



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

EDUCATION, EMPLOYMENT AND WORKPLACE  
RELATIONS LEGISLATION COMMITTEE

**Estimates**

WEDNESDAY, 19 OCTOBER 2011

CANBERRA

BY AUTHORITY OF THE SENATE

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**SENATE**  
**EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS LEGISLATION COMMITTEE**  
**Wednesday, 19 October 2011**

**Senators in attendance:** Senators Abetz, Back, Bernardi, Bilyk, Cameron, Cash, Edwards, Fifield, Fisher, Gallacher, Marshall, Ronaldson, Siewert, Singh and Thisthewaite



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

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

**Department of Education, Employment and Workplace Relations**

Ms Lisa Paul, Secretary

Mr Michael Manthorpe, Deputy Secretary

Ms Jennifer Taylor, Deputy Secretary, Executive

Mr Tony Cook, Associate Secretary

Ms Catherine Wall, Acting Deputy Secretary, Executive

Mr Robert Griew, Associate Secretary

Ms Sandra Parker, Deputy Secretary

Mr John Kovacic, Deputy Secretary

**Corporate and Network**

Mr Michael Manthorpe, Deputy Secretary

Ms Robyn Kingston, Chief Internal Auditor, Internal Audit

Mr Craig Storen, Chief Finance Officer, Corporate—Finance and Business Services

Mr George Kriz, Chief Lawyer and Group Manager, Investigations, Corporate—Legal and Investigations

Ms Vicki Rundle, Group Manager, People and Organisational Development

Mr Benjamin Wyers, Branch Manager, People and Organisational Development

Ms Susan Monkley, Group Manager, Technology Solutions

Ms Kylie Emery, Acting Group Manager, Communication and Parliamentary

Ms Meredith Fairweather, Branch Manager, Communication and Parliamentary

Ms Deb Rollings, Branch Manager, Communication and Parliamentary

Mr Brant Trim, Branch Manager, Communication and Parliamentary

Mr Tim Pigot, Branch Manager, Communication and Parliamentary

Ms Helen McCormack, Branch Manager, Office of Regional Education Skills and Jobs

**Outcome 1—Office of Early Childhood Education and Child Care**

Ms Jennifer Taylor, Deputy Secretary, Executive

Mr David De Silva, Acting Group Manager, Early Childhood Quality and Workforce

Ms Joanna Stanion, Branch Manager, Early Childhood Quality and Workforce

Ms Joan ten Brummelaar, Branch Manager, Early Childhood Quality and Workforce

Ms Lisbeth Kelly, Branch Manager, Early Childhood Quality and Workforce

Ms Ngaire Hosking, Group Manager, Early Learning Childcare Services and Indigenous Support

Ms Robyn Priddle, Branch Manager, Early Learning Childcare Services and Indigenous Support

Mr Matthew Hardy, Branch Manager, Early Learning Childcare Services and Indigenous Support

Dr Russell Ayres, Branch Manager, Early Learning Childcare Services and Indigenous Support

Ms Jo Caldwell, Group Manager, Strategy and Family Payments

Ms Robyn Shannon, Branch Manager, Strategy and Family Payments

Mr Murray Kimber, Branch Manager, Strategy and Family Payments

Ms Gillian Mitchell, Branch Manager, Strategy and Family Payments

**Outcome 2—Schools and Youth**

Mr Tony Cook, Associate Secretary

Ms Catherine Wall, Acting Deputy Secretary, Executive

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

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

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

Mr Tim Kinder, Branch Manager, Curriculum, Assessment and Teaching

Ms Alex Gordon, Branch Manager, Curriculum, Assessment and Teaching

Mr Matt Davies, Acting Group Manager, Engagement and Wellbeing

Mr Stephen Goodwin, Branch Manager, Engagement and Wellbeing

Mr Joey Baker, Acting Branch Manager, Engagement and Wellbeing

Mr Chris Sheedy, Branch Manager, Engagement and Wellbeing

Mr Anthony Fernando, Branch Manager, Engagement and Wellbeing

Ms Susan Smith, Group Manager, Infrastructure and Funding

Ms Hilary Riggs, Branch Manager, Infrastructure and Funding

Ms Oon Ying Chin, Branch Manager, Infrastructure and Funding

Mr Alan Edwards, Acting Branch Manager, Infrastructure and Funding

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

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

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

Ms Robyn Bergin, Acting Branch Manager, National Schools and Youth Partnerships

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

Ms Louise Hanlon, Branch Manager, Review of Funding for Schooling Secretariat

Mr John Kovacic, Deputy Secretary

Mr Anthony Parsons, Group Manager, BER Program Management

Mr Stewart Thomas, Branch Manager, Building the Education Revolution

**Outcome 3—Tertiary, Skills and International**

Mr Robert Griew, Associate Secretary

Mr David de Carvalho, Group Manager, Higher Education Group

Dr James Hart, Acting Group Manager, Higher Education Group

Mr Mark Warburton, Branch Manager, Higher Education Group

Dr Andrew Taylor, Branch Manager, Higher Education Group

Ms Susan Hewlett, Branch Manager, Higher Education Group

Mr Terry Bowditch, Acting Branch Manager, Higher Education Group

Ms Lisa Schofield, Acting Branch Manager, Higher Education Group

Mr Colin Walters, Group Manager, International

Mr Jason Coutts, Branch Manager, International

Mr Vipin Mahajan, Branch Manager, International

Mr Di Weddell, Branch Manager, International

Ms Saloni Varma, Acting Branch Manager, International

Mr Daniel Owen, Acting Group Manager, Skills

Ms Janice Anderson, Acting Branch Manager, Skills

Ms Borka Buseska, Acting Branch Manager, Skills

Ms Kathryn Shugg, Branch Manager, Skills

Mr Neil McAuslan, Branch Manager, Skills

Ms Julie Yeend, Branch Manager, Skills

Dr Melissa McEwen, Acting Branch Manager, Skills

Ms Mary-Anne Sakkara, Acting Group Manager, Skills Reform

Ms Chris Woodgate, Branch Manager, Skills Reform

Mr Martin Graham, Branch Manager, Skills Reform

Ms Linda White, Branch Manager, Skills Reform

Ms Maryann Quagliata, Branch Manager, Skills Reform

Ms Christiana Knapman, Acting Branch Manager, Skills Reform

Ms Kate Driver, Branch Manager, Cluster Coordination

Mr Robin Shreeve, Chief Executive Officer, Skills Australia

Ms Sue Beitz, Head of Secretariat, Skills Australia

**Outcome 4—Employment**

Ms Sandra Parker, Deputy Secretary

Mr Anthony Parsons, Group Manager, Employment Services Management, Procurement

Mr Stephen Moore, Group Manager, Employment Systems

Ms Marsha Milliken, Group Manager, Income Support

Mr David Pattie, Branch Manager, Income Support

Mr Derek Stiller, Branch Manager, Income Support

Ms Margaret McKinnon, Group Manager, Job Services Australia

Ms Fiona Buffinton, Group Manager, Specialist Employment Services

Ms Sharon Stuart, Branch Manager, Specialist Employment Services

Ms Suzie Northcott, Branch Manager, Specialist Employment Services

Ms Margaret Kidd, Group Manager, Labour Market Strategy

Mr John Kovacic, Deputy Secretary

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

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

Ms Rose Verspaandonk, Branch Manager, Social Policy and Economic Strategy

Mr Scott Matheson, Branch Manager, Social Policy and Economic Strategy

Ms Joanne Skinner, Acting Branch Manager, Social Policy and Economic Strategy

**Outcome 5—Workplace Relations and Economic Strategy**

Mr John Kovacic, Deputy Secretary

Ms Michelle Baxter, Group Manager, Workplace Relations Implementation and Safety

Ms Flora Carapellucci, Branch Manager, Workplace Relations Implementation and Safety

Mr Peter Cully, Branch Manager, Workplace Relations Implementation and Safety

Ms Sarah Sullivan, Acting Branch Manager, Workplace Relations Implementation and Safety

Mr Jeff Willing, Branch Manager, Workplace Relations Implementation and Safety

Ms Kay Millican, Acting Branch Manager, Workplace Relations Implementation and Safety

Mr Jeremy O'Sullivan, Chief Counsel, Workplace Relations Legal

Mr Henry Lis, Branch Manager, Workplace Relations Legal

Mr David Bohn, Branch Manager, Workplace Relations Legal

Mr David Bell, Acting Branch Manager, Workplace Relations Legal

Ms Susan Devereux, Group Manager, Workplace Relations Policy

Ms Colette Shelley, Branch Manager, Workplace Relations Policy

Ms Shannon Madden, Branch Manager, Workplace Relations Policy



Ms Michelle Boundy, Acting Branch Manager, Workplace Relations Policy

Ms Yvonne Dunlop, Acting Branch Manager, Workplace Relations Policy

**Safe Work Australia**

Mr Rex Hoy, Chief Executive Officer

Mr Drew Wagner, Branch Manager, Corporate Services Branch

Ms Amanda Grey, Branch Manager, Strategic Policy Branch

Mr Wayne Creaser, Branch Manager, Work Health and Safety Branch

Ms Justine Ross, Branch Manager, Harmonisation and Legal Services Branch

Mr Andrew Craig, Chief Financial Officer

**Fair Work Ombudsman**

Mr Nicholas Wilson, Fair Work Ombudsman

Mr Steven Ronson, Executive Director, Regional Services and Targeting

Mr Karsten Lehn, Executive Director, Complex Investigations and Innovation

Mr Alfred Bongi, Group Manager Customer Service

Ms Janine Webster, Chief Counsel

Mr Mark Scully, Group Manager Nexus Development

Ms Leanne Fry, Executive Director, Workplace Relations Communications and Solutions

Mr Tom O'Shea, Executive Director, Workplace Relations Policy and Education

**Fair Work Australia**

The Hon. Geoff Giudice, President

Ms Bernadette O'Neill, Acting General Manager

Mr Terry Nassios, Director

Ms Pauline Burke, Director

Mr Brendan Hower, Director

Mr Dennis Mihelyi, Director

**Comcare**

Mr Paul O'Connor, Chief Executive Officer

Mr Steve Kibble, Deputy Chief Executive Officer

**Office of the Australian Building and Construction Commissioner**

Mr Leigh Johns, Commissioner

Mr Brian Corney, Deputy Commissioner (Legal)

Mr Clifford Pettit, Executive Director, Legal (Central/West)

Ms Heather Hausler, Group Manager, Corporate Services and Governance

Mr John Casey, Chief Financial Officer

Mr Michael Campbell, Deputy Commissioner (Field Operations)

**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, General Manager

**Australian Institute for Teaching and School Leadership**

Ms Margery Evans, Chief Executive Officer

Ms Keren Caple, General Manager, Corporate and Standards

Mr Anthony Mackay, Chair

Ms Madeleine Scully, Company Secretary

**Tertiary Education Quality Standards Agency**

Dr Carol Nicoll, Chief Commissioner

Mr Ian Hawke, Commissioner

**Australian Skills Quality Authority**

Mr Christopher Robinson, Chief Commissioner

Ms Dianne Orr, Commissioner

Mr Justin Napier, National Manager, Corporate

**Australian Learning and Teaching Council**

Mr Indhi Emmanuel, General Manager, Corporate Services and Company Secretary

**Committee met at 09:00**

**CHAIR (Senator Marshall):** I open this public hearing of the Senate Education, Employment and Workplace Relations Legislation Committee. The Senate has referred to the committee particulars of proposed expenditure for the 2011-12 and related documents for the Education, Employment and Workplace Relations portfolio. The committee has set Friday, 9 December 2011 as the date by which answers to questions on notice are to be returned. Under standing order 27 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. 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)

### **Fair Work Australia**

[09:01]

**CHAIR:** The committee will begin today's proceedings with a discussion of Fair Work Australia. I welcome the Minister for Tertiary Education, Skills, Jobs and Workplace

Relations, Senator the Hon. Chris Evans, and representatives from Fair Work Australia. Minister, would you like to make an opening statement?

**Senator Chris Evans:** No, thank you.

**CHAIR:** If nobody else wishes to make an opening statement, we will now move to questions.

**Senator ABETZ:** First of all, Ms O'Neill, I understand you are the Acting General Manager of Fair Work Australia; is that correct?

**Ms O'Neill:** Yes, from 8 September.

**Senator ABETZ:** Congratulations on that.

**Senator Chris Evans:** I suspect she is not so sure. She will make an assessment of that after estimates.

**Senator ABETZ:** How was that appointment made? How was it authorised? How was it undertaken?

**Ms O'Neill:** That is provided under the Fair Work Act. The minister can make an acting appointment.

**Senator ABETZ:** In that role as acting general manager you can fulfil all the duties of the general manager?

**Ms O'Neill:** To the best of my ability.

**Senator ABETZ:** We will not go there. I am sure you can. What I am looking at is all the technical issues. Thank you for that. I thank the minister's office for providing me with that information in correspondence last night. That was appreciated.

Mr Giudice, I refer to a speech you delivered on 7 October to the Australian Labour and Employment Relations Association national conference in Western Australia. What research has Fair Work Australia undertaken in relation to productivity issues?

**Mr Giudice:** For the purpose of that speech I asked the Minimum Wages and Research Branch to prepare some charts on productivity. Those charts appear in the speech.

**Senator ABETZ:** So that was the basis of the research; it was internal research within Fair Work Australia?

**Mr Giudice:** Yes.

**Senator ABETZ:** So Fair Work Australia has not commissioned any outside research in relation to the link between what might be modern awards and productivity or how the legislation is operating and productivity?

**Mr Giudice:** No, not to my knowledge. I do not think any has been.

**Senator ABETZ:** I accept that it would be to your knowledge. I am sure that, if anything comes up that is contrary to that, we will be notified. You are reported as saying in your speech:

It would be difficult on this evidence to establish any direct link between the type of industrial regulation and productivity growth.

**Mr Giudice:** Yes, that is what I said.

**Senator ABETZ:** Are you therefore saying that the workplace relations regime and the way it is regulated do not bear any direct link to productivity growth?

**Mr Giudice:** The speech was fairly carefully constructed. I, as you would expect, weighed my words fairly carefully and I do not think it would be productive for me to now start paraphrasing. I do not have the speech in front of me, but I would not like to comment beyond the carefully prepared—

**Senator ABETZ:** I do, and I am more than happy to give a copy of it back to you.

**Mr Giudice:** Yes, if you wish to. I will simply be reading it back to you, Senator.

**Senator ABETZ:** In that case that would be singularly unhelpful. What I do not want is mere repetition but an explanation as to whether or not it is the considered view of the head of Fair Work Australia that it is difficult to establish any direct link between the type of industrial regulation and productivity growth.

**Mr Giudice:** I do not wish to elaborate on or paraphrase what I said. You would have to read the entire speech to get the full context of my comments.

**Senator ABETZ:** I have done that. That particular statement has been reported and we have had views from the Productivity Commission and the Australian Building and Construction Commissioner. Indeed, the Fair Work Act itself tells us that part and parcel of this regime is about driving productivity, and yet we are told by the head of this organisation that it is difficult to establish any direct link between the type of industrial regulation and productivity growth.

**Mr Giudice:** That is a negative statement that you quoted. The import of the speech is really quite simple. It is that there is an ongoing productivity growth issue in this country. My suggestion was that somebody should have a good hard look at it on an independent or bipartisan non-political basis. That is really the start and end of the point. There are a number of explanations for why productivity is low. There are different views about it; different political perspectives on it. All I simply said was this is an issue, a matter of high public policy, which is very important for the future of the nation and somebody should look at it on a bipartisan basis. That is really what it amounts to, Senator.

**Senator ABETZ:** And within that speech—I will not be able to locate it immediately—you make the point that other people have made, which is a fair point, that when you have got a lot of new investment the return on that capital will skew figures in relation to productivity. But the suggestion that it is difficult to establish any direct link between industrial regulation and productivity growth does seem to fly in the face of what nearly everybody else in this space is saying, that there is in fact a direct link. Is it the only link? Of course not. But is there a direct link? Yes, there is, and we can go through any number of professors, the Productivity Commission, the ABCC et cetera and, indeed, the act you administer asserts that it is part and parcel of the objectives of the regime to help drive productivity. Yet the head of the organisation is telling the Australian people, if I am reading this correctly, that there is in fact no direct link between industrial regulation and productivity growth.

**Mr Giudice:** I think you would have to read the entire speech, Senator.

**Senator ABETZ:** I have, a number of times, to see if I could somehow excuse that statement. With respect, I cannot. I find great difficulty with it. Given that you are in charge

of running Fair Work Australia, part and parcel of which is to administer fairness but also to help drive the productivity of the nation, I must say it was a statement that did concern me.

**Mr Giudice:** I note your view.

**Senator ABETZ:** Have you raised with the minister your view that it is difficult to establish any direct link between industrial regulation and productivity growth?

**Mr Giudice:** I have always regarded my discussions with ministers as confidential. That answer should not be taken as an implication that I have had such a discussion with the minister. All I am saying is that I do not discuss in public what I discuss with the minister.

**Senator Chris Evans:** I was present for the judge's speech. I spoke before him and stayed for his sessions. I am aware of his views because I listened to what was an interesting presentation. But that is it.

**Senator ABETZ:** You were told courtesy of a public presentation rather than a private discussion. Thank you for that. In the third last paragraph of the last page of your speech you say:

Can I leave you with something to consider? Without wishing to disparage—  
which is always a good start—

any of the major political interests, much of the debate about productivity seems to be based on political positioning rather than on hard analysis.

Do you stand by that comment?

**Mr Giudice:** It is my observation over quite a long time, observing the debate on productivity—yes. I am not being critical of anybody. People see things from a political perspective if they are politicians. I think it needs an independent examination. It is a very, very important issue for the future of this country.

**Senator ABETZ:** I think we all agree. It is a bit like having a tax forum root and branch but not dealing with the GST, the carbon tax or the mining tax. Here we say we need a full review of productivity of our nation, which I agree with, but then we try to carve out industrial regulation as having any direct link to productivity growth.

**Mr Giudice:** That is not what I said. I said industrial regulation is important. This is the danger of taking one sentence out of a speech.

**Senator ABETZ:** Take on notice—because you do not have the speech in front of you—whether you made a statement that industrial regulation is important to productivity growth.

**Mr Giudice:** If I recall, it is the last sentence of the paragraph you were just quoting from. It is a sentence that says something to the effect that industrial regulation should be part of that. Am I correct or incorrect?

**Senator ABETZ:** The last sentence states:

One asks the question, what will happen if that protection fails and we are fully exposed to the competitive pressures of globalised markets.

**Mr Giudice:** You will find the sentence I just quoted somewhere in that paragraph.

**Senator ABETZ:** I am still trying to—

**Senator Chris Evans:** If this issue is to be discussed, it would be appropriate if the head of Fair Work Australia, Mr Giudice, and you both have a copy of the speech; otherwise, we

are having this discussion without the officers having the benefit of the document in front of them. If we are going to have a detailed discussion of what is in the document—

**Senator ABETZ:** That is a fair comment. I do not want to take the matter much further at this stage. I assumed that, having given a keynote address which excited some media interest—

**Mr Giudice:** I have just been handed a copy of the speech. I think the sentence I referred to is the last sentence of the previous paragraph.

**Senator ABETZ:** The last sentence of the previous paragraph states, 'The effect of industrial regulation should also be considered in this context.' But you previously said that, on the evidence, you cannot establish any direct link. Clearly your view is that, in any such independent assessment, sure you would throw it in, but it would come out on the basis of your assertion that industrial regulation does not have any direct link to productivity growth.

**Mr Giudice:** Senator, you are putting words into my mouth. I rely on what I have said in the paper.

**Senator ABETZ:** No, those words are in black and white:

It would be difficult on this evidence to establish any direct link between the type of industrial regulation and productivity growth.

That is what you said. For better or worse, it is on the record. As I said, I will move on.

**CHAIR:** We will table that speech, given that it has now been the subject of some discussion. Are you happy to have that tabled?

**Mr Giudice:** I am not sure I have a full copy. It has some charts in it.

**CHAIR:** We can organise that with someone from your department. We can then table it.

**Senator Chris Evans:** As I was there for the speech, I know that the judge used a series of slides which set out graphs of the productivity changes over the years. These were critical to the points he made in the speech. It would be useful to table both of those.

**Senator ABETZ:** I have a copy of the speech with the tables in it. If Mr Giudice can confirm that that is it, we can photocopy it or later on notice—

**Mr Giudice:** I am not sure whether Senator Abetz has given me the—

**Senator ABETZ:** Let us do it on notice.

**Mr Giudice:** It is published on our website.

**CHAIR:** I would like it to be tabled. Can someone in your office get a printed copy of what is on your website and we will table it?

**Mr Giudice:** Yes, we will do that as soon as we get back to Melbourne.

**Senator THISTLETHWAITE:** I have a couple of questions. Whilst I have not read your speech, Mr Giudice, I am of the view that it is somewhat misleading and unreliable to look at labour productivity growth over a particular period in isolation without attempting to look at other factors, such as what is going on internationally and the broader economy. I assume you have done some research and analysis of labour productivity growth figures in Australia over the recent decades. What was the trend in labour productivity growth during the period of the WorkChoices legislation?

**Mr Giudice:** I do not want to be difficult, but the paper was carefully prepared. It has a number of charts over a long period—in some cases more than 20 years. Labour productivity and multi-factor productivity are both charted. Multi-factor productivity is charted on two different bases. I do not want to paraphrase or get involved in rehearsing what was a very carefully constructed speech in which I attempted to deal with the evidence and the issues in as balanced a way as I possibly could.

**Senator THISTLETHWAITE:** Would I be right in saying that, whilst workplace and labour regulation is a factor that affects labour productivity—both labour and total factor productivity—it is just one of a number of issues that policymakers should consider when we look at policies aimed and geared towards trying to improve both total factor and labour productivity in the economy

**Mr Giudice:** It is one of a range of factors which would obviously have some impact.

**Senator SINGH:** I am aware that in the most recent annual wage decision the minimum wage panel for Fair Work Australia noted that there are differing views about measuring and assessing the needs of the low paid and that some stakeholders have called for further research and consultation in that area. Has Fair Work Australia conducted any research into that issue or does it intend to do so in the future at any point?

**Mr Giudice:** In the decision there was an indication that proposals for further research should be forwarded to Fair Work Australia within a certain period. That occurred. There was a public conference to which parties who were interested came along and put forward their research proposals, and there have been some recent developments in relation to that. It is part of the annual wage review process. It is not appropriate for me to really go into it other than to say that there are developments, they are on the website and parties have been informed of proposals for research next year and proposals in relation to the particular matter that you raised. I think there are two members of the panel who are going to conduct an inquiry and report to the full panel on that issue.

**Senator SINGH:** And when will that reporting occur?

**Mr Giudice:** I am not sure of the time frame on it, but the detail of that program is publicly available and the relevant parties are aware of the program.

**Senator SINGH:** So you are not able to elaborate on what was suggested by the input that was provided through that research with respect to low-paid workers.

**Mr Giudice:** Certainly not. That is a matter that is an issue in the annual wage review proceedings, and it would be quite wrong of me to talk in this forum about what might be a proper outcome or proper way to look at the issue.

**Senator SINGH:** I understand. I understand also that—on another subject—Fair Work Australia works with IR officials in developing countries, assisting them with developing good dispute resolution processes and procedures. I think this is great work that you do, but I think fairly little is known about it. Are you able to provide any detail about the work that Fair Work Australia does in developing countries to develop best practice workplace arrangements with institutions there and where that occurs?

**Mr Giudice:** The impetus for this sort of work is that in a number of the developing economies the IMF, World Bank and other such bodies, as a condition of aid, require or suggest that these economies should develop bodies that can deal with labour issues of one



kind or another. I know it is a very broad description. But that often involves establishing a tribunal for disputes or to deal with employee rights in those countries. Where we are asked, we provide what assistance we can. That would usually involve visits by groups from those countries. We have done quite a lot with the Cambodian Arbitration Council. A number of the members of that council simply came to Melbourne, would observe proceedings, perhaps sitting with some of the commissioners and find out how things are done. Obviously it is up to them to decide whether any of that is useful for them, but we do quite a bit of that sort of work. We have been involved with South Africa, with Cambodia and probably with a number of other countries in one way or another. But we also have quite frequent short visits from other countries. I had discussions on Monday with a group from the Philippines who were looking at minimum wage fixation in that country, and we had a useful exchange of experiences about minimum wage fixation.

**Senator SINGH:** And how is that work funded? Is that an AusAID thing or is that Fair Work Australia?

**Mr Giudice:** We generally try not to use our own funds. On some occasions there is some use of funds subject to the general manager's view, but generally we try to get aid agencies to fund it.

**Senator SINGH:** Are you able to provide the committee with a list of those countries you have had some dealings with in the most recent times?

**Mr Giudice:** I think we could probably extract that from the annual reports. We usually do have a reference to any of that sort of activity in the annual report.

**Senator SINGH:** Okay, thank you.

**Senator ABETZ:** This is possibly for Ms O'Neill or whoever is able to assist. I asked some questions on notice in relation to costs orders and was told, for example, that in unfair dismissal proceedings there have only been two instances of costs being awarded against an employer and only one where costs have been awarded against an employee. In relation to adverse action claims, no costs have been awarded anywhere at all. This is a general question, but that is the background. How much do you think the workload of Fair Work Australia might be reduced in the event that it became, if I can use the term, a 'costs jurisdiction' in the area of unfair dismissals and adverse action? Costs would follow the event. There has been a proposition that some people have put to me very strongly and others have argued against very strongly. I just want to know what, from experience, Fair Work Australia might think about whether it would reduce the workload.

**Ms O'Neill:** From my perspective, it would be mere speculation without any proper foundation, so I do not think it would be very useful to really make a comment. It has been the case that proceedings under the workplace relations legislation for decades have generally been on a no-costs basis within the tribunal.

**Senator ABETZ:** Yes, that is generally the case, and I understand that. I am trying to limit it to adverse actions and unfair dismissals. If people ran the risk of costs, would a lot of the vexatious employers and employees possibly swallow their pride or whatever and say, 'We don't defend this action' or 'We don't take this action', as a result collapsing the workload? Possibly that could be a question more for those who are engaged in the conciliation or the

pre-hearing process, but I do not know. Are Mr Nassios, Ms Burke or anybody else able to shed any light on that?

**Ms O'Neill:** I was just going to make the point that the reason I referred to the longstanding arrangements of it being a no-costs jurisdiction means that there is really no sensible benchmark or comparison that we could draw on to share any experience or insight into the impact any change might have. The other point, of course, is the exception and the circumstances in which costs are available. This includes where an application or response is frivolous or vexatious, so that circumstance is in place.

**Senator ABETZ:** Yes, but it is a fairly difficult threshold to overcome, as I understand it, given the number of dismissal claims that are litigated only to have had three cases where costs have been awarded. If you go to the Supreme Court and elsewhere, costs follow the event, which helps to focus people's minds not to be too litigious about matters and, in fact, to try to settle things as quickly as possible. So it is that added incentive. But Fair Work Australia cannot share any views on that? That is fine. I accept that.

I turn to the answer to question 1,024. The minister answered that, but I think it is from information gleaned from Fair Work Australia. There was a very helpful table in response to question 2. I just want to make sure that I am understanding it correctly.

That relates to the unfair dismissal matters that come before Fair Work Australia for the period 1 July 2010 to 30 June 2011. If there were to be an absolute bar on anybody being able to take an unfair dismissal action if they were employed in a workplace that had up to 15 people employed, we would, in rough terms, have one-quarter fewer applications—is that correct?

**Ms O'Neill:** I have not done the percentage but, as you can see, from that period of time it is 2,434.

**Senator ABETZ:** Out of the 9,700?

**Ms O'Neill:** That is right.

**Senator ABETZ:** Is that number on a headcount or full-time equivalent?

**Ms O'Neill:** The information is based on that provided by respondents to unfair dismissal applications, so it is their assessment as to the numbers. The question that is asked is: are the number of employees a headcount?

**Senator ABETZ:** Thank you very much; that is what I wanted to find out. I now think I know how to interpret that table. Can I go to the case of *Neville Mate v Southern Sydney Newspapers Distribution*, which was an appeal decision about an unfair dismissal remedy. I do not want to canvass the decision other than to ask: how is it that an unfair dismissal case is able to get all the way to an appeal when, in the appeal, we are told that the person had not been engaged for 12 months and was in a workplace of fewer than 15 individuals? Given what the Fair Work Act tells us—what I am asking is: in the application form, does the applicant have to state how long they have been employed and the size of the workplace? If not, would it potentially be a good idea for the application form to ensure that these cases are gleaned from the system prior to going all the way to an appeal? Clearly I would have thought it is a reflection on both the applicant and respondent that these issues were not argued beforehand, so there is no criticism of the fact that it ended up there, from that point of view, other than, it seems to me, that if the application form required the applicant to say how long

they have been employed in a particular workplace and the size of that workplace—employee numbers wise—one would hope that this case could have been gleaned from the system a lot earlier.

**Ms O'Neill:** The application form for unfair dismissal remedies requires the applicant to identify the commencement of their employment and their termination date. They are not asked for the number of employees, because that is often something that is perhaps not in the applicant's knowledge. The employer response to an application is where the respondent is asked to identify the number of employees.

**Senator ABETZ:** If I may interrupt, in that case, Fair Work has in place mechanisms to ensure that that should not have occurred. I am not going to look into, or even seek to canvass, how the case was handled by various parties, but in just reading the appeal decision it seemed to me somewhat bizarre that a case had got that far when you would think it was statute barred from even proceeding. However, Fair Work does have mechanisms in place that should glean it out.

**Ms O'Neill:** There are further mechanisms in place. Under the legislation, the minimum employment period for any employee is six months. It is a 12-month period where the applicant was employed by a small business. In circumstances where, on the face of the documents, there is no dispute that less than six months employment has existed, there are systems and processes in place whereby those matters are pointed out to the applicant in the first instance before any action is taken. It is pointed out that, if those dates are correct, Fair Work Australia has no jurisdiction and, if the applicant continues to pursue such an application in those circumstances, there is a risk of costs and various matters.

The situation is more complex where the period of employment is between six and 12 months because it is often the case—and I am not speaking to the case you mentioned because I am not familiar with it—that there is a disagreement between the parties as to the length of employment or the size of the employer. Where there is a dispute about that, there is obviously a question as to the jurisdiction. That may or may not be the answer in this case.

**Senator ABETZ:** I can accept that just from my reading of it. It seems that those issues were not actually in dispute. I do not seek to delay on this matter further, other than to say that for small businesses it is cold comfort when they learn about cases like this where they are promised, 'You are exempted from the unfair dismissal laws for the first 12 months if you have a workforce less than 15,' but the case goes all the way to an appeal in Fair Work Australia, despite those facts. It can become a hugely costly exercise to go all the way to appeal to be vindicated and to be told, 'Yes, that is what the law says and you should not have been taken there.' That is a matter that we possibly need to look at further. Thank you for that. Minister, with the proposed review of the Fair Work Act, are you also looking at modern awards and how they are operating? Is that going to be part of the brief or not?

**Senator Chris Evans:** We are probably best having this discussion in the period when the department is appearing.

**Senator ABETZ:** I understand that. But, if modern awards are going to be part of it, I would like to ask Fair Work Australia for their observations on how the modern awards are playing out and whether they agree that some of them may need some clarification et cetera.

**Senator Chris Evans:** In broad terms, it is a review of the act that determines a reference being finalised but the focus is on the act and the operation of the act. Events that occurred under the act were obviously part of that, but the terms of reference have not been finalised. We have not made any announcements about that. It is open to you to ask Fair Work Australia about how they view it and what is happening with the modern awards.

**Senator ABETZ:** Has Fair Work Australia received any feedback as to some confusion in the application of modern awards? For example, I refer to the Housing Industry Association media release of 18 May where we are told:

Businesses in the kitchen and bathroom industry could be covered by up to four different awards ...

They go through them. The Housing Industry Association then considers that administrative aids could assist and:

... a proper review by FWA to clarify the coverage of Awards themselves is the only answer.

Is Fair Work Australia aware of the Housing Industry Association's view in this matter?

**Ms O'Neill:** Senator, I may have to take that question on notice. Nothing comes to mind.

**Senator ABETZ:** All right—(1) whether you are aware of that, and clearly you are not, and (2) if you have to take that on—

**Ms O'Neill:** No, not personally.

**Senator ABETZ:** Yes, not personally—and, as a result, whether Fair Work Australia is giving consideration to reviewing aspects. Also in other areas of industry, not only in housing but let us say in the baking section, where I understand there are real concerns. If you are a baker working for a retail baker, as opposed to a wholesale baker doing exactly the same sort of baking work, your award says something different in relation to hours and when penalty rates kick in. It is exactly the same work other than that you happen to be a baker for a retailer as opposed to a wholesaler and some confusions arise, especially if the baker happens to be doing both wholesale and retail work. How do you classify them? If you could take that on notice—

**Senator Chris Evans:** Perhaps I could help. I have been reminded by my officers that the Fair Work (Transitional Provisions and Consequential Amendments) Act provided for a two-year review of modern awards as part of that act. Maybe the judge is better informed than me, but I think that would fall due sometime next year.

**Mr Giudice:** There is a statutory review required as soon as practicable after 1 January 2012 and anyone who is concerned about the operation of modern awards will obviously have an opportunity to put a position in relation to their area of concern.

**Senator ABETZ:** It stands to reason that if you have this wholesale change there will be some areas in modern awards that are not quite as good as one would have hoped them to be. But that will be, therefore, Mr Giudice, a separate review after 1 January 2012 from that which the department and the minister has announced—is that right?

**Mr Giudice:** I do not think there is any connection between the two. I cannot think of any.

**Senator ABETZ:** So they will be separate and conducted separately?

**Mr Giudice:** As you know, Fair Work Australia is bound by its statutory provision and we will simply carry out the review as required by the statute. Whether the Commonwealth

chooses to make submissions to any of those reviews or becomes involved in some other way is open to them but it will be a transparent process and—

**Senator ABETZ:** Do we know who will be conducting it? Will, for example, you be sitting down to take the review or—

**Mr Giudice:** That is a matter that is still under consideration and there is a further review scheduled after four years. Clearly we would like to get the two-yearly review finished before the four-yearly review is due.

**Senator ABETZ:** That is reassuring.

**Mr Giudice:** That is a semiserious comment, I can assure you. There is a lot, potentially, that could be looked at, depending on the views of the parties about the way the awards operate. So I am giving serious consideration, along with some consultation with major parties, to exactly how the review should go ahead, and in due course there will be announcements about that.

**Senator ABETZ:** But you are confident that the review will be able to start early in the new year?

**Mr Giudice:** I would not like to put a time on it, but I am conscious of the statutory requirement that it be as soon as practicable.

**Senator ABETZ:** But on the methodology for the review and the personnel for it, do you think that might be set in place prior to 1 January 2012?

**Mr Giudice:** That would be my hope, yes.

**Senator ABETZ:** I can understand that often best endeavours do not allow you to meet that which is your best hope, but that is what you are working towards but circumstances might overtake them?

**Mr Giudice:** And the views of the parties.

**Senator ABETZ:** Yes, and I accept that. Mr Giudice, Fair Work Australia made a statement, I just noticed, on 7 October 2011 which came out in Melbourne, and I think you were in Fremantle on the same day giving the workplace relations speech but, in any event, that does not matter—

**Mr Giudice:** The results of a virtual world.

**Senator ABETZ:** A statement was made in relation to the annual wage review 2011-12. Paragraph 3 informs us:

The process will include:

- the identification of resource materials;
- brief written submissions by interested parties; ...

What is meant by the term 'interested parties', and that term is also used in paragraph 4. Are they what we might crudely describe as 'all the normal suspects' or will individuals be able to make submission as well? Is it up to anybody who is generally interested?

**Mr Giudice:** As you know I do not normally canvass statements and decisions in this forum.

**Senator ABETZ:** This is not a decision. This is a statement to the public saying that the process will include brief written submissions by interested parties. If I am Joe Bloggs, punter

on the street, saying, 'Hey, Mr Giudice, I'm interested,' will I have the right to make a submission? That is what I am asking. What does the term 'interested parties' mean?

**Mr Giudice:** What is the heading on that statement, Senator?

**Senator ABETZ:** It is the Fair Work Australia Statement Annual Wage Review. It was by yourself, Senior Deputy President Watson, Senior Deputy President Harrison, Commissioner Hampton, Mr Vines, Professor Richardson and Mr Dwyer. It was dated Melbourne, 7 October 2011. I do not think it was a judicial determination or anything of that nature, but was a statement about the minimum wage panel.

**Mr Giudice:** I must say that I am slightly at a loss, Senator.

**Senator ABETZ:** You were in the other part of the continent, and that is understood. If you could take it on notice.

**Mr Giudice:** Yes, that is probably a good idea.

**Senator Chris Evans:** Senator, can I try to be helpful? I have been advised that in the Fair Work Act clause 289 subclause (1) it says that Fair Work Australia must in relation to each annual wage review ensure that all persons and bodies have a reasonable opportunity to make written submissions to Fair Work Australia for consideration and review. I think the key phrase is 'all persons and bodies' as defined.

**Senator ABETZ:** How is 'persons' defined in the act? I dare say that would include my Joe Bloggs.

**Senator Chris Evans:** That would be, I would have thought, on a normal reading, but we can have a look at the definitions as to whether persons and bodies are defined. It seems to me that implies a fairly broad—

**Senator ABETZ:** Minister, that is what I hope it would be. Given that we now have that, my concern is that the statement publicly made by Fair Work Australia seems to limit it by referring to interested parties. Some people may read that as being narrower than the legislative description. I will leave that.

**Senator Chris Evans:** I am not sure I agree with your interpretation, but I am certain that Fair Work Australia would comply with the provisions of the Fair Work Act.

**Mr Giudice:** I am not aware of anybody who has ever sought to make a submission to a proceeding of that kind who has had the submission rejected.

**Senator ABETZ:** Good. That means that you have been complying with it. It is just the language and the statement of 'interested parties' that people may well read in another way and not as inclusive as that which the legislation does.

Can I move on to the answer to question 0238 from the last time we met? I asked about the number of agreements that are dealt with within seven days and we were told in the answer, that for the period of 1 July 2010 to 31 May 2011, 12 per cent of applications for the approval of a single enterprise agreement were determined within seven days. The Prime Minister, when she was shadow minister, made the brave assertion that Fair Work Australia would be dealing with these enterprise agreements with a turnaround of seven days. That was, if you like, a benchmark set by her. We are only achieving 12 per cent according to that benchmark. I assume Fair Work Australia will say that they use their best endeavours—that they try to get these through as quickly as possible. So it then begs the questions: was this promise to have

the turnaround in seven days a reasonable promise—a reasonable proposition? And what is the average time taken for these enterprise agreements to be determined?

There are a number of questions there and I am being met by silence so let us go through them seriatim. One, what is the average—

**Senator Chris Evans:** Can I just say that the first parts of the question are clearly not questions the officers can answer because they go to questions of opinion, but they can certainly help you with questions about the experience under the Fair Work Act with these things. I am sure Ms O'Neill will now do her best to give you some figures that might go to those issues—if she has them.

**Senator ABETZ:** Eighty-eight per cent are not meeting the benchmark that the former shadow minister had aspired that Fair Work Australia would achieve. That is a fairly substantial shortfall so it does beg the question whether it was a reasonable aspiration or not, and therefore the average figure would be very helpful for us.

**Senator Chris Evans:** Can I just make the point that I am not sure your reference to an aspiration of a shadow minister is all that relevant? I am sure that as a shadow minister you have all sorts of aspirations which probably do not trouble the work of the committee. The objectives of the Fair Work Act are obviously spelled out in the second reading speech and in any comments that the Prime Minister would have made as the relevant minister then. I am happy for the officers to actually give you the facts as to how the Fair Work Act is operating, and that seems to me to be the issue at heart.

