns—That last dot point is about market reforms in relation to carbon, water, education and health. They are not part of my agenda, but the other four we absolutely have a role to play in.

Senator ABETZ—I am sorry; you said in the document that this was the government's agenda. I could have given you another agenda of the government's, trying to fix up pink batts and trying to fix up a whole lot of other issues—border protection et cetera—but they are conveniently all airbrushed out of these wonderful five dot points as to what a reforming government is about. It says:

The building and construction industry is crucial to this agenda.

Just as these issues are the focus of the national agenda, they have been identified as a major focus of ours.

Now you are telling us that we can put a line through the fifth dot point. Are you going to issue a new *Industry Update* saying that, on reflection, there should have only been four bullet points rather than the five?

Mr Johns—No.

Senator ABETZ—It is a bit concerning, with respect, when an agency is nearly falling over itself to adopt a government agenda which is clearly a political partisan agenda, as government agendas are because that is what they get elected on or voted out on, and I accept all of that. But it does not fill me with confidence that there is complete political independence in relation to your administration of the office when these sorts of industry updates are sent out saying, ‘This is the government’s focus and I fully support it and identify with these points of focus and we’ll help the government implement them.’ I would have thought your role is pursuant to the legislation, and the last time I read the act I did not read about market reform in carbon and market reform in water as being within your purview.

We had a previous discussion, Mr Johns, about you not resigning your Labor Party membership, and that is a decision you have made. But when we then read industry updates of such a highly politically charged nature, you might understand why some of us at least believe that you should forgo that membership during your period as commissioner.

In this *Industry Update* you also tell us, under the heading ‘Right of entry’, lesson 2—

Mr Johns—I do not have the update with me, I am afraid.

Senator ABETZ—Lesson 2 is:

2. Right of entry is an important right for building and construction participants ...

I would have thought possibly an alternative heading might have been ‘Right of entry needs to be exercised responsibly.’ That might have been a good heading as well.

Mr Johns—Yes, and there are two cases referred to there. One deals with a breach by an employer and one deals with a breach by the unions. The point I am making is: for some reason, both sides seem to be getting it wrong. So each of the two cases in that update look at it from a different perspective. It is actually the Fair Work Act that says the right of entry is important, and I absolutely accept it should always be exercised responsibly, and that is why we have a number of investigations on, and litigation, where we say it has not been exercised responsibly.

Senator ABETZ—You would agree with me, without going into the detail of it, that right of entry is a controversial area in relation to the Fair Work Act, because a certain shadow minister made promises that the right of entry laws would not be altered if Labor were elected, and of course the new Fair Work Act did change the right of entry laws. That aside, it is a very controversial area, and here we have gratuitously told to us that the lessons are:

1. Right of entry laws do not only exist to protect contactors from unlawful intrusion. They also safeguard the right of unions to lawfully enter workplaces;
2. Right of entry is an important right for building and construction participants ...

It seems to be, once again, a wholesale adoption of the government’s agenda.

Mr Johns—I do not accept that characterisation. *Industry Update* looks at breaches by both employers and by unions and explains that both sides seem to be getting it wrong.

Senator ABETZ—We can interpret it differently. The ACTU issued a media release on 28 September. When did Mr Lloyd leave the ABCC?

Mr Johns—I think his term did expire on 28 September, or around that time.

Senator ABETZ—The ACTU issued a media release saying:

Under John Lloyd the ABCC engaged in politically partisan behaviour that is inconsistent with its obligations as a statutory body.

Did the ABCC issue a media release, or indeed did you, Minister, issue a media release to counteract that description of Mr Lloyd?

Mr Johns—That predated my appointment. I did not take up my appointment until 11 October, so I do not know what the agency did.

Senator ABETZ—Who was running the ship of the ABCC after Mr Lloyd left and before you took over?

Mr Johns—Deputy Commissioner Dalgleish.

Senator ABETZ—And he is not with us. Can you take on notice as to whether it was even considered to issue a release in relation to that. I understand, Mr Johns, that under section 22 of the act you are required to give the minister notice of all financial or other interests that could conflict with your duties. I assume that has been attended to.

Mr Johns—Yes. I provided a brief to the minister about my outside activities.

Senator ABETZ—Did that include your membership of the Labor Party?

Mr Johns—I do not think it did, because I read that in the context of what pecuniary interests I might have. So I reported on the fact that I sit on a board and I also receive a honorarium in relation to my chairmanship of a committee associated with the Victorian Health Promotion Foundation.

Senator ABETZ—Who runs that Victorian Health Promotion Foundation?

Mr Johns—It is an independent statutory body created by the Tobacco Act in Victoria.

Senator ABETZ—It sounds like something worth while to be involved in. As I understand the act—and correct me if I am wrong—interests other than just financial need to be noted. Do you update that on a regular basis to the minister? I dare say that you have not had much opportunity, given you have only been in the job a few months.

Mr Johns—There have not been any changes, no, but I would, absolutely. If there were a change in my circumstances, I would notify the minister's office of it. I require the same process of my own executives. They have to make an annual disclosure to me.

Senator ABETZ—Important people from time to time are feted by organisations. Have you ever been given any hospitality or anything by stakeholders?

Mr Johns—Yes.

Senator Chris Evans—I had a good night at the plumbers' the other night!

Mr Johns—It was lunch and I did not get to eat. Yes, we keep a register of events and so forth that I attend. Oftentimes I am invited to speak at lunchtime or evening events and we keep a register of those things.

Senator ABETZ—Is that register then passed on to the minister as well?

Mr Johns—I do not know what the practice is.

Senator ABETZ—The practice, I dare say, would be determined by section 22 of your act. I do not have it in front of me, I do not think, as we speak.

Mr Johns—Section 22 does go to an assessment about whether or not it could conflict with the proper performance of my functions. So there is a judgment to be made about whether or not a lunch or—

Senator ABETZ—Have you notified the minister of any of those?

Mr Johns—No. There is a register that is kept in the office. I have not provided a copy of the register to the minister.

Senator ABETZ—Keeping a register in the office telling yourself what you have been to, that might be a good aide-memoire for the future, but—

Senator Chris Evans—I think the answer is to get the department to give evidence of what the requirements for Mr Johns are, in terms of the practice of other office holders and himself. I am not sure what they are in terms of declaration of gifts or hospitality, but certainly when the officers come to the table I can get one of them to provide you with that advice. Obviously we would expect Mr Johns to comply with whatever those requirements are. Off the top of my head, I am not sure what the requirements are for an office holder in his position, but we can certainly give you that evidence.

Senator ABETZ—In the time you have been in the gig, what is the best hospitality that you have been offered thus far?

Mr Johns—I went to a semi-final of the Australian Open.

Senator ABETZ—Very nice! Who won?

Mr Johns—I could not tell you.

Senator ABETZ—Sometimes with these hospitality things you are offered just one ticket or you are given half a dozen tickets. How many tickets were you offered for this?

Mr Johns—The invitation was extended to me and my partner.

Senator ABETZ—Are you able to tell us who provided you with that hospitality?

Mr Johns—Yes. It was Minter Ellison law firm.

Senator ABETZ—Does the ABCC have any relationship with that law firm?

Mr Johns—Yes. They are on our panel. That is why I disclosed it in the register.

Senator ABETZ—Yes, but who gets to read your register? Other than people in the ABCC, who would know that? The chances are you went to the tennis anyway, because you would have spoken about it over morning tea and they know that you deal with Minter Ellison anyway.

Senator Chris Evans—I think the answer is that Mr Johns is not able to give you the exact process and requirements. As an office holder, the department would have expectations of him et cetera, as with other officers. I will get the officers to take you through that, as to whether it is merely maintained inside the ABCC or otherwise. As I say, when the officers are here we can be clear about what the accountability requirements are. I think Mr Johns has been open with you as to what has occurred. As to what the requirements are, then we will take it from them.

Senator ABETZ—It has only come out because I have asked, and it looks as though it has not been disclosed to you, Minister. So this, by Minter Ellison, has not been disclosed to the minister, has it, Mr Johns?

Mr Johns—No.

Senator Chris Evans—I would point out to you that I would not expect office holders and senior officers in my department to notify me every time they went to the tennis or to the P&C ball. They have requirements on them to notify the department and myself and we will give evidence as to what those requirements are.

Senator ABETZ—It says:

... of all financial or other interests that could conflict with the Commissioner's duties.

Now, if a fair bit of taxpayers' money is channelled to the ABCC and then to Minter Ellison, I would have thought Minter Ellison offering free tickets to the tennis would be seen as, potentially, a conflict of interest. Among some it could also be seen as good client relations. I personally would put it into that category, Mr Johns. So do not get me wrong. I do not suggest that for a quarter-final of the tennis that you cannot even remember who won—it must have been a very good night in fact if you cannot remember. No, sorry, if there is any aspersion in that suggestion, for the sake of *Hansard* it was done in jest. But we, as senators—Minister, you would know—have to disclose anything that is potentially worth more than I think \$250 or \$300.

Senator Chris Evans—The evidence of Mr Johns is that he has disclosed it on the register. The question is what the requirements are and how that register is maintained et cetera.

Senator ABETZ—No, but he has to give you notice.

Senator Chris Evans—I think you are referring to the annual financial declaration. I am not sure that is the same as declarations about hospitality or events as they occur. As I say, when we get the officers to the table I am happy for you to take us through what the requirements on Mr Johns and other officers are.

Senator ABETZ—Fine.