**Ms O'Neill:** The KPI for the agreement approval time that is part of the budget papers and reported on in the annual report is a median of 32 days. The experience for the 2010-2011 year was a median of 21 days from lodgement to approval.

**Senator ABETZ:** Thank you for that and, if I might say, 21 days seems to be a relatively reasonable figure to me—no criticism of Fair Work Australia. But of course it is another example of a huge overpromise with no capacity to deliver by the former minister for industrial relations, who went on to become Prime Minister and is who following suit in a whole host of other areas. Can I ask, is Fair Work Australia spending some money on moving the CEO's office?

**Ms O'Neill:** There are some works underway at the moment to build a general manager's office.

**Senator ABETZ:** Who authorised that?

**Ms O'Neill:** I did. There have been plans for some time to reconfigure several of the floors of Fair Work Australia, for a range of reasons—space has not been used perhaps most efficiently and areas are split over different floors et cetera. The plans included the establishment of the general manager's office on a particular floor and we have just advanced with that part of the overall plan at the moment.

**Senator ABETZ:** Where was Mr Lee's office?

**Ms O'Neill:** Mr Lee's office was on level 8.

**Senator ABETZ:** What was wrong with it?

**Ms O'Neill:** As I understand it, it was always intended to be a temporary arrangement and it was always intended, when building works were to be undertaken, for the general manager's office to be relocated. As I have indicated, that part of the process—

**Senator ABETZ:** What is the cost of that to the Australian taxpayer?

**Ms O'Neill:** I will take the detail of that on notice, if I may.

**Senator ABETZ:** All right. It has been suggested to me that it might be \$50,000, but you can take that on notice. They tell me Fair Work Australia is into twittering. Is that correct?

**Ms O'Neill:** No.

**CHAIR:** What about tweeting?

**Senator ABETZ:** Is it different?

**Ms O'Neill:** No bird noises of any variety.

**Senator ABETZ:** No bird noises of any variety. The *Australian Financial Review* reported on 2 September:

All a-twitter Here's a tweet from Fair Work Australia sent last Friday, after a hectic week of news coverage of the Craig Thomson affair: 'We are currently expecting higher than average call volumes and you may have to wait to speak to a Fair Work adviser: Call centre: 5 minutes, Live Chat: 35 minutes, Email: 10 business days,' it said. Since then, it can only have become harder for FWA, which has remained in the news.

So nobody knows anything about this?

**Ms O'Neill:** I will take it on notice, but I suspect that it is a reference to the Fair Work Ombudsman rather than Fair Work Australia.

**Senator ABETZ:** So why would the Ombudsman have had a lot of extra work as a result of the Thomson case? That is for Verona Burgess, the journalist, to answer for us; not Fair Work Australia.

**Senator Chris Evans:** The Fair Work Ombudsman will appear for us later, so you can ask the question there. Ms O'Neill's evidence is that Fair Work Australia does not tweet, which I think is a very good—

**Senator ABETZ:** Does not tweet or twitter.

**Senator Chris Evans:** Tweet or twitter—whatever they are—but obviously if that is not correct and someone has been doing it semi-officially, she will correct the record.

**Senator ABETZ:** In question on notice 0243 from last time, I asked about what information could be gleaned in relation to compensation for unfair dismissals, and I was told:

Fair Work Australia's case management system contains data as to whether a general protections application is resolved or not resolved ... Fair Work Australia's case management system does not contain data as to how the application may have been resolved.

Did Fair Work Australia or its predecessor collect such data previously?

**Ms O'Neill:** The question you have just referred to as 243, is that right?

**Senator ABETZ:** Yes, that is right.

**Ms O'Neill:** The heading of that is 'Payment of compensation for unfair dismissals', but when the answer for that was prepared and the *Hansard* was rechecked we interpreted it as a



question in relation to adverse action applications, and it was one of series of questions that you asked. If we have misinterpreted that, we can take that on notice, but—

**Senator ABETZ:** These things happen. I thought that with unfair dismissals we previously had been given that information.

**Senator Chris Evans:** That is correct. I thought you went through that at the hearing. My recollection is that we went through the compensation amounts for unfair dismissal at the hearing which is probably why this was interpreted as being about something else.

**Senator ABETZ:** Mr Lee then said, 'That would be very helpful.' Please provide me on notice with updated figures in relation to unfair dismissals and that we do not collect data for adverse actions, to make it clear. If we can glean it for unfair dismissals, why can't we do so for adverse actions?

**Ms O'Neill:** The answer really is the information in respect of unfair dismissals is in place because, as we interpret it, the general manager is required to report on matters including the amount of compensation as part of the three-year report on the operation of the unfair dismissal system, so as a direct consequence of those reporting arrangements. In relation to adverse actions, it would be quite onerous to adopt the same approach. It would involve reconfiguring the case management system, training all of the staff and the ongoing administrative work of entering the data.

**Senator ABETZ:** Albeit, with respect, not too difficult, I would have thought. It would not take much time. Are you telling me that would be a policy decision for government to make? You are collecting the information for unfair dismissals because of the review, is that correct?

**Ms O'Neill:** Yes, the reason we are collecting the information in respect of unfair dismissals is the general manager's reporting requirements.

**Senator ABETZ:** Not review, reporting requirements—thank you.

**Ms O'Neill:** On whether it is a policy question or some other kind, I think there was some debate between you and the minister last time about how to characterise it. I will refer to what I said then.

**Senator ABETZ:** Please remind me where the reporting requirement emanates from. Was it something Fair Work Australia decided for itself would be a good thing to do? Is it a ministerial direction? Is it in the legislation?

**Ms O'Neill:** It is in the legislation. My recollection is that it is in the Fair Work (Transitional and Consequential Amendments) Act.

**Senator ABETZ:** If we were to ask Fair Work Australia to do it for adverse actions as it does for unfair dismissals, it is doable, but you would seek a direction to do so because undoubtedly it is resource intensive?

**Ms O'Neill:** We do not have any plans to start collecting that information of our own volition.

**Senator ABETZ:** Is it correct that, in relation to unfair dismissals, the review is to be given to the minister by no later than 30 June next year?

**Ms O'Neill:** No. I will correct the record if I am wrong, but it is a requirement to report on the first three years of operation of the unfair dismissal system and to provide the report as

soon as practicable after the conclusion of that period. The three-year period will take until 30 June 2012, and so the report will be completed and provided after that date.

**Senator ABETZ:** Sorry, six months after 30 June 2012—my apologies—but no later than six months.

**Ms O'Neill:** That is right. No later than 30 December 2012.

**Senator ABETZ:** Yes, as Mr Tim Lee wrote to the *Australian Financial Review* on 29 August.

**Senator RONALDSON:** Ms O'Neill, welcome. I have a couple of initial questions. I presume it is business as usual in the role of the general manager since you have taken over from Mr Lee?

**Ms O'Neill:** In broad terms, yes.

**Senator RONALDSON:** I confirm with you that Mr Lee told us at last estimates:

I am, at the end of the day, accountable for what happens or does not happen at the conclusion of the investigation.

I take it from that that you are involved in both the ongoing conduct and the outcome of the HSU inquiry in your role?

**Ms O'Neill:** The same position exists. As Acting General Manager, I am ultimately responsible for the outcome of the investigations and any action that is to be taken if contraventions are found.

**Senator RONALDSON:** But as General Manager you are involved in the ongoing conduct of the investigation and, presumably, the outcome of the inquiry as well?

**Ms O'Neill:** In relation to the outcome, but the investigations themselves have been delegated to Mr Nassios, who is responsible for the conduct on a day-to-day basis of the investigations. So I am not involved in that day-to-day work. I am responsible more for ensuring that sufficient resources are in place, timelines are in place and the matter is being done as quickly as possible.

**Senator RONALDSON:** But for the outcome of the inquiry you are?

**Ms O'Neill:** That is right.

**Senator RONALDSON:** Minister, on that basis, can I ask you why, when there was a discussion about Mr Lee moving from general manager to commissioner, one of your spokespeople indicated that Mr Lee, as Fair Work Commissioner, would have:

... no impact on either the ongoing conduct or the outcome of the inquiry.

We have heard from Ms O'Neill today that the general manager will have an input into the outcome of the inquiry, so why would your representative be making those comments, and was it because of adverse publicity in relation to Mr Lee no longer being required to attend the Senate estimates?

**Senator Chris Evans:** I think there were some claims made in the media about the impact of Mr Lee's employment success and his being appointed Commissioner of Fair Work. No doubt my office was asked for some comment on that. I do not remember the particulars and I cannot verify the accuracy of the report, but in general terms that reflects what Ms O'Neill just told you, which is that the statutory obligations of the Fair Work manager remain, and the

occupant of that job is responsible for the overall management. The report, as I understand it, is then handed to the manager of Fair Work for action under the act. So the observation is that those processes will continue, whoever is in the role.

**Senator RONALDSON:** Can you confirm for me, Ms O'Neill, that Mr Lee has taken a pay cut to go from the general manager position to a commissioner position? I can tell you that the package is \$336,860 for the General Manager of Fair Work, whereas a commissioner gets \$316,650. Does that strike you as being unusual?

**Ms O'Neill:** The president may have a comment to make but the pay and conditions for both the general manager at Fair Work Australia and members of the tribunal are set by the Remuneration Tribunal and are all publicly available. I cannot—

**Senator RONALDSON:** Does it strike you as unusual that someone would actually take a pay cut to go from the general manager's job to the commissioner's job?

**CHAIR:** You cannot ask—

**Senator Chris Evans:** Senator, Ms O'Neill: the chairman is intervening to make the point that this is a question of opinion and speculation and not something that Ms O'Neill ought to respond to. All I can say, is that there seems to be an uncommonly healthy interest in the appointment to the commission and we always attract a wide field of candidates. I think the nature of the work and the status of the job seem to make it one where we attract a lot of interest and a lot of applications. Mr Lee obviously decided that it was an appropriate career move, but that was a decision for him.

**Senator RONALDSON:** Thank you very much for that. Of course if someone were to suggest that this was just adding further weight to the desire of Mr Lee to get away from the Senate estimates process and that he was prepared to take a pay cut, I presume you would be horrified at that allegation.

**CHAIR:** That is not a question you could put to anyone.

**Senator RONALDSON:** That is probably a comment, and I should apologise.

**CHAIR:** Yes.

**Senator RONALDSON:** I see there is some head shaking going on, and I am sorry if it has upset someone sitting behind you, Minister, but any way..

**Senator Chris Evans:** I regard it as cheap grandstanding by an opposition senator, myself.

**Senator RONALDSON:** I will continue to do it, despite your concern.

**Senator Chris Evans:** We fully expected a show today. I am glad it has started.

**Senator BILYK:** Your side often say how many of them have taken pay cuts to be senators.

**Senator RONALDSON:** Oh, dearie me!

You were talking about a point—and there was a full process in relation to Mr Lee's position as a Fair Work commissioner—can you just go through that process please? When the position was advertised, how many applicants there were—

**Senator Chris Evans:** Those are questions for the department, I think.

**Ms O'Neill:** We have had no involvement.

**Senator Chris Evans:** Those arrangements are run by my department, so officers will be available—

**Senator RONALDSON:** Can I ask Ms O'Neill then, please: was there a selection process for the Fair Work commissioner?

**Ms O'Neill:** It is not a process that Fair Work Australia manages or is involved in other than that under the legislation the president is required to be consulted prior to the making of any appointments.

**Senator RONALDSON:** Can I ask the president what the process involved in the appointment of one of your commissioners was?

**Mr Giudice:** I understand it is basically a government process. It is a government appointment, and there is a requirement for some consultation with me in relation to the potential appointees. So my view is sought, but it is—

**Senator RONALDSON:** So the government conducts the appointment of commissioners, and Fair Work Australia has no involvement in the selection process at all?

**Ms O'Neill:** That is right.

**Mr Giudice:** That is the way it has always been.

**Senator RONALDSON:** When you say 'it has always been', it has not been going for long, has it?

**Senator Chris Evans:** The previous legislation was the same, as I understand.

**Mr Giudice:** The system has been going for more than 100 years.

**Senator RONALDSON:** Can I ask you, please, about Mr Lee's appointment as general manager? I presume that Fair Work Australia had some involvement in that, did they?

**Senator Chris Evans:** His appointment earlier as—

**Senator RONALDSON:** General manager.

**Ms O'Neill:** Obviously I was not involved, but I do not believe so. Under the legislation it is similar; it is a government process, a government appointment.

**Senator Chris Evans:** We are very happy to answer, but these questions should be directed to the department. The department runs and administers the selection processes—just a statement of fact.

**Senator RONALDSON:** You are a minister at the table—

**Senator Chris Evans:** Fair Work Australia are appearing before the committee.

**Senator RONALDSON:** Are you telling me that Fair Work Australia did not conduct its own appointment of a general manager? You are telling this committee that Mr Lee was just appointed by the government with no pre selection process at all?

**Senator Chris Evans:** No, I am not telling you that. I am telling you that, at the moment, Fair Work Australia are before the committee for questioning. And I am advising you, as Fair Work Australia have, that the selection processes for the officers you have referred to are conducted by my department as, as I understand it, they have been traditionally under various guises of legislation. For instance, commissioners are a cabinet appointment but the processes are run by the department in terms of the selections.

It is appropriate for you to ask questions about that, but that is not in this part of the program.

**Senator RONALDSON:** So under the predecessor the general manager was appointed by the government—is that right? Is that what you are telling me—that Mr Lee and all his predecessors in that role were appointed by the government with no involvement of IRC? Obviously there has been only one since Fair Work.

**Senator Chris Evans:** Mr Chairman, I think we ought to deal with these questions when the relevant officers are at the table. I personally was not minister. I do not have knowledge of those particular processes. I am happy for officers to answer questions about them, but the relevant officers are not before the committee.

**CHAIR:** No, I understand the answer to the question. I think what Senator Ronaldson is now doing is just asking what involvement, if any, there has been of Fair Work Australia. I think the answer is: none apart from the consultation process that Justice Giudice referred to. If that is the answer, you should come back and ask questions of the officers of the department on the process matter.

**Senator RONALDSON:** Ms O'Neill, were you appointed by the government or was there a selection process for you? I think you are acting general manager—is that right?

**Ms O'Neill:** Yes. I was appointed by the minister.

**Senator RONALDSON:** By the minister?

**CHAIR:** Yes, and we have had questions to that effect already this morning. Senator Abetz asked a series of questions around it this morning.

**Senator RONALDSON:** Okay, so he asked that question as well. How far did Senator Abetz go? Were you approached to apply—

**CHAIR:** I am happy for you to do it again if you like, because it was a straightforward answer. But, again, if we are going to go into details about the selection process then it is best done by the department which is responsible for it.

**Senator RONALDSON:** Ms O'Neill, were you approached to apply for the job? Did the minister approach you? Was there an external agency that approached you? How were you approached?

**Ms O'Neill:** I am not aware of the process that the department or the minister undertook in making the decision. I was simply asked whether I would be prepared to take on the role if I were appointed.

**Senator RONALDSON:** And who asked you that?

**Ms O'Neill:** The department.

**Senator RONALDSON:** Was it your understanding that that was via the minister's office?

**Ms O'Neill:** No, I did not have any understanding other than the question I was asked.

**Senator Chris Evans:** Senator, just to be clear, this is not run by the minister's office. It is run by the department. We are happy to answer questions about it. The sign-off on the appointment—the formal approval—comes to me as minister, but, as I say, Ms O'Neill can answer questions in her capacity for Fair Work Australia but the appointments processes are

run by the department. We are going to have questions about that, which is perfectly appropriate, but we have to deal with it when the department are at the table.

**Senator RONALDSON:** Were you provided with a shortlist, Minister?

**Senator Chris Evans:** My recollection is that I was presented with a recommendation, but I will check that.

**Senator RONALDSON:** Did you ask how many people had been asked to apply for this and what the selection process was to satisfy yourself that it was open and transparent and that there had been a significant field of candidates that might be available to you?

**Senator Chris Evans:** I think I asked my staff to just clarify a couple of matters when the submission came before me, but I was not involved in the process. I was asked to approve a submission appointing Ms O'Neill as acting manager. But, as I say, when the department comes before the committee I am happy to go through those things and make sure that my recollection is correct.

**Senator RONALDSON:** Mr Nassios, this is to you now: are you still intending to complete your investigation in relation to the HSU Craig Thomson matter by the end of the year?

**Ms O'Neill:** Senator, if I could just take that question in the first instance—

**Senator RONALDSON:** You are not involved in the investigation, are you? You told me that before, so Mr Nassios can probably answer that—

**CHAIR:** No, if—

**Senator RONALDSON:** You cannot have it both ways.

**CHAIR:** Ms O'Neill is the general manager and if she is seeking to answer the question then she will. Don't you sit there and pretend that you have a right to pick which officers are going to answer the questions.

**Senator RONALDSON:** Sorry?

**CHAIR:** The most appropriate officer at the table will be the one that determines the answer to your question, Senator Ronaldson, so just relax.

**Senator RONALDSON:** I am relaxed. You are the one who is getting a bit uppity.

**CHAIR:** I am fully aware of the show that is about to begin, so you just relax, and we will act appropriately.

**Senator RONALDSON:** All right. Let us hear what Ms O'Neill has to say about it. I will be interested to hear it.

**CHAIR:** We will make sure that all the questions that you want to ask will be answered.

**Senator RONALDSON:** Terrific.

**CHAIR:** But we will do it in a proper way.

**Senator RONALDSON:** Thank you.

**Ms O'Neill:** The first point I want to make is that the change in general manager from Mr Lee to me as acting general manager has had no delaying impact at all on the current investigations. As I indicated before, the delegate has been at all times and continues to be Mr Nassios, who is responsible for the conduct of the investigations. Since my appointment as

Acting General Manager, I have taken steps to ascertain whether Mr Nassios remains confident in his comment in estimates in May that he anticipated that his investigations would be completed towards the end of the year. Mr Nassios has advised me that he still expects to complete his investigations by the end of this year. I can advise the committee that project timelines are in place and the investigations are on track for Mr Nassios to provide the general manager with the outcome of his investigations by the end of the year.

**Senator RONALDSON:** Mr Nassios, could you advise me whether the report of the inquiry will be made public?

**Ms O'Neill:** Again, I will take that question, for two reasons: firstly, that is not a decision for Mr Nassios to make.

**Senator RONALDSON:** I will ask you then. If you say you are the decision maker, will you be making the report of that inquiry public?

**Ms O'Neill:** No decision has been made about that at this stage and it would be premature to make any such statement at this point.

**Senator RONALDSON:** Why? Will it depend on the outcome whether you release it or not?

**Ms O'Neill:** No, of course not.

**Senator RONALDSON:** What is going to be the determining factor?

**CHAIR:** If you wait, Ms O'Neill is trying to answer your question.

**Ms O'Neill:** The delegate, Mr Nassios, will provide the general manager with a report as to the outcome of the investigations. That is only one step in the process. It is then up to the general manager to make a decision, if contraventions are found, as to what action to take as a result. The purpose of that report is to inform the general manager and to assist in making that decision. Until the general manager sees that report, it is not appropriate to decide whether or not to make it public.

**Senator RONALDSON:** Can you either give me the details or take on notice how many staff have been involved in the inquiry, the names of the staff members who worked on the inquiry and the dates on which each staff member worked on the inquiry? If you have not got the information now, can you take the question on notice? Can you advise me whether anyone from the Prime Minister's office or from any minister's offices have contacted Fair Work Australia inquiring into the investigation of Mr Thomson and the HSU? In the Prime Minister's case, since she became Prime Minister, has there been any contact?

**Ms O'Neill:** I will take the first question you asked about the resources on notice.

**CHAIR:** I am sure Senator Ronaldson is not seeking the names of clerical staff that have been involved. He is looking primarily for investigative staff.

**Senator RONALDSON:** Investigative staff, yes.

**Senator Chris Evans:** I will make the general point, too, that it is a longstanding tradition here that we do not ask for the names of more junior staff not appearing before the committee. I am happy for the information to be provided, but it might be 'Mr A' or 'Ms B'. If you wanted to, you could get the names privately.

**CHAIR:** The general application is that people who are in a managerial role can be identified but other people are generally identified by their position.

**Senator Chris Evans:** If you are unhappy with that approach, I am happy for you to contact me privately if you want to identify individuals.

**Senator RONALDSON:** In relation to the contact by the Prime Minister's office or other ministers' offices, has there been any contact?

**Ms O'Neill:** Senator, I might refer you to question on notice No. 890-10 whereby Fair Work Australia reported that on 8 April 2009 it is understood that the industrial registrar at the time communicated with the Deputy Prime Minister's office advising that inquiries under section 330 had been commenced in relation to the Health Services Union, the national office and the No. 1 branch. Outside that answer no other communications concerning the investigations have taken place.

**Senator Chris Evans:** I have something to add. It is not that that is wrong, but I am advised that my office contacted the media officer at Fair Work Australia, I think on 18 August, when there was a media report which caused inquiries to my office saying that Fair Work Australia had started a new investigation. As I understand it, there was a Channel 7 report. One of my media officers contacted, I think the media person of Fair Work Australia, who confirmed that the media reporting was wrong and that they were going to issue a statement. They later issued a statement saying that that media report was wrong. My office did contact them because we were asked about the media reporting of a second investigation. My media officer confirmed that was not correct and Fair Work Australia, as I understand, issued a statement dealing with those inquiries that were coming from the media report that there was a second investigation. I understand their advice was that that was not right. I think you or someone asked me about it in parliament. For completeness of the record, my media officer did contact Fair Work Australia to get advice as to whether that media report was right.

**Senator RONALDSON:** Ms O'Neill, I do need to correct some evidence you gave before. It was actually Mr Ben Hubbard from Ms Gillard's office who contacted Mr Williams, which is my understanding, not the other way around.

**Senator Chris Evans:** I do not think that is right, Senator.

**Senator RONALDSON:** Is that disputed?

**Senator Chris Evans:** Senator, this is important. I do not think that was Ms O'Neill's advice. It is not my understanding. If you are claiming it differently, you ought to support that.

**Senator RONALDSON:** I will ask the question. Are you sure that it was Mr Hubbard who was approached by Mr Williams as opposed to the other way around?

**Ms O'Neill:** That is my understanding, Senator.

**Senator RONALDSON:** I gather that Mr Williams prepared a memorandum for Fair Work Australia on the progress that had been made in relation to the investigation into Mr Thomson and the HSU. If so, what was the date of that memorandum?

**Ms O'Neill:** Senator, I will take that on notice if I can.

**Senator RONALDSON:** Will you provide the committee with a copy of that memorandum, please?

**Ms O'Neill:** Again, I will take that aspect of the question on notice.



**Senator RONALDSON:** Are you saying that you will or you will not?

**Ms O'Neill:** I am saying that I will take it on notice. As you are aware both investigations are ongoing. No conclusions have been reached at this stage and advice has been obtained that there is a very real risk of prejudice to the investigation or of possible civil or criminal proceedings that may ensue. Because the risk of prejudice is high, I am being particularly cautious and taking questions on notice so that they can be carefully considered and legal advice obtained so that no inadvertent disclosures are made.

**Senator RONALDSON:** You must know when the memorandum was dated. Can you at least tell me that?

**Ms O'Neill:** I cannot, Senator.

**Senator RONALDSON:** Are any of the officers at the table able to tell you? That, I am sure, is not going to impact on the inquiry. Can you tell me what date?

**Senator Chris Evans:** I think the officer is prepared to tell you if she can find it, Senator. I think it is a question of not having it to hand.

**Ms O'Neill:** We are taking it on notice because we do not have the date in front of us.

**Senator RONALDSON:** What did Mr Nassios say? It was towards the end of his appearance.

**Ms O'Neill:** We are not sure of the date. As I have just indicated, we are not sure of the precise date.

**Senator RONALDSON:** Can I just have an indication? Mr Nassios, you think it was towards the end?

**CHAIR:** You have asked for a date, not a parameter.

**Senator Chris Evans:** In order to help the committee, after the tea break, if we can get the answer for you and if Ms O'Neill is prepared to provide it, which I think she is, we will provide it. We are not trying to delay it, just for the sake of accuracy the officers do not have the exact answer for you. If we can get it we will give it to you.

**Senator RONALDSON:** Mr Nassios, at the budget estimates you told me that at the end of your investigation, if you were considering making any adverse findings against any person, you would provide a copy of your findings to that person and give them the opportunity to respond. Do you remember that?

**Mr Nassios:** Yes, Senator.

**Senator RONALDSON:** Have you at this stage provided any person or persons with that opportunity to respond to adverse findings that you are considering making against them in relation to this matter?

**Mr Nassios:** No, Senator.

**CHAIR:** We will now break for morning tea.

**Proceedings suspended from 10:30 to 10:44**

**Senator RONALDSON:** Can I clarify that this report will be released, I presume, not over the Christmas New Year period but prior to that. There will be no attempt to have this buried in the Christmas rush.

**Ms O'Neill:** Firstly, to respond to the question that you asked just before the break about the memorandum from Mr Williams, the date of that was 30 June 2009 and it was an email.

**Senator RONALDSON:** That was just immediately prior to his departure.

**Ms O'Neill:** It was immediately prior to the conclusion of his role in the investigation. In relation to the question that you have just asked Mr Nassios, as I indicated earlier, Mr Nassios will be providing the general manager with a report. No decision has been made as to whether or not to make that public. It is then up to the general manager to make a decision as to what action to take.

**Senator RONALDSON:** Mr Nassios, you told me that you had instructed the AGS to write to Fairfax's solicitors seeking information from Fairfax that they had obtained in relation to Mr Thomson. Have Fairfax's lawyers responded to the AGS request?

**Mr Nassios:** Yes, they did. They provided some material.

**Senator RONALDSON:** Mr Nassios, you would be aware that in the *Sydney Morning Herald* on 9 September there was an allegation of secret commissions being paid to Mr Michael Williamson and Mr Craig Thomson by the person who had the company that printed a number of HSU newsletters. Has Mr John Gilleland, Carron Gilleland or any officer of Communigraphix been interviewed by Fair Work?

**Ms O'Neill:** Senator—

**Senator RONALDSON:** I asked Mr Nassios.

**Senator Chris Evans:** The general manager can take the question.

**Senator RONALDSON:** Minister, can I say to you that in every Senate estimates we have been pursuing this the general manager has not involved him or herself at all and Mr Nassios has been free to—

**CHAIR:** Senator Ronaldson—

**Senator RONALDSON:** I am asking the minister a question—

**CHAIR:** No, you are not. You are making a statement

**Senator RONALDSON:** Mr Nassios has been allowed to answer these questions. All of a sudden we have Mr Lee going off as a commissioner, we have a new acting general manager who has not been involved in the process and now is seeking to answer Mr Nassios's questions. What is the reason for that?

**Senator Chris Evans:** It is what is called Senate procedure. The general—

**Senator RONALDSON:** Rubbish! Senate procedure, that is wrong. Why was Mr Nassios allowed to answer questions over three Senate estimates but now he has been stopped from doing so?

**CHAIR:** Senator Ronaldson, if we want to play it by people will only speak when they have the call, we will do so. I am reluctant to do that because I do not mind engagement across the table, but people actually have to allow each other to answer the questions that are being asked.

**Senator RONALDSON:** This is just another cover up by the government of this issue. If you cannot see that, Chair, then heaven help us.

**CHAIR:** No, I cannot see it. As I said earlier I had been expecting the show and the show has commenced but it is just the show—

**Senator RONALDSON:** The show has involved Mr Nassios over the last three Senate estimates who has been giving frank and fearless advice to this committee and he has been precluded from doing so today by someone who is only in the acting role and who knows nothing about this matter. You tell me whether you think that is appropriate or not.

**CHAIR:** What you have said is simply not true. These are allegations that I am happy for you to make in the public domain, it is up to you what conclusions you come to, but the process of actually asking whether individuals have been questioned in the process of an investigation was something that was discussed at length at the last estimates and the one before that and the position which was taken at the last estimates which I expect will also be taken in this one was that questions that go to who is involved in investigations potentially compromise the investigation.

**Senator RONALDSON:** I put it to you that Mr Nassios is being nobbled—

**CHAIR:** And you know that that is being—

**Senator RONALDSON:** Mr Nassios has been nobbled today from giving evidence that he has freely given in the past and you tell me, Minister, how that is appropriate.

**CHAIR:** You know that is not true.

**Senator RONALDSON:** It is absolutely true. So every question I ask Mr Nassios now he will answer me?

**CHAIR:** It is part of the show you want to put on.

**Senator RONALDSON:** Let's try it. Mr Nassios, could you tell me what the situation is in relation to John Gilleland and Carron Gilleland and whether they have been interviewed?

**CHAIR:** I have not given you the call yet. When I do you can ask your question so everyone can hear it.

**Senator RONALDSON:** Thank you. I was going to—

**Senator Chris Evans:** Can I make—

**Senator RONALDSON:** I have been invited by the chair to ask Mr Nassios questions.

**CHAIR:** I still have not given you the call.

**Senator RONALDSON:** Yes, you did.

**CHAIR:** No, I did not. In fact I made the point to you that I had not given you the call. Senator Ronaldson, ask your question again.

**Senator RONALDSON:** The question is in relation to the investigation of the Gillelands, who are, I gather, the owners of Communigraphix. The allegation is that Mr Thomson and Mr Williamson were given American Express cards as a form of secret commission. Is that being investigated by Fair Work? I am asking Mr Nassios, who is the person conducting—

**CHAIR:** We have been through this. The officers are at the table. The most appropriate person will answer the question.

**Senator RONALDSON:** What a joke.

**CHAIR:** It is not a joke. This is the way the Senate has always worked.

**Senator RONALDSON:** What a bastardisation of the Senate process when you as chair are stopping an officer from answering questions and then having them answered by someone who is an acting general manager who has had no involvement in this matter at all. Minister, can you please do something about this?

**CHAIR:** You do not have the call. I am not going to have you make the accusation. What I have said to you on previous occasions—let me repeat it again as part of the show because that is what you want—is that there are processes involved in the Senate estimates. They are long-held processes. I am upholding those processes. They are well and truly established, and the officers at the table best suited to answer the question will answer the question. This is not something new; it is something that has gone on for many years, especially the many years I have been involved in Senate estimates on both sides.

**Senator RONALDSON:** This is a joke. It is disgraceful.

**CHAIR:** You can say it is a joke because it is part of the show that you want to present today, but it is just a show.

**Senator RONALDSON:** The only show here is a show of this government who is not prepared to let the Senate estimates process to work.

**CHAIR:** If you have a question, I am happy for you to ask questions.

**Senator RONALDSON:** This is a complete and utter cover-up.

**CHAIR:** I know this is part of your game that you want to play today.

**Senator RONALDSON:** So you think openness and transparency is a game.

**CHAIR:** No, I do not think that all.

**Senator RONALDSON:** You think that Mr Thomson and everything that has followed since then is a game. You think that the delegation of secret commissions is a game. Is that what you are saying?

**CHAIR:** No, I do not think that is a game at all. All I am trying to do is conduct the estimates the same way as they are normally conducted.

**Senator RONALDSON:** That is rubbish. You have never allowed anyone to interrupt Mr Nassios.

**CHAIR:** That is just a nonsense.

**Senator Chris Evans:** Chair, I make the point that I reject the slurring of both the government and the officers of Fair Work that Senator Ronaldson just engaged in. I understand that in an attempt to get a TV news grab we will have dramatics, and that is fine.

**Senator RONALDSON:** Grow up, Minister. You're better than that.

**Senator Chris Evans:** I am better than that because I know how this is done. What I also know is that the louder and more dramatic you get usually reflects the lack of information and lack of questions you have.

**Senator RONALDSON:** If you will allow me to ask the questions of the person who is conducting the inquiry, I will.

**Senator Chris Evans:** If you have serious questions, we will attempt to answer them; but, as you know, the process is for the general manager to take the questions that she thinks are appropriate and get officers to assist her as required. I think she was about to talk to you about

the general approach Fair Work would take to answering specific questions that go directly to the investigation and the integrity of that investigation.

**Senator RONALDSON:** I do not want to know the general approach. I want to know whether the Gillelands have been interviewed. I also want to know—

**CHAIR:** Wait till you have the call, Senator Ronaldson.

**Senator Chris Evans:** We all have an interest in maintaining the integrity of the investigation, and we ought to allow that to occur. Ms O'Neill is happy to answer your question; and, if they are questions that are better answered by Mr Nassios or other members of fair work, she will refer to them.

**Senator RONALDSON:** So have they been or not?

**Ms O'Neill:** I, Mr Nassios and all officers of FWA want to assist this committee as much as possible—

**Senator RONALDSON:** Have they been interviewed.

**CHAIR:** Just wait, Senator Ronaldson.

**Senator RONALDSON:** No, I know the answer I am going to get. Have they been interviewed?

**CHAIR:** If you know the answer, why are you asking? You gave everyone a spray, and I think it is okay for Ms O'Neill to respond to some of the allegations that you have made. You cannot just make the spray and expect that to stand unchallenged. Ms O'Neill.

**Senator RONALDSON:** Mr Nassios, have—

**CHAIR:** No, I am giving Ms O'Neill the call.

**Senator RONALDSON:** Mr Nassios, have they been interviewed.

**CHAIR:** You do not have the call, and nor does Mr Nassios. Ms O'Neill has the call. We will go through—

**Senator RONALDSON:** Mr Nassios, have you—

**CHAIR:** Senator, this will get you nowhere.

**Senator RONALDSON:** Can you answer whether there has been a re-interview of Mr Thomson since his interview with Mr Smith where he acknowledged for the first time that his credit card had been used and that he authorised it?

**CHAIR:** You do not have the call, and before we proceed I call Ms O'Neill to respond to the previous position that was put by you.

**Ms O'Neill:** Neither Mr Nassios, myself nor any of the officers of Fair Work Australia are able to answer the questions that you have asked on the grounds of public interest immunity.

**Senator RONALDSON:** Mr Nassios, has Fair Work Australia tried to make copies of the American Express card statements that were attached to the card referred to in the *Sydney Morning Herald* article?

**Senator Chris Evans:** Mr Chair, I make the point that I am happy to have the interchange with Senator Ronaldson. I quite enjoy it and it is part of the give and take of the Senate and parliamentary democracy, but witnesses have a right to be protected from abuse and bullying.

All I ask is that the witnesses be treated with respect, be allowed to give the answers to their questions based on the advice they have received—

**Senator RONALDSON:** Why don't you respect the process?

**Senator Chris Evans:** and if there needs to be some drama in order to make the nightly news I am happy to engage in that. But the witnesses ought to be given the protection and be treated with some respect and good manners.

**Senator RONALDSON:** Chris, why aren't you protecting the process?

**CHAIR:** No, Senator Ronaldson, we will now move to the process of seeking the call and it being given by the chair. If you are going to keep defying me like this, we will simply suspend until you agree that we actually are going to do it properly.

**Senator RONALDSON:** Where did you get to in relation to—

**CHAIR:** I have suggested to you—in fact I am insisting—that if you wish the call you will seek it from the chair. When you get the call you can then speak. I have tried to be more flexible with that, but you are not cooperating with me, so let's just play it strictly by the rules.

**Senator RONALDSON:** Okay. So now I have the call?

**CHAIR:** I am not sure whether Ms O'Neill had finished her previous response. If she indicates to me she has, I will then give you the call.

**Ms O'Neill:** I have. I am just noting that Mr Nassios, myself and all are following the legal advice that has been obtained and are being cautious in response to the very real prejudice that exists to the investigation and/or any proceedings that may ensue.

**Senator RONALDSON:** So you are blankly refusing to answer any questions in relation to the investigation.

**Ms O'Neill:** No, that is not what I said.

**Senator RONALDSON:** Let's try again then. On 22 August in an article by Mr Steve Lewis and Mr Andrew Clennell, there was an article about Mr Thomson's credit card spending, including some \$39,454 of HSU members' money being spent on his own campaign. Mr Thomson commented when asked about this that this personal spending had already been dealt with in the Fair Work investigation. Mr Nassios, is that correct?

**Ms O'Neill:** Again I repeat that we are unable to answer any questions that reveal aspects of the investigation that is yet to be concluded. That is an example of such a question.

**Senator RONALDSON:** Have you looked at the Senate estimates in relation to this matter over the last three Senate estimates?

**Ms O'Neill:** I have.

**Senator RONALDSON:** What did you read about Mr Nassios's responses to my questions?

**Ms O'Neill:** I know the area you are referring to.

**Senator RONALDSON:** No, in a general sense. What was the thing that you noticed about Mr Nassios's evidence?

**Ms O'Neill:** I am not sure in particular what you are referring to.

**Senator RONALDSON:** Can I assist you?

**CHAIR:** No, just wait.

**Ms O'Neill:** What I can say as a matter of fact and timing is that the legal advice that both Mr Nassios and I relied on and upon which we are basing our decision that, unfortunately, we are unable to answer a number of questions in relation to these investigations was received after the February estimates, which I think is what you were perhaps referring to.

**Senator RONALDSON:** What I am referring to is that on 22 August in this article—all this about the spending spree and what was there was here in this newspaper—Mr Thomson's response to that was that those expenditure amounts had already been dealt with by Fair Work. I am asking Mr Nassios whether indeed—there is a whole list of this spending spree here that you can see for yourself: restaurants, wine, electronics, election campaign—the comment that was made publicly by Mr Thomson that they had been dealt with by Fair Work correct or incorrect?

**Senator Chris Evans:** Can I just intervene here, Senator. It is not for officers to provide a commentary on what certain people are quoted as saying in the newspapers. There is an official investigation going on. Officers can help you in terms of the terms of reference of that but, clearly, waving around crops of photocopies—in colour I see now—of newspaper headlines is not something that the officers can respond to. Their investigation is proceeding. It is one that is being done independently; they have legal advice about not prejudicing that by discussing details of the case. They have indicated to you that that investigation is on track to be completed by the end of the year. Then Fair Work Australia will deal with it according to their statutory responsibilities. You will have to wait for that inquiry to be completed in order to pursue some of these matters, Senator. But the officers cannot comment on whether someone said something in the newspaper and whether or not they believe that to be true. That is clearly outside their obligations and responsibilities.

**Senator RONALDSON:** I think anyone looking at this will know that this is just wafer-thin excuses to protect a wafer-thin majority. Can I ask Mr Nassios: were you aware of these allegations, which came out on 22 August, in relation to this campaign and other expenditure, before those matters were reported in the newspaper?

**Ms O'Neill:** Again, Senator, we will have to take that question on notice.

**Senator RONALDSON:** Ms O'Neill, how can that question possibly impact on the investigation?

**Ms O'Neill:** I have not claimed the public immunity privilege on that question. What I have said is that I will take it on notice. The reason is that I am being particularly cautious because, on our advice, the risk of prejudice is great and I do not want any inadvertent disclosures made that would prejudice those processes.

**Senator RONALDSON:** But Ms O'Neill, Mr Nassios will know whether he was aware of those matters before they were reported in the press, and I am simply asking him that. If you do not want him to say whether it is being investigated—I think that should be answered—but the answer to this question is quite simple: it is either yes or no. Was he aware of it before it was reported in the press or was he not aware of it?

**CHAIR:** The question has been taken on notice, so it has been answered in that sense.

**Senator RONALDSON:** Mr Nassios, have you re-interviewed Mr Thomson or anyone else involved in this investigation? I think you were happy to talk about interviews, at least in

one Senate estimates. On one occasion you were not, which I understood, and on another occasion you were happy to provide information because it would not impact on the investigation itself. Has Mr Thomson or others been re-interviewed in relation to this inquiry?

**Ms O'Neill:** Again—

**Senator RONALDSON:** I did not ask you, Ms O'Neill. I asked Mr Nassios.

**Senator Chris Evans:** Let us not go through that again—

**CHAIR:** Senator Ronaldson, you are aware of the normal procedures of these Senate estimates committees. We have been through it more than once already this morning. If you want to have a discussion with me again I am happy to indulge you in that. You can ask your question and the most appropriate officer at the table will attempt to answer your question for you.