Senator Chris Evans—As you say, there are well-established practices that apply to members of parliament, departmental officials and office holders. In terms of Mr Johns's position, I am not sure what the requirements and processes are, but the officers will be able to help you.

Senator ABETZ—So the tennis was played in Melbourne?

Mr Johns—That is correct.

Senator ABETZ—And the airfares to get you to and from the tennis, who paid for that; or were you fortuitously down there for work in any event?

Mr Johns—Yes.

Senator ABETZ—When I say ‘fortuitously’, these things happen and I do not blame you for that, but in relation to your partner, was that paid for privately?

Mr Johns—No. Under the guidelines which apply to Commonwealth office holders, you can make an application for your partner to receive travel when they attend an event with you. So I made an application to our CFO, I set out the circumstances of the invitation, and I asked the CFO whether, in his opinion, he would authorise the agency to spend funds to fly my partner to the event. I noted that the other attendees at the event were also attending with their partners.

Senator ABETZ—Was that economy class?

Mr Johns—No. Under the regulations the partner is entitled to travel at the same class as the officer.

Senator ABETZ—If you could let us know what your travel bill has been since your appointment until now, please, that would be helpful.

Mr Johns—Yes.

Senator ABETZ—When I ask for that, also your partner’s travel bill.

Mr Johns—There has only been that single flight.

Senator ABETZ—Just the one? All right, thank you for that. There was an AAP story on 24 November headed—and just because the heading says it, that does not mean you said it, and I accept that—‘ABCC chief sympathises with workers’, and the story suggests the chief of the ABCC:

... says he sympathises with construction workers resentful of his power to compel them to be interviewed.

Is that what you said to media or words to that effect?

Mr Johns—Yes. In the statement that I issued when the Tribe decision came out, I indicated that I understood why people would have concerns about this power being in existence. I then went on to say that I still consider it necessary for the power to exist. It is a power that is quite different in workplace relations practice, so I can understand why people are concerned about it, but it is one that I think is necessary.

Senator ABETZ—There are similar powers that are exercised by ASIC, ATO and other agencies.

Mr Johns—Yes, and I make that point.

Senator ABETZ—Yes. This is a power, of course, that is not only used in relation to construction workers, is it?

Mr Johns—That is absolutely right.

Senator ABETZ—Employers, contractors and other people?

Mr Johns—Yes.

Senator ABETZ—Yes. So it is not only a power to be used against workers?

Mr Johns—That is absolutely right.

Senator ABETZ—So you would sympathise with all people then who might have to have section 52 powers used against them?

Mr Johns—That is correct.

Senator ABETZ—Thank you. Is it correct that you said, in relation to an incident at Diploma Construction's site in West Perth, 'It is regrettable that police action was necessary in this instance'?

Mr Johns—If you have a copy of the media statement in front of you, then it is likely that I said it.

Senator ABETZ—Right:

I am not going to speak to the specifics of this matter; however, I remind employers, unions and workers that as the full service regulator for the building and constructions industry, the ABCC is their first port of call. Arrests and court proceedings need not occur. Adversarial conduct doesn't help resolve issues of immediate concern.

Are they words that you spoke?

Mr Johns—They were words that were attributed to me in the media statement. I stand by them, yes.

Senator ABETZ—You stand by them. So, if a crime is committed on a worksite, should they go to the ABCC as the first port of call?

Mr Johns—No. The point I am trying to make, and maybe I have made it inelegantly, is that when there are industrial matters, industrial disputes, then people ought to come to us first rather than seek remedies of self-help or engage in unlawful industrial action or ignore dispute resolution procedures. What they should do is not engage in activities which are antagonistic and the like. That is the point I am trying to make.

Senator ABETZ—Right. Why didn't you issue a statement saying that people like Joe McDonald, who had his right of entry permit revoked, should not be antagonistic in trying to get onto the worksite of Diploma Construction?

Mr Johns—The reason why I did not, and the reason why the media release specifically says that I am not commenting on the specifics of the matter, is that it is a matter that is under investigation by my agency and so I could not make a specific comment about someone who is the suspect of one of our investigations. It would be alleged against me that I had prejudged the investigation, so that is why in the media release I specifically say, 'Without commenting on the specifics of this matter, as a general proposition people shouldn't engage in these types of behaviours. They should try to resolve their disputes through dispute resolution procedures. If there are industrial matters like underpayments they should come to us rather than engaging in unlawful industrial action.' That is the type of point that I am trying to make.

Senator ABETZ—If somebody is trespassing on a worksite, what could you do about it with your powers?

Mr Johns—If the trespass was in the context of them misusing their right of entry, then I could make an application to Fair Work Australia to have their permit revoked or to have a condition attached to their permit.

Senator ABETZ—How long would all that take?

Mr Johns—I cannot speculate about that.

Senator ABETZ—Days and weeks, wouldn't it?

Mr Johns—Yes.

Senator ABETZ—Yes, and in the meantime somebody would be illegally on the premises, would they not, if they were only to go to you; and the person would not be removed from the worksite?

Mr Johns—No, but I think that what I am trying to encourage people to do is avoid the behaviours which lead to trespass or lead to inappropriate conduct. Certainly once the trespass or the inappropriate conduct occurs, it is absolutely within the right of the people who are affected by that to call the police to try to resolve the matter. What I am trying to do is encourage parties to think about resolving their disputes not through these types of mechanisms. All enterprise agreements have dispute resolution procedures in them and parties should abide by them.

Senator ABETZ—But surely this whole situation would not have arisen if Joe McDonald, who had been defrocked from his right of entry entitlements, had not sought to illegally enter the workplace?

Mr Johns—Section 65 of my act restricts what I can say to you about protected information that I have obtained in the course of my office. Specifically, it prevents me from disclosing protected information to you. I will not talk about the specifics of the matter that you are going to. I am happy to talk generally about how I think parties should behave, but I will not talk specifically about that matter that is under investigation.

Senator ABETZ—Sorry. We have a specific situation where somebody was arrested and you specifically said, 'Arrests and court proceedings need not occur.'

Mr Johns—I was not commenting specifically on that matter. I was making a general statement.

Senator ABETZ—On all matters.

Mr Johns—Yes, a general statement.

Senator ABETZ—An arrest had just taken place with a follow-up of court proceedings and you said that that need not occur.

Mr Johns—The point I am trying to make is that the conduct which led to the arrest should not have occurred.

Senator ABETZ—Where did you say that in any way, shape or form?

Mr Johns—I am accepting that, in that regard, I was inelegant in the way that I expressed it.

Senator ABETZ—It is always inelegant, it seems, in a particular direction. Let's hope the inelegance, if it does continue, is in both directions in relation to these matters. I think time has expired on this and we should go to the department.

CHAIR—Are there any other questions for the ABCC?

Senator FISHER—Yes, I have one, which I hope will not take long. The NBN involves the expenditure of taxpayer money. Is NBN construction activity subject to the Building Industry Code and Guidelines?

Mr Johns—It is.

Senator FISHER—It is? Okay. Have you or your officers met with NBN Co.?

CHAIR—Senator Abetz has already asked these questions. If they are off the same list, maybe we should not go through them again.

Senator FISHER—I do not know if they are, but I must say I have missed him asking about that issue.

CHAIR—The first and second question were exactly the same and in exactly the same order.

Senator FISHER—It is fact, Chair, so it is nice to know that we are singing from a similar hymn sheet.

CHAIR—All right, keep reading down your list and we will see how we go. Break them up a bit. Mix them up a bit so that it is not so obvious.

Mr Johns—I can confirm that I met with the NBN Co. on 30 November.

Senator FISHER—You may not have a view that you are able to express, but if you do, what is your view of the likely ability for workers in the sector to supply the demand of the workforce needed for the role of the NBN?

Mr Johns—I do not have a view about that.

Senator FISHER—Thanks, Mr Johns. Thank you, Chair

CHAIR—All right, thank you. I think that does conclude our questions, so thank you for your appearance before the estimates, Mr Johns. We may now take the afternoon tea break while we change seats for the department to come in.

Proceedings suspended from 9.08 pm to 9.22 pm

Department of Education, Employment and Workplace Relations

CHAIR—We will resume these estimates hearings. We are now moving on to questioning of the department at outcome 5. Ms Paul, while you have already appeared before us in outcome 4, I did not invite you to make any opening remarks you may have wanted to make to the committee but I now do so.

Ms Paul—I have none.

CHAIR—Fine, thank you. We will move straight to questions.

Senator ABETZ—Just a few technical issues, if I may, first. What rights do people have in relation to unfair dismissal if they are engaged under a common-law contract?

Mr Bohn—The unfair dismissal provisions apply in relation to dismissals where one or more of the following prerequisites apply: there is award coverage, agreement coverage or an annual income threshold. That would be what applies in the case of contract employees or people who do not have award or agreement coverage.

Senator ABETZ—If you are engaged under a common-law contract—

Mr Bohn—As an employee?

Senator ABETZ—Yes, as an employee—the only reason why you would not be covered by the regime is because your income threshold is above whatever the current rate is?

Mr Bohn—It is \$113,000-and-something at the moment.

Senator ABETZ—It has been indexed, so it varies.

Mr Bohn—That is subject to the other prerequisites being met—that you have served the employment period and so on and so forth.

Senator ABETZ—The employment period is six months or 12 months?

Mr Bohn—That is right.

Senator ABETZ—What rights do people have in relation to redundancy if they are employed under a common-law contract that does not specifically refer to redundancy?

Mr Bohn—The National Employment Standards apply.

Senator ABETZ—To common-law contracts as well?

Mr Bohn—Yes, to all employees, with some exceptions, but not including contractors.

Senator ABETZ—What appeal rights are there under the Fair Work legislation? They are defined; let us put it that way. I will not put a term on it, but are they specified in the act?

Mr Bohn—The rights of appeal?

Senator ABETZ—Yes, public interest, error of fact, error of law—

Mr Bohn—Appeals against Fair Work Australia?

Senator ABETZ—Yes.

Mr Bohn—Yes, those are dealt with in the act.

Senator ABETZ—What section? Do you have that handy for me, please?

Mr Bohn—You might have to bear with me on that. Can I get back to you in a minute or so on that?

Senator ABETZ—Yes, of course.

Mr Bohn—I will find it, but I cannot immediately bring it to hand.

Senator ABETZ—Possibly take this one on notice. Is the Tasmanian Industrial Commission Wholesale Trades Award known to officers at the table or those behind them? I assume not.

Senator Chris Evans—We certainly are involved with that.

Senator ABETZ—If you are going to be as helpful as you are at question time, I will put it on notice.

Senator Chris Evans—Yes, I think you might meet with the same level of assistance.

Senator ABETZ—Just for what it is worth, we have the case of a business in Tasmania where all its employees used to be covered under that award. Now they have four separate documents to cover their workforce with different modern awards. So, rather than simplifying, it has complicated it for them. What I will do is put some questions on notice.

Senator Chris Evans—What industry is the business in? I presume a number of industries, is it?

Senator ABETZ—Manufacturing agents and wholesalers.

Mr Kovacic—Senator, if you have any details of the nature of the businesses that might be affected, that would be really helpful—

Senator ABETZ—Yes, all right.

Mr Kovacic—in terms of trying to clarify what instruments might cover them.

Senator ABETZ—Thank you for that. Have we found that section yet?

Mr Bohn—Sorry, I am still searching. I might just seek some counsel.

Senator ABETZ—Can I be told what is happening with the appointment of a deputy commissioner at the ABCC?

Mr Kovacic—Certainly. The selection process in terms of the panel has concluded its consideration and prepared a short list for the minister's consideration. That will be provided, if it has not already been provided, to the minister very shortly for his consideration.

Senator ABETZ—I assume you have not seen it yet, Minister.

Senator Chris Evans—No.

Senator ABETZ—We will have a look at that again, no doubt, next time round.

Mr Bohn—I can answer your question, Senator. I have taken some counsel from people familiar with this area. Section 604 is the section you are after.

Senator ABETZ—Thank you for that. Did the department or you, Minister, find it appropriate to put out a press release after former Commissioner John Lloyd's assailant pleaded guilty in the Magistrates Court in Melbourne and was ordered to pay \$500?

Senator Chris Evans—Until you raised it tonight, I was not aware that had occurred.

Senator ABETZ—The work of these commissioners and officers is a very onerous one. As we know from media stories, the sector is quite lawless, but when the person that is charged to enforce the law is dealt with in such a manner—being spat upon et cetera in a public place when he was going about his own private business and was just identified as being the commissioner. It didn't happen on a work site. If I recall the evidence, it was in a newsagency.

Mr Kovacic—He was in St Kilda Road.

Senator ABETZ—Yes. It is a pretty serious thing. So, when the person pleads guilty, I would have thought a statement of support might have been—

Senator Chris Evans—As I say, I did not know that had transpired. I certainly would take the firm view that, when going about their public duties, the officers should not be subject to that sort of treatment or assault. Clearly the courts found that way, as they should.

Senator ABETZ—It was on a plea of guilty, which one would suggest was open and shut. Now can I ask about the department's consideration, if any consideration has been given, from a policy point of view as to how default superannuation funds ought to be handled in the modern award system. Let me go to the specifics. Senator Sherry, when he was Minister for Superannuation and Corporate Law, wrote to the former President of the Australian Industrial Relations Commission, now the president of Fair Work Australia, asking him to consider the appropriateness of the default superannuation fund specified in awards.

He strongly supported the continuation of nomination of default funds in awards, but he asked for the parties to awards to consider the performance of the superannuation funds in their award when they conducted consultations for the modern award process. Without being too long in the preamble, one would anticipate that the average worker would see the default superannuation fund as being a relatively safe bet because it has the imprimatur of Fair Work Australia. I am told that the MTAA fund, out of a list of 50 super funds—

Senator Chris Evans—Are they all industry funds?

Senator ABETZ—In fact, MTAA Super came in at 48th place out of 49 and that is specified—

Senator Chris Evans—You quote us a list. What is the list of?

Senator ABETZ—It is from a media release of 28 July 2010 called SuperRatings, and it is a superannuation—

Senator Chris Evans—There are a lot more than 48 or 49 funds.

Senator ABETZ—It is superratings.com.au.

Senator Chris Evans—Are they all industry funds?

Senator ABETZ—I dare say it is a mix of them.

Senator Chris Evans—There would be a lot more than 50 super funds in the Australian market.

Senator ABETZ—One would imagine so. But out of the 50 that were mentioned, for what it is worth, Cbus is in this list.

Senator Chris Evans—Don't they describe at the top of the table what it is a list of?

Senator ABETZ—It says 'Full list of SR50 balanced index returns'. I have identified the document. This particular fund is included in an award. Has any consideration been given, from a policy point of view, about how this ought to be handled?

Mr Kovacic—My understanding is that there were some recommendations included in the Cooper review of superannuation which went to this particular issue. I think questions about the nature of the recommendations and any government response are probably more appropriately referred to the Treasury portfolio, which has been handling that particular report.

Senator ABETZ—We have a situation, though, where super funds are mandated in awards and most people would anticipate that they would have some degree of robustness about them, given that they are in the awards. But some of the industry funds unfortunately—some would say ‘fortunately’ in some circumstances—when the industry fund recommendation goes before Fair Work Australia, often it is a fund jointly run by the union representing the workers and the industry group representing the employers, and so they are on a unity ticket that their fund, irrespective of how poorly it is performing, should be the nominated default fund.

It just seems to me that workers are entitled to a degree of protection, from a public policy point of view, from that self-interest by employer and employee organisations in effect nominating their own fund as the default fund. I will leave that with you, Minister, and the department for further consideration, but superannuation is going to become more and more important and, as a result, returns obtained for workers, I think, is a matter of concern.

Senator Chris Evans—We are happy to take up our side of the issue. You might want to put a question on notice to Fair Work Australia about how they handle that matter in terms of nomination. I do not understand that. Your question goes to what check Fair Work Australia applies—what process it applies. I am not sure that we will have the answer to that bit, but I am happy to look at our side of it.

Senator ABETZ—We have canvassed that and basically they do not hold any inquiry as to the robustness of the fund and its returns over the years. Basically, if the parties are agreed, it gets put in as a default fund. In some awards, in fairness, there are a number of nominated default funds, but in others the selection is limited and some are quite poor performers. When an industry and union both have a vested interest as organisations to have that fund, despite its poor performance, then one wonders whether the motivation is more from the union and employer organisation point of view than the actual workers’ interests.

Mr Kovacic—In coming back to you on notice, we will explore what, if anything, the Cooper superannuation review recommended in this regard as well.

Senator ABETZ—Thank you for that. The *Australian Financial Review* had an opinion piece by Peter Wilson, the national president of the Australian Human Resources Institute, on 14 October 2010, in which he canvasses some problems, as he perceives them, in relation to shifting employees between subsidiaries and also the business transfer issues. Has that article been drawn to your attention at all?

Mr Kovacic—I think we took some questions on notice at the last estimates hearing about that particular article and, if you will bear with us, we will endeavour to try and find which one it precisely was and refer you to the number.

Senator ABETZ—In that case, if you have done that, I accept that. Can you simply take it on notice and kindly refer me to the answer on notice—

Mr Kovacic—We will try and do that this evening.

Senator ABETZ—which it dealt with, or if somebody can find it I would be much obliged.

Senator Chris Evans—If we find it, we will tell you.

Senator ABETZ—Thank you. Is the department aware of a company called WorkPartners?

Mr Kovacic—I cannot say that I am.

Senator ABETZ—Its activities seem to be in relation to membership recruitment for trade unions. Does that ring a bell?

Mr Kovacic—I have a vague recollection of it being referred to.

Senator ABETZ—It has been reported to me that the company arrives on site and tries to seek discussions with workers. When the employer challenges their right to be on the premises, they come with letters, such as the one attached here, if somebody would like to make a photocopy. I should have made copies beforehand. It is on AMWU letterhead, 'To whom it may concern', basically saying that the holder of this letter is authorised to undertake the union's activities. I want to know whether that sort of activity is consistent with the right of entry provisions of the Fair Work Act.

Mr Kovacic—Would you mind if we had the opportunity of having a look at the letter?

Senator ABETZ—That is fair comment. I will put that aside.

Senator Chris Evans—It sounds like contracting-out, does it not?

Senator ABETZ—Yes. But whether or not you have got—

Senator Chris Evans—Whether it is a sham or not? Is that the question?

Senator ABETZ—Are you aware that there are rising concerns over the union entry rights?

Mr Kovacic—Certainly I have seen articles which suggest that there are concerns.

Senator ABETZ—And you are aware that the number of resource industry employers describing the workplace relations environment as either 'good' or 'excellent' has dropped from about 50 per cent to about 30 per cent. Are you aware of that media report on the—

Mr Kovacic—I think you are referring to the survey that was undertaken by the Australian Mines and Metals Association through RMIT?