**Senator Chris Evans:** The officers are trying to help you in terms of the process, but clearly on questions that go to evidence, who has been interviewed et cetera, they have legal advice that that might prejudice the proceedings or their inquiries which may then prejudice action that might follow from that. You are also aware, as I am, from the newspapers that there is a police investigation occurring into some of those matters that you refer to. So I think we all have to be a little careful about how we handle these matters. If people are genuinely interested in appropriate investigation being successful in terms of uncovering the facts and appropriate action being taken by appropriate authorities then we ought to allow those people to do their jobs without political interference either from the government or the opposition.

**Senator RONALDSON:** Is this caution or cover up, Minister, because this investigation has now been going on for how long?

**Senator Chris Evans:** I am not sure exactly when they started. I think it is a reasonable expectation that the investigation be brought to a conclusion. Ms O'Neill has indicated to you that their earlier evidence, that it would be completed by the end of the year, is still their evidence. They intend for it to be completed by the end of year, so the time frame that they had previously advised is to be met. I am pleased to hear that—and no doubt you are—and we will await the outcome of that. How the general manager, either Ms O'Neill or a permanent appointee, deals with that will be a matter for them, but they will do it in accordance, I am sure, with their statutory obligations.

**Senator ABETZ:** I have two quick questions arising from this. How long has the investigation been going on; when did it start? When was the legal advice to which you refer obtained—before or after the last estimates?

**Ms O'Neill:** The investigation into the national office commenced on 6 April, 2009.

**Senator ABETZ:** I was wrong, it is more than two years—it is more like 2½ years.

**Senator RONALDSON:** At least, because this matter was being investigated before 30 June, 2009, and he provided a report.

**CHAIR:** Senator Abetz was actually asking the officers, not you, Senator Ronaldson.

**Ms O'Neill:** I will take the detail on notice, but it was prior to the May estimates hearing.

**Senator Chris Evans:** My recollection, Senator, is it arose out of the discussion at the February estimates about what was appropriate in terms of evidence to be given, and Fair Work sought legal advice.



**Senator RONALDSON:** Mr Nassios, I cannot remember whether you had given me a response to the question relating to legal advice and the Fairfax solicitors. Did you end up telling me whether they had provided the AGS with the information they had requested? I cannot remember.

**Mr Nassios:** Yes, I indicated that they had.

**Senator RONALDSON:** When was that received?

**Mr Nassios:** Some time in June this year.

**Senator RONALDSON:** Did they provide all the information that had been requested by the Australian Government Solicitor?

**Senator Chris Evans:** That is not a question that the officer is competent to answer. It is asking him an opinion about whether the AGS were satisfied that they got all the information.

**Senator RONALDSON:** The AGS have been sitting in on those interviews with Kathy Jackson, so they are quite actively engaged in this process.

**Senator Chris Evans:** But you asked whether they were satisfied. I was just making the point that Mr Nassios cannot answer that for them, and you ought to ask AGS, that is all.

**Senator RONALDSON:** I will rephrase it. Did AGS receive all the information that they requested?

**Mr Nassios:** Without going into the detail of the information, the question asked of Fairfax by AGS was for 'information that may assist us'. Information was provided in relation to that question.

**Senator RONALDSON:** And that of course, for the public record, was information in relation to the defamation proceedings.

**Mr Nassios:** Correct.

**Senator RONALDSON:** Thank you. There were claims made in the *Melbourne Age* on 19 August that several phone calls were made by Mr Thomson from Melbourne hotel rooms. Have those allegations formed part of your investigation as well?

**Senator Chris Evans:** Senator, Ms O'Neill has made clear that the officers are not going to respond to newspaper articles that you read about the subject matter involved in their investigations. You understand there is an investigation into matters related to the HSU. There have been a series of allegations made since the investigation started. I have no doubt that officers are aware of what appears in the public arena by reading the papers, but it is not competent for them to respond to allegations made or to provide information to you about what evidence they may or may not have received. They have legal advice that tells them that they ought not do that; they have made that clear to you.

You might want to trawl through every newspaper article in the absence of any appropriate more detailed research, but officers cannot respond to allegations or comments allegedly made by people and reported in the newspapers.

**Senator RONALDSON:** Mr Nassios, has anyone from The Entrance Printing been interviewed in relation to the allegations that there was some \$12,647 spent on a union card with the allegation being that it was to prepare election material for Mr Thomson?

**Ms O'Neill:** Again, we are unable to answer that on the ground of public interest immunity for the reasons I outlined earlier.

**Senator RONALDSON:** Are you aware that on campaign material for the member for Dobell a printer was nominated at the bottom of the material, as is required under the electoral laws, and that The Entrance Printing was on the bottom of this election material?

**Ms O'Neill:** Again, I am unable to answer that on the ground of public interest immunity.

**Senator RONALDSON:** If Fair Work Australia were to find that a union official had used their credit card to pay for escort or other private services, would that breach the official's fiduciary obligation to the union members and to the union?

**Ms O'Neill:** Mr Nassios may correct me, but as I understand it, whether there were a breach would depend on the circumstances including the rules of the organisation in question and the processes and policies in relation to expenditure.

**CHAIR:** I am seeking an indication about times from Fair Work Australia. I hope we will wind up soon, but generally we are flexible about the times.

**Senator Chris Evans:** We are here for the day.

**CHAIR:** I am here too, but there is a lot to get through in the day.

**Senator ABETZ:** On 16 September 2011, there was a story in the *Age* under the headline 'Private business in union digs'. It states:

CONTROVERSIAL union boss Michael Williamson is facing more questions over his administration after it emerged that his son is using a building owned by the Health Services Union to run a music business.

Is that something, when it is in the public domain, that excites Fair Work Australia's interest for the purposes of its oversight of industrial organisations under the Fair Work Act?

**Ms O'Neill:** I think it is fair to say that all relevant information is considered in the course of an investigation including reports in the press, without accepting that everything reported is accurate. Beyond that, in terms of the specific allegations that you mention, I am unable to answer that in respect of the particular investigations underway.

**Senator ABETZ:** That begs the question. These organisations deal with huge amounts of members' money. Who has oversight of it because it seems, with great respect and undoubtedly one day we will know the reason why the HSU investigation has taken over 2½ years in circumstances where—I withdraw that. Suffice to say, it appears that if it had been pursued with some greater vigour we may have had an outcome earlier than now.

**Senator Chris Evans:** I think that is an unfair reflection on the officers. If you have questions about the processes for monitoring and holding unions accountable for their expenditure and their registration, I am sure the officers can help you with those.

**Senator ABETZ:** You see, I could not help but notice that Fair Work Australia recently deregistered the strippers' union in the ACT, but they seem to have great difficulty in dealing with a union that may well have used their services in the past. I am just wanting to ascertain what the priorities are of Fair Work Australia investigations and why a strippers' union can be deregistered very quickly but union officials who use those services with union members' moneys do not seem to be dealt with as expeditiously as some in the community might anticipate.

**Senator Chris Evans:** I hope you are going to share with us the reasons for that decision, Senator!

**Senator ABETZ:** Yes, there were. You might complain, because I think there is a colour photograph somewhere, but the colour photograph, in case you were excited, is only of Mr Rudd and not of anything else. This is a story in the *Canberra Times* of 12 October.

**Senator Chris Evans:** I was only joking. The officers are happy to help you in terms of what accountability measures are in place for expenditure of union funds.

**Senator ABETZ:** There have been many allegations. For example, I may be wrong but I think Mr Ludwig had \$45,000 worth of legal fees paid for by his union in a matter that was completely unrelated to his union activities. Who protects union moneys and, when things like that do finally come out, does Fair Work Australia investigate these matters and ascertain whether or not these things come up in the audits of these industrial organisations?

**Senator Chris Evans:** Mr Chairman, I think rather than responding to particular newspaper allegations it would be appropriate for officers to explain to the committee how the oversight of union expenditure occurs as a process.

**CHAIR:** I think that was the first part of Senator Abetz's question.

**Senator Chris Evans:** Yes. They will be able to help there.

**CHAIR:** Let's start with that and see where we go.

**Mr Nassios:** In terms of information that comes to light, whether it is through newspaper articles or other means, we will follow up those allegations if we believe we have a role to play in looking at those allegations. Again, not going into specific details of articles that have appeared in the newspapers recently, our role is confined to organisations that are registered under the Fair Work (Registered Organisations) Act. Often the allegations are made in respect of bodies that are registered under state industrial registration type acts. To the extent that the allegations are made against those bodies we have no role to play in looking at the claims that are made.

**Senator ABETZ:** All right, so just as a hypothetical, the Australian Workers Union in Queensland might fall under the Queensland legislation. I will ask you one more question before handing back to Senator Ronaldson. I think you, Ms O'Neill, indicated that the investigations into Mr Thomson started on 5 or 6 April?

**Senator Chris Evans:** I think the investigations into the HSU were the way it was described.

**Ms O'Neill:** The HSU national office. I said that the investigation started on 26 March 2010. I am sorry; I made a mistake. I said 6 April 2009, didn't I?

**Senator ABETZ:** That is what I thought you said.

**Ms O'Neill:** I am sorry; that was a mistake. The formal investigation started on 26 March 2010. The earlier inquiry stage commenced on 6 April 2009.

**Senator ABETZ:** The Thomson story only broke in the media, as I understand it, on 8 April 2009, which means that Fair Work Australia got into the act very early. Are you able to share with us why that started 12 days before we, the great unwashed, got to hear about it? Had somebody tipped you off?

**Ms O'Neill:** Without going into the detail, the inquiry was triggered by information that came to Fair Work Australia attention.

**Senator ABETZ:** By 'information received', as the police would say.

**Senator RONALDSON:** And what was the nature of the matters referred to you which triggered the investigation?

**Ms O'Neill:** I will take that on notice.

**Mr Giudice:** I would like to add to the remarks I made earlier to Senator Abetz. It might clarify something. The senator was putting to me that in the speech that he has referred to I had suggested that industrial regulation was irrelevant to productivity performance, or something to that effect. I have now had a chance to look at the speech and I would just like to read this passage, which says:

I am not suggesting the nature of our industrial relations system is irrelevant to productivity performance. Clearly it is not. The nature and extent of regulation can have a significant influence in some industries, and the effect may be positive or negative.

Then I go on to deal with that point some more. I just wanted to reinforce the fact that I think the way that exchange was left may have been misleading.

**Senator ABETZ:** The speech is tabled. Mr Giudice, do you agree that also in that speech we would find a sentence that it would be difficult on this evidence to establish any direct link between the type of industrial regulation and productivity growth?

**Mr Giudice:** Yes.

**CHAIR:** I am loath to open up this discussion again—

**Senator RONALDSON:** There had been some issues raised, from recollection, Ms O'Neill, in relation to Mr Lee's background to the extent that he was a union official, and I think that he had worked for a Victorian ALP minister. Is there anything in relation to your involvement that could lead to those conclusions, appropriate otherwise?

**CHAIR:** What conclusions? I do not understand the question.

**Senator RONALDSON:** There had been some commentary sometime ago about Mr Lee's background, that he was a former union official and worked for an ALP minister.

**CHAIR:** If the question to Ms O'Neill is about her background, I would advise you to simply ask that.

**Senator RONALDSON:** I do not think that it would be appropriate to ask that.

**CHAIR:** Well, then, don't.

**Senator RONALDSON:** I was just asking whether there was anything that would potentially cause any concern in relation to this investigation.

**Senator Chris Evans:** It is obviously not a matter that she can comment on. The only concerns I have heard expressed have been by opposition spokespeople in relation to Mr Lee. This is not a matter that Ms O'Neill has any responsibility for. If you have a question relating to her responsibilities, that is different, but I am not sure where you are going with this.

**Senator RONALDSON:** I just wanted to be sure that Ms O'Neill was confident that she was not in any way compromised in relation to this investigation. There had been matters

raised about Mr Lee and I just wanted to make sure that Ms O'Neill was confident that she was not going to be in a similar situation.

**Senator Chris Evans:** I think that it is appropriate for her to ask if she feels that she is compromised. I am sure that question of Mr Lee's background has nothing to do with that, but to the extent that Ms O'Neill wants to answer I am happy for her to do so.

**Ms O'Neill:** I do not consider that there is anything in my background that would compromise my involvement.

**CHAIR:** If there are no further questions, I thank you, Justice Giudice, Ms O'Neill, Mr Nassios, Ms Burke—and Ms Burke, I do not think that you got a go at all today—and thank you, Fair Work Australia, for appearing before this estimates proceedings today.

#### **Fair Work Ombudsman**

[11:27]

**CHAIR:** Welcome. Mr Wilson, did you have any opening remarks you would like to make to the committee before we commence?

**Mr Wilson:** No, I do not.

**Senator BILYK:** I want to ask you about the workplace rights campaign. I am a senator for Tasmania and I know it is being run there. Is it specific to Tasmania or is it being run Australia-wide? Can you just tell us a bit about how it all works?

**Mr Wilson:** I am afraid I do not have a direct answer to that. I am sorry, we do have an answer—I misled you. I will ask Mr Ronson whether he is able to answer that.

**Senator ABETZ:** Mr Ronson is responsible for Tasmanian affairs.

**Mr Wilson:** He is indeed.

**CHAIR:** It is a small job!

**Senator BILYK:** Careful! You are outvoted, Senator Marshall.

**Senator Chris Evans:** Senator Marshall, I would remind you that coverage of these proceedings is nationwide.

**CHAIR:** It is an important job, though.

**Senator ABETZ:** We see Victoria as a colony of ours, don't we, Senator Bilyk!

**CHAIR:** With some of the finest people.

**Mr Ronson:** Senator, in answer to your question, the campaign is Tasmanian run only at this point, so it is what we call a regional campaign and—

**Senator BILYK:** Sorry, Mr Ronson; can you tell us why it is only in Tasmania?

**Mr Ronson:** We run four national campaigns per year and we run a whole series of state or regional campaigns. So, for various reasons, we will try or employ different campaigns at different times. Sometimes they are used as pilot type campaigns and, if they prove successful at a local level or a state level, they might become national campaigns. So there are different reasons for—

**Senator ABETZ:** Come on; who wanted a trip to Tasmania?

**Senator BILYK:** Everybody!

**Mr Ronson:** There is high interest in travelling to Tasmania at all times!

**Senator Chris Evans:** But mainly in the summer!

**Mr Ronson:** So it is a regional campaign. It commenced in August 2011 and it aims to educate employers on best practice guidelines when hiring new employees, and Fair Work inspectors will be promoting best practice guidelines and templates to around 100 employers who placed job adverts in the month of August.

**Senator BILYK:** Okay. So they were adverts that were put in Tasmanian newspapers?

**Mr Ronson:** Yes.

**Senator BILYK:** And presumably it is educative, not punitive, at this stage?

**Mr Ronson:** Employers will be audited in October, this month, to assess compliance with record-keeping, pay slip and hourly rates of pay obligations, so there is that combination of education and compliance.

**Senator BILYK:** I know that previously there have been campaigns run by your officers in regard to the Taste of Tasmania, which is obviously a big event—it gets national recognition—and compliance rates there, going back quite a few years. I understand that, in about 2008-09, non-compliance rates were in the 60 per cent range. I am wondering if this links to any of that sort of activity at all.

**Mr Ronson:** I am not aware there is a direct link between what we do with the Taste of Tasmania and this particular campaign.

**Mr Wilson:** Senator, it is worth pointing out that, when we ask our regional officers to construct a campaign, they take into account what they know about their region or state, and obviously they take into account where the pressure points might be. We can certainly say that the staff in Tasmania are very high performing and they are very well connected with their community, and that I would be quite confident, if there were problems that they thought were evident in one campaign that needed to carry through in another, that that would intuitively be brought through in their planning for that campaign.

**Senator BILYK:** Is the Taste of Tasmania campaign continuing? Are you able to tell me that?

**Mr Ronson:** I have no reason to believe it will not occur again.

**Senator BILYK:** And compliance rates have improved, I understand, since that began a few years back?

**Mr Ronson:** I do not have the—

**Senator BILYK:** Maybe you could take that on notice—

**Mr Ronson:** We will.

**Senator BILYK:** and just let me know. I am fairly interested in that. The other area I am interested in is the Fair Work Information Statement Audit Program. Is that complete?

**Mr Ronson:** That is a campaign that we have run in quite a few states at different times, and we have found it to be quite a successful audit program, where effectively we are enhancing awareness of what is a key condition of the National Employment Standards but also providing education in those interactions. The audit program you are referring to occurred between February and July this year.

**Senator BILYK:** I am specifically referring to the Tasmanian part.

**Mr Ronson:** Yes, the Tasmanian Fair Work Information Statement Audit Program. I am just looking at these notes in front of me to see whether it has fully concluded. The information before me does not disclose whether there has been a report on that at this point.

**Senator BILYK:** Okay. Do you have any information on how many employers were audited?

**Mr Ronson:** Yes. Fifty city and regional based businesses were selected for the audit.

**Senator BILYK:** Throughout Tasmania?

**Mr Ronson:** Yes.

**Senator BILYK:** Do you have any information—you might not have this yet, if you are not sure if it has been completed—on the compliance or non-compliance rates?

**Mr Ronson:** I do not have that information.

**Senator BILYK:** Could you take that on notice and, if the audit has been completed, let me have the information.

**Mr Ronson:** Sure.

**Mr Wilson:** Senator, again we can say in respect of the regional audits that they are routinely the subject of a reporting process and we, of course, make the information public, and we will respond to you.

**Senator BILYK:** Just going back to the 'Is it Workplace Right?' campaign, I presume that that campaign will help inform future direction and compliance activities for your agency to follow up on.

**Mr Wilson:** Certainly. As the Fair Work Ombudsman just indicated, with all our evidence and information that we disclose during all the campaigns, we evaluate it, we report publicly and we use that information to inform all future compliance activities.

**Senator BILYK:** Thank you. That is all.

**Senator THISTLETHWAITE:** Mr Wilson, an issue on which I have received some emails from constituents of late—and which has been an issue in the media—is that of offshoring of Australian workers' jobs and companies moving operations or employment bases overseas. In particular, of late it has been a topical issue in the Australian airline industry. I am wondering if you could inform the committee of whether your organisation has done any work in this area, and in particular whether there have been any investigations conducted in this area.

**Mr Wilson:** Perhaps I can address this question in a couple of ways just to test where your question might be—you can let me know, I suppose, whether I am on the right track. The process of offshoring per se is, on one level, not unlawful within the Fair Work Act. If a company makes a decision to relocate workers to another country then, provided the consultation process has been followed, that in itself is not a problem. I presume, though, that your question is about workers who are brought into Australia from other countries and then perform work in Australia. Is that the nature of the question?

**Senator THISTLETHWAITE:** Yes.

**Mr Wilson:** The issue there—I guess the first position to put is a slightly tentative one—is that a worker performing work in Australia is, of course, subject to the Fair Work Act unless

they are not, and there are some not-so-clearly defined circumstances where that might be. A worker who comes in temporarily for a day or two, or a week, would probably not be covered by the Fair Work Act. The issue of controversy, so far as our side of the Fair Work Act is concerned, is where workers perform work for some period of time in Australia and then, essentially, it becomes a matter of some investigation detail as to whether or not the Fair Work Act might apply.

There are a couple of matters that I can give you which illustrate our attention to those matters, one of which concerns an investigation into four Filipino workers on an oil drilling rig off Western Australia, for which we have commenced action in the Federal Court where we allege that the workers have been underpaid. That matter is before the court, so I need to be circumspect about what I say, but it concerns a company called Pocomwell and the allegations are that the workers were performing work on a particular barge for quite a length of time and thereby were underpaid pretty significantly. That matter will go through the courts and it will ultimately turn on whether it can be said that the particular barge was within Australia or not—and that will be a matter of evidence and also law.

The other circumstance which we are considering—and it is a matter of public interest—concerns airline flight crews who are, as part of their roster processes, brought through Australia from other countries and then perform work in Australia. That particular investigation, which concerns entities associated with the Jetstar brand, is still in play and it would be too early for us to really make any call about exactly where that is likely to go. I guess, if I can also say further, that at one level we would say that a flight crew that is perhaps performing work for an airline which simply flies into Sydney and then flies out of Sydney and never does any other work is not covered by the Fair Work Act—unless there were some other prevailing circumstances—but the issue which we are examining is what occurs when the flight crew comes into an Australian city and then flies on to other Australian cities.

**CHAIR:** There is just one extension of that, if you don't mind Senator Thistlethwaite, there is also the potential of people flying in and in fact living in Sydney and then simply flying out again—as opposed to the other way. What you are suggesting in 'flying in' is the assumption being that they actually reside in a third country, but there is potential that you fly in and fly out but you actually reside in this country.

**Mr Wilson:** That aspect technically could be looked at, but on our information we are not presently looking at that kind of particular issue.

**CHAIR:** Sorry, I diverted you from Senator Thistlethwaite.

**Senator THISTLETHWAITE:** How long has the Jetstar issue associated with flight crew investigation been ongoing?

**Mr Lehn:** The Australian and International Pilots Association did refer a matter to us formally in May this year and we have been investigating that aspect since that time.

**Senator THISTLETHWAITE:** Are there specific terms of reference for that inquiry?

**Mr Lehn:** The terms of reference relate to the allegations as they were presented to us by the AIPA. We are continuing to examine those particular allegations and have received a fair amount of documentation. We have conducted interviews. At this stage it is premature to indicate what the outcome of that investigation may be.

**Senator THISTLETHWAITE:** Can you outline what the allegations are?



**Mr Lehn:** The allegations are that a subsidiary of Jetstar, a foreign entity, has engaged pilots on individual contracts and those pilots continue to operate almost exclusively in Australia. That formed the main basis of the AIPA allegation.

**Senator THISTLETHWAITE:** Do you know the name of the subsidiary of Jetstar?

**Mr Lehn:** Yes, it is a company called Jetstar Airways Ltd.

**Senator THISTLETHWAITE:** When do you anticipate that investigation will be concluded?

**Mr Lehn:** We are nearing the end of that particular investigation, we still have a further set of interviews to conduct and perhaps look at some more documentation. At this stage it is anticipated that we should be able to reach a conclusion, which we have not yet reached, by the end of this year.

**Senator THISTLETHWAITE:** Is Mr Lehn the appropriate person to ask questions about outworkers?

**Mr Wilson:** We will see after you ask the question I suppose.

**Senator THISTLETHWAITE:** Over the last year is enforcement of outworker conditions an area that the Fair Work Ombudsman has looked at? Have there been any investigations conducted over the previous financial year?

**Mr Wilson:** I am not aware of any formal investigations into outworkers, but we do provide advice to outworkers and also their engagers and employers and through a contract we have with the Queensland government people who are Fair Work inspectors are conducting a series of audits in Queensland about outworkers at the moment. That is the extent of the work that we have with outworkers.

**Senator THISTLETHWAITE:** Have there ever been any investigations since the Fair Work Ombudsman has been in existence in this area?

**Mr Wilson:** I would have to take that on notice. I could not definitively say that there have not been. If there have, there would only be a handful of them but we will check our records.

**Senator THISTLETHWAITE:** Could you also take on notice if there has been any subsequent prosecutions out of those investigations?

**Mr Wilson:** There certainly has not been any prosecutions of those matters. Mr Ronson informs me that we may have conducted some in Victoria in 2006-07, but we will check our records and provide the answer to you.

**Senator Chris Evans:** Just out of interest, how does the relationship between that and state investigative bodies work? Do you have sole responsibility? I am not sure whether that helps answer the senator's question.

**Mr Wilson:** I think it is a little bit mixed. I would probably start off by saying that in all states except your state of WA, we would have main responsibility. The state agencies might have some through fair trading arrangements. The other enforcement, if I can put it that way, that is conducted would certainly be by the Textile, Clothing and Footwear Union, which conducts quite extensive checks of workers and occasionally undertakes activities and prosecutions. I think we would be misleading if we said our work in the field was extensive.

**Senator THISTLETHWAITE:** I know that in New South Wales the Department of Industrial Relations does have those powers. Would I be right in saying that if a prosecution were to be taken it would be taken under the Fair Work Act rather than under a state industrial instrument or piece of legislation?

**Mr Wilson:** Certainly, since 1 Jan 2010 it would have been conducted under the Fair Work Act. It is possible that there might be occupational health and safety or fair trading issues which bring state law into being, but the main industrial relations prosecution would be under the Fair Work Act. We are not exclusive litigants. We certainly can be litigants, but people such as the TCFU or others can commence action, and if they do so we would not necessarily monitor that.

**Senator THISTLETHWAITE:** If the Fair Work Ombudsman received a complaint about an alleged breach of an award or outworker provision, is there a set of guidelines that you follow which dictate whether or not a formal investigation and then a prosecution is launched, or is it just a matter of a legal officer or the like assessing the evidence?

**Mr Wilson:** We would treat it no differently from any other matter which comes to our attention. The outworkers by definition are a vulnerable class of workers, so there might be issues associated to the complaint which cause us to become more intensively involved at an early stage. Saving that, the usual process would be that a complaint is made and received and then goes through a process of about a month of voluntary resolution, where we say to both sides, 'There has been a complaint; you may wish to sort it out'. We would then become involved through a more extensive process. The difficulties we face, and I am sure you will be aware of this, are associated with the vulnerable nature of the workers, who are often migrants, often poorly educated and afraid to make complaints. In some ways it is pleasing to see that the work being done by our state partner agency, the Department of Justice and Attorney-General in Queensland, is giving us a template that can potentially be extrapolated across the country. We will be very interested to see the results.

**Senator THISTLETHWAITE:** Is that template in existence now, or is it being put together at the moment?

**Mr Wilson:** I can give you some of the details about that campaign. When I say 'template', I mean an approach, not so much a documentary template. In August the Queensland department sent letters to 669 clothing manufacturers notifying them of further audits. From those 669 they will be conducting 300 audits. They intend to examine a number of issues, including record keeping and also what the people are being paid. From that, we expect to obtain some sort of useful intelligence which will give us an indication of what the scale of the problems might be and how a useful government style investigation can be constructed.

**Senator ABETZ:** One issue that did excite my interest was this talk about the Taste of Tasmania. Do the locals do the investigation or do we have people come over to Tasmania?

**Mr Wilson:** I have never been invited.

**Senator ABETZ:** You do not take personal charge of it, Mr Wilson, that is reassuring.

**Mr Wilson:** It is. If we ask Mr Ronson to maybe answer that question.

**Mr Ronson:** The Taste of Tasmania audit is being conducted by Tasmanian based Fair Work inspectors.

**Senator ABETZ:** Good, reassuring to hear. Mr Wilson, possibly a question for you—I was told, I think yesterday, that the government's new shipping arrangements mean that seafarers on Australian ships that might be plying the seas overseas would not be subjected to the Fair Work Act but would be subject to international arrangements and agreements. Are you across that in any detail? The reason I raise it is will they be able to avail themselves, these workers, of the services of the Fair Work Ombudsman?

**Mr Wilson:** I think we have fairly basic knowledge of that initiative which I think comes from the transport minister.

**Senator ABETZ:** That is right.

**Mr Wilson:** I am not precisely aware of where that measure is up to in the legislative calendar but certainly we are aware of it. We have jurisdiction at the moment in respect of certain classes of seafarers working the Australian coast, including foreign ones, and we conduct investigations in relation to those.

**Senator ABETZ:** If you are not 100 per cent sure, feel free to take it on notice.

**Senator Chris Evans:** I think the department may well be able to help you later on but of course the reality is it is a proposition which will then be draft legislation and the bill introduced.

**Senator ABETZ:** Yes.

**Senator Chris Evans:** So in terms of those details they will have to be contained in the bill, so I suspect the Ombudsman's office are not going to be very helpful until they have seen the legislation but the department can certainly assist you—

**Senator ABETZ:** I think that is a fair comment, Minister, and I accept that, so—

**Senator Chris Evans:** But in terms of the proposal the department can help you later on if you want to talk about where that is all up to.

**Senator ABETZ:** Thank you, that is a fair comment. In recent—well, not so recent—times anymore, the Fair Work Ombudsman told us that they were updating all relevant web content—pay tools, pay and conditions guides and fact sheets—to reflect the 2011 annual wage review decision. These will be made available by 1 July 2011. I did not check the website, so can I ask did you live up to that expectation that they were all available as of 1 July 2011?

**Mr Wilson:** I am pretty sure that we did meet the expectation. My hesitance is to say 'all' but we certainly gave it a stab and I will take that on notice as to about the—

**Senator ABETZ:** Yes, if you could and if any of those then were subsequently changed or amended because of information received.

**Mr Wilson:** Sure.

**Senator ABETZ:** Thank you for that. Now the big question of the day that Fair Work Australia denied—it is only in the front of the folder because I had to rip it out of the Fair Work Australia folder—they deny any tweeting or twittering of any nature, so I am wondering whether the Fair Work Ombudsman engages in such activities?

**Mr Wilson:** We do, and Mr O'Shea can answer that question.

**Senator ABETZ:** All right, so if you—

**Senator Chris Evans:** Can I indicate at the start that this is not authorised by the minister and I think anyone over 15 who does it is mad, but anyway. So you are on your own!

**Senator ABETZ:** Can we quote that and pass that on to Mr Rudd?

**Senator Chris Evans:** Any of my cabinet colleagues—

**Senator ABETZ:** I think we know which side you are on, Minister.

**Senator Chris Evans:** No, Senator, I am afraid it has become trendy among a range of people but I am forever happy to help people dig themselves out of holes when they—

**Senator ABETZ:** Yes.

**Senator Chris Evans:** But that is not an official government position, that is a personal position.

**Senator ABETZ:** Do not twitter until you want to see it on the front page of a newspaper is very good advice.

**Senator Chris Evans:** But anyway, off you go.

**Senator ABETZ:** So you do twitter?

**Mr O'Shea:** The Fair Work Ombudsman does have a Twitter account.

**Senator ABETZ:** Thank you. Then can I ask specifically about this. There was a story in the *Australian Financial Review* on 2 September quoting Fair Work Australia as saying:

"We are currently expecting higher than average call volumes and you may have to wait to speak to a Fair Work adviser: Call centre: 5 minutes, Live Chat: 35 minutes, Email: 10 business days," ...

Do you lay claim to ownership of such a tweet?

**Mr O'Shea:** We regularly tweet the status of our contact centre availability, yes.

**Senator ABETZ:** And, when your workload varies, that seeks to assist those that are regular users of your service.

**Mr O'Shea:** That is the intention, yes.

**Senator ABETZ:** Was there any particular reason why on the Friday before 2 September—sorry, I do not have a calendar with me—you would have had a higher than average call volume?

**Mr O'Shea:** I do not have that information.

**Senator ABETZ:** Take that on notice. If you can tell us what necessitated the tweet, that would be helpful.

**Mr O'Shea:** I could add that that period of time following the wage decision obviously involves more callers calling our info line.

**Senator ABETZ:** When was the wage decision?

**Mr O'Shea:** I do not have that in front of me.

**Mr Wilson:** It was from 1 July.

**Senator ABETZ:** Yes, from 1 July, so one would anticipate that by the end of August most of those calls would have died down. That would be two months.

**Mr Wilson:** Yes, indeed. We will give you a proper answer on the subject, but the volume of calls varies on a daily basis.

**Senator ABETZ:** Of course.

**Mr Wilson:** It can be influenced by all sorts of reasons, including staff illness and so on. But we will get you a proper answer. The purpose of those tweets—in fact, it is on the front page of our website as well—is really to say to the community, 'Look, you might be experiencing some problems if you call between these peak hours.'

**Senator ABETZ:** Yes, which is fair enough good management practice. But one would hope that if it is because of staff illness, for example, you would say, 'Due to staff illness, there may be some delays,' rather than saying it is because of the bigger demand on the services on a particular day. But let us know.

**Mr Wilson:** All right.

**Senator ABETZ:** The Fair Work Ombudsman has issued a 'Best practice guide—use of individual flexibility arrangements'. Are you aware of that document?

**Mr Wilson:** Yes, we are.

**Senator ABETZ:** Do you perchance have it in front of you?

**Mr Wilson:** I am pretty sure we do. Would you like a copy?

**Senator ABETZ:** No. Well, chances are you have a nice printed copy, unlike my black and white copy, but I am sure I can read it. You have that document. On the front page, the last paragraph on the right-hand side—

**Senator THISTLETHWAITE:** Sorry, Senator Abetz. Could you just give us the title of that document.

**Senator ABETZ:** Yes: 'Fair Work Ombudsman: best practice guide—use of individual flexibility arrangements'. On page 1, the last paragraph says:

For specific information regarding your minimum legal obligations, contact the organisations listed under the 'For more information' section at the end of this guide.

Am I correct that those organisations would be Fair Work Online, the Fair Work Ombudsman and Fair Work Australia? Am I reading the document correctly?

**Mr Wilson:** Correct.

**Senator ABETZ:** I am told by a number of small businesses in particular that, when they go to the Fair Work Ombudsman seeking advice, they are given advice but with a caveat: 'This is not legal advice. This is not necessarily 100 per cent correct. You've got to get your own advice to make sure that what we're telling you is correct.' So I am just wondering on what basis you are now inviting people and saying that they can ring these organisations and obtain, in effect, legal advice.

**Mr Wilson:** I think the sentence says:

For specific information regarding your minimum legal obligations, contact the organisations listed ...

**Senator ABETZ:** That is right.

**Mr Wilson:** It does not seem to me to say, 'For legal advice, contact those organisations.'

**Senator ABETZ:** Are we going to suggest that somebody telling you what your minimum legal obligations are is not legal advice? I am sorry, I am just a lawyer by trade, but I would have thought that was legal advice.

**CHAIR:** That's the beginning of your problem!

**Senator ABETZ:** It could well be.

**Mr Wilson:** We define our service in this way. How others wish to define it I suppose is up to others.

**Senator ABETZ:** Or how you portray it, with respect. This is what I am questioning: how you portrayed in this paragraph.

**Mr Wilson:** I am sorry, I am not quite certain of the question.

**Senator ABETZ:** You have told us in the past you cannot give legal advice et cetera, that that is not your role. You give advice, but for people to be 100 per cent sure on what their obligations are they should be seeking legal advice outside of the Fair Work Ombudsman; that best endeavours are used et cetera but basically, at the end of the day, if the Fair Work Ombudsman gives people wrong advice they cannot sue the Fair Work Ombudsman because you never hold yourselves out as giving 100 per cent robust legal advice. Is that verballing the Fair Work Ombudsman in any way? If it is, I am happy to be corrected. But I understand that, in a nutshell, that is what small businesses have been told since day one and I think it is what I have been told at these hearings from day one.

**Mr Wilson:** I will endeavour to answer the question in a couple of parts. First of all, you started with the *Best Practice Guide* No. 3. We, in publishing that, provided the document to a host of external organisations, including unions, employer groups and the like, and the words were settled as a result of those consultations. I am not aware that that point was put to us in the settlement process. So that is in respect of the *Best Practice Guide* itself, and I do not particularly resile from those words. We are saying to people, 'If you need to find out more, then here is the place that you can find out more.'

In terms of the offering which we then provide through our range of channels, including the Fair Work Infoline, the fairwork.gov.au website, our inspectors, our staff and so on, I accept to an extent your point about legal advice. But, with respect, we are not in the business of providing settled legal advice on a client-lawyer basis, and when I say we 'don't provide legal advice' that is what I mean. Clearly we are able to say to people, 'Your minimum overview condition is 1, 2, 3,' but the context of that is a call which may last 10 or 11 minutes. It would be difficult for anyone to put the view that that is settled legal advice between a client and a lawyer; if they wish to then, by all means, they can do so, but we do not hold ourselves out as having done that. And when people require more than what we can provide in that context, we of course always say to them, 'This is a matter of some detail and some gravity for your business, so you should be speaking with your industry association or union or lawyer.'

**Senator ABETZ:** I hear what you say. I know this is gratuitous but, if ever you do a redraft, possibly deleting the word 'legal' might be of assistance because some people have taken it to mean that minimum legal obligations. People used to come to me as a lawyer and say, 'In these circumstances, what are my legal rights and my legal obligations?'

**Mr Wilson:** Sure.

**Senator ABETZ:** I do not want to labour that point much further, other than to go to page 2 where, with the individual flexibility agreement, there is the requirement that the employee be better off overall. The boot test I think we can be agreed on. But, first of all, what if somebody were to ring up the infoline and, in the event you were doing a day out on the

infoline, Mr Wilson, say to you: 'How is that going to be judged? How is that going to be determined? Can you tell me what my minimum legal obligations are?'

**Mr Wilson:** The process that we use is to ask a series of questions of the caller to establish the employing identity and thereby the conditions which apply to that employing entity. That is a matter of sorting through what the modern award is and what the predecessor state award might be, if one is applicable. From that, we can then say, 'You operate under this award and these are the minimum conditions.' As you may be aware, individual flexibility arrangements are made under the act, of course, but they are referenced back to either the modern award, which might apply within the workplace, and there is always going to be a clause within that modern award which specifies what the subject matter of the IFAs might be, so we would always draw attention to that. But, in a particular case, you can negotiate on these issues but not on other issues. Similarly, if the call establishes this, we may be able to indicate what authority is given by the collective agreement which may apply within the workplace. Collective agreements should, but not always, have delegatory clauses in them as well which indicate what IFAs can be. So we go through that process. We then try to say to the person that there are a number of tests for forming the individual flexibility arrangement. By definition it has to be agreed by the worker and the employer.

**Senator ABETZ:** If I can interrupt you, that is all fine, and I think I understand the process. But what if the employer, on the basis of the promise of providing minimum legal obligations, were to ring and say, 'Look, this is the deal; the employee thinks he's better off but, under the law, I am told I bear the responsibility that the employee is better off; can you confirm to me that the employee will be better off so I can sign this deal because I am not 100 per cent sure?'

**Mr Wilson:** I think your question has already answered itself in that the duty is with the employer. We would of course not be able to make that call in the course of a telephone call and we would say that to the caller.

**Senator ABETZ:** You would also tell them that if they got it wrong they would be up for a \$6,600 penalty as an individual or \$33,000 if it is a body corporate. You will find that on page 5. It hardly makes the IFA process attractive if the body that gives out information is more than happy to say, 'If you muck this up, there is a \$6,600 penalty as an individual or a \$33,000 penalty if you are a company; we can tell you what happens if you get it wrong but we're not actually in a position to tell you whether or not that which is proposed will be adjudicated as being better overall.'

**Mr Wilson:** I am not sure of your question, Senator.

**Senator ABETZ:** I would have thought, with great respect, that it is pretty obvious. You can tell people what the penalty will be if they get it wrong but you cannot give them advice as to how to get it right before any penalty might apply to them.

**Mr Wilson:** Senator, with respect, I do not discern a question in that. It is a proposition. Are you asking me to respond to the proposition?

**Senator ABETZ:** Absolutely—and sometimes we do put propositions to witnesses at these hearings, as you would well know.

**Mr Wilson:** Again, as we would all well know, the Fair Work Act provides penalties for quite a number of actions or absence of actions. It would be improper of us to not draw those

penalties to people's attention. That is quite different, though, from endeavouring to say that, because we do not offer an opinion about the content of individual flexibility arrangements, somehow it is improper for us to draw out what the penalties might be if the process is not followed.

**Senator ABETZ:** But, Mr Wilson, it is like being told, 'If you speed along this road the penalty will be \$200, but we're not going to tell you what the actual speed limit is.' That is the dilemma so many small businesses face. They see the possibility of a \$6,600 penalty and then the need to go to lawyers to get absolute legal advice, which will be an extra potential cost. Can you understand why individual flexibility arrangements fast lose any sense of attractiveness for employers?

**CHAIR:** If you do not mind, Senator Abetz, I just want to follow up. Who initiates a prosecution in terms of a potential breach? Do you exclusively do that or are other parties able to do that?