Senator ABETZ—That is the one, yes.

Mr Kovacic—I am aware of it, yes.

Ms Paul—By the way, as to the reference to the question on notice, the answer to the article in the *AFR*, is EW0594_11.

Senator ABETZ—Thank you very much for that. I am obliged to you. So we are aware of these rising concerns. Minister, does the government intend to do anything in a legislative way to address these rising concerns?

Senator Chris Evans—There are no plans for any legislative changes, but certainly I met with AMMA, I think, late last year. I have had a relationship with AMMA over many years and they came and saw me when I came into the portfolio. I have met with a number of mining companies in recent times and, among other things, a couple of them have raised this issue. It is certainly an issue that I am aware of and I have discussed with them their attitudes

and responses. But if you are asking me whether we are planning changes to right of entry laws, the answer is no.

Senator ABETZ—That is on the record. Thank you. Can we go back to this letter from the AMWU. You now have it in front of you?

Mr Kovacic—Yes.

Senator ABETZ—Would that suffice, or is it consistent with the right of entry provisions of the Fair Work Act?

Mr O’Sullivan—This in and of itself does not purport or suffice to exercise right of entry provisions. I would describe it as just what it says in its facts: it is a letter, presumably by the AMWU, stating that the holder of it is an authorised representative of their union. That is pretty much what it does.

Senator ABETZ—Yes. It says it is ‘an authorised representative of our union’.

Mr Kovacic—Yes, that is right.

Senator Chris Evans—The question is: is that enough to be classified as a holder of right of entry?

Senator ABETZ—Yes.

Mr Kovacic—I think the threshold in terms of being able to exercise right of entry is that you need to be a permit holder under the act, and if the holder of this letter did not have a permit then arguably the provisions of the act would not be complied with.

Senator ABETZ—So, just because the signatory on the letter might be a permit holder, that does not clothe the holder of the letter with a permit.

Mr Kovacic—I do not think you can delegate the capacity, no.

Senator ABETZ—Thank you very much. What action would be available to an employer under the act in trying to deal with people who, in effect, purport to be union officials—clothed by a mere fig leaf, but nevertheless they claim to be clothed as union officials? They would, for all intents and purposes, be able to treat them like any other stranger at the gate?

Mr O’Sullivan—That is correct. If they do not have the valid requirements to exercise their right of entry then they have no special rights to be on the property.

Senator ABETZ—You are aware of this sort of activity?

Mr Kovacic—In terms of the specifics, no.

Senator ABETZ—But of this type of activity? Has it been drawn to your attention previously?

Mr Kovacic—No.

Senator ABETZ—But you are aware of WorkPartners?

Mr Kovacic—I recall—and I cannot recall how long ago, but some time ago—the name WorkPartners appearing in some media articles at the time.

Senator ABETZ—Could I ask you then, Minister and department, to give consideration to an education program amongst employers that the holders of these types of letters are not under official authorisations for the purposes of the legislation.

Mr Kovacic—We would consider that.

Senator ABETZ—And, Minister, could you take that on notice.

Senator Chris Evans—I am not sure that I would launch an education campaign, but I certainly think it is appropriate for us to clarify it with the peak bodies or, on one of our engagements with stakeholders, to raise the issue and express our view about the veracity or value of these things.

Senator ABETZ—All right. And we will get an opening statement at next estimates as to what you have done to pursue that.

Senator Chris Evans—As I say, that is why I do not want to create the impression that I am going to go out and launch a TV ad campaign.

Senator ABETZ—Having been Special Minister of State for five years, I know about government education campaigns—

Senator Chris Evans—You have got a lot to be embarrassed about, I know!

Senator ABETZ—but can I assure you I was not thinking about that at all. At least we never promised to abolish them all and then do it, as you guys did. But let's move on.

Senator Chris Evans—You were far more brazen.

Senator ABETZ—Are you aware of the ABS wage price index?

Mr Kovacic—I am.

Senator ABETZ—There is one that is dated December 2010.

Mr Kovacic—Yes.

Senator ABETZ—Do you have that or is that available to you? I can ask this under the ABS if need be, which I think is in Economics tomorrow. It seems that the lead sector in the league chart for 2007-08, 2008-09 and 2009-10 in relation to total hourly rates of pay, excluding bonuses, and in relation to increase in wages has in fact been mining.

Ms Paul—I do not think we have that chart in front of us, so I am not sure if we can comment on it.

Senator ABETZ—But, if I were to say that that is what the chart asserts, that would not surprise you, from your general knowledge about wage claims and payments within the various sectors of our economy?

Mr Kovacic—Sorry, Senator; would you mind just repeating the comment about the mining sector.

Senator ABETZ—The mining sector was the lead sector in relation to wage price index increases for total hourly rates of pay, excluding bonuses, for the last three financial years.

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

Senator ABETZ—All right. I will ask the ABS about it. I think they are on tomorrow.

Mr Kovacic—There were some updated, more recent figures released today in terms of the wage price index. In terms of the sectors for, I think, the December quarter, it was the electricity and water sector, I think, that was the lead sector in terms of growth in the index. Mining and another sector were behind that sector.

Senator ABETZ—That is why the AWU had to start flexing its muscles in relation to the mining sector. Can I ask whether your attention has been drawn to the 9 February 2011 decision of the Federal Court that interprets the Fair Work Act of 2009 as, in effect, absolving an employee engaging in industrial activity or as a union officer from any responsibility and accountability as an employee? I refer to *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education*.

Mr Kovacic—I am aware of the decision. I am not sure I would agree with your characterisation of it.

Senator ABETZ—Are you aware of the decision?

Mr Kovacic—Yes.

Senator ABETZ—Can I ask whether the decision accurately reflects what the government's policy intention had been in relation to those provisions.

Mr Kovacic—The decision continues the long-accepted prohibition against an employer taking adverse action against an employee for the impermissible reason that the employee is a union official or member and is carrying out lawful union activities. We are still analysing the decision. I would also note that the period for a potential appeal of that decision is yet to conclude.

Senator ABETZ—We can talk about the test that the full court majority applied, but I am wondering whether the test that the full court majority applied is in accord with what the government expected from its public policy considerations. To put it very bluntly, governments from time to time have legislation that they think means something and a court comes along and says, 'No, we interpret this differently,' as a result of which the parliament changes the legislation to ensure that the legislation accords with the public policy intentions that it had in the first place. All I want to understand is whether this full court decision actually reflects what the government had intended or whether it was a surprise to the government and the government is now giving consideration to changing the legislation.

Mr Kovacic—The intent of the legislation is to protect employees—

Senator ABETZ—We know what the intent is. All I want to know is whether this decision reflects the government's—

Senator Chris Evans—I think the answer to that is that, first of all, the reporting of decisions and the decisions themselves are often quite different. The second point to make is the one that the officer made, which is that the appeal period for any appeal against the decision is also open, and I have made it a practice not to comment on press reports about what decisions mean or whether it calls for me to intervene. I get them daily from both employers and unions when they do not like a decision. This is a decision the department will analyse, but we will make that analysis finally after we see whether or not the decision is actually appealed.

Senator ABETZ—This is a full Federal Court decision, so I anticipate the only other port of call would be the High Court and, in those circumstances, it may be appropriate for the Commonwealth to seek to intervene in the case. So I am wondering whether the full court decision does represent—

Senator Chris Evans—We will jump those hurdles when we get to them.

Senator ABETZ—But you are still analysing the case?

Senator Chris Evans—Yes.

Ms Paul—Yes.

Senator ABETZ—When do you think that analysis will finish?

Mr Kovacic—It would be more than a week. It would not be days.

Senator Chris Evans—As I say, that analysis would obviously be put on hold if there was an appeal.

Senator ABETZ—We will revisit it in the May estimates and find out where you are at with it. Thank you for that. Can I take you to the case of JJ Richards and Sons Pty Ltd v Transport Workers Union of Australia [2010] FWAFB 9963.

Mr Kovacic—Yes.

Senator ABETZ—It has been put to me that the case suggests that unions may take protected industrial action before bargaining has commenced, even if no majority support determination has been made. Once again, is this full bench decision, irrespective of how I may have characterised it, one which the government is accepting as a reflection of what was intended in the legislation?

Mr Kovacic—The threshold requirement in terms of the application for a protected action ballot order is that Fair Work Australia needs to determine whether or not the applicant has genuinely been trying to reach agreement, and that is an approach that not only is reflected in the Fair Work Act but was previously reflected in the Workplace Relations Act.

Whether or not that threshold test is met will be determined on the facts of a particular matter. In the JJ Richards case, Fair Work Australia had determined initially that that test was met. On appeal, that decision was overturned on a technicality. More recently, a subsequent application from the TWU has been successful in terms of a protected action ballot order.

In terms of the issue that you raised, it has never been the case under workplace relations law that bargaining has to have commenced before an application for a protected action ballot order could be made.

Senator ABETZ—If that is the case, could the department—and time is getting short—undertake for me, please, an analysis of the explanatory memorandum to the Fair Work Act at paragraphs 1,630 and 1,708, in which we are told that protected action may only be taken after bargaining has commenced.

Mr Kovacic—We will take that on notice.

Senator ABETZ—If that was the legislative intent. The suggestion is that bargaining had commenced just because the union had asked the employer to commence bargaining; but, in

the absence of the union proposing any specific terms of the agreement or issuing a log of claims on the employer, that seems to be—

Mr Kovacic—Can I just again reiterate that the threshold test that an applicant needs to satisfy Fair Work Australia of is that they have genuinely been trying to reach agreement, and that is something that is determined on the facts of a matter. But we will take the question on notice.

Senator ABETZ—Yes, but we are told in the explanatory memorandum ‘only after bargaining has commenced’. All that had happened in this case was that the union had said, ‘We want to have a chat, but we still don’t know what we’re going to put in our log of claims and we don’t have any specific terms to put to you.’

Ms Paul—We have taken that on notice.

Senator Chris Evans—It was a live question, and this was debated at a meeting I had with some of the industry and union groups. One of the questions that arise there is what you do if an employer refuses to meet or bargain at all.

Senator ABETZ—That is another issue, but in this case the union just took it upon themselves to engage in the activity that they—

Senator Chris Evans—I am just saying that, in terms of your earlier point, it raises that question.

Senator ABETZ—But not if the employer is not given anything to respond to other than being told, ‘We want to bargain with you but we don’t have a log of claims, we don’t have any specific issues.’ The full bench of Fair Work Australia tells us that is good faith bargaining, but I do not think any punter in the street would interpret it as such, and it seems to be in conflict with that which was in the explanatory memorandum. As Ms Paul said, you have taken it on notice—

Ms Paul—We have.

Senator ABETZ—and I will look forward to the response on that. Can I take you to another case with the National Union of Workers, Baiada Group Pty Ltd, trading as Adelaide Poultry: are you aware of that one?

Mr Kovacic—I am aware of some concerns that the NUW has expressed about Baiada.

Senator ABETZ—What happened in that case was that there were some orders but there was a lack of consent given by the employers and employees involved, and the decisions and/or transcripts have not been opened to public comment and have been marked as confidential. I understand the employer has made an application against the union for matters relating to the access to non-union members’ records. We have some real logistical difficulties here, and I am wondering once again if that is how it was envisaged that the Fair Work Act would be implemented.

Mr Kovacic—I would need to take that one on notice.

Senator ABETZ—If you could, please, thank you. Let us go to questions that were taken on notice. In EW0592_11, I had asked you:

Mr Kovacic, what about yourself? Did anybody draw to your attention the conflict in the evidence that you gave and what Mr Lloyd gave?

You responded, Mr Kovacic:

Not that I can recall, but I am happy to take it on notice.

You then say:

A check of my notes of conversation does not reveal any record of this occurring.

Do you stand by that answer?

Mr Kovacic—Yes, I stand by the answer. I have a book where I take notes of conversations and, whilst it might be poorly expressed there, I checked my notebook as to whether there was any record of a conversation and there was not.

Senator ABETZ—I did not ask you in fact to check your note or notes but just your recollection. Apart from not having taken a note—and I accept that no notes were taken—can you indicate to us whether or not you now have any recollection that somebody may have told you that the evidence of Ms Paul conflicted with that given by Mr Lloyd?

Mr Kovacic—I do not have any recollection.

Senator ABETZ—At all?

Mr Kovacic—I have nothing to add to the answer.

Senator ABETZ—Can I put to you specifically that Mr Lloyd may have rung you to tell you that?

Mr Kovacic—He may have done so, but I have no record and no recollection of the conversation.

Ms Paul—At any rate, I think we have traversed this territory before in terms of—

Senator ABETZ—No, this is a very serious matter, Ms Paul. Can I suggest to you that, if somebody as senior as Mr Lloyd rang you to tell you that there was a conflict in the evidence, that is not something that you would just dismiss from the back of your mind. Surely that is a very serious matter and not something that you would forget. I want to put it specifically to you whether or not you now recall Mr Lloyd ringing you to indicate that he was concerned that the evidence he had given did not match the evidence of Ms Paul.

Mr Kovacic—I have no recollection, as I have said in the answer. That is not to say that it did not happen, but I have no recollection. My record of conversations again showed no record of a conversation to that effect.

Senator ABETZ—But you would agree with me that it is a pretty serious thing and that something like that must have surely imprinted itself on your mind?

Ms Paul—I imagine Mr Kovacic gets about 30 calls a day from eminent people, or at least people as eminent as Mr Lloyd.

Senator ABETZ—Ms Paul, I am asking Mr Kovacic. I am sure he can answer.

Mr Kovacic—Ms Paul has made the point that I was actually going to make. I get lots of phone calls—

Senator ABETZ—How many phone calls have you received in your career as a public servant appearing before estimates committees to the effect that there has been a conflict of evidence between the secretary of the department and the head of an agency within the department?

Ms Paul—After a considerable period of time had elapsed—

Senator ABETZ—No, I am sorry, I am not asking you. I have asked Mr Kovacic for his experience.

CHAIR—Mr Kovacic has actually answered the question about not having any recollection or a note on that call.

Senator ABETZ—No, but I just asked, in general terms, how often that has occurred in his career; that a head of agency has rung him to say that the secretary of the department's evidence conflicts with that which he had given?

Ms Paul—The circumstances—

Senator ABETZ—No, I am asking Mr Kovacic.

Ms Paul—do not make it any easier to remember, I am sure.

Mr Kovacic—I cannot recall any occasions.

Senator ABETZ—Thank you for the interference, Ms Paul. This is serious but I am asking Mr Kovacic directly—

Ms Paul—I think he has already answered.

Mr Kovacic—I cannot recall any occasions.

Senator ABETZ—You cannot recall any occasions. So despite all this nonsense, with respect, about getting important phone calls from 30 people per day et cetera, something like that would have stuck in your mind then, wouldn't it?

Mr Kovacic—Not necessarily.

Ms Paul—I think Mr Kovacic has answered your question.

Senator ABETZ—Not necessarily? A head of agency says to you—

Senator Chris Evans—At the end of day—I do not want you to badger the officer—Mr Kovacic is an experienced officer. He gave you some evidence, which is that he did not recall such a thing occurring, and he has, in response to the question on notice, gone and checked his records of conversations, the way he maintains his records, and he has found no record of that alleged conversation. So he stands by the evidence that he gave you earlier and he cannot do any more than that. If that is his evidence, that is his evidence.

Senator ABETZ—Your evidence is that you cannot recall the commissioner of the Australian Building and Construction Commission ringing you a day or so after the estimates in May 2010 indicating that his evidence and that of Ms Paul clearly differed and that he was astounded at Ms Paul's evidence?

Mr Kovacic—My answer is that I cannot recall. I checked my notes. I have no record of a conversation. I cannot recall.

Senator ABETZ—But would you agree with me that if such a call was made, it would be—

Ms Paul—I think Mr Kovacic has answered the question.

Senator ABETZ—I am sorry, Ms Paul—

CHAIR—We do not talk about ‘if such calls could have been made’. That is just purely hypothetical and speculative.

Senator ABETZ—Would you agree that such a call, if made, would have been very important?

Ms Paul—I think it is impossible to speculate about what could have happened in May 2010, now, in terms of the importance—

Senator ABETZ—Can I say, Ms Paul, this is exactly the sort of obfuscation that does you and the department no credit. What you do is you deny, a question is put on notice, an obfuscating answer is given, and then we follow up nearly 12 months later and the excuse is, ‘So much time has passed by, of course we can’t remember.’

Ms Paul—It is not an obfuscation, if you actually have looked at the notes of conversation—

CHAIR—That is just a nonsense, Senator. We have gone through this now, over the last estimates as well, and the evidence has been clear. You do not accept it—you made that very clear at the last estimates, unfortunately—and I am not sure where you want to go with it. You have tried to clarify the evidence given. It has been clarified. What do you want to do with it now?

Senator ABETZ—With all that Mr Kovacic has said, he has not denied that the phone call was made to him, have you?

Mr Kovacic—What I have said is I have no recollection of a call.

Senator ABETZ—Do you deny—

CHAIR—Senator Abetz, this is not appropriate.

Senator ABETZ—that Mr Lloyd rang you about this issue? Do you deny that Mr Lloyd rang you about this issue?

Ms Paul—I think the officer has answered the question to the best of his ability—

Senator ABETZ—No, do you deny—

Mr Kovacic—How can I deny something I have no recollection of?

Ms Paul—That is right.

Senator ABETZ—So you cannot deny it? Thank you.

Senator Chris Evans—This is not a Salem witch hunt. You are entitled to ask an officer a question. He took a question on notice. He has checked his records. He has given you the answer. He has confirmed his earlier evidence. You may not like that. Seeking to imply bad motive and insulting the officer is obviously a decision for you, but I do not think it assists in

any way, shape or form. The evidence given by the officer is clear, he has repeated it across a number of estimates hearings and on notice, and that is his evidence.

Senator ABETZ—You can try to spin it that it is clear evidence. It is not. I would have thought anybody listening to this hearing, anybody that reads the documentation associated with it, would be gobsmacked for somebody to say that he cannot recall whether or not the Commissioner of the Australian Building and Construction Commission had rung him shortly after a hearing to say that Ms Paul's evidence did not match his and that he was concerned about it.

Ms Paul—We are always fully aware of our responsibilities in front of this committee. Always. We have been here many years and we take it very seriously.

Senator ABETZ—It is a matter of grave concern to me and, I am sure, to many other people, the responses that we have had now. They have been sort of drip-fed out over such a long period. Can I move to question on notice 0607 about representations made for the inclusion of superannuation under GEERS. I asked you to provide a list of those stakeholders and the nature of their representations, and you were only able to recall, is it right the names of trade unions? To provide a more definitive list with the specific nature of each representation would involve an unreasonable diversion. Is that right?