**Mr Wilson:** We are not exclusive litigants in any part of the Fair Work Act. I could be wrong; there might be one or two. But, certainly, in respect of individual flexibility arrangements and modern awards, any person with standing can make an application to a court. My understanding of the penalties is that they relate to the formation of the agreement and, in particular, to whether there has been coercion or misrepresentation about the content. The difficulty I have and, in fact, any person working for us has in forming an individual flexibility arrangement is that these are highly personal arrangements which are dealt with between an employer and employee. It is not feasible for any of our staff to really delve into the circumstances to make an assessment about whether or not that particular worker is better off.

**Senator ABETZ:** Of course, we also know that human nature is such that some people enter into deals and arrangements that are all roses and sunlight and sunshine and 'we love it all'. Then, a little bit later, the relationship sours and somebody says, 'I'm not sure that I am actually better off in this arrangement,' and then seeks to get back pay or whatever else.

**Senator Chris Evans:** That is right, but what Mr Wilson is really telling you about is the same sorts of incidents as you and I and other senators have dealt with in our electorate offices. When someone rings you up and says, 'This is the story,' often there is one bit missing that is quite critical to the situation. Somebody says, 'I've been denied something by Centrelink and blah, blah, blah,' and they do not mention that they might have \$100,000 in assets or whatever. As you know, you never give advice to a constituent definitively like that, as to their case, because you have to delve into the circumstances and be confident that you have got the whole story. I think what Mr Wilson is reflecting is that general approach—that you cannot tell someone anything definitive in response to a phone call.

**Senator BACK:** Mr Wilson, where does an employer go for general guidelines on flexibility arrangements in advance, if not to the Ombudsman, if they do not want to get themselves in the position of ever being the subject of penalties? To whom should they refer?

**Mr Wilson:** In a very general sense, to the Fair Work Ombudsman. We do provide that very general advice. But what we do say to employers across the country is that we are not their advocates and neither are we an employee's advocate, and that, if they need assistance about forming the normative view about whether or not this agreement works in this particular case, that is really something they should be speaking about with their industry



association. Therefore, the advice we give is certainly the advice through these best practice guides and elsewhere on our website, which are illustrative. They take the illustrations of the explanatory memorandum a little bit further, but they are quite conservative illustrations.

If you put that into the circumstances of a particular staff member in your office, for example, who wants to start a bit earlier and thereby trade off some benefit as a result, it may well be in that person's case that they are better off overall. But it may well be in the case of some other person that they are not. That is a matter of individual discussion and advice. Quite clearly, if you are not certain in your own mind, you need someone who can advise on that in a little bit more detail than our general telephone line.

**Senator Chris Evans:** Can I just make the point to Senator Back that the government did fund industry employer organisations and trade unions to provide education for their members—and I forget the figures—with a significant amount of funding into supporting those industry associations providing education services in the transition to modern awards. I accept that is an ongoing service requirement which comes down to whether people join those organisations or not.

**Senator ABETZ:** Basically 80 per cent of workers and businesses are not members of their relevant organisations.

**Senator Chris Evans:** That is an issue which is always hard to overcome in the sense of reach.

**Senator GALLACHER:** I have read your 2009-10 annual report and it states that in excess of \$26 million has been recovered in underpayments by some 13,000 employers and 98 per cent of that is done without recourse to legal action. Then I see further in your report that some \$2 million has been recovered in penalties, there were some 33 underpayment prosecutions, six unlawful industrial action prosecutions and a few other minor areas. Nowhere in your report can I see the amount of expenditure on legals as a line item. I was curious if there was information as to how much you did expend in legal fees to come to those results.

**CHAIR:** I am not sure that we have finished with IFAs yet, so we can come back to that.

**Mr Wilson:** We can answer it to an extent.

**Senator Chris Evans:** The question is about legal fees for prosecutions.

**Senator GALLACHER:** The good work is reported, but I am curious as to how much legal expenditure there was to achieve those outcomes.

**Mr Wilson:** We spend legal fees in two classes, one of which is our external legal spend to firms and barristers and the like, which Mr Scully has, and we also then employ 40 or so lawyers, which is a separate line. Mr Scully is in a position, I think, to answer both of those.

**Mr Scully:** The total of both those line items is around \$8.6 million. That includes the cost of our internal legal group as well as the payments we make to external legal providers.

**Senator ABETZ:** These interventions from other senators are very helpful. Does the Fair Work Ombudsman actually run any prosecutions on IFAs as yet?

**Mr Wilson:** We have, Senator. I will ask our chief counsellor, Ms Webster, to answer that question.

**Ms Webster:** What was your question again, please Senator?

**Senator ABETZ:** Have you undertaken any prosecutions or actions, whatever the term is, applications, in relation to individual flexibility agreements or arrangements?

**Ms Webster:** Yes, we have, Senator. There was the matter of the Australian Shooting Academy which was recently handed down in Queensland. That involved individual flexibility agreements. In particular a small number of employees were provided with IFAs and, as confirmed by the court, they were coerced into signing those. As a direct result they suffered some financial loss.

**Senator ABETZ:** How many have you taken?

**Ms Webster:** Just the one.

**Senator ABETZ:** Just the one case. Of course, we will never know how many individual flexibility arrangements exist out in the big wide world. Do we have any anecdotal evidence or any assessment that might point to the number of IFA's?

**Mr Wilson:** Not specifically in relation to that question. The information that we have is fairly basic because by definition these are matters which are formed between an employer and an employee and they are not brought to us unless there is a particular problem. What we do know is that in the last financial year there were 1,721 telephone inquiries which had the client mentioning flexible work arrangements or individual flexibility arrangements, so about 1,700 inquiries out of, I think, it was 885,000 phone calls. That is where people speak to us about the issue. The policy we have is that if that raises a problem we then immediately bring it to an investigation if that is needed.

**Senator ABETZ:** Are you able to indicate to us how many of those phone calls are employee or employer related?

**Mr Wilson:** Fifty-nine per cent were employees or their agents, 39 per cent were employers or their agents and two per cent were other categories, such as independent contractors. The other information I can give to you is that, in addition to the one matter which Ms Webster referred to, there are presently three fairly advanced investigations concerning individual flexibility arrangements. They cover a number of issues but it is probably inappropriate for me to detail the names of those.

**Senator ABETZ:** Of course.

**Senator Chris Evans:** If I may be helpful, given my encyclopaedic knowledge of the act, section 653 of the act requires the general manager of Fair Work Australia to review developments in making enterprise agreements, conduct research into the extent to which individual flexibility arrangements under the modern awards and enterprise agreements are being agreed to and the content of those arrangements. There are a few other matters there. Then the review and research must be conducted in relation to the following periods, the three-year period that starts when the section commences and each later three-year period. The Fair Work general manager will be required to review the experience if you like of flexibility arrangements.

**Senator ABETZ:** As of January next year.

**Senator Chris Evans:** Or at the three-year mark. I think it is the middle of July because there is this argument about the act fully coming into being. So around the middle of next year.

**Senator ABETZ:** This will be a separate review from the Fair Work Australia one that we heard about this morning, the departmental review that we will cover tonight. This is a separate one is it?

**Senator Chris Evans:** There are a range of requirements in the statute which provide for the gathering of this information and the operation of the act and that is one of them that is picked up.

**Senator ABETZ:** When you undertake general investigations do you from time to time stumble across individual flexibility arrangements?

**Mr Wilson:** I believe so. When we conduct auditing we will look for individual flexibility arrangements.

**Senator ABETZ:** Auditing rather than investigations, thank you.

**Mr Wilson:** Mr Ronson tells me that we have seen a few where individual flexibility arrangements are in place but we have not discerned any problems with those.

**Senator ABETZ:** Right. If flexibility and productivity are important considerations for the Fair Work Act and for Australia generally what is the Fair Work Ombudsman doing to celebrate and highlight good IFAs?

We issue press releases that we have got a bad one, we have made a conviction, a huge fine—that is all good because you have to get rid of the rogues; I fully agree with that. It seems nearly all one-way traffic in the media and the way we are approaching the IFAs. It is negative in that we will tell you what the penalty is, but we will not actually tell you what should or should not be in them. Does the Fair Work Ombudsman, during audits, find the odd IFA that it might think is worthy of highlighting as being a best-model example. The employer and employee could be asked whether it could be used, with their names removed, as an example of how IFAs can work for the betterment of both employees and employers so there is not only one-way negative traffic in relation to IFAs.

**Mr Wilson:** That is a good suggestion. I will take it up with Mr Ronson and see how we can do that.

**Senator ABETZ:** It is nice to know that the opposition from time to time can come up with good suggestions.

**Senator THISTLETHWAITE:** I want to return Mr Wilson to the issue of foreign crews on Qantas flights and the flights of their subsidiaries. Mr Lehn mentioned earlier that there had been a formal complaint by the Australian and International Pilots Association. Are you aware of any other complaints by any other organisations or individuals?

**Mr Lehn:** Yes. Forgive me, I think I was distracted in answering the previous question. There is a separate complaint which has come from an individual complainant in relation to the use of foreign based cabin crew on Jetstar domestic flights.

**Senator THISTLETHWAITE:** Are you able to tell who?

**Mr Lehn:** No, the complainant in that matter has elected to remain confidential and I cannot disclose that.

**Senator THISTLETHWAITE:** Have any other organisations made complaints?

**Mr Lehn:** No.

**Senator THISTLETHWAITE:** Is one of the issues that you are investigating the use of overseas labour hire firms providing crew on wages that are less than those paid to Australian staff that work for that company?

**Mr Lehn:** That is the substance of the allegation, yes.

**Senator THISTLETHWAITE:** Is there any substance to the allegation? Are you able to inform us about that?

**Mr Lehn:** It is a complex issue. The labour hire arrangements in place—

**CHAIR:** I am not sure I am comfortable with these questions about an ongoing investigation.

**Senator Chris Evans:** That is right. The officers are happy to answer questions about the nature of the issues, but not other questions. I almost jumped in when the officer was asked the name of the complainant as I do not think that was appropriate. On issues regarding wage rates, we are happy to help where we can.

**Senator THISTLETHWAITE:** Is one of the issues being investigated tag flights where a flight crew works on both domestic and international routes?

**Mr Lehn:** Yes. The use of tag flights forms part of the investigation. As I said, it is quite a complex issue. It goes to the way that airlines structure their operations with domestic and international flights and the way that the crews are placed in anticipation of deployments overseas and so on. There are a number of issues that we are yet to discuss with the managers of Jetstar. In fact, we have had some initial discussions and we have more to come. We have not formed a view at this stage as to whether any of the practices contravene the law. We are simply not in a position to do that at this point in time.

**Senator THISTLETHWAITE:** Is the nature of the investigation the application of the Fair Work Act to those tag flights?

**Mr Lehn:** Naturally our jurisdiction extends to the Fair Work Act. We are looking at the nature of the operations in that context.

**Senator ABETZ:** I asked earlier about the ombudsman getting up all the relevant fact sheets for the 2011 annual wage review decision and I was told that these would be made available by 1 July. Please tell us the date on which they were put up because the concern was that there was not sufficient time for those dealing with payrolls to get the information for the next pay period. Please let us know when the fact sheets were put up and whether anything is in place to try to get the decision made for fact sheets to be put up earlier so that people have sufficient time to make the adjustments.

**Mr Wilson:** We will take that on notice.

**Proceedings suspended from 12:31 to 13:30**

**CHAIR:** We will now resume these estimates hearings and the questioning of the Fair Work Ombudsman. Senator Abetz.

**Senator ABETZ:** Thank you, Chair, and welcome back to the officials. Can I have confirmed to me if PayCheck Plus—I think that is a program or a service you have—in relation to the building industry was compiled in liaison with the ABCC, or did you do it all of your own volition and the ABCC then simply advertised it as a service for people in their sector to utilise?

**Mr Wilson:** Unfortunately I would need to take that on notice; I do not know the answer.

**Senator ABETZ:** All right; not much rides on that so, yes, do so. I understand the Fair Work Ombudsman is undertaking a research project to gain a better understanding of industry practices and, I understand, building industry practices, with a particular focus on the manufacture and installation of inbuilt furniture and roof truss manufacture. Is that news to you?

**Mr Wilson:** I do not know about any research project into that. If you would like to give me more details we might be able to nail it down.

**Senator ABETZ:** I am referring to a media release of 18 May, 2011, by the Housing Industry Association. Sorry, it is a member alert, not a media release—so if you are unable to access it let me know and I can provide a copy—in which the HIA makes certain observations about businesses in the kitchen and bathroom industry that could be covered by up to four different awards and then they list those four awards. They talk about the confusion and then they say, and this is the direct quote:

For some time now HIA has been pressing the government for a resolution. In response, the Fair Work Ombudsman is now undertaking a research project to gain a better understanding of industry practices with a particular focus on the manufacture and installation of inbuilt furniture and roof truss manufacture.

The Fair Work Ombudsman has indicated that it intends to develop a simple checklist to provide greater certainty when considering award coverage.

This rings no bells?

**Mr Wilson:** It rings a faint bell. My recollection of the matter is that there have been some approaches. I was not sure that it was from the HIA, but certainly in respect of some aspects of the furniture industry I recall that there were dialogues. Unfortunately, I cannot recollect the detail of that. I would need to take that on notice.

**Senator ABETZ:** If you could. I welcome these sorts of collaborations with industry groups. I get it from a number of different areas that genuine employers, especially in the small business sector, are just at a loss to know which award their workers should fit under and sometimes there are real problems. We are told that it is common for an off-site business—that is a building business that is off site—to provide services to the public in areas of kitchen and bathroom renovation, laundry and wardrobe fit-outs, custom-made home furniture, shop fit-outs and timber flooring.

Then the question is: which modern award should apply? Should it be the Timber Industry Award, the Joinery and Building Trades Award, the Building and Construction or the Manufacturing and Associated Industries awards? I think we can agree there can be room for some confusion and, if you are working to help sort that out I congratulate you on that, welcome that and look forward to the answer on notice.

**Mr Wilson:** We will take that on notice.

**Senator ABETZ:** Keen reader as I am of the *Wynnum Herald*, it had a story on 8 June 2011 which was all of four lines long, headed 'Tiling audit'. It read, 'Fair Work inspectors audited 12 tiling businesses in Brisbane and on the Gold Coast to find 11 had underpaid employees.' I would have thought that all of us would be concerned at this huge rate of underpayment if there were a random audit of 12. What do we put this down to? Do you have

any information to share with us about that particular audit, because it seems to me that the Fair Work Ombudsman's role is educative. Do you consider this large breach—11 out of 12—is a failure on the part of the Fair Work Ombudsman to properly educate and inform? Do you consider it wilful and deliberate that the tiling industry just happens to attract people that want to underpay their workers? What do we put this high rate of underpayment down to?

**Mr Ronson:** The information I have in front of me obviously differs to what is in front of you. We commenced the South-East Queensland tiling industry audit campaign in November 2010. There were 12 employers operating within and around Brisbane and the Gold Coast who had their records assessed for compliance with hourly rates of pay and time or wage record-keeping obligations. But of the 12 businesses audited, one employer was identified as having a monetary contravention. The information I have in front of me contrasts with yours. I am advised that the employer voluntarily back paid three employees a total sum of \$2,283. All audited employers were compliant with time or wage record-keeping obligations.

**Senator ABETZ:** It just goes to show we cannot rely on the *Wynnum Herald* in relation to these matters. You are saying that, out of the 12 audited, only one was found to have a—

**Mr Ronson:** It seems to be the inverse.

**Senator ABETZ:** That is good news. Thank you for that clarification. How are we going with the cleaning industry? They have made numerous representations to me about the complexities and difficulties of the application of the award. I understand that the Fair Work Ombudsman had a national cleaning services campaign. Is that still ongoing?

**Mr Ronson:** You are right. There was a national cleaning services campaign. The report is available on our website.

**Senator ABETZ:** Yes, and I have that in front of me. So the campaign is finalised?

**Mr Ronson:** Yes, but I should note that the way campaigns typically are structured is that often some ongoing investigations arise out of the actual audit programs. So it may well be the case that there is still what we call tail or legacy work, but the actual audit program itself is completed.

**Senator ABETZ:** When you say 'legacy work', is that looking to ascertain whether somebody needs to be prosecuted or not?

**Mr Ronson:** What can happen in the context of an audit, which has its own methodology, is that if there is a reason to believe that there is a deeper compliance issue or a more serious noncompliance, or perhaps a lack of engagement from an entity that is being audited, the option we have is to escalate to an investigation which, in a sense, gets behind the documents and typically plays out in the form of more formal interviewing of the employer, interviewing the workers and so forth.

**Senator ABETZ:** Is the Fair Work Ombudsman's office cognisant of any particular concerns, especially in the state of Western Australia?

**Mr Wilson:** In the cleaning industry?

**Senator ABETZ:** Yes, we are still on the same topic.

**Mr Ronson:** I am aware of one particular concern that was referred to us and included in our audit.

**Senator ABETZ:** What was that concern?

**Mr Ronson:** From memory, I think the Australian Cleaning Contractors Association were concerned about some labour hire practices in Western Australia which involved the cleaning sector—or appeared to involve the cleaning sector. The advertisements from a particular company seemed to suggest that they could provide a service that could help employers get around the Fair Work Act. The Australian Cleaning Contractors Association referred this matter to us and we agreed to include it as part of our audit in the national campaign.

**Senator ABETZ:** Has the proposition been put to you that the provisions of the Fair Work Act also tend to discriminate against certain employees? The example that was given to me was that if a cleaner has a contract to clean a certain premise which might take one hour, then in those circumstances you can employ somebody for a minimum of one hour under the award. But if you were to have another such premise, let us say half an hour away, that needs to be cleaned and you were to use the same employee, you would have to pay them for the travel time to the next job. What happens is that individual companies find it very difficult in certain circumstances to provide a full day's work for people when they have a whole lot of scattered contracts around the place because there will somebody else that can underbid them on the basis of, 'I've got a local employee who only wants to work for one hour and therefore we will engage that person for the one hour to clean that premise.' Another company that might want to bid for that job clearly cannot because their wage structure, which is a huge component of cleaning, would—in rough terms—be 50 per cent higher than the competitor. Have those sorts of concerns been brought to the Ombudsman's attention with a request for advice as to how some of these practical difficulties might be overcome?

**Mr Wilson:** I will have to take that on notice. There is another division which may well have dealt with that matter which is not represented here today. I do not believe Mr Ronson's division has had any contact on that subject.

**Mr Ronson:** No, I cannot recall that particular example or scenario in our report.

**Senator ABETZ:** Also, is there a limitation in the award that you can only work five days in a week?

**Mr Ronson:** I would need to refresh my memory.

**Senator ABETZ:** Okay. And the cleaning industry is now having difficulty, because of that limitation, getting workers to work on a Monday and Tuesday because if they work five days a week, and there are penalty rates on a Saturday and Sunday, then clearly they want to work on Saturday and Sunday when they can earn more money.

Nobody is putting their hand up for working only during the week because there is that limit of five days work. I will leave that to you. If you could let me know if it has been brought to your attention, or if discussions have taken place as to how these issues can be resolved.

Moving on, and I think we had a preliminary discussion about this, Mr Wilson, in relation to the IFA document: what responsibility does the Fair Work Ombudsman take for providing incorrect advice which has seen some small businesses pay their workers in excess of what they have to, and they are unable to recoup their money?

**Mr Wilson:** From time to time we will have a person who puts to us the view that there has been some sort of negligent action on the part of the agency. We will, as will every government agency, consider that and determine what needs to be done about it. If you care to put a specific example to me I might be able to give a more precise answer.

**Senator ABETZ:** And if a specific example could be provided, and you are willing to acknowledge that occurred, would—I know this is hypothetical but rather than calling it hypothetical can I call it 'in principle'—the Fair Work Ombudsman, in principle, be agreeable to supporting an act of grace payment?

**Mr Wilson:** I choose my words carefully. We have—

**Senator ABETZ:** Do you want to take it on notice?

**Mr Wilson:** Not particularly. We have provided act of grace payments, as have many other government agencies.

**Senator ABETZ:** In relation to advice that was proffered?

**Mr Wilson:** I will take that aspect on notice.

**Senator ABETZ:** Clearly agencies will do that, but I am wanting to find out specifically in relation to advice proffered.

**Mr Wilson:** We will take that on notice.

**Senator ABETZ:** So you will take on notice whether any such payments have been made and also whether, in principle, in relation to advice you would be minded to support such a request. Feel free to take that on notice as well. It might potentially set a precedent not only for the Fair Work Ombudsman but for other departments.

**Senator Chris Evans:** I do not think I would encourage Mr Wilson to flash outside the off stump, even in taking it on notice, in the sense that there are, in my experience, very strict guidelines regarding act of grace payments. I am sure he will be requested and guided by Finance and others to apply those guidelines. We will take it on notice.

**CHAIR:** In terms of the types of examples that Senator Abetz is referring to, they would be caught up in your normal complaints process, wouldn't they? What percentage of your overall complaints refer back to what is considered to be inappropriate advice received?

**Mr Wilson:** It is miniscule. There is a handful of matters a year where we have claims put to us that because of our actions there have been unfortunate consequences. The duty we have under the Commonwealth framework is to consider those carefully, but it is only a handful per year, out of, potentially, a million or so interactions.

**Senator ABETZ:** For what it is worth, for example, yesterday I got an email from somebody who will remain nameless, 'I am a small business owner employing about 30 staff. I have been struggling with trying to pay the correct wages. Every time I go into the Fair Work site I enter the same information and yet come up with a different wage.' The frustration of this small business person has led to an email to me.

It is a real issue. Have you received any complaints—apart from mine just now—about conflicting information or advice that has been given?

**Mr Wilson:** Yes.

**Senator ABETZ:** Do you keep a record of that?

**Mr Wilson:** We do.

**Senator ABETZ:** Are you able now to provide to us a numerical record as to how many complaints you have received about conflicting advice?



**Mr Wilson:** I do not know whether we can and I will take that aspect on notice. Addressing that email that you referred to, the only answer that can be given to that constituent is to say, 'Come forward and tell us the detail.' It could well be one of a number of circumstances. It could be that there is some genuine error within our website, and if there is we need to know about it and we need to be able to replicate the exact problem that they experienced. I have not heard of that issue. There are other alternatives, including people putting in conflicting information that leads to different results. Typically what we find when it is put to us that we have given conflicting information on different days is that the question is different, just a little way, and that that leads to different answer.

**Mr O'Shea:** And indeed, Senator, wage rates and the like can change from time to time with decisions, so the date on which the different information was requested will be important.

**CHAIR:** But it would be disturbing if the same information was put into a program and different answers come out on a day-to-day basis. That would have to be an error, surely.

**Mr Wilson:** Exactly.

**CHAIR:** You haven't got any systems designed to do that, have you?

**Mr Wilson:** We certainly have not.

**Senator Chris Evans:** If you did they wouldn't work!

**Mr Wilson:** Errors in IT can occur. I am not saying we have them, but if it was a particular search string that led to that then that clearly is something we would want to know about and fix and make sure it cannot be replicated.

**Senator ABETZ:** That is one of the issues of the public perception in relation to approaches to the Fair Work Ombudsman that—

**Mr Wilson:** I cannot fix what I do not know.

**Senator ABETZ:** Yes, but I assume you do know that, at least with some, there is a public perception that whilst the Fair Work Ombudsman is there to help it is also there to prosecute and therefore some people are a bit hesitant to come forward with information or concerns.

**Mr Wilson:** I have heard that previously, and when I have heard it I tend to say that I know of no example where that actually has occurred. I know of no example where people have come forward and sought advice that has then led to difficult consequences for them.

**Senator ABETZ:** It may be an ill-informed perception but, as I travel around, that is something that is put to me from time to time. Would it be possible for the Fair Work Ombudsman to provide, for want of a better term, a spreadsheet with each award and the categories of pay?

**Mr Wilson:** We do. We provide pay and conditions guides which are published for something like 85 per cent of the modern awards. The slight complexity, which creates a three-dimensional spreadsheet, is the transitional and phasing arrangements relating to the state awards. So we have most of that information there. I am afraid the idea of putting it in a two-dimensional spreadsheet, across with columns and down with rows, is not quite how we would have to present the information.

**Senator ABETZ:** One assumes that, as the Fair Work Ombudsman, you and your officials are about as good as it gets in relation to being able to put an enterprise agreement together. I

understand that earlier last month the enterprise agreement for the Fair Work Ombudsman was only approved after you personally, I think, Mr Wilson gave an undertaking to Fair Work Australia. Is that correct?

**Mr Wilson:** Not quite. There was an undertaking given to Fair Work Australia, but it is not correct to say that it was only approved after that undertaking was given.

**Senator ABETZ:** Or was it approved prior to the undertaking being given?

**Mr Wilson:** No, and the circumstances relating to the undertaking were that at the point that it was put to me for signature—and indeed for the transmission of the agreement to Fair Work Australia—it was identified to me by my staff that there was an inconsistency between two clauses within the document—

**Senator ABETZ:** Were they 176 and 156?

**Mr Wilson:** Yes, clause 176 and clause 156. That was just an out-and-out drafting error on the part of the team that had put it together. So we looked at that and for our own staff point of view as much as for Fair Work Australia we thought it appropriate to put an undertaking to Fair Work Australia. Subsequently Commissioner Deegan approved the agreement on the basis of the document itself and also the undertaking that I provided.

**Senator ABETZ:** So did you go to the commission with the undertaking in your pocket, if I can use that term?

**Mr Wilson:** Most certainly.

**Senator ABETZ:** Right. So you had identified this issue prior to lodgement?

**Mr Wilson:** Certainly prior to lodgement.

**Senator ABETZ:** So some of the reporting on that is, in fairness to you, unfair, and I accept that. Why would you not have then corrected the document prior to its lodgement so that you would not have to provide the undertaking? Would that not be a tidier way of doing it?

**Mr Wilson:** The reason we provided the undertaking is that, in the formalities of the approval process—I forget the terminology—that the ballot had not gone to the employees indicates an acceptance on the part of the employees of the agreement and the obligation is for us then to put that agreement as balloted by the employees to Fair Work Australia. That is what we did and it was considered that that would be a more expedient process for us and our staff.

**Senator ABETZ:** So you would have had to re-ballot the whole lot?

**Mr Wilson:** I am not precisely sure whether we would have had to do that, but certainly the assessment made was that the undertaking was the most expedient approach.

**Senator ABETZ:** Was it an employer representative that drew this matter to your attention or an employee representative within Fair Work Australia that drew it to your attention?

**Mr Wilson:** It was an employer representative.

**Senator ABETZ:** Good to see that there are some good employers around that pick up these things.

**Mr Wilson:** Well, we think it is a best practice agreement and we are very proud of it, but unfortunately there was a problem with the drafting.

**Senator ABETZ:** And if I might say also after that, I was under a misapprehension, given some of the reporting, that if you guys do not know how to do it how on earth can you expect others to do it, but you had picked up the error before lodgement and then for expedition you provided the undertaking. I am satisfied with that.

Now let us go to the realm of the Church of Scientology—and I am surprised that Senator Xenophon is not here. But it has been put to me that there was a draft report and then a final report. Is that correct?

**Mr Wilson:** Yes, that is correct.

**Senator ABETZ:** Was the draft report provided to the representatives of the Church of Scientology?

**Mr Wilson:** The draft report was circulated to a number of people we regarded as complainants, probably eight or nine or 10 in total. It was also provided to various Church of Scientology entities and also of course to their solicitors.

**Senator ABETZ:** If you are investigating a matter, is it normal practice that you provide a draft report, let us say to the employer and the union, with what we can describe as your preliminary thoughts, prior to a final report?

**Mr Wilson:** It is probably unusual practice, but it is not unheard of practice. Clearly in this case which was very extensive, which had gone on for about a year at that time, we thought it was the best way to proceed. There were clearly a number of views that needed to be put to either side to make sure we had the evidence correct and that our interpretation of various matters correct.

**Senator ABETZ:** It is a practice that I think the Audit Office undertakes on a regulation basis. I was just wanting to know, if it is not usually done, what was considered to be the unusual nature of this particular investigation as to warrant the taking of this step?

**Mr Wilson:** I think we took the view that there were quite a number of findings which would be contested by any number of people, including the church and the complainants who had approached us. It is possibly not dissimilar to other complex and large investigations where we have done the same sort of thing as well.

**Senator ABETZ:** You have?

**Mr Wilson:** I believe we have.

**Senator ABETZ:** Can you take on notice how often you have done this? That would be helpful. Were any material, significant changes made from the draft to the final report as a result of feedback from any of the parties, and I do not want to know from which parties?

**Mr Wilson:** The final report is materially different from the draft, and I am uncomfortable talking about the draft. The reason for that is it was circulated on a confidential basis to the parties. I do not wish to make any comment about where the final report is different from the draft. Clearly the draft report was put to them for the purposes of eliciting feedback or additional evidence and so on. As a result of that, yes, the final report was different.

**Senator ABETZ:** That is fine and that is the purpose of sending out a draft report by saying that you have an open mind and you are still able to be convinced. Clearly, whoever it

was able to convince you one way or the other that the draft should be amended. If I might say, gratuitously, I would have thought that that was the proper way to approach it.

**Senator Chris Evans:** You might like to ask this question, Senator Abetz, but it seems to me, for clarity, that the amendments or the revised report were made by the same person who made the original report. It leaves open in the answers whether or not there was a secondary process. I am not sure whether you want to leave that hanging. I think it would be a useful accountability.

**Senator ABETZ:** That is a line of questioning that I had not thought of.

**Senator Chris Evans:** It was left open at the end of that. I do not know what the answer is but I think it ought to be clarified.

**Mr Wilson:** I will answer that question, but if I can use a little bit of time to explain the process. We had a principal investigator who was clearly the lead investigator. She worked on the matter for many months. She met with the witnesses during the evidence and so on. As it developed, the report passed through many hands. It clearly was a team effort in terms of the draft report. The draft was issued as my report and I take accountability for that. Having said that, I believe the letter might have come from Mr Davidson who is the New South Wales director. The draft was an invitation from him to the parties to make comment. That process of comment went on for about six or eight weeks or maybe longer. The report was finalised, again, by the same kind of team and was issued then by me as the final report.

**CHAIR:** I can understand if minor changes were made to the draft report you probably would not recirculate it, but if significant changes were made did both parties get an opportunity to look at it again?

**Mr Wilson:** No, they did not. My view on that was that the issues by that stage were well known and it came to a matter of making a decision, which is what we did.

**Senator ABETZ:** I am sure I know what the answer is, but are you confident that the draft report, which appears to have found its way into the media, was not leaked by any of your officers?

**Mr Wilson:** I believe that is the case. If I can anticipate a further question, we did not investigate that possibility.

**Senator ABETZ:** You did not investigate it?

**Mr Wilson:** No. The context of that is that the media approached us about the draft literally at the same time as we were settling the final. So it was a matter of: 'let's finalise the final and ensure it is out there.'

**Senator ABETZ:** That final report is now out there as a public document?

**Mr Wilson:** It is a public document, yes.

**Senator ABETZ:** As a result of which there are now no ongoing investigations or briefs to prosecute as a result of this investigation?

**Mr Wilson:** There is one matter which is still being investigated. Mr Ronson may care to speak on that.

**Senator ABETZ:** I am very sensitive that we do not traverse into an area we should not, but I am sure Mr Ronson is sufficiently experienced not to offend.

**Mr Ronson:** The report is clear—there is only one ongoing investigation and that information has been made public.

**Senator ABETZ:** It has been put to me that the media release from the Fair Work Ombudsman in relation to this investigation does not reflect as accurately as it might the actual findings of the report.

**Mr Wilson:** That contention has been articulated to us as well. I disagree with that contention. The media release was authorised by me as well. It went through a number of hands obviously in its settlement. It is a longer media release than we would normally issue. It is also one which is very measured and careful in its language. It has been put to me that the church contends that it is not an accurate reflection. I repudiate that. It is a very good summary and a very sober summary of the report. But if it is not, well and good. They are entitled to issue their own media release; which they did.

**Senator ABETZ:** Is it correct to say that no adverse findings against the church were made by the Fair Work Ombudsman?

**Mr Wilson:** No, it is not correct.

**Senator ABETZ:** Was the press release in relation to this finding taken off your website for a day or two?

**Mr Wilson:** Before I get to that question, I would like to clarify my answer to your previous question about whether there were adverse findings against the church. The document is a long document; in one sense it speaks for itself. The terminology of 'adverse findings' is one that can be debated about what is adverse or not. But I would contend fairly clearly that the report says that there are poor or no practices within the church to determine whether or not there are employees—that in itself is an adverse finding. The church would contend that there are no adverse findings in the sense of us having to determine to commence litigation—that may be the case—but there are other findings which I would say are adverse in nature.

In relation to the media release, the contention has been put to us again by the church that the media release was withdrawn from the website for a while. We do not believe that is the case. I think there was a typographical mistake somewhere in the document—I am not quite sure where—but I believe that typographical error was corrected and that led to a change in the hyperlink of the particular media release.

We think that might explain the view that it may have been withdrawn from the website. But certainly, as far as we are aware at the moment, there was absolutely no withdrawal from the website.

**Senator ABETZ:** Did the innocuous sounding typographical error change the material nature of the media release or not?

**Mr Wilson:** I would say no. I will need to check what that typographical error was. If I am mistaken in that then I will let you know.

**Senator ABETZ:** Thank you for that. In relation to what you said about the clear distinction between volunteers and employees, how does that potentially impact on similar types of organisations that, hopefully, are not as notorious an organisation as the Church of Scientology such as the local Catholic or Anglican dioceses, who have volunteers doing all sorts of good and wonderful things not only for the church community but for society at

large? Do you foresee that other organisations might have that? I recall way back in the dark ages a campsite that was run by an interdenominational church group. I, in fact, on that group's behalf, defended a case where the issue was: was the person a volunteer or an employee? These are notoriously difficult issues I would have thought not only for the Church of Scientology but for other community organisations?

**CHAIR:** How did you go with that case?

**Senator ABETZ:** We won. If I might say, Senator Marshall, I always knew I was under pressure when I had to walk into court with legal cases under my arm. That was one case in which I did have to actually take some legal books in with me.

**Mr Wilson:** I am aware of the contention that the report may have implications for other religious organisations, charitable organisations or volunteer organisations. I do not think it does. To effectively pick up on the point you made about the case and your experience, there are difficulties in some respects trying to determine who is in some circumstances a volunteer or an employee, but certainly what we experience through the complaints we get about other church and charitable organisations is that generally those categorisations are quite clear and, if there are problems, they are at the margin. The point we were trying to make through the report is that there seemed to be a large number of complaints from people saying that they were entitled to be employees when they had been classified as volunteers. The other point we were trying to make was, as we went through the investigation, there was simply a refusal on the part of the church to consider that they had any employees. That seemed to me to be a little bit of a gap in governance on their part.

**Senator ABETZ:** Without delaying too long, I understand that, especially in previous days when more women than men entered into nunneries and monasteries, for example, they would be trained up as teachers and be full-time teachers but be paid a stipend considerably less than that which the average teacher was paid, which made access to a Catholic education so much more affordable to a whole variety of people. Were they employees they were being underpaid but there was a very clear understanding that they were not being paid a low stipend but were volunteering, I would imagine, about 80 or 90 per cent of their time, if not more. Where does that leave us with those sorts of examples and situations?

**Senator Chris Evans:** I think it leaves us in a very difficult position. I had similar issues when dealing with visas as minister for immigration, with Buddhist monks seeking to come in under 457 arrangements et cetera. How does one set the appropriate Australian wages and conditions for a Buddhist monk?

**Senator ABETZ:** Don't they have a union? Come on, Gavin; here is an opportunity!

**CHAIR:** Not if they haven't got any money!

**Senator ABETZ:** Oh, they don't have any money for the union!

**Senator Chris Evans:** If you saw what they were getting paid, you would understand why they do need a union! All I can say, Senator Abetz, is that that taught me that these things are not as simple as one sometimes hopes.

**Senator ABETZ:** Do you have a special guide in relation to volunteers and voluntary organisations? People might, for example, say, 'Look, I'll be officially employed for two hours a day,' but they then volunteer for the other six hours a day. It is not written in a tablet of stone. It is just that, because they are all community minded, they are happy to do so.

**Mr O'Shea:** We do not have a guide that specifically covers volunteering in isolation, although it is caught up in a fact sheet that we have produced which is more centred around the issue of internships and unpaid work trials. So we do cover off some of the parameters around volunteering in that. But of course, from a compliance point of view, it really is a case-by-case basis and analysis of whether there is an employment relationship or not.

**Senator ABETZ:** Yes. Of course, if people want to know whether they are doing the right thing or not, that is a vexed question. But I dare say we are not going to resolve it here at these estimates, so let us move on, because I realise we are already over time. I understand that the legal team at the office of the Fair Work Ombudsman won the 2011 Excellence Award in Government Legal Service. Is that right?

**Mr Wilson:** Indeed it did.

**Senator ABETZ:** And who gets the gong for that?

**Mr Wilson:** Ms Webster.

**Senator ABETZ:** Well, congratulations to you and the team on that, Ms Webster. I understand you got the gong for helping to cut the external legal spending of the agency by 30 per cent.

**Ms Webster:** That is correct, Senator. That is one of the reasons why.

**Senator ABETZ:** So which legal firm missed out? No, I do not expect an answer to that! So we are now relying more on internal advice?

**Mr Wilson:** That is right.

**Senator ABETZ:** Can you tell me about the case of the Fair Work Ombudsman and—is it the Ballina Island Resort?

**Mr Wilson:** It is, yes.

**Senator ABETZ:** Was independent legal advice sought in relation to prosecuting this matter, or was it internal?

**Ms Webster:** Senator, in respect of all matters going to court, we do actually obtain external legal advice in order to establish that the parameters of our litigation policy have been met, and one of those issues is around the prospects of the matter succeeding. In this matter, we had AGS as solicitor on the record.

**Senator ABETZ:** The Australian Government Solicitor. I do not want to do them too much of a disservice, but they are more internal rather than private practice lawyers—albeit I think the AGS now charge out too, don't they? Is that correct?

**Ms Webster:** That is correct.

**Senator ABETZ:** Yes. Has the Fair Work Ombudsman learnt anything from that case? Do you accept the findings of Magistrate Lloyd-Jones, was it?

**Mr Wilson:** Yes.

**Senator ABETZ:** Yes, Federal Magistrate Michael Lloyd-Jones.

**Mr Wilson:** Yes, we accept the findings of the court. We clearly did not appeal the matter. This is one where we took litigation in 2009 against an employer in Ballina who did not provide documents in response to a notice to produce, which is the document by which we ascertain information from an employer.

The inspector at the time, and since, held the view that the employer was being a little bit difficult in not providing the information, and that was why we were motivated through the inspector, and then the legal team, to take the matter to court. Magistrate Lloyd-Jones thought that we were being a little bit heavy-handed in doing that, and he is entitled to that view—I disagree with him but nonetheless he is entitled to that view. What we have learned from that, I suppose, is that we need to be very careful when we take such matters in future—and we probably will not. I can build on that a little—

**Senator ABETZ:** That takes some of the wind out of my next question. If you say you disagree with a magistrate's findings, what confidence can we have that another such case would not be taken, especially given that the magistrate observed that the breach took place within a month of the Fair Work Act becoming law? He also said:

Many large well resourced organisations have breached provision of the Act since its introduction so it is not surprising that a small, under resourced owner operator business is not fully conversant with the provisions of the *Fair Work Act*.

I also understand that quite substantial penalties were asked for, which the magistrate rejected and was critical of.

**CHAIR:** Mr Wilson, you wanted to expand on your previous answer, too, I think.

**Senator ABETZ:** Did he? Sorry.

**Mr Wilson:** Yes. The net result of the decision was the view that we should be educating employers who do not comply with notices to produce—I accept that aspect of it. Certainly, in the future, we would build into our decision-making process a further follow-up with the party that had not complied with the notice, saying something to the effect of, 'Look, you do need to provide this, and if you don't then you leave yourself open for litigation.' That was probably the stage that we missed out and certainly one which the magistrate was entitled to draw to our attention.