Mr Kovacic—Certainly the second paragraph refers to a wider church of stakeholders who have made representations.

Senator ABETZ—Yes, but without a mention of any specific stakeholder.

Mr Kovacic—Certainly, I accept that. Certainly there are a number of unions and peak bodies that are mentioned there who have made representations as well. But to do a forensic search—

Senator ABETZ—Sorry?

Mr Kovacic—The AMWU, CFMEU, Unions NSW, ACTU, and the MEAA are some of the unions and employee associations that are specified as having made representations.

Senator ABETZ—Yes. I was putting to you last time that it was only from the trade union movement, as I recall. I said:

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?

I agree that telling us about the nature of the representations may well have been a huge use of resources, I accept that, but just naming who some of those stakeholders might have been, other than the trade unions, I would have thought would have been a helpful response, and you have not named any other stakeholder other than trade unions.

Mr Kovacic—If you would like us to go away and get two or three examples of each of those sorts of stakeholders referred to in the second paragraph, I am prepared to take that on notice, but in terms of doing a forensic search around all of the representations—

Senator ABETZ—I accept that. But I am continually told 'a variety of stakeholders' and when I ask you name unions. I then put it on notice and we are told 'a variety of stakeholders'

including', and then once again we just get a list of unions. So if you can take that on notice again I would be much obliged.

Mr Kovacic—All right.

Senator ABETZ—Can I move to question 593 where you, Minister, had written to Fair Work Australia and it was posted as a formal submission. We are now told the letter was not intended to be a formal submission and has been categorised as correspondence on Fair Work Australia's website. Are you aware of how it happened that the categorisation got changed?

Mr Kovacic—That would be a matter you would need to ask of Fair Work Australia.

Senator ABETZ—Were any further representations made by the minister or the department to Fair Work Australia to change the classification?

Mr Kovacic—Not to my knowledge.

Senator ABETZ—The president said on page 93 of the Senate committee *Hansard*:

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 Chris Evans—All I can say is that when I wrote the letter I did not regard it as a submission and I was surprised to see it had been put on the website. Do I care or was I concerned or was I upset or angry? No. Have I gone to them and said, 'Change it'? No. Quite frankly, I have more to worry about than that.

Senator ABETZ—So this has been done at the volition of Fair Work Australia?

Ms Paul—Yes.

Senator ABETZ—All right. Thank you. The member for Groom wrote to the minister on Christmas Eve without Christmas wishes—which the minister was offended by, he told us earlier in the hearing—but I am wondering, more seriously, whether the department has now looked into this matter. Do you have that letter in front of you?

Mr Kovacic—I am sorry; I do not have it.

Senator ABETZ—Understood.

Senator Chris Evans—Can I say my office provided me with a copy, after the question, which I had a look at, but I have not had a draft response come to me yet, so I have not written back to him. I am due to write back to him but I have not seen a draft response. The letter was shown to me earlier this evening for the first time. Unfortunately, what happens is that correspondence goes down and then comes back up, so I had not seen it personally.

Senator ABETZ—Yes, especially with the Christmas break.

Senator Chris Evans—I will give him an appropriate reply.

Senator ABETZ—I can understand all that, but if the department could take on notice the concern expressed in the second and third paragraphs of that letter and indicate whether similar concerns have been expressed to the department about the lengthy delays in relation to collective agreements. I will just leave it at that, given the hour of the day.

In response to EW0595_11 we were told:

The Minister is considering the issues in Ms Ridout's letter.

Now, with the passage of however many months, is the minister still considering the AiG representations or have we come to some determination about the matters raised in that correspondence?

Senator Chris Evans—I am not sure what the formal answer is, but people write to me about issues all the time. I met with the AiG's representative on my National Workplace Relations Consultative Council. AiG are represented and attended when we last met and that included a consideration of a lot of the issues that were on the agenda of employers and unions. We had a fairly good discussion about those issues. As to whether we have formally responded or whether that is part of the engagement, I will have to check.

Ms Paul—I think we considered it was part of the ongoing engagement. It was not unusual for us to—

Senator ABETZ—This letter was written on 1 October 2010, so a considerable passage of time has elapsed.

Ms Paul—Yes.

Senator ABETZ—In that case, can I ask you to take on notice the issues raised in that letter and the government and department's response to all the expressions of concern in relation to the various matters and how the government is seeking to address them, because they were, if I might say, serious matters that were raised.

Ms Paul—The matters raised by AiG we always take seriously. Perhaps we can come back to you on the way that those sorts of issues get fed into the normal policy consideration mechanisms, of which we have many in this field.

Mr Kovacic—The issues raised would be similar to the issues raised by AMMA and RMIT as part of that survey that we spoke of before.

Senator ABETZ—We know what the issues were because we have a letter dated 1 October, if you can go through that detail for me.

Ms Paul—We will address the issues for you, if you like.

Senator ABETZ—Yes, please. Thank you very much. Can I turn to EW0601_11, dealing with expressions of interest for Fair Work Australia. Are you currently in the process of appointing new ones?

Mr Kovacic—Yes. Some vacancies in New South Wales and Victoria were advertised in late October last year. That process is still underway. The panel has convened and considered the expressions of interest that were received. There are 75 of those. At this stage, the panel is yet to provide a short list of candidates to the minister for his consideration.

Senator ABETZ—I trust that unionists are appropriately represented in the expressions of interest. Can you please provide to us an analysis of the list of expressions of interest as you have previously done?

Ms Paul—As we have done in the past? Certainly.

Senator ABETZ—That would be helpful now. Will the practice change for this round of appointments in relation to expressions of interest?

Mr Kovacic—In what sense?

Senator ABETZ—Last time I asked as to the first round of expressions of interest, where I think you had 148 expressions of interest, I asked:

I assume an acknowledgement would have been sent out.

You said:

I would assume so.

We now know that acknowledgements in fact were not sent out, that the information pack provided to those who expressed interest in the position stated that, ‘Only applicants who are selected for further consideration will be contacted.’ I think the reason you and I assumed that an acknowledgement would be sent out was that it would just be a polite thing to do. I would have thought it a good employer-employee type relationship, as a model employer, to at least acknowledge that you had received the application, so I am wondering whether we are going to do that basic courtesy on this occasion?

Mr Kovacic—Certainly. We can do that.

Senator ABETZ—You will? Thank you. Now, remind me. I think earlier I did ask about the new transfer of business. No, that was within subsidiaries, wasn’t it?

Mr Kovacic—Ms Paul provided the reference number to the—

Ms Paul—The question on notice.

Senator ABETZ—That was in relation to subsidiaries.

Ms Paul—The *AFR*.

Mr Kovacic—It was about that *Australian Financial Review* opinion piece by Peter Wilson?

Senator ABETZ—Yes, that was between subsidiaries. What number was that?

Ms Paul—Let me dig down. EW0594_11.

Senator ABETZ—Thank you. In relation to the transfer of business rules in question EW0594_11, you said:

The Department will continue to monitor the operation of the new transfer of business rules.

What has your ongoing monitoring told you? Are there problems with the rules? Are more problems coming to light, and what is the government’s response? Or are we just monitoring and saying, ‘That’s very interesting,’ but not doing anything about it?

Mr Kovacic—In terms of our continuing monitoring, it has not changed the tenor of the response there in the sense that the framework is operating as intended.

Senator ABETZ—Sorry, what was that?

Mr Kovacic—The monitoring does not suggest that there are any major problems with the operation of the framework. So there is really no change from what was reflected in our response to question 594.

Senator ABETZ—So this is just a general watching brief, as you would have on all matters but there is no specific attention being paid to the issues of transfer of business rules.

Mr Kovacic—It is part of the general monitoring of the operation of the new framework and, clearly, as you would be aware, there are still decisions that are being made to bed down the framework. As part of that general monitoring approach, we are certainly paying attention to what might be key decisions about the operation of the framework.

Senator ABETZ—We were told on 560 that:

Consideration has, to date, not been given to amending the Fair Work Act 2009 ... to provide scope for the Fair Work Ombudsman to provide binding advice ...

Why do we have the caveat 'to date'? Is it now being considered or is the situation still the same?

Mr Kovacic—The situation is still the same.

Senator ABETZ—So once again we have complaints from certain sections and we have a watching brief on it, but nothing other than that.

Senator Chris Evans—I would make the point to you that I make to all the parties: the moment someone has a concern or has a decision that they do not like out of Fair Work Australia, they immediately call for me to (1) intervene and overturn the decision or (2) to amend the act. The act has been in place for a short period of time. We will obviously make amendments as necessary. There will have to be some made in relation to the paid parental leave arrangements.

But it is not my intention to encourage people to think that the fix to all of their problems is to immediately run into the parliament and fix the act. Moving legislation into the parliament is not that quick generally and there are a whole range of reasons one would want to look at how the legislation is operating to make considered judgements. I encourage the parties to work with each other and with Fair Work Australia to try to resolve some of the issues that come up rather than look to a legislative response for every issue that they confront.

Obviously, amendments to the legislation will be considered in due course, and there are some that we are obviously going to have to make, but my general approach is to encourage the parties to sit down and talk about the issues and whether or not we can resolve them other than through legislative change.

Senator ABETZ—Your answer on that occasion was:

Consideration has, to date, not been given ...

I am wondering whether that was because it was being closely monitored and something might be in the pipeline.

Ms Paul—No, it was just a reflection of when we answered it.

Senator ABETZ—Thank you for that. What is your monitoring of take-home pay applications telling us?

Mr Kovacic—There are two points here. The most recent data about applications that was released by Fair Work Australia several weeks ago indicated that during the December quarter there were, I think, no applications for take-home pay orders. We are aware of only a small

number of take-home pay applications having been successful. If you are looking for more specifics we would need to take that on notice but our recollection is that in the order of three orders have been made.

Senator ABETZ—That would undoubtedly be, if those orders were made, because somebody's take-home pay had been reduced as a result of the introduction of modern awards.

Mr Kovacic—It would have been as a direct result of the award modernisation process. That is correct.

Senator ABETZ—Which resulted in a reduction in the take-home pay.

Mr Kovacic—That is what the take-home pay order is designed to protect against. Again, as we have canvassed previously, it was one of the—

Senator ABETZ—But you have not countenanced the possibility that it would actually occur in practice.

Mr Kovacic—No, certainly. What I said previously, and what I was just about to go to, is that in relation to the protections that were built into the framework to acknowledge the practical reality and difficulty of merging a whole range of pre-existing industrial instruments—in the order of over 3,700 down to 122 modern awards—there was a variation in the terms and conditions and there were issues there. Consistent with the government's commitment, the intention of the award modernisation process was not to impact on employees, so take-home pay orders were provided to prevent that from occurring.

Senator ABETZ—Because it could occur?

Mr Kovacic—Certainly. What I have said is that the inclusion of take-home pay orders in the framework was designed, in those circumstances where it had the potential to occur, to provide a remedy and to ensure that it did not occur.

Senator ABETZ—Read our previous discussions.

Mr Kovacic—In terms of numbers of applications, there have been relatively few and in terms of the numbers of orders, there have been three.

Senator ABETZ—Sorry?

Mr Kovacic—There have been three orders, to the best of our knowledge. That would suggest that it has not been a major problem.

Senator ABETZ—Because of that provision and because of the new regulations that were introduced by Ms Gillard, whenever it was.

Mr Kovacic—Certainly, and that was part of the protections that were built into the framework by the government.

Senator ABETZ—The president of Fair Work Australia had no difficulty in writing:

An employee whose take-home pay has been reduced as a result of the introduction of modern awards may apply to Fair Work Australia for a take-home pay order to preserve their existing take-home pay while they remain in the same job.

In previous estimates both you and Ms Paul have had great difficulty in uttering such a sentence, but anyway we now know—

Mr Kovacic—No. What we have emphasised is the protection that has been built into the framework to protect against that situation arising.

Senator ABETZ—But not sufficient as to not require take-home pay orders.

Ms Paul—That is the whole nature of the framework.

Senator Chris Evans—That is what the order is for.

Senator ABETZ—Exactly, Minister, but in previous discussions—

Senator Chris Evans—It is to make sure it does not occur.

Ms Paul—That is right, to make sure it does not occur.

Senator ABETZ—Read previous *Hansard* transcripts before you were the minister—

Senator Chris Evans—I think you will find I will not.

Senator ABETZ—Sorry?

Senator Chris Evans—Read the *Hansard*.

Senator ABETZ—That might inform you of information that you might not necessarily want to be seized of, but that is fine.

Mr Kovacic—I am just reminded that there is capacity for pre-emptive take-home pay orders as well, which again is a part of the overall protections that are built into the framework.

Senator ABETZ—That is right, all of which I welcome, but for all we know there may be workers out there who are not necessarily aware of that and are being paid less than they otherwise ought to be. We will leave it at that.

Senator FISHER—I would like the opportunity to focus just on the issue of annual leave loading. What is the department's view as to whether or not section 90 of the Fair Work Act can be used to compel payment of leave loading on leave accrued by retiring or redundant workers, even if an award or an agreement says it is not payable? I am sure you are familiar with the example I gave to the Fair Work Ombudsman and the minister earlier of the Road Transport and Distribution Award, which clearly says that annual leave loading payment is payable on leave accrued and taken but it is not payable on leave paid out on termination. What is the department's view of the effect of section 90 of the Fair Work Act and can it be used to compel payment of leave loading to retiring and redundant workers even when an award says not?

Mr Kovacic—The effect of section 90 subsection (2) of the Fair Work Act is that, in terms of termination payments and in respect of annual leave, the employer is obliged to pay the employee the amount that would have been payable had the employee taken that period of leave whilst still employed. In the circumstances that you have raised, it would require the payment of annual leave loading, irrespective of the provisions that you have referred to in that particular award.

Senator FISHER—So it would require the payment of annual leave loading, even if the award says it is not payable.

Mr Kovacic—That is correct. I need to also add that at the minister's request the department last week wrote to key stakeholders, seeking to convene a meeting to discuss the issue in terms of annual leave loading and, in particular, any concerns they might have. That meeting is scheduled to happen next Tuesday, 1 March. It is going to be a teleconference. After that discussion occurs, the department intends to brief the minister on the issues canvassed in those discussions. In the questions earlier this afternoon, or in the discussion with the Fair Work Ombudsman, there was a canvassing of what options exist in this area. Depending on what, if anything, the government ultimately chooses to do, they range from making an application to vary a modern award, as well as considering legislative amendment or, alternatively, introducing regulations that deal with the issues.

Senator FISHER—Or allowing the stakeholders to sort it out on an industry-by-industry basis, as many would consider it has been done in the past, and then feeding back through the award and agreement system.

Mr Kovacic—These are all issues that will be canvassed with the stakeholders next Tuesday.

Senator FISHER—Was that the department's view at the time of the passage of the Fair Work Act?

Mr Kovacic—What I can say is that the provision in the act was certainly in the draft legislation that was canvassed at the committee on industrial legislation.

Senator FISHER—Was this issue raised?

Mr Kovacic—There was not any substantial discussion. We have not had the opportunity of doing an analysis of either submissions to the Senate inquiry or issues that were canvassed in the Senate inquiry to see whether it was raised in that context.

Senator FISHER—You are not able to say at this stage conclusively that it was raised? It looks as if it was not raised.

Mr Kovacic—My recollection is that there was not any substantive discussion, if indeed there was any discussion around the issue.

Senator FISHER—I gather from that you would not have advised the government about this issue because it was not an issue at the time.

Mr Kovacic—That is a fair assumption, but I would need to take it on notice.

Senator FISHER—Section 90 of the Fair Work Act deals with the new employment standards, so is it a fair assumption that the department, like the industry stakeholders—both employer and employee—considered that the new employment standards dealt with minimum obligations, that annual leave loading was something outside minimum obligations and would be left to be dealt with, as it has traditionally been dealt with, in awards or agreements? Would that not be a fair assumption?

Mr Kovacic—It would be a reasonable assumption.

Senator FISHER—That would be why it was not raised with you by the parties and why neither you nor the government raised it with the parties. Was it raised during debate in parliament?

Mr Kovacic—I do not know that. I would have to take that on notice.

Senator FISHER—My recollection and understanding is that it was not, and I would like to hear and see your answer to that. I would also like your response to the proposition that the assumption made by the government was entirely the same—that is, that leave loading is something outside the Fair Work Act and outside section 90 of the Fair Work Act and would be dealt with by awards and agreements. Do you think that Fair Work Australia would have subsequently put clauses, like this one that is in the road transport award, in a modern award saying, ‘Leave loading is not payable on leave paid out on termination,’ thinking and knowing that clause would be in conflict with the Fair Work Act and, in particular, with section 90(2)?

Mr Kovacic—I cannot speak for Fair Work Australia. What I can say is that the process it adopted in terms of developing modern awards was to take the most common provisions from the pre-existing industrial instruments and combine them to form the modern award.

Senator FISHER—It would not make a lot of sense for the workplace umpire to put in an award something directly at odds with the act, would it, Mr Kovacic? Come on!

Mr Kovacic—I do not know to what extent they would have had submissions on the issue of—

Senator FISHER—The government, and perhaps the department on the government’s behalf—the minister—provided directions to Fair Work Australia in formulating modern awards and in the transitional process. Did any of those directions to, or any of those discussions with, Fair Work Australia or the commissioners in Fair Work Australia include telling the commissioners that if they were to make a provision of this sort—saying ‘no leave loading payable on accrued leave’—in a modern award then it would be at odds with and therefore overruled by the Fair Work Act?

Mr Kovacic—I would need to take on notice the details of that.

Senator FISHER—Thank you, but I think not. I put to you that, given earlier discussions this afternoon—I know it is a short time but it is nonetheless some time and you guys are very well across your brief—you would have come to the table armed with some evidence of that having occurred, had it occurred. I look forward to your answer but I put to you that it will not have been put to the officers of Fair Work Australia that, if they put in a modern award a clause saying ‘no leave loading payable’, it will be at odds with section 90 of the Fair Work Act.

Senator Chris Evans—Most of your assertions are probably not unreasonable. I do not agree with them all.

Senator FISHER—That is very reasonable of you.

Senator Chris Evans—I am a very agreeable chap but I would not expect Mr Kovacic to agree to them as an official of the department.

Senator FISHER—He has done very well so far.

Senator Chris Evans—Yes, but he is very agreeable too. We will take those questions on notice but, as I say, when you ask him to provide an opinion and clearly you ask him to go beyond what is reasonable for official—

Senator FISHER—Thank you.