The wider context of it is that the inspector had two people come to him complaining that their rates of pay were not correct and that when they tried on at least three occasions to raise the issues with the employer he would get moody and resent their inquiries. We then served the notice. The inspector made contact with the employer and asked for a reason why the employer had not provided the documents. The employer stated it was because he was dealing with a staff member who had resigned. The inspector formed the view, rightly or wrongly, that he was not going to get the documents and, as a result of that, took the view that this was something we should be proceeding with to court. After a very long, circuitous process, the fine that was awarded against the director was in the range that I thought it would be, but that fine has not yet been paid.

**Senator ABETZ:** The magistrate has said there was no underpayment alleged in the hearing. Is that correct? There was no issue of underpaying—

**Mr Wilson:** That is not a relevant consideration in that proceeding.

**Senator ABETZ:** You have just said in your evidence—and I want to clear that up for the record—that a complaint had been made about underpayment, as a result of which an investigation occurred, but there is no evidence or suggestion that there actually was an underpayment. The only issue was the nonsupply of payment slips.



**Mr Wilson:** But the importance of the matter is that we could not commence an investigation without the documents, so by not providing the documents the employer was stymieing the investigation. Whether or not there was an underpayment was absolutely irrelevant to those proceedings, because it was not about whether there had been an underpayment. The proceedings were about the nonsupply of the documents.

**Senator ABETZ:** You actually said, in the background to the case in your information to the committee just then, that the complaint initiated from an allegation of underpayment. I just wanted to put on the record that it was not asserted in the court that there was any underpayment, because people's reputations can be impacted by these things. The federal magistrate did observe as well that it would have been more appropriate for the Fair Work Inspector to inquire as to the practice of pay slip distribution adopted by the motel's owner and provide some suggestion on how the system could be improved to meet with the requirements of the Fair Work Act, especially given there was no underpayment alleged. There was, he said, no evidence, submissions or even a suggestion that this avenue had been pursued by the Fair Work Inspector. I hope that the Fair Work Ombudsman and all the staff have learnt from this decision for the benefit of, if I might say, especially the small business sector.

**Mr Wilson:** We certainly learnt from it, and I accept the view that we should be building further steps into providing information to employers or cautioning them about the way things work or the consequences of not providing information. There are obviously some salutary lessons in the decision for us, but as I said I think that, in the end, the punishment fits the crime. The penalty was in the range but I would have thought appropriate.

**Senator ABETZ:** Was a much higher penalty requested at the hearing?

**Mr Wilson:** Undoubtedly we always put higher—

**Senator ABETZ:** But wait a minute; you are a model litigant. Why would you be asking for a higher penalty than the one that you honestly anticipated? These are some of the things that add to the perception of the Fair Work Ombudsman's office by the small business community and the small business sector, and that is why I, with respect, Mr Wilson, pursue some of these matters with a degree of vigour, because I get to hear these concerns expressed on a fairly regular basis. Can you explain how asking for a higher penalty than you honestly believe would be provided is in harmony with the requirement of the Fair Work Ombudsman being a model litigant?

**Mr Wilson:** I am not trying to parse my statements but it is important for me to make this comment, which is that you asked me in Senate proceedings a series of things about a particular matter and I put the opinion to you, which is that, after having read the judgment of the court, I take the view as a decision maker that somewhere around the \$500 amount is what I would have thought—

**Senator ABETZ:** What was asked for?

**Mr Wilson:** I am still speaking; I am sorry. I would put it to you that, having read the decision and taking into account where the magistrate stands, having looked at the facts of the matter and trying to be dispassionate about it, that would be the range that I would have thought appropriate, because it is a penalty of some description; it is not a high penalty. Now whether that is what was put to the court by our solicitors in the actual case, I do not know—

and I will call on Ms Webster in a minute to ask—but I do need to parse my opinion about the case and our discussion of it here from the matter that was in the court and our actions as model litigants when the matter was before the court. I will ask Ms Webster if she has some information about what was asked in the court hearings.

**Ms Webster:** As to whether or not a higher amount was put, we would have to take that on notice. What I can tell you is that, as chief counsel, I remind the legal team on every occasion that we do not seek the highest possible penalty in respect of proceedings. What we seek is a penalty which is appropriate in all of the circumstances. Accordingly, in many of our matters we actually assist respondents in putting information forward. We tell them what we think might be relevant to the court in determining an appropriate penalty, and that is common practice.

Examples of that would be the financial status of a particular employer if they say or indicate they may not be able to pay back a penalty. That is the ethos of the legal team, that is the way we approach our matters and that is our obligation as a model litigant.

**Senator ABETZ:** The magistrate's decision speaks for itself. The Office of the Fair Work Ombudsman had a contract for an operations manual redesign for \$16,450. That was in June of this year. What were we redesigning? What was the problem that needed to be dealt with?

**Mr O'Shea:** That cost was attributed to a firm we went to to assist us with redesigning our internal operations manual.

**Senator ABETZ:** What was the problem with it that required the redesign?

**Mr O'Shea:** There was no problem. It was simply a new platform. It went from a very unwieldy IT program to a more advanced, easier to search one.

**Senator ABETZ:** When was the initial program developed? It seems to me it would not have been that old given the age of the Fair Work Ombudsman's office. Therefore, I was inquiring as to why we needed a redesign so soon.

**Mr Wilson:** The predecessor operations manual, I believe, was in a PDF format.

**Mr O'Shea:** That is correct.

**Mr Wilson:** It had been around for quite a number of years in that format. Even though our office is only two years old, it came from the Workplace Ombudsman and was rolled over.

**Senator ABETZ:** You inherited a system and you have since redesigned it?

**Mr Wilson:** In what is called a wiki format, which is more interactive.

**Senator ABETZ:** You did not get a brand-new one at the commencement and then have the added cost two years later of a redevelopment. That is what I was seeking to pursue.

Going back to the Ballina case, could you take on notice the amount of costs that were charged by the Australian Government Solicitor in pursuing this \$500 penalty.

**Mr Wilson:** Certainly.

**Senator ABETZ:** In relation to contracting arrangements, how many prosecutions have you pursued in that area, if any, in the last 12 months or so? As I understand it, for the most recent financial year you have received 87 complaints in relation to contracting arrangements out of a total of 21,891 complaints.

**Ms Webster:** For clarification, do you mean prosecutions of sham contracting arrangements?

**Senator ABETZ:** Yes, in relation to sham contracting. Are you able to prosecute any other contracting arrangements?

**Ms Webster:** Yes, we are.

**Senator ABETZ:** What sort?

**Ms Webster:** Under the Fair Work Act, adverse action may occur in respect of a contractor or potential contractor, so that is an example of where we might be involved in that area.

**Senator ABETZ:** But that would be logged as an adverse action claim against a contractor, wouldn't it? And an unfair dismissal claim against a contractor would be an unfair dismissal claim. So, yes, just sham contracting.

**Ms Webster:** In respect of sham contracting, we have five matters currently before the court. We have had two matters handed down by the court in respect of sham contracting. When I say 'sham contracting', that is the provision which requires an individual or a company to enter into that arrangement knowingly or recklessly.

**Senator ABETZ:** As I understand it, the figures are the total number of prosecutions undertaken by the Fair Work Ombudsman and its predecessor agencies relating to contracting—and that is a category that you have provided, I understand, to the Housing Industry Association in Canberra. So that is sham contracting?

**Ms Webster:** I would have to look at the document you are referring to. Potentially it may actually include matters where someone has just got it wrong.

**Senator ABETZ:** All right. I might place some questions on notice in relation to that. It would be fair to say sham contracting is not a heavy workload in your area?

**Mr Wilson:** I do not think we would say that. The five that we have on foot would be about 10 per cent of the matters that we have on foot.

**Ms Webster:** That is correct.

**Senator ABETZ:** But, in relation to your investigations, it would not be 10 per cent of your investigations, would it?

**Mr Wilson:** I think you are right on that.

**Senator ABETZ:** So if it is 10 per cent—and you have got how many on foot at the moment?

**Ms Webster:** We have five.

**Senator ABETZ:** the Fair Work Ombudsman at any one time has roughly 50 cases on foot?

**Ms Webster:** That is about right.

**Senator ABETZ:** All right.

**Senator Chris Evans:** That is prosecutions of cases.

**Mr Wilson:** Yes.

**Senator Chris Evans:** Not investigations.

**Mr Wilson:** No.

**Senator ABETZ:** The Fair Work Ombudsman has produced a brochure *Fair Work Ombudsman: Fair Work in the Contact Centre Industry*. Is that a document that anybody at the table is aware of? Can you take on notice how many of those were produced and at what cost, what motivated this document and the date it was decided to produce this document.

**Mr Wilson:** We will do that.

**Senator ABETZ:** On one of the inside pages it says:

... if an employer dismisses or threatens to dismiss an employee to re-engage them as an independent contractor to do substantially the same work, the Fair Work Inspector can apply to the courts to ...

and then it talks about protecting the employee, which is all good. Have you produced a similar document for small business employers as to what sham contracting may or may not involve and what rights they might have to contract people and what benefits there may be for them, for their business, in engaging contractors rather than employees?

**Mr Wilson:** We will take that on notice as well.

**Senator ABETZ:** I suspect that you have not and it just seems that there is an ideology creeping into a whole host of areas at the moment—not only yours; the ABCC, the Australian Taxation Office and elsewhere—motivated by certain elements about contracting and what is sham contracting. I just trust that that has not also reached the Fair Work Ombudsman, but we will see whether or not we have a document that looks after the interests of contractors and small business employers.

There was an article on 3 August in the *Age* which says an audit of Japanese restaurants and Asian grocers in Melbourne has found that 75 per cent had broken workplace laws. Was the Fair Work Ombudsman involved in that investigation?

**Mr Wilson:** Yes, it was. I will ask Mr Ronson to speak to that.

**Mr Ronson:** I can confirm that the Fair Work Ombudsman conducted that campaign.

**Senator ABETZ:** What is the rationale or reasoning for talking about Japanese restaurants and Asian grocers as opposed to any other nationality of restaurant and any other nationality of grocer?

**Mr Ronson:** That is a good point. The rationale for undertaking the campaign was that in the three months prior to the campaign the Fair Work Ombudsman received up to one dozen tip-offs regarding certain Japanese restaurants and Asian grocery stores in the Melbourne CBD and Holmesglen station area.

**Senator ABETZ:** So we find it appropriate to identify them by their nationality as opposed to their geographic location and the type of food they might be serving.

**Mr Ronson:** Senator, I think you have made a good point. We have received some feedback from one advocate in particular, a New South Wales IR advocate, who brought to our attention the campaign potentially presents as discriminatory—

**Senator ABETZ:** By the sounds of it you have taken on board that concern. If you have, I do not seek to prosecute it any further. I would be the last person to be accused of trying to be politically correct but I would have thought in situations like this it is unnecessary. I am one of those people who, if the police are looking for somebody who has committed a murder and

they are Caucasian looking or Asian looking then it is appropriate for the police to inform the community of that to help them identify the suspect. But in this case I think it is a bit gratuitous and not necessarily all that helpful. But you guys have acknowledged that; therefore I will not belabour the point.

**Senator Chris Evans:** That is a point well made. I think it is fair enough that investigations often do focus on key areas where there are identified complaints and problems, and we have had the same thing across various agencies. But the public expression of that could probably be handled better. I think the problem with the police alerts is more when they say they are looking for somebody 1.87 metres tall. I have no idea what they are looking for—a dwarf or a giant. So I may have bumped into them in the street but I would have no clue. If they just used feet and inches I would have some idea.

**Senator ABETZ:** For what it is worth, I do not subscribe to former Police Commissioner Nixon's view that you should not tell the community what physical features you are looking for in a suspect. But point made. Thank you, Chair. And thank you to the Fair Work Ombudsman.

**CHAIR:** I thank the officers of the Fair Work Ombudsman for their attendance today.

**Office of the Australian Building and Construction Commissioner**

[14:47]

**CHAIR:** We will now reconvene with questioning of the Office of the Australian Building and Construction Commissioner. Welcome, Mr Johns and your officers. Do you have any opening remarks you would like to make to the committee before we go to questions?

**Mr Johns:** No, thank you.

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

**Senator ABETZ:** Thank you, Chair, and thank you for your attendance, the ABCC. Briefly please, what progress or lack of progress can you report in relation to the sham contracting inquiry? It was announced on 19 November 2010, almost 12 months ago, so whereabouts are we? Do we nearly have a report? What stage are we at?

**Mr Johns:** There is a well advanced draft report, and I am participating in a pre-release consultation with stakeholders later this month in the hope of finalising the report and then releasing it later on.

**Senator ABETZ:** Before the end of the year?

**Mr Johns:** Yes.

**Senator ABETZ:** All right. And those stakeholders?

**Mr Johns:** I will call Mr Pettit to the table—

**Senator ABETZ:** Is it a lengthy list?

**Mr Johns:** No.

**Senator ABETZ:** All right. If it is not too lengthy a list I would like to hear it. But if you are going to read out 30 or 40 separate names of organisations—

**Mr Johns:** I think there are eight.

**Senator ABETZ:** All right.

**Mr Pettit:** There are actually seven. Pardon the acronyms, but they are: the ACTU, the CFMEU, the AWU, the ACCI, the AiG, the MBA and the HIA.

**Senator ABETZ:** Thank you for that.

**Senator Chris Evans:** You referred to them earlier as 'the usual suspects'.

**Senator ABETZ:** Yes, I think I did use terminology of that description. Will this report be released by you, Mr Johns, or will it go to the minister for release? How is that going to work?

**Mr Johns:** Once it is finalised I will release it publicly.

**Senator ABETZ:** You will release it as an independent statutory organisation. As a result of your investigations into this, do you anticipate that any investigations or prosecutions will flow?

**Mr Johns:** I think it is fair to say that the information that has come before the inquiry in terms of the submissions has been of a more general nature than specifically relating to individual allegations of sham contracting. I do not anticipate that civil penalty litigation will arise out of matters which have come before the sham contracting inquiry.

**Senator ABETZ:** Just give me a reminder here. The unions did boycott this investigation at one stage. Did you talk them around?

**Mr Johns:** No, Senator.

**Senator ABETZ:** So the unions did not have any input into the inquiry.

**Mr Johns:** They made no submission and they did not attend the roundtables, having been invited to do so.

**Senator ABETZ:** Why, in those circumstances, would you be giving them a copy of the draft report?

**Mr Johns:** Despite their non-engagement with the inquiry, they are stakeholders within the industry, important stakeholders, and my obligation I think as the head of the agency is to always seek to engage with stakeholders regardless of their preparedness to do so.

**Senator ABETZ:** Did any state governments participate or provide a submission?

**Mr Johns:** There was a submission from the New South Wales state government.

**Senator ABETZ:** When was that?

**Mr Johns:** I would have to take that on notice.

**Senator ABETZ:** Before or after a regime change in New South Wales?

**Mr Johns:** My recollection is that the submission was made by the former state New South Wales government.

**Senator ABETZ:** Apart from the private sector employer organisations mentioned, were there any other private sector participants in the inquiry.

**Mr Johns:** What do you mean by that? There were employer associations.

**Senator ABETZ:** Yes, like the HIA et cetera. For example, did Leighton Holdings or Joe Blogg Builders make a submission to you off their own bat—individual submissions as opposed to representative submissions?

**Mr Johns:** There were individual submissions and there were also representatives from major head contractors and the like at the roundtables.

**Senator ABETZ:** Have all those submissions been put up on the website?

**Mr Johns:** Yes.

**Senator ABETZ:** Did the ATO or Treasury participate?

**Mr Johns:** They participated in the roundtables, yes.

**Senator ABETZ:** What about the ACCC or ASIC?

**Mr Johns:** There were representatives from ASIC at the roundtables.

**Senator ABETZ:** But not the ACCC?

**Mr Johns:** That is correct.

**Mr Pettit:** Sorry, just to correct that. The ATO attended the roundtables, but Treasury did not.

**Mr Johns:** Yes, sorry.

**Senator ABETZ:** Thank you for that. Why, given that one would anticipate that this might be a report on which government might act, haven't we provided a draft of the report to the ATO or to ASIC? ATO in particular, I think, is at the forefront of the law and in the prosecution of sham contracting, and they may have been able to provide some assistance, I would have thought, in the final draft.

**Mr Johns:** I think we might have traversed this material on the last occasion. I will not be making any recommendations about tax law matters and I will not be making any recommendations about corporations law matters. Certainly, the assistance that ASIC and the ATO provided during the roundtable process was invaluable but I am not going to go to matters within their jurisdiction in my report.

**Senator ABETZ:** We will wait and see what the report actually tells us. It seems to me that, in the past, those matters that were determinative of whether or not it was a genuine contracting relationship were something that especially the ATO was heavily involved in by determining the common law et cetera around that. I would hate to think that we will have one definition of sham contracting for the ATO, another definition for some other area and yet another definition for workplace relations. We shall see what transpires from your report. It is rumoured—and I will not put it any stronger than that—that inspectors of the ABCC in Melbourne are not going on to building sites if there is a suggestion of industrial tension. Is that right?

**Mr Johns:** No, there is no policy to that effect.

**Senator ABETZ:** If there is no policy, is there an informal understanding that that will not occur?

**Mr Johns:** No. In relation to each reported matter of an alleged breach of the BCII Act or the Fair Work Act, an assessment is made about whether or not it is necessary to have an ABCC inspector attend immediately. In circumstances where that is necessary or appropriate then they would. In circumstances where it is not necessary or appropriate then they would not. I obviously have an obligation as an employer to protect the occupational health and safety of my employees and that is a relevant matter that we take into consideration. There is

also in that regard a protocol that we have with Victoria Police in relation to those matters where those concerns arise.

**Senator ABETZ:** What about the presence of union officials? Is there any policy that you do not go on to building sites if union officials are present?

**Mr Johns:** No.

**Senator ABETZ:** What about an informal concern from the occupational health and safety perspective?

**Mr Johns:** It is not a rule that we would apply. It is not something that we would necessarily have any higher regard to than other matters about whether or not it is necessary or appropriate to have an officer there immediately.

**Senator ABETZ:** If you have occupational health and safety concerns for your investigators—and I can understand that—and there is an allegation of thuggery or intimidation on a worksite after which the ABCC is called in and the unions could get to know that if they cut up rough enough they can ensure that the ABCC investigators will not front up at the site because of the OH&S concerns.

**Mr Johns:** I am not aware of any example where that has occurred in recent times.

**Senator ABETZ:** In recent times or at any time?

**Mr Johns:** I can say in the 12 months that I have been in the job I am not aware of any circumstance where that has occurred. I can think of a circumstance where we have sent inspectors immediately to a site to try and resolve the issue on the spot. I am not aware of a situation where we have decided not to do that when it was necessary to do it because of the matters that you traverse with me.

**Senator ABETZ:** It seems that good investigative practice would be to try to get witness statements as soon as possible.

**Mr Johns:** Absolutely.

**Senator ABETZ:** Also, I would have thought that it would be completely unacceptable if your inspectors were being intimidated by industrial activity or union officials and so not undertaking their work. Has this occupational health and safety consideration always been with the ABCC or was it introduced?

**Mr Johns:** No, my predecessor was always very concerned about the occupational health and safety issues that arise for ABCC inspectors. He spoke about it often.

**Senator ABETZ:** Are you aware that an important ABS measure of industrial action has climbed to 44 days lost per 1,000 workers for the June quarter 2011?

**Mr Johns:** I am.

**Senator ABETZ:** Is it correct that this is the highest number since the ABCC was established?

**Mr Johns:** I would have to go look back over all of the records. I am happy to take it on notice. It is certainly high.

**Senator ABETZ:** I have been provided a graph in which we see that the great decline is when the ABCC was established and just recently it has shot up again. I know this is against standing orders, chair, so thank you for your forbearance. It shows graphically how with the



implementation of the ABCC the industrial action fell and in recent times—since about December last year—it has shot up again.

**Mr Johns:** Yes. The explanation for the spike is that there were a number of industrial action matters involving Queensland government jobs and there was also some increased industrial activity involving the desal plant in Victoria. Those two matters significantly explain the increase in that quarter. In respect of both of those matters the ABCC has already commenced legal proceedings.

**Senator ABETZ:** That has obviated my next question, which was whether it has led to a review of your strategies. Clearly your strategy to deal with that is to take actions in relation to the two sites that you say are responsible for that huge spike.

**Mr Johns:** And to get them into court as quickly as possible.

**Senator ABETZ:** Yes. Thank you for that.

You gave a speech to the Industrial Relations Society in Melbourne. I am sure the chair will be pleased to know that you shared a platform with one Mr Peter Reith at that organisation. You entered into the national debate that we have been having about productivity. I simply ask: why did you do so? Do you accept that productivity and workplace relations do go hand in hand?

**Mr Johns:** I accept that, as others have said in the debate, workplace relations is an element of the productivity question.

**Senator ABETZ:** And you concluded your speech with an I assume rhetorical flourish, calling on everybody involved to focus on productivity and to use the existing workplace relations framework as a springboard—

**Mr Johns:** 'For excellence', I think I said.

**Senator ABETZ:** Yes—'as a springboard for excellence'. Many of those that you called upon—and I will not go through them all, but they include practitioners, advisers, bargaining representatives and industry participants—actually see the current framework as a restraint on productivity improvement. So you would be aware of that. I assume Mr Reith would have been an exponent of that view as well at the conference.

**Mr Johns:** I do not fully recall all that Mr Reith said at the conference.

**Senator ABETZ:** All right. Leaving him out of the equation—

**Senator Chris Evans:** I hope it was not the continuation of his very unfair attacks on you, Senator Abetz!

**Senator ABETZ:** Yes, he asked why the coalition wasn't there. It is a very simple answer: we weren't invited!

But let's move on. You are aware that there are at least some concerns being expressed that the current workplace relations framework is a constraint on being able to reach the height of productivity excellence that you have called for.

**Mr Johns:** I am certainly aware of the variety of views being expressed about the issue in the public domain.

**Senator ABETZ:** And you would accept that workplace productivity is best worked out by management and workers getting together to improve workplace practices?

**Mr Johns:** Yes.

**Senator ABETZ:** Would you accept that building unions have a particularly appalling record when it comes to advancing work reform and productivity?

**Mr Johns:** I think what I said in my speech was that there had been some missed opportunities by each of the employer and union organisations in Victoria in recent times to satisfy the productivity agenda.

**Senator ABETZ:** Which is a lot more diplomatic way of putting it and well done on that. Do you then have a strategy to combat this intransigence or the fact that the industry participants have missed the opportunity to springboard themselves to productivity excellence.

**Mr Johns:** The objects in my act indicate that I am to have concern to the issue of productivity. The BCII Act does not give me any statutory role to enforce, if you like, the issue of productivity. I can encourage party force—

**Senator ABETZ:** Exactly. Strategies are not only about enforcement, but cajoling and encouraging.

**Mr Johns:** I think on a previous occasion I have indicated that there is an intention for us to issue a guidance note on good-faith bargaining in the building and construction industry. That would be available to all participants and it will talk about issues of productivity and how people might advance those within the framework of good-faith bargaining.

**Senator ABETZ:** What has happened to the FWO in my home state of Tasmania? Do we still have a physical presence there?

**Mr Johns:** I think you mean the ABCC.

**Senator ABETZ:** Sorry, the ABCC, you are quite right.

**Mr Johns:** Yes, we do.

**Senator ABETZ:** Is that shared with the Fair Work Ombudsman?

**Mr Johns:** We have one permanent officer who is exclusively with the ABCC and we have four inspectors who are co-badged as Fair Work inspectors and also as ABCC inspectors. So for the very first time we now have a presence in Launceston, where we did not have one previously.

**Senator ABETZ:** Well done on your pronunciation of Launceston. Is the ABCC in Hobart housed in with the Fair Work Ombudsman as well?

**Mr Johns:** Yes.

**Senator ABETZ:** I hope I am up to date, but the latest report on the website—that I saw, at least—for the period September 2010 to April 2011 stated that there were four examinations under the compulsory examination power during that period. First of all, can you confirm quickly if that is correct. The follow-up question is: since April 2011 how many further compulsory examinations have taken place?

**Mr Johns:** I can confirm that those statistics are correct. I can also advise that the most recent compliance report to 30 September 2011 has been released by the agency. I can indicate that since the previous report there has been one compulsory examination conducted and I have issued a further notice to conduct one next week.

**Senator ABETZ:** Thank you.

**Mr Johns:** Sorry, I stand corrected, it might be the week after, I am told.

**Senator ABETZ:** We do not have the annual report as yet?

**Mr Johns:** No, arrangements have been made for it to be tabled out of session.

**Senator ABETZ:** When do we anticipate that?

**Mr Johns:** It will be tabled before the statutory requirement, which is the end of October.

**Senator ABETZ:** I suppose that is helpful. Look, you are not Robinson Crusoe in this area, but it is always helpful if annual reports can be delivered prior to these October estimates.

**Mr Johns:** I can certainly undertake to the committee that I do not propose that there be a repeat of this next year.

**Senator ABETZ:** Thank you very much for that. If you have these figures handy quickly—if people have to go through their folders at some length and through indexes, then just tell me and we will put them on notice—can you tell me if the number of staff has changed?

**Mr Johns:** There are currently 145 staff, Senator.

**Senator ABETZ:** How does that compare to the last annual report, do we know?

**Mr Johns:** It is static.

**Senator ABETZ:** Roughly the same, thank you. Can you take on notice the distribution by office, state and territory, and their functions? How many have left in the past year?

**Mr Johns:** I would have to take that on notice. I can report, though, that there has been a recruitment of 17 new ABC inspectors.

**Senator ABETZ:** Inspectors, all right. How many more staff in total have been recruited in the last 12 months? What roles have they taken on, and could you tell me if any of those recruitments are in fact new roles, as opposed to replacing those that have left?

**Mr Johns:** I am happy to take that on notice.

**Senator ABETZ:** Thank you. What was the total expenditure for 2010-11, and how does that compare with the previous year?

**Mr Johns:** Concerning our total expenditure for the last financial year, we had a budget of a little over \$33 million and there was a surplus of about \$3 million. That is consistent with the previous financial year. For the year before that there was an annual appropriation of just under \$33 million and a surplus of nearly \$5.5 million.

**Senator ABETZ:** The appointment of the two deputy commissioners in July—how long have those positions being vacant? It was quite lengthy, wasn't it?

**Mr Johns:** Questions about the appointment should be directed to outcome 5. But my recollection is that one of the positions had been vacant since the November before, and the other one had been vacant since the December before, because I was that Deputy Commissioner.

**Senator ABETZ:** Have any preliminary discussions been held between you, Mr Johns, and the minister about the proposed legislation which will get rid of the ABCC and turn it into the Fair Work Inspectorate?

**Mr Johns:** No, Senator, other than I was advised that there was an intention to introduce the bill. That was not new to me; it had been known to me when I was appointed.

**Senator ABETZ:** Your contract of appointment—

**Mr Johns:** I have a three-year statutory term which has two years remaining.

**Senator ABETZ:** Is there anything in that contract that says that if the legislation gets passed that you would get the job of being in charge of the Fair Work Inspectorate?

**Mr Johns:** No, Senator.

**Senator ABETZ:** So there may potentially be a payout for you if that were to occur?

**Mr Johns:** I have no idea.

**Senator ABETZ:** If they abolish something from underneath you, I daresay you would be entitled to compensation for your three-year contract, but we might pursue that further—

**Senator Chris Evans:** Decisions about that obviously have not been made and are subject to the passage of legislation. I should advise Mr Johns not to get too hopeful of a big payout. We will be making him earn his salary.

**Senator ABETZ:** That is good to hear, but I was wanting to know whether there had been any discussions, other than here and now at the estimates, between the minister and the Commissioner. How are your discussions going with the Commonwealth Ombudsman about oversight of the section 52 hearings?

**Mr Johns:** On 12 October I was advised, and my officers were advised, by the Office of the Commonwealth Ombudsman that they were unable to undertake the role that I had invited them to undertake.

**Senator ABETZ:** Given the events of recent times, that is not surprising. Did the Ombudsman make any suggestion to you that they might be able to undertake that role in the event that the Commonwealth Ombudsman supplied funding for that task to be undertaken?

**Mr Johns:** The basis upon which I invited the Commonwealth Ombudsman to undertake the post-examination review was always intended to be—and was clearly communicated to his office—on a fee-for-service basis. Notwithstanding that it was going to be on that basis, on 12 October I was advised that, due to a limited number of staff with the skills required, and staff being committed elsewhere, the funding from the ABCC would not assist them at this time.

**Senator ABETZ:** Take it on notice if need be, but do you feel at liberty to be able to provide to the committee the letter from the Ombudsman?

**Mr Johns:** I might take on notice whether that is appropriate.

**Senator ABETZ:** I understand or predicted in my question that you might have some hesitancy on that, so that is fine. So, where does that leave you, given that it was announced you would seek to have the Commonwealth Ombudsman oversee this activity? That is now not going to happen, so do we just draw a line underneath it and keep on as usual?

**Mr Johns:** It is clearly out of my hands now.

**Senator ABETZ:** Yes, but you do not have a plan B for somebody else or some other office to potentially oversight the use of the section 52 powers.

**Mr Johns:** No.

**Senator ABETZ:** When we were talking about the unfortunate spike in industrial activity—if I can use that term—or days lost, you mentioned a project in Queensland. That was the Gold Coast Hospital?

**Mr Johns:** Yes, we are involved in litigation involving both the Gold Coast Hospital and the Brisbane law courts.

**Senator ABETZ:** So two projects. In relation to the Gold Coast Hospital—I think I may have questioned about this last time—an injunction, an order of Fair Work Australia, had been ignored?

**Mr Johns:** My recollection is that there was an initial injunction issued in the Federal Court.

**Senator ABETZ:** You are right, yes.

**Mr Johns:** Then there was an opportunity provided to the union to lead further evidence in relation to that injunction. Her Honour removed the injunction following the receipt of that evidence.

**Senator ABETZ:** Did the ABCC intervene in those proceedings?

**Mr Johns:** Yes. The substantive proceeding is ongoing and we continue to be an intervener, which means a party under our legislation, in those matters.

**Senator ABETZ:** How is the MOU with major contractors going? I think we canvassed that last time.

**Mr Johns:** Yes, and I think on the last occasion I was waiting for a reply. I have since had one and they have indicated a preference not to enter into an MOU but rather to have a further dialogue about how they can more readily provide evidence to the commission in relation to our investigations.

**Senator ABETZ:** So another good idea of yours has hit the dust—not only the Ombudsman but the MOU. Have the unions been approached for an MOU?

**Mr Johns:** No.

**Senator ABETZ:** The fact that it is not going ahead obviates a lot of questions. Possibly more rhetorically, because it is now not going to happen, I just wonder whether it is good practice for a regulator to enter an MOU with parties it may have reason to prosecute if the parties contravene the law. I just bounce that ball. It is not going to happen because you are not going to have a memorandum of understanding.

**Mr Johns:** It is not, but just to be fair, the memorandum of understanding only went to issues where they were likely to be a witness, not to circumstances where they were going to be the subject of an investigation.

**Senator ABETZ:** If they were likely to be a witness?

**Mr Johns:** Yes.

**Senator ABETZ:** But they could potentially be called as a witness in a matter that you might be prosecuting against them?

**Mr Johns:** In that case I have not been clear enough. The MOU was only intended to go to matters where their evidence was not to be used against them and where they were not the subject of an investigation.

**Senator ABETZ:** I understand the difficulty of miscommunication between us, because we are talking about a hypothetical MOU which has now not come to pass, so that is fine. I understand that the commission has been conducting a national audit of painters, plasterers and other finishing trades. Is that correct?

**Mr Johns:** Yes.

**Senator ABETZ:** Can you confirm, without mentioning a name, that a Western Australian commercial painting business is currently the subject of an investigation which was commenced in response to allegations raised by a union representative?

**Mr Johns:** I might ask Mr Campbell, the deputy commissioner for operations.

**Mr Campbell:** I am not aware of the particular employer or contractor you might be referring to. Again, if you want to name the company, I am happy to confirm whether or not that is the case.

**CHAIR:** It might be best not to.

**Senator ABETZ:** I do not want to. That is why I prefaced my question 'without—'

**Mr Campbell:** But I would say that, if a complaint were made by a union official against a company and that complaint were credible, I would see no reason why we would not make inquiries into it.

**Senator ABETZ:** It has been suggested—and this may assist you in identifying the case—that there was a letter dated 27 May from the ABCC, and it provided advice of the outcome of its investigation. The letter states that the ABCC's opinion was that the contractors are in fact employees, and I am advised that there are limited reasons and no evidence is provided to support that finding except for a table of boxes that includes generalised statements such as, 'Labourers require supervision and contractors are engaged to provide direct labour or supervision, so it is not likely the worker would subcontract his own work.' There was no individual reference to each employee. The HIA member, I am told, pays the super guarantee levy, superannuation contributions, long-service leave contributions and worker's compensation. I have been advised that in this case these payments have been taken into account by the ABCC as indicia of employment statutory obligations. But I am advised that they are equally applicable to contractors, and long-service leave has been paid only after CFMEU pressure to do so.

**Mr Campbell:** I will struggle to traverse the nature of that investigation given that it is possibly ongoing.

**CHAIR:** And, if it is ongoing, it is a bit problematic for us.

**Mr Campbell:** So perhaps I can take it on notice to have a look at the matter.

**Senator ABETZ:** All right.

**CHAIR:** But you are now aware of the investigation to which Senator Abetz is referring?

**Mr Campbell:** I have an idea of the matter the senator is referring to, yes.

**Senator Chris Evans:** I suggest that at the break, just for clarity, Senator Abetz privately let Mr Campbell know which case he is referring to so that there is no confusion. That way there would be no need for anything to go on the record.

**Senator ABETZ:** Much as I would like to I do not think my notes actually indicate that. Out of an abundance of caution I have not been provided with the actual—

**CHAIR:** If we potentially believe that the case referred to is ongoing I think we should leave it pretty much—

**Senator ABETZ:** In that case—

**Senator Chris Evans:** I think it would be useful, Senator, if you are able to supply the name to the ABCC Commissioner's office then at least when they reply to you we will be certain that they are replying on the same matter.

**Senator ABETZ:** Finally, the suggestion has been made that the ABCC states that 'While there has been no breach of the sham contracting provisions of the Fair Work Act, in their opinion the HIA member has engaged in bogus contracting.' Has that terminology been used to your knowledge, Mr Campbell?

**Mr Johns:** It is language which is used within the agency. Because sham contracting has a specific definition in the Fair Work Act, you only breach the provisions of the sham contracting provision if under 357(1), you do not properly characterise people and then under 357(2) the defence is not available to you. Only in those circumstances is it sham. In circumstances where 357(1) is satisfied, we would characterise that and commonly refer to it as bogus contracting, but in those circumstances it would be a situation where, on our assessment of the evidence, the person is entitled to the defence, so if both elements of 357 are not made out which are the necessary elements for sham contracting as it is defined in legislation.

**Senator ABETZ:** So what is the definition of 'bogus contracting' again?

**Mr Johns:** From our perspective it is where the elements of 357(1) are satisfied but the defence is available in 357(2).

**Senator ABETZ:** Since when has a prosecuting authority decided to relabel legislation and make value judgments against that which the legislature has actually legislated to say that it is only sham contracting if these things occur but you have a defence against it to only read half the legislation and then say, 'Aha, we are now going to give that the term "bogus" contracting', which is to adopt, if I might say, the language of the CFMEU.

**Mr Johns:** The consequences of elements of 357(1) being satisfied are that you have workers who have been mischaracterised as contractors who ought to be characterised as employees. What flows from that often is that they are not receiving their entitlements which is a breach of other aspects of the Fair Work Act. Even if there is no sham contracting, there are often breaches associated with the mischaracterisation of workers. That is why we use that language because it does not mean that the person has a clean bill of health and that they are entitled to treat those workers as contractors.

**Senator ABETZ:** Other than looking up the CFMEU newsletter, can I find a definition of 'bogus contracting' in the Fair Work Act?

**Mr Johns:** No.

**Senator ABETZ:** And in the mainstream workplace relations texts or commentaries, other than when quoting the CFMEU type descriptors, you would not find the term 'bogus contracting' either would you?

**Mr Johns:** I do not know that I would agree with you. In the submissions I received as a part of my inquiry my recollection is that it has been traversed in academic material as something less than sham contracting but something which indicates that there is not legitimate contracting occurring. It is the halfway house if you like.

**Senator ABETZ:** And no prizes for guessing which academics might potentially use that terminology that fits hand in glove with the campaigns of the CFMEU.

**Senator Chris Evans:** Senator, I think you ought to calm down with your conspiracy theories a bit—

**Senator ABETZ:** I have been very calm in the way I have expressed it, but the reaction from two former union officials, I think, speaks for itself. Can I ask you, Mr Johns—

**Senator CAMERON:** Point of order, Chair.

**Senator ABETZ:** whether or not you are able to provide a list of all references. Can you take that on notice, please.

**CHAIR:** Just a minute, Senator Abetz. Senator Cameron, did you want to say something to me?

**Senator CAMERON:** No, I do not.

**CHAIR:** Good. We do try to avoid the formalities of points of order here if we can. We would just ask everyone to give due respect to everyone else's point of view.

**Senator CAMERON:** That is right.

**CHAIR:** Senator Abetz, please continue on.

**Mr Johns:** Sorry, Senator, I missed the question.

**Senator ABETZ:** I asked if you could take on notice for me, if you are able to, in what submissions to your inquiry the term 'bogus contracting' was used.

**Mr Johns:** I think I said I referred to the submissions and I also referred to academic material.

**Senator ABETZ:** Yes. I am not going to give you the task of traversing all the academic material that might refer to it but just the submissions that have come to your organisation.

**Mr Johns:** We will take that on notice.

**CHAIR:** Are you able to indicate how long you might have left in this area, Senator Abetz?

**Senator ABETZ:** I have quite a bit. How many other senators have questions?

**CHAIR:** Senator Cameron, at least, has some questions. We are due to break in 15 minutes. Do you think you might be finished in 15 minutes?

**Senator ABETZ:** Yes.

**CHAIR:** All right. Let us continue on, then we might break and come back with Senator Cameron.



**Senator ABETZ:** Have you seen the document *Implementation guidelines to the Victorian code of practice for the building and construction industry*, Mr Johns?

**Mr Johns:** I have.

**Senator ABETZ:** As I understand it, that is a draft. Have you been specifically asked to comment on that?

**Mr Johns:** We have not.

**Senator ABETZ:** But you have seen it. Is it your intention to comment on it?

**Mr Johns:** No.

**Senator ABETZ:** Thank you. You issued an ABCC e-alert on 24 August 2011—

**Mr Johns:** Sorry, what was the date?

**Senator ABETZ:** It was 24 August 2011. It was entitled 'ABCC assessor subcontractor losses on Brisbane projects affected by industrial action'. I welcome this initiative, because often in these disputes subcontractors, small contractors, pay a very, very heavy price as well. It is in relation to the Gold Coast University Hospital project. It says:

If your company has been adversely impacted or suffered a loss ... contact the ABCC.

Without mentioning names, have any contacted you as yet?

**Mr Johns:** I would have to take that on notice.

**Senator ABETZ:** Did you also issue this by way of a media release?

**Mr Johns:** I will take that on notice.

**Senator ABETZ:** Because, whilst e-alerts are good, I am not sure that all contractors and subcontractors on building sites would necessarily look up the ABCC website every night just to see what alerts there might be. So I would like to know how much publicity has been given. But I welcome the initiative in any event. We were told in that same e-alert that on 6 June you had commenced legal action, and I assume that is ongoing.

**Mr Johns:** That is correct.

**Senator ABETZ:** You issued a media release on 1 July 2011 entitled 'Members' funds wasted through repeated contraventions'—again, a welcome release and thank you for that.