Ms Paul—But, also, what you asked us to take on notice was quite a complex matter. You actually asked—if I heard you correctly—for, over a range of time, a range of matters. I do believe that, in the time between the earlier conversation today and now, we would not have had time to look at all the documents and so on.

Senator FISHER—I accept that.

Ms Paul—I put to you that we have taken it on notice genuinely and we will go and have a look.

Senator FISHER—I do accept that.

Senator Chris Evans—The bottom line is that there is an acknowledged difficulty which the Fair Work Ombudsman and others spoke about. The department briefed me on it and, as I indicated in answer to an earlier question from Senator Abetz, my view about these things is that you get the parties in a room and get them to have a serious think about how they might help solve it rather than say, ‘Minister, legislate.’ Hopefully the meetings that will be convened will have them engaged in a positive discussion about the way forward.

Senator FISHER—That is positive. Meanwhile, what is the government expecting employers to do in the face of approaches from the Fair Work Ombudsman saying, ‘We will now police our changed view of the law and seek voluntary compliance’? Obviously, if voluntary compliance is not forthcoming, the cop only has involuntary compliance as the remaining possibility, and that is prosecution of employers, both retrospectively and for currently accruing obligations. So what would the government have employers do today?

Senator Chris Evans—I would encourage employers to obey the law. They have received advice from the Fair Work Ombudsman about what they think the law is. Obviously it is open to people to test that, but people can only go on the basis of the Fair Work Ombudsman’s very clear interpretation and publication of their view. I accept that creates issues in terms of the employer.

Senator FISHER—Their view has changed but the law has not. The law has not changed one iota since you passed it in 2009. It is just that the cop’s view of it has.

Senator Chris Evans—We all know there is a difficulty here that has developed but, as I said at the time, you cannot ask the Fair Work Ombudsman to say, ‘No, I won’t be enforcing the law. I won’t be meeting my statutory obligations.’

Senator FISHER—Maybe not, but you are saying, ‘Let common sense rule,’ and at the same time you are saying employers are going to have to pay up if they are asked to. It is not common sense to me.

Senator Chris Evans—The alternative is to say, ‘Ignore the law.’

Senator FISHER—Or, ‘Fix it quick smart.’ The law has not changed. It is only the cop’s view of it.

Senator Chris Evans—All right, the cop's view of it, as you like to put it, but they got senior legal advice that has been put out there publicly.

Senator FISHER—They did not need that for a good year and a bit when they were telling employers, 'You don't have to pay.' They are now saying, 'We told you you didn't have to. Now we're telling you you do have to and you did have to.'

Senator Chris Evans—We have canvassed all this ground.

Senator FISHER—Sorry. We have.

Senator Chris Evans—What I am saying to you is that the evidence of the Fair Work Ombudsman, as I understood it, was that they put that legal advice out there and no-one has been beating down their door, saying, 'No, no, that's wrong.' They may say the situation is wrong and they are concerned about it, but if the legal advice is contested, then obviously it is open for people to contest it.

Senator FISHER—I stand corrected, but I understand it has been contested by way of correspondence between the Ombudsman and employer organisations, albeit not in a court. But there is another outcome, given the unusual nature of this situation, that being that it has arisen purely because the workplace cop has changed its interpretation of the law even though not one letter of the law has changed. It is an arguably unique situation. There is another scenario if the government is minded to resolve this cooperatively: to put a moratorium on movement for a short period whilst the government sets about resolving it, given that it has arisen belatedly, recently. Up until now the situation has been, 'Thou shalt not have to pay.' It is now only because of a matter of opinion that the workplace cop is saying, 'Thou has to pay.' Could the government not consider a moratorium for a period whilst the matter is sorted out? After all, back pay remains back pay. It is still payable whenever it is payable, within reason.

Senator Chris Evans—I have not given that concept any consideration.

Senator FISHER—I just thought of it then.

Senator Chris Evans—What I can say to you is that the parties are coming together next week.

Ms Paul—On Tuesday.

Senator Chris Evans—And I think that will allow them to air these issues. Following that, I will get some advice from the department, and we will have a clearer understanding of the views of the parties and the options going forward. I concede it is a problem; the Fair Work Ombudsman concedes it is a problem. We sometimes have the same thing when we get court decisions with a different interpretation upsetting what we had all thought was the case. All we can do is get them together and see if there is a way forward that people broadly find acceptable.

Senator FISHER—Thank you. To encourage good faith in decisions of the workplace umpire, in advice of the workplace cop and in some certainty around your workplace laws, I would urge you to consider the moratorium prospect as well. Thanks, Chair.

Senator BACK—There are two issues I would like to get your response on. The first is a circumstance that occurred certainly in Western Australia and, I think, in Tasmania over this

last Christmas period, in which employers ended up paying twice for public holidays over the Christmas period. Are you familiar with this?

Mr Kovacic—Yes, I am.

Senator BACK—The view that has been put to me is that there needs to be clarification of the rules of the NES modern award state and territory public holiday legislation to ensure certainty and consistency and removal of the doubling-up of penalty payments, simply because we are going to face this again in probably 12 months time.

Senator Chris Evans—Do you want me to override states rights?

Senator BACK—Never—in a word, no.

Senator Chris Evans—You had better review what you just put. If you get Premier Barnett to give me this power, I will fix this problem for you, if you like.

Senator BACK—I am sure you do not want that. Could you tell me what action is to be taken in regard to addressing this anomaly?

Mr Kovacic—The issue is one that the minister has alluded to. It goes to where the authority to declare public holidays rests and that is with state and territory governments. I acknowledge that it is likely to occur again in 2011. In circumstances where a public holiday falls on a Saturday or a Sunday, it is state governments that make the declaration as to whether there is a substitute day also declared as a public holiday. That is the issue.

Senator Chris Evans—Which is why we had different results in different states.

Mr Kovacic—Exactly.

Senator BACK—What is the solution?

Mr Kovacic—There was a discussion at a recent meeting of the National Workplace Relations Consultative Council where the ACCI raised some concerns about this. From recollection, it is a matter that is to be taken up with state and territory ministers.

Senator BACK—With the minister?

Senator Chris Evans—Not with me. The bottom line is that the states set out arrangements regarding public holidays in legislation and some states had arrangements whereby the double take, if you like, did not occur. I think one of them actually moved to amend, didn't they?

Senator BACK—Queensland moved to amend, I think, yes.

Senator Chris Evans—That is an option open to Tasmania and Western Australia under their own law.

Senator BACK—The advice given to me was that Queensland's was a misguided approach, but it certainly seemed to have solved it. You are in agreement that it was not the intention under the Fair Work Act—

Mr Kovacic—The issue is not the Fair Work Act. The issue is what days are declared public holidays and that authority rests with state and territory governments.

Senator Chris Evans—Some states have more public holidays than others. The Fair Work Act governs what occurs on a gazetted public holiday.

Senator BACK—The second issue, unrelated, is the right of entry by unions alleging health and safety concerns and a recommendation that there should be some process for entry in which the union would give some indication of its reason and its concerns prior to gaining entry, such as a written statement. Could you comment for me on that.

Mr Kovacic—The provisions of the Fair Work Act have a well-established regime in terms of right of entry which require 24 hours notice for the person seeking right of entry to be a permit holder. There are certain tests in terms of being given a permit. In circumstances where the authority is abused, there is the capacity for Fair Work Australia to remove that permit, and where that right of entry is being abused, there are mechanisms under the Fair Work Act to address the situation.

Senator BACK—When you say 24 hours notice, is that a written request for entry?

Mr Kovacic—Invariably it would be a written request.

Senator BACK—In the event that the union is claiming some occupational health or safety issue, is it required that the union specifies what it believes that concern to be in advance of seeking a right of entry?

Mr Kovacic—In terms of whether it is an occupational health and safety issue, that would be governed by state and territory occupational health and safety legislation. I am aware that not all jurisdictions necessarily provide for right of entry in respect of OH&S matters; that differs across the jurisdictions.

Senator BACK—Is there a possibility of confusion there? Does the Fair Work legislation also include provisions regarding an occupational health and safety circumstance for right of entry?

Mr Kovacic—As you might be aware, one of the other major reforms that the government is pursuing is harmonisation of workplace health and safety laws. The model act that was agreed by the Workplace Relations Ministers Council in December 2009 has provisions relating to right of entry for occupational health and safety purposes.

Senator BACK—What is the status of that now?

Mr Kovacic—The timetable for progressing the harmonisation of workplace health and safety laws requires all jurisdictions to enact that legislation so that it can come into effect on 1 January 2012. Safe Work Australia, the joint Commonwealth-state body that is in essence driving the development of not only the model act but the supporting model regulations and codes of practice, currently has out for consultation an exposure draft of the draft model workplace health and safety regulations and codes of practice. That period of public comment closes I think in early April. Safe Work Australia will then consider the comments that are received prior to putting a recommended package of regulations and codes of practice to the Workplace Relations Ministers Council for endorsement probably around the middle of the year. Assuming that ministers agree to those model regs and codes of practice, it will then be up to jurisdictions to ensure that both they and the model act commence on 1 January 2012.

Senator Chris Evans—For the senators' information, you might just describe the Western Australian position in relation to that.

Mr Kovacic—Certainly. The state government in Western Australia has indicated that there are some areas of the model workplace health and safety act that it has concerns about

and is unlikely to reflect in the legislation that it seeks to enact. One of those areas is right of entry for OH&S purposes.

CHAIR—Thank you for your attendance today at estimates.

Committee adjourned at 10.51 pm