**Mr Johns:** Was it a media release or an e-alert?

**Senator ABETZ:** This one is headed 'media release'.

**Mr Johns:** Yes.

**Senator ABETZ:** You make the point that CFMEU members are having literally hundreds of thousands, if not millions, of dollars wasted by their union's leadership. Will the quantum of the penalties that have been imposed still be able to be applied in the event of the government's proposed legislation passing?

**Mr Johns:** Questions about the bill, which we have not seen, should be directed to the department in outcome 5.

**Senator ABETZ:** I think you have now, wittingly or unwittingly, let something out of the bag—the previous bill that we have had before us is not necessarily going to be the bill which the parliament is going to deal with?

**Senator Chris Evans:** To clarify, Mr Johns would not have seen the bill so I doubt he had the capacity to let anything out of the bag.

**Mr Johns:** I had no idea.

**Senator ABETZ:** There was a bill before the parliament.

**Senator Chris Evans:** That is public knowledge.

**Senator ABETZ:** And that is what I was referring to. Now what Mr Johns is saying, I think, is that the bill we have been looking at in great detail, chances are, will not be the bill that will be presented to the parliament any more but another manifestation of it might be.

**Senator Chris Evans:** The point I was making, with all due respect to Mr Johns, is he would not know.

**Mr Johns:** That is the point I was trying to make as well.

**Senator Chris Evans:** The process of the form of the bill is currently before government. We have not consulted Mr Johns on that. When the bill is introduced, he will have the ability to look at that as well as you.

**Senator ABETZ:** I was labouring under the misapprehension that the bill that had previously been introduced would be the bill that would be pursued through the parliament but, clearly, that is not a given at this stage.

**Senator Chris Evans:** I am sure the basis of the bill will be that which was previously introduced. There are government processes and decisions to be taken about the bill and they are in train. I am not telling you 'yes' or 'no'. I am just saying those decisions are before government. When the bill is introduced, you will see the form of it then.

**Senator ABETZ:** I will take a wager it will not be in the same form as it was previously introduced. If it is going to be the same bill, Mr Johns, or the bill that has been before the parliament, and if that penalty regime were to be introduced—and I assume you have seen that proposed bill—would the same quantum of penalties be able to be applied against the CFMEU, for example?

**Mr Corney:** The decision on the amount of penalty is a matter for the court in any particular matter.

**Senator ABETZ:** Yes but the maximum penalties that the court could mete out will be reduced.

**Mr Corney:** Whatever the legislation says is, of course, something that is on the record for the court to have regard to. That is clear. But the actual assessment of a particular penalty is a discretionary matter for the court and may well have regard to a range of matters.

**Senator ABETZ:** But if a court were minded to mete out the maximum financial penalty possible, would it be a lesser sum if the bill were to be legislated as opposed to that which currently exists?

**Mr Corney:** The courts are obviously required to follow the law.

**CHAIR:** That is not a question. It is a hypothetical question.

**Senator ABETZ:** No, it is a very simple one. I am disappointed that Mr Corney is not willing to tell us that, yes, the maximum penalties will be less.

**CHAIR:** How would he know? The bill is not in the parliament.

**Senator ABETZ:** The bill that is before the parliament, which we are now assuming will no longer be proceeded with, will be superseded. I accept that might be in the mix. But the actual bill that was introduced into the parliament is on the public record.

People know what the figures are, and I am disappointed that a deputy commissioner of the ABCC cannot tell me that the penalty regime in that bill is, in fact, a lesser penalty regime than currently exists. So be it—the record speaks for itself. Mr Johns, is it correct that there have been 134 sham contracting investigations?

**Mr Johns:** I understand that is correct for over the course of the past year.

**Senator ABETZ:** I have gained that from the *Australian Financial Review*, 12 October. What has happened with those 134?

**Mr Johns:** I will ask Mr Campbell to address that issue.

**Mr Campbell:** It is fair to say that the vast majority of those matters were resolved without the need for prosecution. We certainly did commence one prosecution with regard to sham contracting last financial year—I might be corrected, though.

**Senator ABETZ:** Out of those 134 how many are still active?

**Mr Campbell:** We have about 20 matters currently.

**Senator ABETZ:** That is helpful. I could be provocative and raise the *Daily Telegraph* story about Mr Hubbard trying to nobble somebody in the ABCC, but let us move on to a report in the *Weekend Australian* of 23-24 July, headed 'Federal court ruling win for building watchdog'. It said:

As well as the compensation, Mr McDonald was fined ... They also must pay the ABCC's costs, which could add up to \$100,000.

Has a request or demand for costs been made by the ABCC in that case?

**Mr Corney:** The assessment of costs is still being worked through.

**Senator ABETZ:** So you have sought an audit for costs?

**Mr Corney:** No, we obviously require to work through what our costs will be. The usual course is that—

**Senator ABETZ:** To get an order for costs and then work out your costs, rather than working out your costs in anticipation of getting an order for costs?

**Mr Corney:** We need to have an assessment of what our costs will be.

**Mr Johns:** Our usual practice where there is the capacity to do it under the BCII Act is to make an application for costs. In those circumstances the court will oftentimes make an order for costs on a basis that is agreed or taxed. It is after that that you do your assessment. Then, if you like, you put a bill to the other party, and if you cannot agree upon the costs it goes to taxation. Our standard procedure is to make an application for costs where we can, and to get a costs order. I think what Mr Corney is saying is that in the current matter we are making an assessment post that event as to what our costs are.

**Senator ABETZ:** So you have a costs order?

**Mr Corney:** My understanding is that we have, but I will need to confirm.

**Senator ABETZ:** Take on notice whether or not you have a costs order and ultimately how much you have recovered, or let us know if it is still in the process of being taxed. I noticed you intervened in the Joe McDonald case for having his ticket reinstated.

**Mr Johns:** Yes.

**Senator ABETZ:** But there has been no outcome of that?

**Mr Johns:** That matter is still before the Western Australian Industrial Relations Commission.

**Senator ABETZ:** It is for decision, isn't it. Has it been heard?

**Mr Johns:** It was being heard this week.

**Senator Chris Evans:** It has only been in the papers this week.

**Senator ABETZ:** The look of Mr McDonald with his peace sign and braces was a sight to behold.

**Mr Johns:** If I might correct the record technically. In relation to that matter we made an application to be heard on factual matters. We did not actually make an application to intervene, because that is not the power that we have in relation to that state jurisdiction, but we were granted the opportunity to be heard.

**CHAIR:** We will resume with questioning for the ABCC by Senator Cameron, and when that concludes we will move to Comcare.

**Proceedings suspended from 15:45 to 16:00**

**CHAIR:** We will now resume these estimates hearings with further questioning of the ABCC.

**Mr Johns:** Chair, there is just one matter that Senator Abetz asked about, involving a costs order. We made some inquiries during the break and we can provide some additional evidence now, if it is convenient, or we will continue to have them on notice.

**CHAIR:** Put them on notice. He did not seem desperate to have them right now, so if you can take them on notice. If he rings through after watching this and says he wants them now, we will get them at the end of Senator Cameron's questioning.

**Mr Johns:** Thank you, Chair.

**CHAIR:** Senator Cameron.

**Senator CAMERON:** Mr Johns, thanks for the replies to the questions on notice. Can I take you to question on notice No. EW0119\_12. It is about the Commonwealth DPP v. Tribe. You indicated in your response that you have reviewed section 52 notices to determine whether they were defective or not, and there were defective notices, and all 203 notices issued before 24 November 2010 included the same defect indentified in CDDP v. Tribe. That is still relevant information that you have given me—that is correct?

**Mr Johns:** The ones that predated the Tribe decision, yes. I am sorry, Senator, can I ask you to repeat the question number again?

**Senator CAMERON:** EW0119\_12.

**Mr Johns:** Thank you.

**Senator CAMERON:** I will be going to a few of those answers to questions on notice. Can you explain why all those notices were defective? Was this a breakdown in the management system in the ABCC?

**Mr Johns:** The determination made by Magistrate Whittle in the Tribe matter was that there were two defects. One was that there had not been a delegation by my predecessor to the deputy commissioner and that, in addition, there had not been a delegation of investigative power under section 10 by my predecessor to the relevant inspector.

**Senator CAMERON:** That would seem to me to be a fairly straightforward obligation under the act. Would that be your understanding of it—the delegation power?

**Mr Johns:** Since the decision, I have remedied both of those defects.

**Senator CAMERON:** I am not arguing that. You have remedied it. But I am interested in all the angst, cost and aggravation that workers suffered because of the previous defects. I think Mr Campbell was under the previous management of Mr Lloyd. I am just wondering whether you have analysed how that happened—how such a basic breach of the ABCC's obligations under the act took place?

**Mr Johns:** There has been no analysis undertaken as to why those two delegations had not previously occurred.

**Senator CAMERON:** Why not?

**Mr Johns:** Because they had been corrected, moving forward, and so it would not have served any future forward purpose to understand why that had occurred.

**Senator CAMERON:** So it is not important to the ABCC to understand why they put workers through the trauma of court cases that were defective?

**Mr Johns:** I do not think that it is fair characterisation of what I just said.

**Senator CAMERON:** I am asking you a question.

**Mr Johns:** We took on board the decision of the magistrate, we noted the two defects and we cured them, moving forward. That is the extent of what I thought necessary for me to do as the ABC Commissioner.

**Senator CAMERON:** So, in hindsight, you do not believe that you should have had a look at the internal management structures that allowed these breaches of the act to take place?

**Mr Johns:** No.

**Senator CAMERON:** Why not?

**Mr Johns:** Because I was focused on what was necessary to move forward.

**Senator CAMERON:** I am interested in why they took place. I am interested in why workers were put under this type of pressure on the basis of defective operations of the ABCC. Would you be prepared to do an analysis as to why this happened so you can advise the Senate why these basic breaches took place?

**Mr Johns:** I am happy to take on notice whether there is any information as to the basis upon which the delegations had not been exercised in the past.

**Senator CAMERON:** No, that is not what I am asking you.

**Mr Johns:** Then I misunderstand the question.

**Senator CAMERON:** The question is: will you do an analysis? It is not a 'take it on notice' proposition. I am simply asking you: will you do an analysis as to why your fundamental obligations—not yours but the ABCC's—under the act were breached under the management of Mr Lloyd?

**Mr Johns:** I will make inquiries as to whether there is any information that indicates why the delegations had not been signed.

**Senator CAMERON:** And I will be asking the question at the next estimates as to what you have done to undertake that investigation. Mr Johns, you gave a speech in relation to productivity in the industry, along with a number of other issues, recently. Is that right?

**Mr Johns:** I did give a speech to the Industrial Relations Society of Victoria last Friday.

**Senator CAMERON:** Yes. I think I have asked about Econtech under the previous commissioner, Mr Lloyd. For your speech, who advised you on the productivity issues?

**Mr Johns:** The statistics were pulled from the ABS.

**Senator CAMERON:** So it was basically a statistical speech? You did not make that speech on productivity through any experience or expertise other than the statistics?

**Mr Johns:** The statistics referred to in the speech were drawn from the ABS.

**Senator CAMERON:** Yes. What is your definition of productivity?

**Mr Johns:** Productivity is a measure of the outputs derived from the inputs. There are different measures, depending on whether you are measuring labour productivity or multifactor productivity and the like. So there are different measures.

**Senator CAMERON:** What are the key issues you looked at in multifactor productivity for your speech?

**Mr Johns:** The only aspects that I looked at were the statistics provided by the ABS.

**Senator CAMERON:** So, other than statistical evidence, you have no expertise in productivity, yet you called for an analysis of productivity in the industry?

**Mr Johns:** I did not call for an analysis of productivity in the industry.

**Senator CAMERON:** What did you call for?

**Mr Johns:** I called on all building industry participants to commit themselves to the issue of productivity.

**Senator CAMERON:** Okay. Do you intend to engage Econtech to advise you on productivity again?

**Mr Johns:** No.

**Senator CAMERON:** Do you have anyone in the ABCC who has expertise in productivity measurement?

**Mr Johns:** No, we rely presently entirely on the ABS data.

**Senator CAMERON:** I am a bit concerned. Do you believe you have an obligation to deal with issues of productivity in the industry?

**Mr Johns:** The objects of my act talk about productivity. As I indicated to Senator Abetz earlier, there is nothing in the act that says there is a civil penalty if you do not engage in productivity or do not have that within your agreement.

**Senator CAMERON:** That is a penal provision.

**Mr Johns:** To the extent that there is an interest that I have under my statute in productivity arises from the objects of my act.

**Senator CAMERON:** What is your budget?

**Mr Johns:** It is \$33 million per annum. A little over that.

**Senator CAMERON:** Within that \$33 million budget the previous commissioner did not deem to have anyone on board who understood the issues of productivity in the industry even though it was mentioned in the act.

**Mr Johns:** I do not know the details of former staffing complement prior to my appointment.

**Senator CAMERON:** Given you have a \$33 million budget and part of the object of your act is productivity, would it be important to have someone who could advise you on industry productivity?

**Mr Johns:** To the extent that we look for data and information about it, we look to the ABS.

**Senator CAMERON:** Yes, but data information does not tell you anything other than macroeconomic figures. It does not tell you what is happening in the industry, does it? It does not tell you where the problems of productivity are.

**Mr Johns:** I accept that you cannot draw enterprise level conclusions from macroeconomic figures, yes.

**Senator CAMERON:** Given that you are—I would not go so far as to say lecturing people about productivity, but you are drawing people's attention to productivity, why wouldn't the ABCC have people who could advise you about productivity matters in the industry?

**Mr Johns:** It is a suggestion that I am happy to look at.

**Senator CAMERON:** I think that would be better spending some money on the actual issue of productivity as distinct from penal provisions and investigations. I think, if it is part of the act, it would be an appropriate thing for you to do. If you are happy to look at it I will ask you next time you come along what you have done with that and how you would deal with it. The ABCC announcement of the inquiry into sham contracting was made almost 12 months ago on 19 November 2010. When will the inquiry conclude and when will you issue your report?

**Mr Johns:** I traversed this material earlier.

**Senator CAMERON:** I am sorry if I missed that.

**Mr Johns:** Do you want me to traverse it again?

**Senator CAMERON:** No.

**Senator Chris Evans:** I am sure Mr Johns can give you a 36-second answer which will give you what you need.

**Mr Johns:** There is a draft report that is well advanced. I am conducting a pre-release consultation with stakeholders at the end of October and I anticipate being able to release the final report in mid to late November.

**Senator CAMERON:** I have been engaged on another committee so, if I am asking any questions that Senator Abetz has asked, I am happy to wait for the record.

**Senator ABETZ:** It happens to all of us.

**Senator CAMERON:** Who has the ABCC commissioned to undertake further research as part of its inquiry into sham contracting in the constructing industry?

**Mr Johns:** We have not proceeded with that research proposal. We announced an intention to engage in that research, but we have determined that, in order to do it properly, it would require a public RFT proposal and my concern is that to go through that process would hold up the report. So that is something that I think is further work to be done post the report.

**Senator CAMERON:** But you do intend undertaking it post report?

**Mr Johns:** It is something that I think is important to be conducted.

**Senator CAMERON:** I assume that means 'yes'.

**CHAIR:** I am not sure. What does that mean, Mr Johns?

**Mr Johns:** If it is within the budgetary capacity of my agency to undertake it, I am very keen to do it, but that is something to be assessed.

**Senator CAMERON:** Have you estimated the cost of that research? Do you have a ballpark figure for the cost?

**Mr Johns:** All I can say at this stage is that it would be in excess of \$80,000. That is why we have formed the view that it would need to go out to an RFT.

**Senator CAMERON:** You would spend more than that on lawyers on failed cases, wouldn't you? You would have spent much more than \$80,000 on failed prosecutions, wouldn't you?

**Mr Johns:** When we engage lawyers we engage them under a deed of standing offer, which means there is no necessity for an RFT. When you have separate expenditure items—for example, the commissioning of research—which cannot fall under a deed of standing offer then you have to go out to an RFT. That is why there is a different process.

**Senator CAMERON:** I suppose it is about priorities—whether the ABC continues to make the priority an attack on the trade unions and the industry, as it was under your predecessor, or whether it thinks some of these wider analytical approaches are appropriate. Have you determined what your balance is yet?

**Mr Johns:** The agency is engaged in a greater spread of regulatory activity than previously. It had some impressive results in the past 12 months and I see no reason why it would not continue to be a full service regulator in the building and construction industry.

**Senator CAMERON:** You are quoted in the *Australian Financial Review* on 12 October—there is a report on your address—and in the *Age* on 18 October as taking this particular view about the productivity impact of certain clauses in enterprise bargaining agreements. I want to come back to this issue. Obviously, you have looked at productivity as it relates to not just agreements but particular clauses in agreements. Did you look at the ABS to give you some advice on that? How did you deal with that?



**Mr Johns:** I looked at each of the pattern agreements, one of which expressly deals with the issue of productivity in a facilitative way. The other agreement has no clause dealing with facilitative arrangements for productivity.

**Senator CAMERON:** Given your statutory functions set out in section 10 of the ABCII Act, which relates primarily to compliance and enforcement—and you spoke about that yourself—why do you consider it to be part of your role to offer opinions about productivity measures in enterprise bargaining agreements?

**Mr Johns:** Because it is in the objects of my act. My act talks about standards of behaviour and my act talks about education. Within the confines of those functions and those objects I consider it to be relevant to my statutory function to deal with—

**Senator CAMERON:** There are standards of behaviour?

**Mr Johns:** Yes.

**Senator CAMERON:** And what else?

**Mr Johns:** Education; we have a role in education. The objects of the act expressly deal with the issue of productivity.

**Senator CAMERON:** How much of your budget is allocated to the standards of behaviour?

**Mr Johns:** We do not allocate the budget in that way. We allocate the budget according to functional areas: to investigations, to legal and to education and building the capacity of industry. Those are the three main functional areas within the budget. There is not a budget line item that says 'improving standards'.

**Senator CAMERON:** But would you be able to give us an idea of how much you spend on pursuing the objects of your act on standards of behaviour, education and productivity?

**Mr Johns:** I can certainly give you the budgetary breakdown between the work that we do on investigations, the work that we do on legal and the work that we do on education and building the capacity of the industry, yes.

**Senator CAMERON:** Okay.

**Mr Johns:** But, for example, where the act talks about improving the standards within the industry, regulatory work through investigations is an element of that. Litigation is an element of improving standards, as is education and building capacity. All of those three functional areas go to that issue without having a single line item that says 'monitoring standards of behaviour within the industry'.

**Senator CAMERON:** Who has responsibility for education within the ABCC?

**Mr Johns:** The public affairs and education branch.

**Senator CAMERON:** Can you provide me with details of the educational qualifications of people who you rely on to provide you with advice on the education process within the industry?

**Mr Ronson:** Yes. It is a new function and there is currently some recruitment ongoing. But I will provide that information to you.

**Senator CAMERON:** Prior to you becoming commissioner, Mr Johns, was there any allocation of funding for education in the ABCC? Mr Campbell, maybe you can answer this.

**Mr Johns:** Mr Campbell was not with the agency. He joined the agency as the deputy commissioner about two months ago.

**Senator CAMERON:** I may be mixed up because you were with—

**Mr Johns:** Certainly one of the skill sets that Deputy Commissioner Campbell brings to the agency is his experience in education and building the capacity of industry to comply with workplace laws.

**Senator CAMERON:** Somebody should be able to tell me what the expenditure on education was under the previous administration before Mr Johns.

**Mr Johns:** We will take that on notice.

**Senator CAMERON:** Can you give me a breakdown on how much was spent on education, what the education processes were, what was done in terms of education and also, other than this Econtech nonsense that was carried out, whether there was any other analysis done on productivity.

**Mr Johns:** We will take those on notice.

**Senator CAMERON:** Do you or any of your officers have any ongoing engagement with Ken Phillips?

**Mr Johns:** I do not know what you mean by engagement.

**Senator CAMERON:** Do you talk to him about productivity? Do you talk to him about industrial relations? Is there an engagement between Ken Phillips and ABCC?

**Mr Johns:** The only recent engagement that I can recall is that he was critical of the agency in relation to the conduct of the sham contracting inquiry. I wrote to him to correct errors that he had made on his website about the conduct of that inquiry. That is the only recent engagement that I can think of.

**Senator CAMERON:** I will ask you to take that on notice, and ask your staff whether they have had any engagement with Ken Phillips that you may not be aware of.

**Mr Johns:** I will take that on notice.

**Senator CAMERON:** You criticise the parties enterprise bargaining negotiations for the outcome, yet in your speech to IR Victoria you said that productivity enhancement, 'is not the role of the judiciary, the umpire or the regulators; it is the responsibility of the enterprise level parties'. How do you weigh that up against the position that you have just outlined to me?

**Mr Johns:** At the end of the day, enterprise bargaining is between the parties and it is only them that can have an agreement about issues of productivity. It is not mandated or arbitrated, as it once was in the past. The role of any regulator, for example, my office, in this is a facilitative one, it is an encouraging one. But at the end of the day, it is not something that I can impose. It is only something that the parties can agree upon.

**Senator CAMERON:** Do you propose to make any public comments, given the history of Mr Lloyd, who engaged quite heavily in political comment. Do you propose to make any public comment on the government's decision to reintroduce the Building and Construction Industry Improvement Amendment Bill?

**Mr Johns:** As I made very clear in my speech to the Industrial Relations Society last Friday, my role is to implement legislation enacted by the parliament, and that is presently the

Building and Construction Industry Improvement Act. It is a role that I and my officers discharge with great purpose. It is not my role to engage in matters of policy.

**Senator CAMERON:** Have you or any of your officers had discussions with the Victorian government about its recently released guidelines for state government funded projects in that state?

**Mr Johns:** Yes. There was one meeting that occurred on 7 October between officers of the Department of Treasury and Finance in Victoria and the ABCC in relation to our operation of the national code. The guidelines from Victoria had not even been released then, so it was not—

**Senator CAMERON:** You have not had any on the state government guidelines?

**Mr Johns:** No.

**Senator CAMERON:** Can you provide details of the state government officers who attended that meeting?

**Mr Johns:** I will take that on notice.

**Senator CAMERON:** And the ABCC officers as well.

**Mr Johns:** Yes.

**Senator CAMERON:** Will the ABCC play any role in the administration of the Victoria government guidelines?

**Mr Johns:** No, it does not seem to contemplate that we have a role, and we are a federal government agency.

**Senator CAMERON:** How many interviews have you personally conducted using the ABCC coercive powers since you announced the changes to the way these will be carried out by the ABCC?

**Mr Johns:** Two, and there is another one in, I think, two weeks time.

**Senator CAMERON:** Two plus one. That is it. Thanks very much.

**Senator ABETZ:** Was there some more information?

**Mr Johns:** Yes, in relation to that matter where you asked about the costs order, we did make an application for costs. We were granted a costs order. The matter has since gone on appeal. So that is where the matter is at.

**Senator ABETZ:** All right. Thank you very much.

**CHAIR:** Thank you, Mr Johns, and your officers for attending these estimates today; that concludes your questioning. We will now commence with Comcare.

#### Comcare

[16:28]

**CHAIR:** Welcome, Mr O'Connor and Mr Kibble, to these estimates hearings. Mr O'Connor, did you wish to make any opening remarks to the committee before we commence with questioning?

**Mr O'Connor:** No, Chair.

**CHAIR:** Thank you. Senator Abetz?

**Senator ABETZ:** Mr O'Connor, can I take you back to last estimates. You kindly agreed on 30 May to provide us with a copy of the improvement notice issued to DIAC. Comcare replied to the committee, forwarding the improvement notice, on 1 June 2011. I just want to take you through a few steps and ask for confirmation. I understand that at 12:41 on 31 May—that is, the day before the letter was delivered to the committee—you, Mr O'Connor, sent to the minister's office a draft of the proposed letter to the committee. That is correct?

**Mr O'Connor:** Correct.

**Senator ABETZ:** Did that draft say, in part: 'While the investigator is now satisfied with DIAC's response to the improvement notice, there remains a number of areas of safety systems improvements required'?

**Mr O'Connor:** Correct.

**Senator ABETZ:** Why, at 5.24 pm on that same day, about five hours later, did Mr Kibble send an email to Minister Evan's office which read:

As discussed, please see attached the revised letter to the Senate committee, this version now saying, 'The investigator is now generally satisfied with DIAC's response to the improvement notice'?

That is, I would suggest to you, materially different to saying that there remain a number of areas in which improvements are required, so I ask whether that change to the correspondence was initiated from the minister's office.

**Mr O'Connor:** Not that I am aware of, but Mr Kibble was the author of that letter and I will ask him to clarify.

**Mr Kibble:** No, it was not.

**Senator ABETZ:** You sent a draft letter to the minister's office which I assume you were happy with and that you thought represented the truth.

**Mr Kibble:** Yes.

**Senator ABETZ:** That was at 12.41 pm. So why did you make changes to the letter?

**Mr Kibble:** I reviewed the draft during the course of the day but that change was not made in response to any suggestions or advice from the minister's office.

**Senator ABETZ:** Were any phone calls had between you, Mr Kibble, and the minister's office between 12.41 pm and 5.24 pm?

**Mr Kibble:** I cannot vouch for the times, but I certainly did speak to the minister's office around that time about the draft letter. The purpose of that phone call was primarily to let them know that the draft letter was with them.

**Senator ABETZ:** There was no discussion about the contents of the letter?

**Mr Kibble:** I suspect that in that conversation I would have talked about the context of the letter. We were treating it, as you might imagine, as a regular question on notice, albeit one which was being turned around slightly quicker than most questions on notice. But it was dealt with in the normal processes for a question on notice. I might have discussed with the minister's office what the context of it was.

**Senator ABETZ:** So you just started by saying that you rang them to tell them about the draft letter coming their way. Now we have developed it further to discussing the context of

the letter. Was the first contact on the day from Mr O'Connor to Mr Evans's office made by forwarding an email of a draft letter?

**Mr O'Connor:** As far as I am concerned, that is correct. That is my understanding.

**Senator ABETZ:** How did the conversation start? Mr Kibble, did you ring the minister's office or did the minister's office ring you?

**Mr Kibble:** I would like to preface my answer with the fact that I have kept no records of those conversations, so I am not sure when they occurred. I certainly recall talking to the minister's office on that day. I rang them to let them know that the email was there with the draft letter and, as I said, when I spoke to them I talked about the context of what the letter was about and left it at that.

**Senator ABETZ:** Did they ring you back later on—'they' being the minister's office?

**Mr Kibble:** They might have rang back the next day to indicate that they were happy for the letter to go, which I think was confirmed by email from the minister's office the next day. They were happy for the letter to go to the committee.

**Senator ABETZ:** So you have a difficulty in that we do have, as you would be aware, the FOI here. Did you not email somebody by the name of Michael who happens to be the minister's Chief of Staff saying, 'As discussed, please see attached the revised letter to the Senate committee'? So if you had only run them to tell them that the letter was there, why would you, five hours later at the maximum, send an email to say, 'As discussed, here's the revised letter.' There must have been a discussion about the contents of the letter and the need to change it.

**Mr Kibble:** I do not have a record of the conversations with the minister's office on that day and the next day but I do recollect talking to the minister's office. On the use of the word 'revised', I suspect that it is simply that I had changed the letter in the course of the day.

**Senator ABETZ:** Why did you change the letter during the course of the day?

**Mr Kibble:** It would have been based on discussions internally about the contents of the letter.

**Senator ABETZ:** So why do you say 'as discussed with the minister's office' if it was only discussed internally? This was clearly discussed, Mr Kibble, with the minister's office and the letter was revised as a result of that discussion with the minister's office, wasn't it?

**Senator Chris Evans:** Can I just be clear: as I recall—and I have not been briefed on this—this came up at estimates and we arranged to clear a response to you more quickly. My understanding is that Comcare sought to have that cleared by my office, as is the normal way in replying to senator's questions.

**Senator ABETZ:** That is right.

**Senator Chris Evans:** That was done and then the answer was provided. That is just the normal process for these things—that the minister's office approves a response—but this was turned around in a couple of days, as I recall.

**Senator ABETZ:** The minister's office can also request changes to be made to correspondence, and we are agreed, I would assume, that the original draft sent to your office, Minister, has been changed. The question therefore is: by whom was it changed and why? As I understand it, when draft letters came to me as a minister the department would not, hour

after hour say, 'Look, that was just a draft; we've decided to redraft the letter,' and then two hours later say, 'Oh, we've thought about this letter a bit more; here's the third draft of the letter.' When it goes to the minister's office it is the draft for approval by the minister. The process then is that if the minister has a bit of an issue with the letter a phone call may be made to say, 'I don't like the letter; can we amend here or there.' That is the normal process. To suggest, Mr Kibble, with great respect, that you, of your own volition because you thought about the letter a bit more, sent a further draft to the minister's office is something, with respect at this stage, I am not willing to accept. I am asking you to dig into your memory and ascertain whether or not there was any request by the minister's office to change the correspondence.

**Mr Kibble:** I am happy to take it on notice but, as I said, that is my recollection of what occurred.

**Senator ABETZ:** Of your own volition you sent the minister another draft when your boss at 12.41 pm that day had said to a particular person in the minister's office that I will not identify, 'Please find attached a copy of the draft letter we propose sending to the committee this afternoon together with a DIAC infringement notice.'

**Senator Chris Evans:** Senator, there is no secret. I think they dealt with my Chief of Staff, Mr Boyle. There is no secrecy involved here.

**Senator ABETZ:** If you do not mind, it was in fact an email to Rachel Livingston who is not your Chief of Staff. It helps if you are fully briefed on these matters, Minister, before you intervene.

**Senator Chris Evans:** I am briefed on all important matters and quite frankly this does not rate, but in terms of formal dealings, my Chief of Staff takes responsibility for those things. You referred to an email to Michael; I was just letting you know who he was.

**Senator ABETZ:** Yes, all right.

**Mr Kibble:** Senator, my recollection is that I was conscious that Mr O'Connor had sent a draft letter in the afternoon. I was conscious that in the course of the day we had changed the draft and so, to make sure that the minister's office had the latest draft, we sent that draft to the minister's office.

**Senator ABETZ:** The head of your department, Mr Kibble, the head of Comcare emailed saying, 'Please find attached a copy of the draft we propose sending to the committee this afternoon.' If the minister's office—and I do not blame them for this—would have said at 12.42 pm, 'Yep, fine, send it off,' there would have been no amended letter, would there? You would not have written to the committee saying, 'Look, the letter that was sent was wrong and we seek to correct the record.'

**Mr Kibble:** Senator, what happened was that Mr O'Connor's email at 12.41 pm mentioned that we intended to send it to the committee. That is what we were aiming to do. As you would have seen through the FOI documents, the minister's office came back the next day and said, 'That's fine, Mr Kibble, please send off to the committee,' which is the normal process with questions on notice and we duly sent it off to the committee the next day.

**Mr O'Connor:** And, Senator, all of the documents that relate to this were released. I believe some were redacted in terms of the investigation report if that was part of that investigation. We were treating this from that day as a question on notice and, consistent with

the processes that are usual in this place, those advices or updates or responses to questions on notice are cleared through the minister's office.

**Senator ABETZ:** Of course—and it is quite appropriate, should they want to do so, for the minister to seek alterations to the correspondence. There is no argument with that. What I am trying to find out is who initiated the change to the correspondence which I consider, at least, to be a material change.

**Mr Kibble:** I did, Senator, as I mentioned earlier.

**Senator ABETZ:** And not as a result of any discussion with the minister's office?

**Mr Kibble:** As I said before, Senator, no.

**Senator ABETZ:** That is interesting because you send this email at 5.24 pm, Mr Kibble, 'As discussed' so I do not know what you discussed because it is all your own work. You are on the record unfortunately with the email 'As discussed, please see the attached revised letter,' which now says that the investigator is now generally satisfied with DIAC's response to the improvement notice. Unfortunately for you, Mr Kibble, only four minutes later—four minutes later—you send a further email to Rachel Livingston in the minister's office saying, 'Rachel, as discussed with Paul, here is a copy of the investigator's letter to DIAC sent yesterday re Villawood—still work to do generally.' So, if there is still work to do generally how can you, four minutes earlier, of your own mind, of your own volition, say that the investigator is now generally satisfied with DIAC's response to the improvement notice, yet exactly four minutes later you are saying that this investigator says that there is still work to do generally. Tell us how that dovetails in please?

**Mr Kibble:** The improvement notice issued by the investigator in relation to Villawood on 1 April needs to be seen in the context of the broader investigation into issues at seven immigration detention centres. So on the Villawood visit on 1 April, the investigator saw specific issues that she required safety improvements on. She issued the notice to the department and gave them a timeframe. The department responded to that, as you have seen through the FOI documents. The investigator and the Department of Immigration and Citizenship had correspondence over the next few days, and you have seen all those documents. The improvement notice needs to be seen in the context of the broader investigation. If the investigator and Comcare feels that the party, in this case the department, has not complied with the requirements of the improvement notice then we can take prosecution action. Quite clearly we did not do that. The investigator thought that some improvements were further needed, which were included in the final investigation report which you also have a copy of and which have been published on our website.

**Senator ABETZ:** Do you usually not take notes when you are talking with a minister's office about draft letters?

**Mr Kibble:** Not always; it depends.

**Senator ABETZ:** Minister, are you able to shed any light on whether you or any of your staff requested any changes to this particular letter?

**Senator Chris Evans:** No, you accused me earlier of not knowing anything about it. I think that is fairly close to the mark. I was involved, we were here, and you or the committee sought further information. Comcare agreed to give it to you, I think with my authority. We discussed it here, as I recall. They then sought to get their response cleared by my office. That

was done—I think we turned it around in less than 48 hours, which I think is probably a world record; and the material was provided to the committee. That is the extent of my knowledge of it.

**Senator ABETZ:** Because other than for the FOI request, this committee would have been told that Comcare was generally satisfied in relation to the changes that had been made by the Department of Immigration and Citizenship.

**Senator Chris Evans:** Well, it is up for Comcare to answer on whether they are satisfied or not. That is the issue.

**Senator ABETZ:** Well, that is what we were told, and anybody reading the correspondence to the committee would read 'the investigator is now generally satisfied with the DIAC's response to the improvement notice'. Whereas the original draft said 'there remain a number of areas of safety improvements that are required'. That was in the original draft.

**Mr O'Connor:** They are not mutually exclusive on the face of it.

**Senator ABETZ:** They are in as much as on 31 May Comcare felt compelled to write to the Department of Immigration and Citizenship with not one concern, not two concerns, not three concerns and not four concerns but rather five concerns. So this was still an ongoing issue of genuine concern to the investigator, and the committee got a fob-off letter to say 'we are generally satisfied with the DIAC's response to the improvement notice' when you clearly were not—because on the day that you are trying to tell the committee that that is the case Comcare is sending out a letter telling DIAC that they are not satisfied; that there are five key areas that need further improvement.

Can I just say, from an organisation like Comcare, it is a matter of great concern that FOI has to be accessed to get the truth as opposed to the correspondence which was put before us. It is quite clear, Mr Kibble, that your original draft wanted to tell the committee what the truth was—namely, that there remain a number of areas—exactly what Comcare did later that day in writing to DIAC, pointing out five areas of concern. Why did Comcare write to the committee and say that DIAC is generally satisfied with the response?

**Mr O'Connor:** It was not our intention to fob off, nor do we believe it had the effect, in our view, of fobbing off, this committee. On the question on notice that was put the day and a half before to us, we undertook from this table to get a response with regard to the improvement notice. I would reinforce the point that Mr Kibble sought to make, which is that we need to understand the context of the visit to Villawood and the concerns that led our investigator to issue an improvement notice, and the broader concerns with regard to the immigration detention facilities, of which there were five major areas of concern, and the subsequent breaches, we believed, of federal law that led to the call for an action plan that would document the department's response to those safety concerns. My understanding of the discussions and Mr Kibble's description to this committee is consistent with what I recall was the situation that day. If I recall, there were discussions internally that Mr Kibble has identified to you, which include with the investigator, because, in the end, we had to be comfortable that the statements being made to this committee represented an accurate and appropriate statement of affairs with respect to the work that was being led by that investigator.



**Senator ABETZ:** What was inaccurate, Mr O'Connor, in saying to the committee that there remained a number of areas of safety systems improvements required?

**Mr O'Connor:** Because that reflected the status of what the investigator in our subsequent report, not just in the improvement notice, which was a response to the immediate safety concerns at that particular detention facility, but in the broader issues of concerns, which I understand the investigator either that day or the next—and pardon me for not—

**Senator ABETZ:** The same day they wrote to DIAC about Villawood talking about the harm minimisation strategies at Villawood. There was limited, if any, material provided to demonstrate or substantiate the claim about video cameras at Villawood. Why was the letter changed when your original draft said there were still problems? Later on that day, DIAC sent a letter off to confirm to DIAC there are still ongoing problems, and Mr Kibble felt it necessary to advise the minister's office that further work needed to be done. There is not a hint of that in the letter that was actually provided to the committee.

**Mr O'Connor:** Senator, the perspective that I certainly understood Mr Kibble's letter to this committee was conveying was an accurate statement, which I recall Mr Kibble 'verified', if that is the right word, with the investigator about being comfortable with the statement. It does not say that all matters, the subject of the improvement notice, have been resolved. In my view as a reader of that letter, that statement is certainly not inconsistent, it representing this office's position with regard to the status of the affair. I reiterate that neither its contents nor its words or intent were intended or, in our view, had the effect of being a fob-off. It was meant to be a summary of the status of that matter.

**Senator ABETZ:** With respect, Mr O'Connor, anybody listening in or reading the *Hansard* that will be produced will find your explanation exceedingly difficult to accept, given that Ms Murray, on that day, wrote to DIAC saying, 'Nevertheless, I note by way of feedback, Comcare's ongoing concerns regarding ...' and then listing five matters. To say that you are generally satisfied, why didn't Ms Murray just write off to DIAC and say, 'Yep, we're generally satisfied'? What the committee was told was a misrepresentation of Comcare's position. Let there be no doubt about that, because Mr Kibble's first draft was the truth, it represented the truth and represented that which was in Ms Murray's letter to DIAC. So that is the truth of the matter. Or are we saying that Ms Murray's letter to DIAC, on 31 May, did not represent Comcare's position?

**Mr Kibble:** As we said before, they are not mutually exclusive.

**Senator ABETZ:** In our eyes they are, Mr Kibble, and it is a matter of great regret that officials that are basically on oath are willing to make statements of that nature, and I do not say that lightly.

**Mr O'Connor:** It is not a matter of like being on oath; we are on oath, Senator, and we take those matters seriously. We have to leave it as a matter of perspective as to the interpretation of that letter. We neither resile from that letter, nor from Ms Murray's perspective, as the investigator, with regard to the work that needs to be done. We maintain the view that it is not mutually exclusive.

**Senator ABETZ:** Against all logic, against all interpretation, you maintain that assertion, but it simply does not stand, by any reading of the documentation. What is more, it nearly sounds like a self-protection mechanism that Mr Kibble, after sending off the letter to the

committee with the changes that clearly came from somewhere else, found it advisable to send somebody in the minister's office a little missive attaching the letter from Ms Murray, saying the words, 'As discussed with Paul, here's a copy of the investigator's letter ... —still work to do generally.' So Mr Kibble was clearly very much in the space of wanting to make sure that the minister's office knew that Comcare was saying, 'Work still needed to be done,' as was in his original draft. And then having been required, I would suggest, to change the letter, four minutes after he sends that off he sends another letter to the minister's office just to protect himself that says 'more work needs to be done'.

**Senator Chris Evans:** The sense of that is all reflected in the letter provided to the committee. They are not mutually exclusive. I do not know what your point is, other than that information was sought, it was approved by my office and provided to the committee. The final version, I think, is consistent with the other information provided to you and otherwise, in terms of the ongoing engagement with DIAC about improvements required. The officers have provided the context. Quite frankly, I do not know what this is all about.

**CHAIR:** Can I just intervene here. It appears now we are simply at the point where we are disagreeing about different opinions and I am just wondering if there is any ability to actually take it further because I think the issue has been well canvassed.

**Senator ABETZ:** Fair comment. I will just pursue it a little bit further. If the two letters are exactly the same in nature and in content, why bother changing the terminology? If they are identical in content and substance, why would you bother to make the change? It is ridiculous, isn't it?

**Senator Chris Evans:** They are clearly not the same in content.

**Senator ABETZ:** No, exactly, they are not the same in content. Thank you very much; that has been my point all along.

**Senator Chris Evans:** Senator, any fool would recognise that they are not exactly the same. It is not actually being contested, so for you to think that you have made a great revelation I suggest to you that any fool reading the letters would agree that they do not have the same content.

**Senator ABETZ:** But why was the change made if there is no inconsistency between the two letters? Was it just stylistic, Mr Kibble?

**Mr Kibble:** I do not think that I can add any further to my earlier answer on that.

**Senator ABETZ:** Surely, you make the change to the letter because you hope that it more accurately reflects the truth. But in this case it unfortunately detracted from the truth, did it not?

**Mr O'Connor:** Senator, I think we need to leave that as a matter of perspective of the readers of the letter. Mr Kibble has been clear about what happened. Mr Kibble is being clear with this committee on oath that it was the matter of internal discussion and we have been clear that the letter and its intent and what was presented to the committee at your request as a response to a question on notice is consistent with what unfolded that day in previous work and, subsequently, with the report that was released to your office and publicly.

**Senator ABETZ:** Did anybody else in the Comcare office have discussions with the minister's office about the draft letter?

**Mr Kibble:** I am not aware of any other discussions, no.

**Senator ABETZ:** Take it on notice, please, to ascertain whether those internal discussions that developed the change to the letter may have been as a result of the minister's office having spoken to another Comcare official other than the two that are sitting at the table.

**Mr Kibble:** Senator, I will take it on notice but I am almost certain that no-one else in Comcare spoke to the minister's office about the letter.

**CHAIR:** Mr O'Connor, you gave the impression that you believe we are actually on oath here. No-one is, but it would be a serious contempt of the Senate if anyone was to mislead the committee. I just wanted to make that point clear.

**Mr O'Connor:** Thank you for the clarification.

**Senator Chris Evans:** That is not a licence not to tell the truth, by the way!

**CHAIR:** No. I think that contempt of the Senate is probably worse.

**Senator XENOPHON:** The Commonwealth Ombudsman's report, No 4, 2010 which you are familiar with and which I raised previously, recommended that Comcare and Finance develop a proposal for establishing a scheme similar to the CCDA Scheme that is compensation for detriment for defective administration whereby people affected by poor administration of the SRC Act can seek compensation. You note that the recent Senate Finance and Public Administration Committee's report into the Public Service Amendment (Payments in Special Circumstances) Bill recommended that this be implemented as a priority.

My questions go to that, and I appreciate the work that you have been doing in relation to these matters. Can Comcare provide an update on where the discussions are in relation to establishing a scheme similar to the CCDA Scheme so that victims of Comcare administrative errors can seek full compensation?

**Mr O'Connor:** Yes, Senator. Significant work has been undertaken with the two departments that have the policy responsibility for this. One is the Department of Education, Employment and Workplace Relations and the other is the Department of Finance and Deregulation. A number of discussions have ensued to find an appropriate legislative vehicle and way forward to be able to address and deliver on the recommendations of the Ombudsman's report as well as the separate December 2010 recommendations in similar terms to the Department of Finance and Deregulation. It is not finalised yet.

**Senator XENOPHON:** Further to that, has any special group been formed to deal with this issue? If it has, how many times have they met? Has a timeline being created for the creation and implementation of such a scheme? If so, when does it propose that the scheme be in place?

**Mr O'Connor:** It is probably best that I take that on notice and give you the answer as to the membership of that. We do have a working group tasked with that with clear responsibility in terms of Comcare officials who are supporting the work of the two policy departments that are progressing that. The timetable in terms of any suggested possible legislative amendment obviously would be subject to what the government's view is in progressing that and any other suggested changes that had been tabled in this House and in the other place.

**Senator XENOPHON:** Further that to that, if I can put on notice for a copy to be tabled of the timeline of the scheduling for the work done on this in getting a bill? And will a consultative draft of the scheme be released? And if so, what is an approximate time line for that?

**Mr O'Connor:** I will take that on notice. With the time line, we are working to try and get this done at the first opportunity. I think that needs to be reinforced and I can be clear about that. It is not as if there is a project timetable where there are phases in this. A number of people have been working hard to progress this matter and to get a common understanding. With regard to whether or not there will be any legislative change and what the drafting of that legislative change might represent, I would have to defer to the department that has the policy responsibility for that.

**Senator XENOPHON:** Sure, but could you take those on notice? Given that the Commonwealth Ombudsman made this recommendation in March 2010 and it was supported in a bipartisan sense by the Finance and Public Administration committee in August, you could understand why there would be some frustration that it has not progressed further. Or are you saying there is some light at the end of the tunnel in relation to this process?

**Mr O'Connor:** I certainly remain positive; there is certainly both good will, energy and a lot of intellectual effort being put into this. This is not just a matter of admiring the problem; this is a matter of significant work being undertaken to try and find a sustainable solution that is available to the broadest range of people who could be affected under the Comcare scheme—not just public servants or former public servants whose claims are administered by Comcare. We are looking to find the most sustainable wide-reaching solution, as had been our undertaking in agreement with the former Commonwealth Ombudsman, Professor John McMillan.

**Senator XENOPHON:** My final question is has Comcare fully implemented the second recommendation in the Ombudsman's report, namely that Comcare should develop a procedure to assist any person to make a written request for reconsideration? If they make a request that is not in writing or indicate a wish to courier a payment; in other words, to help facilitate that?

**Mr O'Connor:** Correct, that has been undertaken. We have revised our procedures to be able to make sure we do not take such a black-and-white view as that and to have a broad interpretation, as is intended under our legislation. But any offer to facilitate a remedy for the equivalent of defective or deficient administration is still subject to the legislative constraints that we have talked about at this committee before.

**Senator XENOPHON:** If it were possible perhaps to table the new procedures, on notice, I would be very grateful.

**Senator ABETZ:** Have you issued any further improvement notices to the Department of Immigration and Citizenship?

**Mr Kibble:** I am not aware of that.

**Senator ABETZ:** No? With this letter of 31 May that set out the five concerns, have they been addressed?

**Mr Kibble:** Yes, they would have been addressed and—

**Senator ABETZ:** And are you generally satisfied, or is there more work to be done? Let us get this absolutely clear.

**Mr Kibble:** As you know, the investigator issued the final investigation report to the Department of Immigration and Citizenship and, as Mr O'Connor mentioned previously, found that in five areas the department had not complied with the legislative requirements under the OH&S Act. It made certain recommendations for safety improvements, and the department has provided an action plan in response to those to meet those improvements. That action plan sees a rolling set of initiatives and measures; I think the final one is by June next year.

**Senator ABETZ:** And Comcare is monitoring that rolling action plan?

**Mr Kibble:** Yes.

**Senator ABETZ:** Right; and so far, so good?

**Mr Kibble:** Yes.

**Senator ABETZ:** Absolutely everything has been satisfied?

**Mr Kibble:** As far as I am aware, yes.

**Senator ABETZ:** The minister—not this minister but the Minister for Immigration and Citizenship—was highly critical of your report. Are you aware of the media?

**Mr Kibble:** Yes.

**Senator ABETZ:** Does Comcare stand by its report?

**Mr Kibble:** Yes.

**Senator ABETZ:** So it does not accept the minister's criticism?

**Mr Kibble:** We issued a draft report to the department three days before the investigator issued the final report. We provided that draft report to the Department of Immigration and Citizenship. This we do occasionally with our investigations to ensure there are no factual errors or anything of that sort; we do an investigation report. The department came back and provided some information about factual errors which we duly corrected. They also had some other observations which we did not agree with in relation to whether or not they had complied with the OHS Act. But we stand by the investigation report, yes.

**Mr O'Connor:** I reinforce that the minister did make a public statement on 12 August that he and his department took the report seriously. He acknowledged that there were differences of views about some of the facts or perspectives taken.

**Senator ABETZ:** He also said there were things in the report that they respectfully disagreed with and they did not believe were an accurate reflection.

**Mr O'Connor:** I think that goes to highlight that, with regard to things that are written, readers of a report—in this case DIAC and its senior officials—took a different perspective in the understanding of the views than we took.

**Senator ABETZ:** They were not different understandings of the views; they just disagreed with you outright.

**Mr Kibble:** I would like to add one thing which might have been implicit in what I said earlier. As Mr O'Connor said, the department, as reflected in the minister's comments, had some different perspectives or did not agree with all of our perspectives. But crucially they

accepted the investigator's recommendations for safety improvements. They have taken the action plan to implement it and it reflects that acceptance of the recommendations.

**Senator ABETZ:** Despite all the immigration minister's public protestations, the department finally did cooperate with you to attend to the matters that you raised.

**Mr Kibble:** Yes.

**Senator ABETZ:** Are questions about the training that takes place under the Occupational Health and Safety Act for Comcare or Safe Work? I always struggle to know who is who in the zoo on this one. Do I ask you these questions or should they be directed to Safe Work?

**Mr Kibble:** Could you clarify what you mean by training under the OHS Act?

**Senator ABETZ:** Training courses that are currently accredited under the Occupational Health and Safety Act.

**Mr Kibble:** That is us.

**Mr O'Connor:** On behalf of the SRCC.

**Senator ABETZ:** Will the training courses that are currently accredited be recognised on a transitional basis following the commencement of the new work health and safety laws?

**Mr O'Connor:** Yes. We understand that will be in place for 12 months, but I stand to be corrected by Mr Kibble.

**Mr Kibble:** Yes, until 31 December 2012.

**Senator ABETZ:** You took some questions on notice that I provided in writing at the budget estimates. There was a document entitled 'Q and A for Melissa', HSR training guidelines. Do you remember that?

**Mr Kibble:** Yes.

**Senator ABETZ:** I asked:

Please look at the document titled "Q&A for Melissa" ... Is this document a briefing for Melissa Ryan ...

We were told it:

... is an internal document that is in draft and that Dr Culvenor received as part of his FOI ... It is not clear how this draft document was or was not used.

If we go to the minutes of the Safety, Rehabilitation and Compensation Commission of 23 March 2010, we are told at paragraph 2.13: 'Ms Ryan briefed the commission on Dr Culvenor's situation and claims that he considers the proposed changes will disadvantage him.' Given that information, Mr Kibble, is Comcare still of the view that 'it is not clear how this draft document was or was not used' and that 'there is no record of it being provided to the Safety, Rehabilitation and Compensation Commission'?

**Mr Kibble:** I have nothing to add to the response we provided to the written question on notice.

**Senator ABETZ:** I am actually asking you further questions on the basis of those answers, which would suggest that chances are that the Q&A which you dismissed as a draft document, saying that you did not know how it was used, was used by Ms Ryan when she briefed the commission, because the document was headed 'Q&A for Melissa—HSR training

guidelines'. And guess what the minutes say: 'Review of HSR training course accreditation program'. So do you still say that the two were not necessarily linked?

**Mr Kibble:** I am not going to add anything to our response to the written question on notice.

**Senator ABETZ:** Despite new questions arising from those written responses, we are just going to be stuck with them. This will make estimates a very fruitful exercise.

**Mr Kibble:** But, just to clarify in relation to that particular issue, that document was provided under FOI but, as we said in the written response, we have no record in any way, shape or form that it was provided to the commission, nor indeed that Ms Ryan had it with her when she was talking to the commission about this issue. So there is nothing more that we can say about that.

**Senator ABETZ:** Let us go backwards. In relation to the transition, the 12-month transition recognises training that has already been done, but is there any transition to enable ongoing training for any period?

**Mr Kibble:** Sorry, Senator. I am not quite sure of the thrust of your question. As we said earlier on the existing accredited courses, our intention would be that they would remain accredited until 31 December 2012.

**Senator ABETZ:** Mr O'Connor, you are on the SRCC, are you not?

**Mr O'Connor:** Correct.

**Senator ABETZ:** And you have no recollection about Ms Ryan's briefing to the commission on this particular day as recorded in the notes? You were in the minutes as being present.

**Mr O'Connor:** I have nothing to add there.

**Senator ABETZ:** We do not know what the minister's office told us about letters, but so be it. Is it correct that currently the guidelines for the training are clear that there are no set requirements in relation to the type of course—be it five days—and how much of that has to be face to face?

**Mr Kibble:** I am not quite sure what more we can add. We have traversed these issues over a range of estimates. I am not sure we can add much more.

**Senator ABETZ:** And we have been given, with respect, obfuscating answers that do not give us the information that is clearly available on the face of the documents.

**Senator Chris Evans:** Insulting and demeaning people and then adding the words 'with respect' does not obscure the fact that you are not treating them with respect. The officers have gone to great pains over successive estimates and through questions on notice to be as helpful as they can. The constituent whom you represent on this matter is obviously not satisfied—I understand that—but the officers, quite frankly, have exhausted themselves in providing a huge amount of information. We have gone over and over the ground. I do not think repeating your conspiracy theories—I think this is about the eighth for today—and insulting the officers is a useful way of proceeding. I urge the chairman to insist that officers are treated with respect—I know he does. Those sorts of comments, Senator, are really unhelpful.

**Senator ABETZ:** 'Obfuscating' is offensive, is it?

**CHAIR:** No, but it assigns intent. I do not think the officers are intending to do that.

**Senator ABETZ:** That was the only word I used. I agree with you, Chair, which makes one wonder as to the minister's intervention.

**Mr O'Connor:** A year ago we answered, if I recall, 10 questions on this matter. In subsequent estimates there were 12 questions. We have answered 215 other questions on notice with regard to this.

**Senator ABETZ:** I wish you could be as exact in relation to some other matters as well.

**Mr O'Connor:** I will certainly endeavour to for the committee. On a number of these matters there have been comprehensive replies. We have accredited or reaccredited a number of providers. They will continue in a transitional phase.

**Senator ABETZ:** You said 'a number of providers'. Not all the accredited ones have been reaccredited for the transitional period, have they?

**Mr O'Connor:** My understanding is that those who applied did that and some chose not to reapply, despite repeated requests and offers of assistance to be able to support that, with extensions of time to be able to facilitate that outcome. Our energy and focus is on working with states and territories in anticipation of these harmonised laws being in place to be able to make sure we have effective support in place. There is further work being done across Australia, facilitated by Safe Work Australia, with regard to a technical advisory group on the elements and adequacy of these training programs for health and safety representatives. We continue to support that important work. It is important work that Safe Work Australia is undertaking through that advisory group to make sure there is a national consensus on what is appropriate and to make sure that the most appropriate course of training for health and safety representatives, which I understand—and I stand to be corrected by my colleagues at Safe Work Australia—still focuses on five days face-to-face training. I understand more work is being done on that and we will continue to contribute to support that matter. We have canvassed this at length. We have given a full, comprehensive and unfiltered statement of what happened and the documents have been supplied.

**Senator ABETZ:** Like the answers to the committee from the minister's office—completely unfiltered. Why weren't the training courses all automatically reaccredited for the transition period?

**Mr Kibble:** There were normal expiry dates. As Mr O'Connor said, a couple decided not to reapply for various reasons. We worked with others to make sure that they met the accreditation guidelines. Those that are accredited will be grandfathered for another year.

**Senator ABETZ:** Where is that transition period you refer to in the legislation?

**Mr Kibble:** It would be in the guidelines.

**Senator ABETZ:** So it is not in the legislation?

**Mr Kibble:** No, the legislation just provides that the regulator—in the proposed laws—that the regulator can accredit HSR training courses.

**Senator ABETZ:** It is not in the legislation?

**Mr Kibble:** I will take that on notice, but if I—



**Mr O'Connor:** I believe it is in the current legislation. In the current legislation, the Occupational Health and Safety Act 1991, that the accreditation by the Safety, Rehabilitation and Compensation commission—

**Senator ABETZ:** No, the bill that is currently before the parliament does not have a provision for transitional arrangements for trainers that we are talking about, does it?

**Mr Kibble:** We will take that on notice, just have to make sure.

**Senator ABETZ:** There was some previous discussion as well as to whether the proper guidelines had been referred to. We were told in the written answers that the guidelines had been referred to. But in the report on which you relied, which was known as the Stoker and Wright report of 22 September 2009, they only make reference to the 1991 situation, do they not? That is all they refer to.

**Mr Kibble:** Again, I cannot add much more to what we put in our written response. We stand by our written response. From memory, there might be a misunderstanding. As Mr O'Connor mentioned, the current Commonwealth OH&S act is actually the Occupation Health and Safety Act 1991. I think that is where the confusion may have laid in the development of that particular question. I think it was a misunderstanding about what was actually being referred to.

**Senator ABETZ:** Unfortunately, no other date is referred to in this quite extensive report of any other guidelines.

**Mr Kibble:** As I said, I cannot add any further to our written response.

**Senator ABETZ:** In answer to question 86 from budget estimates, you said the review conducted in 2009 looked at the process in place at the time—that is, the process that was based on the 2007 guidelines—but there is nothing in the report that actually says that they were looking at the 2007 guidelines. But there is an indication that they looked at the 1991 guidelines, is there not?

**Mr Kibble:** I cannot anything more. That question was asked as part of the 215 questions. I have nothing more to add on that.

**Senator ABETZ:** I wish you could be an exact with some other of your answers, but it is nice to you know you have counted up the questions.

**CHAIR:** Senator Abetz, I think the officers are trying to accommodate you.

**Senator ABETZ:** It is gratuitous each time to be reminded how very hard working I have been. It is very genuine to raise that on a regular basis, but it is quite clear how it is meant. I accept that other people do these things as well from the other side of the table, Chair.

We were told by you that the reviewers were given the 2007 guidelines and that they are referred to on page 12 of the review. Can you just take on notice whereabouts on page 12 of the review you get that answer from?

**Mr Kibble:** Yes, Senator.

**Senator ABETZ:** It was, as I understand it, in relation to answer 94. It was accepted that Comcare agreed the report recommended that training be predominantly face-to-face and not exclusively face-to-face, and now it has become exclusively face-to-face and we have no actual understanding as to why this has occurred.

**Mr Kibble:** As I said, we answered that question and I have nothing more to add to that answer.

**Senator ABETZ:** Then remind me, how did it go from predominantly to exclusive, which has cut out a significant player in the training area when there has been—and I stress this—no criticism of the training delivery of the product and we are now, in a ham-fisted way, demanding a particular model irrespective of what it might deliver and deliberately cutting out a model which has delivered, if I might say, very effectively for other Commonwealth departments?

**Mr O'Connor:** That is an observation. The Safety Rehabilitation and Compensation Commission, of which I am a member, considered those matters. The consideration of those matters has been well documented in the extensive range of documents supplied and answers given on notice. The particular articulation from one former service provider, who has strong and clear views about this, was provided thoroughly and completely to the Safety Rehabilitation and Compensation Commission in March at its meeting. I and other commissioners considered that. We took a view. That view is documented. The decision of the commission was shared extensively—

**Senator ABETZ:** We know exactly that a decision was made that the recommendation from all of the evidence was predominantly but not exclusively. Yet at the end of the sausage machine it became exclusive. I do not want to know who voted for it. I want to know why that decision was taken which is going to sideline somebody. In fact, it will take somebody completely out of the marketplace, an organisation that has delivered excellent training in this space, as you would be aware, to many federal agencies as well. It just defies any logic and no explanation has been given other than that the decision has been taken. We know the decision has been taken. We think it is wrong and we are seeking an explanation for the decision. All we are being told is, 'You have got it in writing that the decision was taken.' That does not really take us very far.

**Senator Chris Evans:** Senator, this has been explored at great length. How you use your time at estimates is a question for you, but I think we are at a point where you have queried it, we have discussed it at length and the bottom line is that the constituent and you do not agree with the decision. I think we are just going to have to agree to disagree, because I am not sure we are making any further progress. But that is up to you.

**Senator ABETZ:** Yes, but if you cannot justify the decision, any sensible person would say, 'Let's revisit the decision.' All we are being told is, 'The decision is the decision because it is the decision but we cannot really explain to you why we have come to this decision, which was in fact against the recommendation put to us.' That is the frustration that the constituent quite rightly has and I must say, having delved into this at some length with now, undoubtedly, over 215 questions, I share that frustration.

**Mr O'Connor:** The opportunity to reconsider that matter was taken on board as a serious matter. It was an agenda item that was considered for the person who was affected by that earlier decision. Their articulation of the points and the principles was put before the commission. The commission reconsidered the matter. There was nothing in that further material that persuaded the commission that it would be any different other than to reconfirm its commitment to those guidelines which were consistent with the expectation and trend that was emerging with regard to an expectation of five days face-to-face training, which has

continued and is the subject of continuing and further work. That is the work that Comcare is doing to support our colleagues at Safe Work Australia and members of the technical advisory group who are meeting in the national discussion about what the most effective arrangements for the training of health and safety representatives are. We continue to support that work and would defer to our colleagues at Safe Work Australia as to the latest status of that work of its temporary advisory group.

**Senator ABETZ:** One wonders whether in a former life you may have been a merry-go-round operator. That is all that we seem to be getting.

**CHAIR:** Yes, but this whole issue has been a merry-go-round.

**Senator ABETZ:** But in relation to the 1991 reference, that was not to the act but to the panel. But if we cannot even get that straight, I am not sure we are going to get much further.

**Senator Chris Evans:** Is it unreasonable to ask that you restrict your bile and abuse to me and leave the officers alone and treat them with some professional respect?

**Senator ABETZ:** I have, and the lack of responsiveness today from Comcare I do not think has covered Comcare in glory in any way, shape or form.

**CHAIR:** It is a matter of people having a different opinion—

**Senator ABETZ:** Of course it is.

**CHAIR:** so let's keep it all civil and continue on with questions.

**Senator ABETZ:** How much less income is Comcare anticipating if the work safety legislation goes through?

**Mr O'Connor:** I am thinking. Bear with me.

**Senator ABETZ:** Comcare gets funding, does it not, from its 21 licensed operators?

**Mr O'Connor:** Correct. There are regulatory contributions that are made by licensed self-insurers. There are regulatory contributions that are made by the premium paying agencies—any of the agencies affected by our work health and safety or occupational health and safety acts today.

**Senator ABETZ:** Yes, and the legislation will alter that regime. Are you anticipating any less income as a result? As I understand, some of these national licensees will now have to pay a licence fee to potentially eight separate licensing authorities.

**Mr O'Connor:** I do not think that is the way it will unfold. I will assist by explaining my understanding of how this will unfold. The Work Health and Safety Bill does not affect the licensed status of any of these self-insured licensees. Those licensees receive their status under a different piece of federal law, which is the Safety Rehabilitation and Compensation Act. That piece of legislation sets up the licensing regime which enables Comcare to levy regulatory charges or contributions from those licensees. The Work Health and Safety Bill as it currently stands, we understand, is proposed to applying it to each and all of those Commonwealth and non-Commonwealth licensees. So there is no change in the Work Health and Safety Bill, as far as I understand, with regard to the separate requirement, opportunity or availability of federal law for Comcare through the SRCC to levy a regulatory contribution. The contributions are not levied as a result of the Work Health and Safety Bill.

**Senator ABETZ:** No, but they will be subjected now potentially to the eight separate jurisdictions and will have to register and pay their fees to those different jurisdictions with

different laws applying, as we know for example, in the state of New South Wales, possibly Victoria and possibly Western Australia.

**Mr O'Connor:** My understanding is that the intention of workplace relations ministers is that the self-insured licensees will remain part of the Comcare scheme through next year. And I think the intention of the last communique of the workplace relations ministers is that those licensees would remain subject to Comcare's work health and safety coverage, as the proposed sole regulator in the federal jurisdiction, through till 1 January 2013, subject to all of the states and territories complying with the harmonisation program.

**Senator ABETZ:** And after 2013?

**Mr O'Connor:** The arrangements after 2013, in terms of licensing arrangements and fees, are the subject of discussion between high-level officials of the Commonwealth and each of the state and territory jurisdictions. That is a policy matter for the department with regard to the facilitation of those arrangements.

**Senator ABETZ:** But are you anticipating lesser fees as of 2013? I think we understand where I was going to.

**Mr O'Connor:** Our intention at Comcare is to do what we can to support the department to make sure that there is no increased regulatory cost or burden as a result of the introduction of this law.

**Senator ABETZ:** So if you were sitting here again in two years time I could quote to you that you were not anticipating any reduction or diminution in income to Comcare because of these changes?

**Mr O'Connor:** Let me wind forward. As the workplace relations ministers have anticipated events unfolding, I understand there is a decision in principle that if there is harmonisation in each of the states and territories the intention is that the day-to-day regulatory oversight for work health and safety matters would transition to states and territories for all but the Commonwealth licensees, Australia Post and the Reserve Bank. It is a matter of logistics that we are supporting the department in working with other states and territories to figure out what is the most effective and efficient way of collecting and levying charges with respect to work health and safety oversight or regulatory activity.

**Senator ABETZ:** The question is: are you anticipating less income as a result—yes or no?

**Mr O'Connor:** If the regulatory oversight of those self-insured licensees comes to pass as is foreshadowed by the workplace relations ministers and a large number of those licensees do transfer to states and territories for day-to-day regulatory oversight, there is the potential for the regulatory contributions to the Comcare scheme to alter. Whether they alter in terms of the payment arrangements is a matter that will be worked out with the states and territories.

**Senator ABETZ:** I have no further questions.

**Senator BILYK:** Mr O'Connor, I just want to thank you and your agency for the work that has been done with regard to the issue I have brought up previously at estimates. It is not resolved completely yet, but it is ongoing and your officers have been very helpful and very accommodating to the constituent and my staff. I want to put that on record, especially after some of the brickbats you have been having this afternoon. Thank you to your agency for that.

**Mr O'Connor:** Thank you, Senator. I will be sure to pass that on to the people who are involved. You are right, the matter has not yet been completely resolved. We will be working hard to make sure that the person affected by the workplace injury is supported and has continuing and ongoing support from us and her former employer.

**Senator BILYK:** Thank you.

**CHAIR:** That concludes questioning to Comcare. Thank you, Mr O'Connor and Mr Kibble, for your attendance at estimates today. We will now move to Safe Work Australia.

### Safe Work Australia

[17:45]

**CHAIR:** I now welcome Mr Hoy, Mr Creaser and Ms Ross from Safe Work Australia. Mr Hoy, do you have any opening remarks you would like to make to the committee before we proceed to questions?

**Mr Hoy:** Thank you, but I do not.

**Senator ABETZ:** How will the Work Health and Safety Act apply to voluntary organisations and will they be impacted? Has this issue been raised with you? There is some question that it might impact, given the definitions.

**Mr Hoy:** Yes, the issue has been raised with us. The model Work Health and Safety Act will apply to volunteer workers in the same way that it applies to other workers. However, there are issues in terms of genuine volunteers, and we have been meeting with the volunteer organisations to attempt to ensure that no unintended consequences happen through this model legislation. Those discussions are still ongoing, but we think we can resolve their concerns.

**Senator ABETZ:** How quickly?

**Mr Hoy:** In the next few weeks.

**Senator ABETZ:** Excellent. All the best with that. Many volunteer organisations have expressed concerns, but if you are fully across them, are aware of them and appreciate them that is good. Many volunteers are involved in incorporated associations.

**Mr Hoy:** One of the things we are working on is to produce a practical guide which will help address some of the issues that have been raised by those volunteer associations.

**Senator ABETZ:** I would like to hear that they would be exempted. Is it still a possibility, even at this late stage, to have an amendment to the legislation which puts it beyond any doubt that volunteer organisations, and officers of those volunteer organisations, do not find themselves being subjected to fines et cetera of up to \$3 million?

**Mr Hoy:** We are looking to make sure there are no unintended consequences of the application of the model legislation.

**Senator ABETZ:** But you will be stuck if the legislation is passed as currently drafted in relation to officers of an incorporated association, and many volunteer organisations—

**Mr Hoy:** Yes, we are having a look at that.

**Senator ABETZ:** How do we overcome it? You were saying, 'By giving guidance et cetera to them.'

**Mr Hoy:** What I was actually saying was that volunteer workers, in the sense that they are workers for volunteer organisations, should be covered in the same way as other workers. There is some uncertainty and some ambiguity about coverage of volunteers and volunteer associations, and that is why we have been having discussions with them as to how we may address those concerns. Those discussions are ongoing.

**Senator Chris Evans:** I am happy to ask Mr Hoy to brief you when they get to some sort of conclusion. It is an important issue raised by lots of people.

**Senator ABETZ:** That is very helpful.

**Senator Chris Evans:** Effectively, I think Mr Hoy's answer is that he is working at it and trying to fix it. When he fixes it I expect him to brief me and I am happy for him to brief you.

**Senator ABETZ:** That is a very helpful suggestion, but what I have been told is that while the bill purports to exempt volunteer associations the definitions do not seem to do that, and office bearers in particular have a problem. If, magically, we can somehow overcome the terms of the legislation—I am not sure how we are going to do that—and if Mr Hoy has a whizzbang plan I will be all ears, and I look forward to that briefing.

Now, how are we going with the timetable, Mr Hoy, of this harmonised legislation which is supposed to be starting on 1 January 2012?

**Mr Hoy:** Senator, as I have explained before, the Commonwealth states and territories committed to implementing the model legislation by 1 January 2012. In terms of the model act, legislation has passed the parliaments in Queensland, New South Wales and the ACT. The legislation is currently before this parliament and the South Australian parliament. It is expected that legislation will be shortly introduced in Tasmania and the Northern Territory. Victoria and Western Australia have made public statements about their current intentions.

That is model legislation in terms of the model regulations. They were developed by Safework Australia through our processes. They were agreed to in principle by workplace relations ministers in August, together with the priority codes of practice. That was in principle subject to finalisation of the regulation impact statement. That regulation impact statement was finalised and it was sent to the ministerial council back in September. It is currently before the ministerial council.

**Senator ABETZ:** Look, that all sounds good, but for the fact, for example, that New South Wales has not adopted the model legislation and it clearly has a breakout in relation to its legislation that still allows union prosecutions. We know that statements, as you describe them, have been made by the West Australian and Victorian governments, but do you have any handle as to the likelihood of those two jurisdictions, and indeed South Australia, passing similar legislation and having it in place by 31 December.

**Mr Hoy:** Well, the South Australian bill is the model bill before that parliament. It is true that there was an amendment made in the upper house of the New South Wales parliament, which included an amendment that was inconsistent with the model legislation. In terms of Victoria and Western Australia, I cannot add anything further to the comments they made. Those governments are the ones who actually made the commitments. We have developed the legislation, it is now up to those governments, jurisdictions, to implement it.

**Senator ABETZ:** Yes, but there has been a significant change, hasn't there? The people have voted out those governments that made that commitment. How does that deal—

**Senator Chris Evans:** Senator, can I just deal with that. Both Victorian and Western Australian governments have given their commitment to harmonise legislation—

**Senator ABETZ:** To the principle.

**Senator Chris Evans:** They reiterated that. They are arguing about putting some propositions to me and publicly timing. But neither of them have withdrawn their commitment to harmonisation with the proviso that West Australia reserved its position or had a caveat on three matters at the original COAG. They have maintained that position. But both of them have reiterated their commitment to the harmonisation of laws and their commitment to introduce legislation to do that. There has been a bit of commentary now about timing and other issues. But I take the commitment as being firm.

**Senator ABETZ:** Right.

**Senator Chris Evans:** They have corresponded to me in those terms, but raised other issues that they wanted to raise with me.

**Senator ABETZ:** But will we have a national harmonised scheme, Minister, do you think on 1 January?

**Senator Chris Evans:** Senator, what I would say is that each government has committed to that. We want to hold them to those commitments. They made those commitments under the COAG processes. There are potential financial penalties for states who do not honour their obligations. Mr Hoy and his officer have been working very hard on getting the regulations in place. They are also being progressively approved by states. We are making good progress but the deadlines are getting tight, I concede.

That is why I look forward to your cooperation in getting the Commonwealth legislation passed through the Senate in the next week of sitting.

**Senator ABETZ:** If we did not have carbon tax to deal with, we would have plenty of time.

**Senator Chris Evans:** You do not have any amendments for that one so we will get through that quickly. So then we will be able to get onto this issue.

**Senator ABETZ:** We are used to being gagged these days so chances are it will be dealt with quickly.

**Senator Chris Evans:** Some of your people are pleading to gagged.

**Senator ABETZ:** Codes of practice: public comment on 26 September with a closing date of 16 December, was it?

**Mr Hoy:** No, it is 18 November for one lot, 16 December for a second lot.

**Senator ABETZ:** When do the codes of practice come into force? On 1 January as well?

**Mr Hoy:** All the model legislation we wanted to have in place by 1 January. There are some key codes of practice, which all of the jurisdictions indicated they would like to have in place with the act, the model regulations and the first stage codes on 1 January. Then there is a range of other codes of practice, and there are nine in that second category, and another group of codes of practice that will be progressively developed in the early part of 2012. Codes are non-legislative for a start, they are guidance material. The key legislative package—

**Senator ABETZ:** But they will be pretty devastating in a court hearing, one would imagine.

**Mr Hoy:** What do you mean by 'devastating'?

**Senator ABETZ:** If one has breached a code of practice that would not be helpful for your litigation of the matter, would it?

**Ms Ross:** Yes, codes of practice can be used in evidence.

**Senator ABETZ:** Exactly. So if the code of practice comes in as of 1 January in some areas, but we only get them actually finalised and into the marketplace on 18 December, and given the Christmas break, it does not really give much opportunity to employers to acquaint themselves and change any systems that might need changing in that 13-day period which includes the Christmas break.

**Mr Hoy:** These codes of practice have developed through our tripartite processes. It has been an exhaustive process, just like the regulations. There has been a lot of public comment. We have extended public comment to make sure that stakeholders are aware of all of the requirements in there. The jurisdictions are—we have developed them—responsible for educating, explaining and informing their particular stakeholders.

**Senator ABETZ:** I have said on a number of occasions, and I am sure you agree, Mr Hoy, that many employers, eighty per cent of them or more I would suggest, are not part of those representative stakeholder groups and they may not be, as a result, aware or educated about the code of practices by which they might have to comply within a period of 13 days. One of those deals with the building sector, does it?

**Ms Ross:** Preventing falls in housing construction, and the managing of risk in construction work.

**Senator ABETZ:** Most building companies go on leave in mid-December and do not come back until the new year. They will potentially be confronted with the changes now.

**Senator Chris Evans:** I will just make a couple of points then Mr Hoy can answer. We have been working very closely with the peak industry organisations like ACI and ARG and have had strong support from them for harmonisation, they have been working with their constituent members and groups. There have been some issues raised by the Housing Industry Association.

Mr Hoy and others are meeting with them to work through some of the issues that they have raised. So there is close engagement with industry on any concerns. This is a collaborative approach. It has been driven by a structure that has included key industry and trade union groups from the very start. They have all had some wins, they have all had some losses, and we are now happy to work with any groups who feel that they have not quite got there.

**Senator ABETZ:** These key groups only represent about 20 per cent of their potential membership and I am concerned about the employers—and, indeed, workers potentially, depending on what the codes say—that may not be informed.

**Senator SINGH:** Mr Hoy, it was nice to have you canvas with Senator Abetz the journey since 2008-09 or wherever it started.

**Senator Chris Evans:** It was 1901, I think!



**Senator SINGH:** Some may have thought we would never have got this far. Certainly it has been a journey and there has been a lot of consultation and input from various states. The states have committed to the harmonisation and the bigger picture of what this will mean for the country which is important for workers. I want to ask you about asbestos—that is probably no surprise—in relation to the model harmonised OH&S regulations which created a new requirement that only licensed persons can certify whether or not high-risk asbestos removal work has been done safely and that the work air is free from asbestos fibres. How do the regulations seek to manage that kind of high-risk removal work?

**Mr Creaser:** The regulations set out a framework for licensing of asbestos removalists. For the first time across Australia there will be a nationally consistent licensing arrangement for asbestos removalists, both the class A for more dangerous friable asbestos and class B for non-friable asbestos. As you mentioned, there is also a requirement for class A removal or friable asbestos removal for a licensed assessor to assess the work after it is completed and to provide a clearance certificate to say it is basically safe for people to return into the area to work.

**Senator SINGH:** So the regulations, thus far, have not had any appropriate licensing requirements in place. Is that correct?

**Mr Creaser:** The licensing requirements have been variable across jurisdictions, ranging from very little to a system not dissimilar to what we are proposing. But they have all been based on competencies, usually at jurisdictional level, rather than national competencies. So we have been working with the Construction and Property Services Industry Skills Council to develop four competency units for each of the licensed classes which are the class A, the class B, supervisor for class A work and the licensed assessors. We believe these will be available by the end of November to register training organisations to start developing courses. There will need to be a transition process to allow registered training organisations to pick up those courses and develop the training packages and then to train a sufficient pool of people to enable them to undertake that work.

**Senator SINGH:** What happens with an existing licensee in a certain jurisdiction—we all know that regulations are different across the country at the moment—that does not have regulations that perhaps are the standard to which the harmonised regulations will be? Will there be a requirement for some kind of harmonised licensing for existing licence holders to get up to a certain standard, being covered by the new licence arrangements?

**Mr Creaser:** Yes, as part of the transition arrangements, each jurisdiction will need to look at their existing licence requirements and determine whether a person can be transitioned directly to the new licensing class or whether they will need to undertake further training to meet the requirements of the national units. That will part of the consideration that will need to be taken at jurisdictional level for the transition arrangements.

**Senator SINGH:** Have you been aware of the fact that we do not have at the moment a harmonised licensing requirement situation in the country being the subject of any kind of separate inquiry or investigation?

**Mr Creaser:** I am sure there have been various inquiries and investigations by jurisdictions into asbestos removal work.

**Senator SINGH:** Are you aware of any?

**Mr Creaser:** I could not name specific things. I am aware that they certainly do occur on probably—

**Senator SINGH:** You are not aware of the New South Wales Ombudsman's report last year, in 2010, into licensing arrangements? It was part of a report.

**Mr Creaser:** I am basically aware that it exists, yes, but I am not familiar with it.

**Senator SINGH:** If some states do not meet this COAG deadline for harmonising OH&S laws, what will this mean for the proper licensing of asbestos removal works, particularly, for example, in WA, where there is a lot of asbestos in place and it is a significant issue for workers and for the community at large? What will that mean for that state and for those jurisdictions if that COAG deadline is not met?

**Mr Creaser:** I do not know whether I can speak for what will happen in a specific jurisdiction without looking at what the current requirements are; I would have to go back and familiarise myself with them in detail. But it really depends on what the gap is between the existing arrangements and the arrangements we propose and also how well the process for removal of asbestos and working with asbestos in WA is currently handled. We would need to look at the specific issues around that for that jurisdiction.

**Senator SINGH:** You are aware of the national review into asbestos management that the minister announced?

**Mr Hoy:** Yes, but if you have questions they would be better directed to the department because they are managing that review.

**Senator SINGH:** Yes, I was just wondering if you were aware of it. Thank you.

**Senator ABETZ:** Mr Hoy, I received a response today to question No. 0302, relating—this is a good segue from Senator Singh—relating to asbestos matters and the NBN project.

**Mr Hoy:** I am not familiar with that question or the answer.

**Senator ABETZ:** All right. Can it be provided to Mr Hoy, please; I understand it was a tabled just recently. It was from budget estimates and has only just come in. I assume that we are all agreed the disease in general terms is a bigger term than injury in the work-health space.

**Mr Hoy:** I will just read the answer. Yes, I am sorry, I now recall this. What was your question, Senator?

**Senator ABETZ:** Senator Singh has corrected me: the disease can in fact be an injury. But, speaking as a layman in this area, in general terms would you agree the disease is a bigger problem than injury in general terms in the work-health space?

**Mr Hoy:** Are you talking about asbestos, or more generally?

**Senator ABETZ:** Just generally at this stage.

**Mr Hoy:** It has always been difficult to estimate how many people actually have work induced disease problems. It is a lot easier to advise on injured and fatalities, but this is an unknown area. Certainly in the area of asbestos and mesothelioma there is such a long latency period that you will not know for 30 or 40 years, so that has been difficult.

**Senator ABETZ:** Is asbestos one of the biggest problems or contributors to workplace disease?

**Mr Hoy:** Yes, it has been.

**Senator ABETZ:** Are you saying in that answer that the harmonisation process will not in fact be really altering or will not have any affect or change in relation to matters asbestos?

**Mr Hoy:** What that answer was addressing was your specific questions about pulling cables and so forth.

**Senator ABETZ:** That is right.

**Mr Hoy:** We attempted to answer in that context. While, as Mr Creaser said, there will be strengthened requirements all around Australia for management of asbestos, it depends on where these people are actually undertaking this work and whether in fact they do pick up the model regulations relating to asbestos.

**Senator ABETZ:** But you conclude by saying that it is expected to provide for the same level of safety and similar levels—

**Mr Hoy:** Yes.

**Senator ABETZ:** So there will not be any enhancements?

**Mr Hoy:** Nor would there be any diminution either. You were asking whether it was 'easier or more difficult', 'more or less expensive', 'safer or less safe'.

**Senator ABETZ:** Yes, I thought that was 'unloaded'.

**Senator Chris Evans:** Senator Singh referred to the asbestos management review we have commissioned and, if you want to, we can talk about that when the department is before the committee. We regard that as an important piece of work to expand our knowledge and look at other things we might do to manage what is a massive issue for Australia, for workers and their families. That review is about examining what else we can do to lift standards, deal with management issues and removal issues and generally try to address in a holistic way what is a huge problem for Australia.

**Senator ABETZ:** That is good to hear and we will see how that transpires. With the new Work Health and Safety Bill and the regulations, will there have to be any further regulations from the regulations that are out now?

**Mr Hoy:** No. The regulations that have been agreed to in principle are the regulations. The conversation we were having earlier, before you left, related to further codes of practice.

**Senator ABETZ:** Yes, that is right.

**Mr Hoy:** One of the things I was going to say is that a number of these codes of practice are actually based on existing national standards and existing codes which have been in operation for a number of years. A couple you mentioned were construction and falls from heights. They have been translating national codes into regulations and codes. So the subject matter is principally the same; it is just that they are now regulations or codes as distinct from former national standards. It is true that a number of jurisdictions did not always adopt those national standards or, if they did, sometimes they did not adopt them in whole. So there are some differences.

**Senator ABETZ:** Where are we at with the regulations under the act?

**Mr Hoy:** I mentioned before that they are with the ministerial council for final approval.

**Senator ABETZ:** So they haven't been publicly released as yet?

**Mr Hoy:** They have not been publicly released as final approved regulations but we posted them on our website to enable people to sensibly comment on the codes of practice, which are out for public comment.

**Senator ABETZ:** Are those the ones that were posted about two days after the minister posted them on his website?

**Mr Hoy:** The minister did not post any regulations on his website as far as I know. We posted them on our website when we went out for public comment on the further codes of practice, because people who were commenting on them sensibly had to have regard to the regulations.

**Senator ABETZ:** Do we have a finalised regulatory impact statement?

**Mr Hoy:** Yes, we have.

**Senator ABETZ:** When was that?

**Mr Hoy:** We were advised that the regulation impact statement met COAG requirements on 9 September 2011.

**Senator ABETZ:** Any suggestion that we might have to revisit that?

**Mr Hoy:** Not that regulation impact statement, no.

**Senator ABETZ:** What about any other regulation impact statement?

**Mr Hoy:** We are discussing with the Office of Best Practice Regulation possible requirements for regulation impact statements for codes of practice. Those conversations are ongoing.

**Senator ABETZ:** When do we anticipate—

**Senator Chris Evans:** Just for completeness, the Victorian government have made some commentary about the RIS and its impact on Victoria and whether or not they are satisfied that it adequately addresses the Victorian government's requirements for their assessment of impact on Victoria. The RIS has been out for some time. I issued a press release. It was 9 September, you said, Mr Hoy?

**Mr Hoy:** On 9 September we got the letter from the Office of Best Practice Regulation. Could I just add—

**Senator ABETZ:** When were the regulations finalised, again?

**Mr Hoy:** The regulations were approved in principle by the ministerial council on 10 August. They are currently with the ministerial council for final approval because the in-principle approval was subject to finalisation of the regulation impact statement.

**Senator Chris Evans:** The ministerial council could not finally deal with the matter because the regulatory impact statement had not been finalised. So there was an in-principle decision by the ministerial council and now it is back before the ministerial council for decision.

**Mr Hoy:** Senator, could I just take you back. You were asking about the regulations. I should have mentioned that we are finalising regulations for mining. That is being done through a parallel process, because it was subject to two ministerial councils working on this. We have responsibility to develop core mining regulations for those jurisdictions—in other words, the non-mining jurisdictions: South Australia, Victoria, Northern Territory, Tasmania,

the ACT and the Commonwealth. They will be including core mining provisions in their work health and safety regulations. The mining states—that is, Queensland, New South Wales and WA—will probably include all of those mining regulations in their mining legislation.

**Senator ABETZ:** The decision RIS—that makes sense to you?

**Mr Hoy:** Yes.

**Senator ABETZ:** When was that put up on your website?

**Mr Hoy:** No, it has not been published on our website. That is in accordance with COAG requirements in that it will not be published until the ministerial council makes the final decision on the regulations and codes of practice to which the regulation impact statement refers.

**Senator ABETZ:** Do you have anything up on your website, Minister, relating to this?

**Senator Chris Evans:** It is a very good question, Senator. I will have to take that on notice. I remember I issued a press release welcoming the regulatory impact statement. That would be on my site in terms of the media releases. I do not know, Mr Hoy, whether you have any understanding or whether there is other material. Do you mean generally, Senator Abetz, or relating to the RIS or—

**Senator ABETZ:** No, the decision RIS.

**Senator Chris Evans:** No, I would not have thought that would be up there Senator but I am happy to take it on notice. I am not sure.

**Mr Hoy:** We provided the regulation impact statement to the members of Safe Work Australia after it was approved by the Office of Best Practice Regulation, but it has not been published on our website nor any of the individual jurisdictions' websites.

**Senator ABETZ:** We can possibly discuss under outcome 5 whether or not it has found its way onto your website. The National OHS Strategy 2002-2012 expires next year. Will we have a new strategy ready by then?

**Mr Hoy:** Yes, we will. We are well advanced in development of a replacement strategy. The aim is to have one in place when the other national strategy expires.

**Senator ABETZ:** When does that expire?

**Mr Hoy:** On 30 June 2012.

**Senator ABETZ:** The national strategy sets the targets of reducing the incidence of work related deaths by at least 20 per cent and reducing the incidence of workplace injury by at least 40 per cent. How are we tracking on that?

**Mr Hoy:** We are tracking well on the 20 per cent target, but it is unlikely we will meet the aspirational target of 40 per cent by 2012.

**Senator ABETZ:** It is amazing. We are tracking well on the target on one but the other one is just an aspirational target. They are either both targets or both aspirational.

**Mr Hoy:** As I understand it, when the authors of that strategy put it in place there was originally the 20 per cent target. They subsequently added an aspirational target.

**Senator ABETZ:** To double it.

**Mr Hoy:** I do not know whether that was the logic of it.

**Senator ABETZ:** Are you able to tell us how close we are to it? If we were to draw the line now, would we be able to say we had reduced our workplace related deaths by 20 per cent?

**Mr Hoy:** Amanda Grey, my colleague, who knows all about this, will answer your questions.

**Ms Grey:** Sorry, I do not have it, but I am more than happy to take it on notice because we have fact sheets that can provide that information.

**Senator ABETZ:** Excellent, and then the same in relation to workplace injuries. I would be much obliged for that. Did the decision regulation impact statement take into account the development in New South Wales?

**Mr Hoy:** Do you mean the political development? What sort of development?

**Senator ABETZ:** The development that the legislation is not harmonised and it has this breakout in relation to allowing unions to undertake prosecutions.

**Mr Hoy:** The regulation impact statement was about the regulations and the first stage codes of practice. Back in 2009, there was a regulation impact statement relating to the model act. The amendment that you are referring to in New South Wales relates to the model act, not the regulations. So what the regulation impact statement looked at was the impact of regulations.

**Senator ABETZ:** Thank you for clarifying that in my mind. You are quite right. The decision regulation impact statement has not included the codes of practice.

**Mr Hoy:** It included what are called the first stage codes of practice. I can provide you with a list on notice.

**Senator ABETZ:** Is that on your website?

**Mr Hoy:** Yes, it is.

**Senator ABETZ:** Do not take it on notice. I can access it from there.

**Mr Hoy:** We have been advised that, of the six codes of practice which are currently out for public comment, no regulation impact statement is required.

**Senator ABETZ:** The regulation impact statement says, 'While some of the harmonisation and reform model work health and safety regulations will result in clear winners and losers, especially for small businesses, the expected aggregate benefit,' et cetera. Are we able to identify those whom we believe will be the winners and those who will be the losers?

**Senator Chris Evans:** I will let Mr Hoy answer but in broad terms the impact of harmonisation is of most benefit to those businesses that operate in more than one state.

**Senator ABETZ:** That is pretty obvious.

**Senator Chris Evans:** That is what I am saying. So if you think it through the benefits are to working people. There are benefits to businesses that operate in more than one state and obviously there are other improvements in the regulations et cetera. That is the broader context. Mr Hoy can take you through the detail.

**Senator ABETZ:** Time is very short. Can you tell us about the losers? In particular, referring to page III which says, 'Some individual businesses may face significant cost increases.'

**Mr Hoy:** I can give you an overall comment on the analysis in the regulation impact statement, but you want—

**Senator ABETZ:** The overall analysis tells us there are winners and losers. Everybody is always willing to tell us who the winners are—those who operate across state boundaries. That is all good. What about the losers that are clearly identified? Nobody ever seems to be willing to say, 'This particular type of business will lose.' In fact, as I understand it, it was considered that having the same set of harmonised laws would provide less complexity and confusion for small business but again some individual businesses may face significant cost increases. Which ones are they?

**Senator Chris Evans:** I will let Mr Hoy answer but it is expected that single state firms and small businesses could face a net cost of \$3.27 per worker per annum. To that extent they were losers because they would incur that extra cost of \$3.27 per worker per annum.

**Senator ABETZ:** We are told 'significant cost increases', which is more than \$3.27 per worker, one would assume.

**Senator Chris Evans:** You asked me what was in the RIS; I am telling you that that was in the RIS. I did not make it up. I am telling you what it says.

**Senator ABETZ:** Thank you, but I am referring to a particular clause which tells us about significant cost increases. Who are we talking about, Mr Hoy?

**Mr Hoy:** As you have indicated, it did talk about small business. But equally the analysis also said that while there was a net cost of \$3.27 per worker per annum it was outweighed by the net benefit to society of \$21.48 per worker per annum, equating to around \$250 million per annum.

**Senator ABETZ:** We always go to the winners and all the good things. So, we cannot identify as a cohort those that will face significant cost increases.

**Senator Chris Evans:** You can. For those single state firms and small businesses you multiply \$3.27 per worker per annum by the number of workers. So if they have 10 workers it is going to cost them \$32.70 per annum.

**Senator ABETZ:** And the RIS says that that is 'a significant cost increase.' I do not think so, Minister.

**Senator Chris Evans:** It is the RIS that I am quoting from.

**Senator ABETZ:** I know. You are quoting from one section. They tell us there is a significant cost increase and you are telling us that the significant cost increase is that for a business with 10 employees they are going to face an increase of roughly \$32 per annum, which is about 60c a week.

I do not think the drafters of the RIS would seriously tell us that that is a 'significant cost increase'.

**Senator Chris Evans:** I assume they are talking about the totality.

**Mr Hoy:** Yes.

**Senator ABETZ:** No; it says, 'some individual businesses may face'. It is not total. It says 'individual businesses may face significant cost increases'. And 60c a week for a business that employs 10 people hardly fits into the category of significant and therefore I want to know what businesses were identified to lead to that statement being made.

**Mr Creaser:** The reason that clause is in there is that for some sectors in some jurisdictions there will be significant costs because the change of regulations in the particular jurisdictions will require some compliance. Those businesses will differ across different jurisdictions and across different sectors. The analysis has not been done to a level of detail to be able to clearly identify those individual businesses. But it is just recognising that there will be some businesses that will be affected to a greater extent than others.

**CHAIR:** Thank you. We will now break for dinner and resume with outcome 4.

**Proceedings suspended from 18:31 to 19:30**

**CHAIR:** We are now resuming the estimates hearings with outcome 4 and will begin with program 4.1.

**Senator BERNARDI:** I have some questions about Job Services Australia and the tender process initially. What proportion of providers have been offered an invitation to roll over their services?

**Ms Parker:** Are you comfortable if I give you the numbers of providers?

**Senator BERNARDI:** Yes, I am happy for you to give me the numbers of providers.

**Ms Parker:** The question was?

**Senator BERNARDI:** What proportion of existing providers have been offered an invitation to roll over their services?

**Ms Parker:** Ninety-six per cent is the answer.

**Senator BERNARDI:** Okay. Do you have an actual figure? I do not have them in front of me.

**Ms Parker:** Of providers? I will check. We might come back on that.

**Senator BERNARDI:** Perhaps you can take it on notice. It is not terribly important.

**Ms Parker:** That is fine. Thank you.

**Senator BERNARDI:** What about the percentage of existing business that was offered up to the existing providers?

**Ms Parker:** That is the same thing. Those providers who were rolled over?

**Senator BERNARDI:** Not necessarily, no. If you have 96 per cent being allowed to retender, I wonder how much of the business that is allocated was allocated to new providers or the existing ones?

**Ms Parker:** There are no new providers at this stage.

**Senator BERNARDI:** So 100 per cent is going to existing providers.

**Ms Parker:** That is right. We are just waiting to do the next step in the process.

**Senator BERNARDI:** Can you advise me of the benchmark for the assessment of the providers who have been offered a rollover of the contract?

**Ms Parker:** The government announced as part of the budget that those providers who were rated under the Job Services Australia performance framework as having three, four or five stars would be rolled over and the business of one- and two-star providers would be put up for business review and possible tender.



**Senator BERNARDI:** Okay. Where a provider who may otherwise have satisfied the criteria—three-, four- or five-star—has been impacted by natural disasters like, for example, the Queensland floods, has DEEWR given consideration to that impacting the performance? Can you tell me if it has affected positively or negatively the results?

**Ms Parker:** Yes. We advised all providers that any of them who were one- and two-star providers who were, therefore, in scope for potential business review and possible tender thereafter would be able to submit extenuating circumstances reasons why they should not be put up for tender or business review. The extenuating circumstances were explained to providers in an industry newsletter that was sent to them in June, and further advice has been provided verbally at various conferences and meetings. The extenuating circumstances were to be circumstances outside the providers' control or influence. The department, in doing its initial business review, took into account all extenuating circumstances on a case-by-case basis for each provider at the employment services area level and also for sites, previous performance and a whole range of other factors as well. So we absolutely considered the floods an extenuating circumstance.

**Senator BERNARDI:** Sure. Were there any providers, then, that were rated one or two star due to the extenuating circumstances that were still given the opportunity to roll over their business?

**Ms Parker:** That is still being discussed with the providers themselves. There have been two in that category.

**Senator BERNARDI:** I do not want to name the provider I am referring to, but there is a circumstance where one was previously a three-star provider and there is still some question about whether they will have the opportunity to roll over their business.

**Ms Parker:** All of the providers know whether they have been offered the opportunity to roll over their business now. There is no negotiation on that at the moment.

**Senator BERNARDI:** Why can't you tell me, then, whether the one- or two-stars have actually been—

**Ms Parker:** I said two of them.

**Senator BERNARDI:** Two of them have been? So that has been confirmed.

**Ms Parker:** What that means is that we accepted the extenuating circumstances arguments. It may or may not have been floods or other things as part of those circumstances. We accepted those arguments. They need to work with the department. They need to do capacity building. We will be watching them closely, but they will not have their contracts taken away from them.

**Senator BERNARDI:** Can you tell me the names of those two providers?

**Ms Paul:** I am a bit shy of doing that, because it reveals them to have not been a three-star provider and often they do not want us to do that.

**Senator BERNARDI:** I am mindful of that sensitivity.

**Senator Chris Evans:** Do you have a particular—

**Senator BERNARDI:** I have the same reticence.

**Senator Chris Evans:** If you have a particular incident you want to talk about, we are happy to do that in general terms or offline privately.

**Senator BERNARDI:** I might find that out privately if that is okay.

**Ms Paul:** Yes.

**Ms Parker:** We will be publishing them in November, but we prefer not to before then.

**Ms Paul:** It is only a couple of weeks.

**Senator BERNARDI:** Okay, that will suffice. Has the department written the next contract and finalised the offer yet?

**Ms Parker:** We are still in the process of drafting the deed.

**Senator BERNARDI:** When will that be made available and formally presented?

**Ms Parker:** In November. It is part of the RFT—the request for tender. The actual deed will come out with that.

**Senator BERNARDI:** To go back to the natural disasters issue for a moment, where one of the providers is a specialist and their case load has been particularly impacted by a natural disaster or unforeseen event that is outside their control with a decrease in the level of local job vacancies and job seekers, has this been accommodated as well and factored into the assessment process?

**Ms Parker:** Yes, we have.

**Senator BERNARDI:** Okay. What about where the decision has been made to offer up specialist business to existing general providers? Are they then required to take on a specialist contract or does this become part of their generalist business?

**Ms Parker:** There are a number of steps in the process. We will first offer the business to higher-performing providers—four- and five-star, generally—in the same employment services area. The providers we make the offer to are selected on the basis of their performance in the stars but also their particular performance with that cohort if it is a specialist contract. They might be a generalist. We would say to them, 'We would like you to deliver this chunk of business as a specialist contract.' We will negotiate that. There are other ways of doing it. Another way of doing it is to have them advertise themselves as a generalist provider but with particular specialty. That is certainly our preference.

**Senator BERNARDI:** But they would then have two contractual obligations with the department—one as a generalist and one as a specialist?

**Ms Parker:** That is right.

**Senator BERNARDI:** And they would have two different performance appraisals?

**Ms Parker:** The performance appraisals are the same. The specialists who have a particular cohort of job seekers who may be more difficult to work with get that taken into account in the star ratings. They are already weighted in their favour, if you like. It takes account of the fact that those job seekers are more difficult to place.

**Senator BERNARDI:** Can you briefly advise me of the process of review if people feel they have been unfairly dealt with or assessed by the department?

**Ms Parker:** Certainly. The approach we use is in line with the Commonwealth procurement processes. There is not a departmental process for review of decisions. The primary external complaint mechanism is the civil legal system. We do have a mechanism where if providers wish to complain about a process then they can certainly contact the

department. We have an external probity adviser who will as needed review the process that was followed to ensure that we did what we said we would do publicly.

**Senator BERNARDI:** You started off by saying there was not a formal process of review.

**Ms Parker:** That is correct.

**Senator BERNARDI:** Yet you kind of just told me there was one where people could complain and say, 'I don't think process has been applied' or 'We've been dealt with unfairly.'

**Ms Parker:** There are two different things. There is one where a provider will say, 'I want you to review a decision you made.' The decision is the department's to make. The second is, 'I think the process was flawed.' We have an internal legal adviser, but we also have an external probity adviser who can advise on the actual process issues.

**Senator BERNARDI:** Where they think the department has simply made the wrong call, does the department then review that?

**Ms Parker:** The department will look at it internally on a case-by-case basis, but we are not required to under the Commonwealth procurement processes.

**Ms Paul:** Normally what we would do—and we did, for example, in 2009, when we had done a 100 per cent tender for the first time ever since the Jobs Network was created in 1998 and there were naturally people unhappy with decisions—is sit down with them and go through in great detail why they had not been successful. That worked really well. We received both types of issues from providers, either because they had not won business or because they had received less business than they had. We sat down with them really carefully.

We also had people who were worried about the process and so we would once again sit down with them and with the probity adviser and that worked well too. In this instance it is a much smaller deal because this is a business reallocation. Most business goes on. If you are a three star or above, that is 96 per cent.

**Senator BERNARDI:** Are the four per cent the people that complain?

**Ms Paul:** That is right. They have every avenue to sit down with us and have us go through that.

**Senator BERNARDI:** How many of the four per cent did actually question the department's decision?

**Ms Parker:** We have had one request for review. We have had other questions but one request for review.

**Senator BERNARDI:** What about people who have said the process is flawed?

**Ms Parker:** We have had none so far. We have been very open and transparent about the process. We have consulted with providers and peak bodies. As I said, we have an external probity adviser there the whole time throughout the process. As the delegate, their job is to pull me up if we are not following the process. It is very transparent.

**Ms Paul:** In this instance, as Ms Parker explained earlier, we have tried to control for all of that at the front end instead of afterwards. For example, one of the best ways was being able to allow for extenuating circumstances. Rather than just saying, 'Black and white; we will go through all the criteria,' but to allow for that and sit down with people to understand their extenuating circumstances I think has really helped.

**Senator BERNARDI:** What is the current case load of Job Services Australia?

**Ms Parker:** As at August 2011, there were 724,822 job seekers.

**Senator BERNARDI:** I thank you for being prepared with an exact figure; that is excellent. How many job seekers have been on the case load for 12 months or more?

**Ms McKinnon:** Fifty one per cent of them have been on the case load 12 months or more.

**Senator BERNARDI:** Is 51 per cent correct?

**Ms Parker:** Yes. There were 368,060.

**Senator BERNARDI:** How many of them have been on the case load for more than 24 months?

**Ms Parker:** That is 32 per cent, around 235,000.

**Senator BERNARDI:** Are all the job seekers who have been on the case load for more than 24 months in stream 4?

**Ms Parker:** No.

**Senator BERNARDI:** Could you give me the numbers broadly for stream 4, stream 3, stream 2 and, if there are any, stream 1?

**Ms Paul:** Yes, we can do that.

**Senator BERNARDI:** There are two sets of questions here. One is about the job seekers that have been on the case load for two years plus in each of those streams and the other is the allocation of the actual numbers in each stream overall.

**Ms Paul:** Overall?

**Senator BERNARDI:** Yes.

**Ms McKinnon:** Do you want those over 12 months?

**Senator BERNARDI:** No, I would like the figures for the job seekers that have been on the case load for two years plus and the figures for those on the case load for 12 months as well, and then maybe we could have the overall figures.

**Ms Parker:** We have the figure for two years plus. Did you want the figure by stream?

**Senator BERNARDI:** Yes, please.

**Ms Parker:** On the case load for 24 plus months as at August 2011, there were 234,696 job seekers overall. In stream 1, there were 7,776; in stream 2, 36,432; in stream 3, 105,108; and in stream 4, 85,380.

**Senator BERNARDI:** Before we go to the next range of figures, am I correct that stream 1 is meant to be for people who are able to find their own jobs and have full capacity.

**Ms Parker:** That is right.

**Senator BERNARDI:** You said 7,776 people who are perfectly capable of working have been in this stream for two years plus. How do you account for that?

**Ms Parker:** Job seekers are put into a stream through the jobseeker classification instrument. That instrument determines a whole range of factors, including what sort of disadvantage they may have, how long they have been unemployed and how long it is since their last job. All of those factors are put into the mix to determine the stream. There are some job seekers who we would consider to be genuinely job ready, but they are still in stream 1.

That would imply that there is some reluctance on their part to find a job. Stream 4 requires you to have multiple disadvantage.

**Senator BERNARDI:** I understand that and that is why I confined my question to the 7,776 in stream 1. Frankly that number almost beggars belief.

**Ms Parker:** Nationally it is not a huge number.

**Senator BERNARDI:** No, it is not a huge number.

**Ms Parker:** It is not a good figure.

**Senator BERNARDI:** No, it is not a good figure. Is there a justification such as geography or something else? We can maybe get on to that under another program.

**Ms Paul:** It will be a mix of factors.

**Senator Chris Evans:** Geography would be a disadvantage.

**Ms Paul:** Geography could be a factor.

**Senator BERNARDI:** We can come to that under another program.

**Ms Parker:** Job seekers cannot be required to move for work under the act.

**Ms Paul:** It could be a young person who is finding it hard to crack through. There is a range of things. It could be reluctance, as Ms Parker said.

**Senator SIEWERT:** Do you have a breakdown of the ages of the people in stream 1, for example what percentage of them are young?

**Ms Parker:** We will take that on notice.

**Senator BERNARDI:** I think it would be interesting to get an age breakdown across all the streams and the lengths of time.

**Senator SIEWERT:** One of the issues that I want to go to is how many of those people are older workers.

**Ms Parker:** Yes.

**Senator BERNARDI:** Please take that on notice. Are you clear about what we want? It is an age breakdown of the streams for two years plus, the streams for 12 months plus and the numbers overall.

**Senator BACK:** Please also give us some breakdown of the employment pathway funding allocated to stream 1 job seekers over the last 24 months.

**Ms Paul:** Would you like that now?

**Senator BACK:** If you have it available, that would be fantastic; otherwise please take that on notice.

**Ms Parker:** We will take it on notice as we have a lot of data here.

**Senator SIEWERT:** Do you have the figures for the one year?

**Ms Paul:** Are these the figures for the Employment Pathway Fund, the EPF.

**Senator SIEWERT:** Sorry, I got a bit confused as to whether we are taking the figures Senator Back asked for on notice, or are we doing them now?

**Senator BACK:** On notice.

**Ms Parker:** On the Employment Pathway Fund, if you are interested in how many job seekers in each stream have been unemployed for 12 months, we have that here.

**Senator SIEWERT:** Yes, that is what I am after.

**Ms Parker:** For August 2011, 12-plus months, 24,718 for stream 1. We had 87,254 in stream 2. There were 137,278 in stream 3 and 117,654 in stream 4. We provided the 24-plus month figures a bit earlier.

**Senator SIEWERT:** The rest of those figures would essentially be those who have been job seekers for less than 12 months?

**Ms Parker:** Yes, that is right.

**Senator SIEWERT:** I refer to the report over the weekend that talked about issues around mental health, for example people on Newstart and the coincidence with mental illness. Can you break those figures down into what the multiple disadvantages are? Is mental health identified as one of those key areas?

**Ms McKinnon:** Mental health comes under people with a disability. It is broadly aggregated, and the reason that question will be difficult to answer is that it is a cumulative function with points assigned to each factor that impacts upon the likelihood of getting a job. So if we gave you numbers they would add up to more than the total pool in stream 4 because the job seeker will have multiple disadvantages.

**Ms Parker:** It is difficult to separate them out. To be in stream 4 you have to have multiple disadvantages.

**Senator SIEWERT:** I am going back to the old days when we had PPS, and there was a lot of concern then. I used to get feedback from people who were providing some of the services there around mental health, so I am trying to work out whether the new process is coping better with people with multiple disadvantage and particularly with mental illness.

**Ms Paul:** We know it is coping better with people with multiple disadvantage. We know it is coping better for two reasons; one is the statistics are showing us that more people with multiple disadvantage are getting jobs, so the Job Services Australia framework is working in the way that was intended—that is, to load up for multiple disadvantage. The second way it is working is just because that is how the money is now distributed. One of the changes in introducing this new framework was to put in much more money per person with multiple disadvantage than was available before. The signs are all going in the correct direction of the policy intent. The difficult question is how many of those people have a mental illness, although we could have a look at it on notice.

**Ms Parker:** The categories we have are homeless, homeless youth, disability, Indigenous, culturally and linguistically diverse, refugee, sole parent, age, long-term unemployment. We do not separate mental health out of disability on its own. I can tell you that by stream, but under the disability category.

**Ms McKinnon:** As an indication, 7 per cent of stream 1 have disability. It rises to 16.2 per cent in stream 2.

**Senator BACK:** Before you go on, which year category is this in? The greater than 2 or the 12?

**Ms Paul:** This is the entire cohort.

**Senator BACK:** 7.1, 16.2.

**Ms McKinnon:** Stream 3 has 32 per cent people with a disability.

**Senator SIEWERT:** Sorry? What was stream 2?

**Ms McKinnon:** 16.2 per cent. Stream 3 is 32.1 per cent and stream 4 is 43.4 per cent.

**Ms Paul:** Are you saying that 43.4 per cent of people in stream 4 have a disability?

**Ms McKinnon:** Amongst other disadvantage.

**Senator SIEWERT:** Is that counted separately to those on a disability support pension who are using Job Services Australia rather than disability unemployment?

**Ms Parker:** It could be overlapping. If they are on DSP and in JSA, Job Services Australia, that would overlap.

**Senator SIEWERT:** So it does not necessarily mean that these are all people on Newstart? We need to be clear.

**Ms Parker:** No, some of them would be on youth allowance and some would be on parenting payment.

**Senator SIEWERT:** I will not go through breaking those down to the various income support categories. Could you take that on notice?

**Ms McKinnon:** We can probably do that though.

**Senator SIEWERT:** I heard you saying there is evidence to suggest things are improving. How do you know that it is improving for particular types of disadvantage? For example, if people with a mental illness as their significant disadvantage are being supported through the process, how do we know if there are people being left behind by the approach—

**Ms Paul:** The reason why I am confident—just to start the ball rolling here—that people would be picked up is because the jobseeker classification instrument is one of the most robustly evaluated evidence-based instruments that I have ever come across in government and, indeed, as an instrument itself, it has got a world-class reputation. We are constantly testing it to see if it is predictive, and it is a predictive instrument.

**Senator SIEWERT:** It is not the assessment tool. We can go into that and its application—in fact I want to start visiting that when we get over to disability employment services and DSP. For the people who have already been streamed into Stream 4 you have got your processes specifically targeted to them. Once they are in Stream 4, how do we know then that those processes are meeting the needs of people with certain types of disadvantage?

**Ms McKinnon:** Stream 4 is doing better because we previously had a waiting list under a PSP and they are now in the major Stream 4 cohort. Stream 4 is getting 25 per cent better outcomes, with a really loose comparison to PSP. I guess the issue is that I do not think you would find a job seeker in Stream 4 whose only barrier was mental health. So it is the servicing strategy that you are interested in.

**Senator SIEWERT:** Yes, it is if somebody has those strains of disadvantage. We may be good at addressing homelessness. If homelessness is a very significant disadvantage for somebody, the processes may be really good at addressing that, but not the barrier of mental health. What I am trying to find out is: how do we know that we are actually assisting all of those disadvantages?

**Ms Parker:** It is difficult to isolate that factor, but we know that our providers have increasing caseloads of job seekers with mental health issues. It is known nationally and internationally that mental health is an increasing issue—or it is being better identified perhaps as well. Our employment services providers are people who deal with those kinds of issues. Many of them are more than just employment services providers. Many of them have multiple services they deliver and many of them are experts or have expertise in this area. Many of them have social workers working with them and many of them have allied health professionals working with them. That is a vague answer, but we contract them for the multiple services that they provide. In terms of being able to absolutely measure, I do not think we can measure absolutely that a mental health client receives as much—

**Senator SIEWERT:** So we are not measuring the outcomes against disadvantage in Stream 4?

**Ms Parker:** We are, but only on those job areas.

**Ms Paul:** We are measuring job outcomes. We are measuring what the system is for—whether people get jobs—

**Senator SIEWERT:** There are over 85,000 people in Stream 4 who have been there for more than two years. Are we doing anything to look at that multiple disadvantage to measure whether Stream 4 is meeting all of their needs? Are they the people that are left, for example, whose needs we are not meeting?

**Ms Paul:** I understand what you are saying—particularly those people who are still sitting there who have not got a job yet. We know that there are fewer of them proportionally than there were in the old system. Nonetheless, I take your point. One thing we might be able to look at for you, but we would have to take it on notice obviously, is whether we can look at referral patterns, for example. They get a considerable amount of money for these people, as you know, and under the Employment Pathway Fund are able to refer to allied health professionals. We might have a look at that and it might give us some sense of the sorts of supports which are being brought in.

**Senator SIEWERT:** That would be appreciated. Do you do an analysis of the people who are there against the disadvantage? Not all of them meet all those criteria for the stream 4.

**Ms Parker:** Against which disadvantage?

**Senator SIEWERT:** Against the criteria for stream 4; do you do an analysis of those that are on there and if the 20 per cent of their significant disadvantage is homelessness? Do you know what I mean? You could look at what the characteristics are of that cohort of people.

**Ms Parker:** Yes. The difficulty we have again is the multiple stuff. We would be able to tell you that there are this many job seekers with 17 disadvantages and some with eight, and how many with four.

**Senator SIEWERT:** But do we know what they are? Is there a common thread across that? If mental health turns up in—

**Ms Parker:** In how many categories?

**Senator SIEWERT:** Yes.

**Ms Parker:** Can we take that on notice and we will have a look?

**Senator SIEWERT:** Yes.



**Ms Parker:** One of the things we have here which might be of interest is a post-program-monitoring survey. We can tell you the outcomes, what happens to people with disability—under which the mental fits—in stream 4. For what we call a positive outcome—which we will explain in a minute—in what we call the equity group of disability we get 31.9 per cent, and that is three months after services in employment services.

**Senator SIEWERT:** Three months is?

**Ms Parker:** Three months after they have left.

**Senator SIEWERT:** No, that is the 13-week outcome?

**Ms McKinnon:** The positive outcome is education and training, off benefit or employment.

**Senator SIEWERT:** So, 31 per cent and 13-week outcome. How many do we—

**Ms McKinnon:** A positive outcome.

**Ms Parker:** A positive disability group.

**Senator SIEWERT:** A positive outcome, yes.

**Ms McKinnon:** In stream 4.

**Senator SIEWERT:** So, 31 per cent have a 13-week positive outcome?

**Ms Paul:** Thirty-one per cent of those with a disability in stream 4 have a positive 13-week outcome.

**Senator SIEWERT:** How many have a 26-week outcome?

**Ms Parker:** We only do the 3 months at this stage on our survey.

**Senator SIEWERT:** So we do not know?

**Ms Parker:** No, we do not go back again.

**Senator SIEWERT:** I have been told, and in fact we had evidence at the committee—actually it was not stream 4, mind you—that was looking into the impairment tables that it is down to about a 16 per cent 26-week outcome.

**Ms McKinnon:** I think I have inadvertently confused you about the 13-week outcome, which is a payment to the provider and a kind of peg in the sand. This is actually that three months after receiving the assistance—so three months after receiving education and three months after receiving some assistance with employment—they are either employed or still in education. It is about the sustained, positive outcome three months after the job provider has had an intervention with the job seeker.

**Senator BACK:** Going back to the employment service areas, could you provide us with a list of which employment service areas are affected by the business reallocation?

**Ms Parker:** We cannot actually name the providers at this stage. We are doing that in November.

**Senator BACK:** It is the employment service areas that are affected, not the actual businesses themselves.

**Senator Chris Evans:** Ninety-six per cent are getting renewed.

**Ms Paul:** That is right. I do not have it with me, though.

**Senator Chris Evans:** By areas, do you mean geographical areas?

**Ms Paul:** There are 118 employment service areas. We will take it on notice.

**Senator BERNARDI:** There are things I want to specifically cover like Australian JobSearch, the relocation pilot and things like that. If we have more time, I am happy to continue on this particular thing for a bit.

**CHAIR:** Sure.

**Senator Chris Evans:** Inside outcome 4 we are happy to be cooperative. We can bring officers forward and back.

**Senator BERNARDI:** How much of the Employment Pathways Program funding is allocated as stream 1 job seekers of the 7,776 who are unemployed for 24 months?

**Ms McKinnon:** I do not have it by the length of unemployment and stream.

**Ms Paul:** We will take it on notice.

**Ms McKinnon:** I have it by stream but not further broken down by length of unemployment, so I will take that on notice.

**Senator BERNARDI:** If you could take that on notice, that would be great. Thank you very much. Are you happy if I jump to the Australian JobSearch?

**Ms McKinnon:** Really happy!

**Senator BERNARDI:** If I can cover off the things that I have been specifically requesting, that would be advantageous.

**CHAIR:** All right. Why don't we formally agree we will do all of outcome 4 in one bit and just move through that way. Then we are under no pressure.

**Ms Paul:** That is absolutely fine. People can come and go.

**Senator BERNARDI:** I understand there is what I would call a glitch in the online website jobsearch.gov.au whereby providers wishing to remove what are termed 'active jobs' are unable to do so. Is that correct?

**Ms Parker:** Can we get a little bit more information? Is this coming from someone who has tried to use the system recently and had it provide an error?

**Senator BERNARDI:** I have an email sent from the JobSearch help desk.

**Ms Paul:** I do not think it is ringing bells.

**Ms Parker:** No.

**Senator BERNARDI:** I have an email from the JobSearch help desk that says, 'There is a glitch in the system whereby providers wishing to remove active jobs are unable to do so.' The help desk advised that 'this glitch is due to be fixed but not until 3 December'.

**Mr Moore:** I am not aware of that specific issue, but 3 December is our next scheduled significant release, so it sounds like a plausible piece of advice.

**Senator BERNARDI:** It is called defect 5892 specifically. I presume there are not 5,891 other ones.

**Mr Moore:** No.

**Senator Chris Evans:** I won't give you your number, Senator!

**Senator BERNARDI:** I've heard how I'm No. 1!

**Mr Moore:** As I say, I am not aware of that particular issue, but I am happy to try to answer your questions concerning it. I imagine that, if a particular user has an issue, on ringing the help desk we can deactivate a vacancy for them. Even though they might not be able to do it themselves, we typically have work-arounds available to us to support them continuing to do their business.

**Senator BERNARDI:** The concern, of course, is that once a job has been filled it cannot be removed from the system automatically or via the normal mechanism of intervention. People continue to get applicants for jobs that are no longer in existence. To be told that it was, effectively, a low-priority issue—that is the interpretation I have put on it because it is not going to be fixed until 3 December.

**Ms Paul:** It is not a matter of priority, though. It is that the system is so large and complex that you have to do releases of changes on it all at once. We only do it quarterly.

**Ms Parker:** It is so we do not impact on providers normally. If you do things every day then they will get more upset.

**Ms Paul:** It would have no reflection on priority. It would just be that that is our next date.

**Mr Moore:** It could also depend on the complexity of the change. The more complex the change, the greater the amount of testing we have to do to make sure that we do not inadvertently impact on some other part of the system.

**Senator BERNARDI:** All right. Does the monthly DEEWR job vacancy report then rely on any of the data that is on the Australian JobSearch network?

**Ms Paul:** I am not sure.

**Ms Parker:** We will take that on notice. We do not have the people here who run this.

**Senator BERNARDI:** I am sorry; I did not catch that.

**Ms Parker:** We do not have the people here who run the AJS, so we will take it on notice if that is all right.

**Senator BERNARDI:** Yes. If it does in any way then clearly the data would be unreliable if people could not close down available jobs.

**Ms Parker:** We would need to check for those errors, yes.

**Ms Paul:** We will check it out.

**Senator BERNARDI:** If you could provide that information. But I do not want there to be misapprehension about what I am after. I wonder whether the data that is on the Australian JobSearch site is incorporated into the DEEWR vacancy report, because the implications are that, if you cannot delete jobs that have been filled, the report is potentially inaccurate. When you come back to me I do not want a smokescreen and that sort of stuff. I want you to understand what I want.

**Ms Paul:** I think the vacancy report goes beyond just what is on this website. If Mr Moore is not familiar with this issue then it is not going to be one affecting a broad mass. It sounds like it could be but it will not be, because otherwise it would be well in front of our attention. So my own knowledge of those two things suggests to me it is not a widespread problem, but we will come back with the specifics.

**Senator BERNARDI:** I am interested in whether it incorporates it. I am sure the monthly report goes much further, but it is more the potential.

**Senator Chris Evans:** So you are more interested in the impact on the monthly report than in a particular fault? If you were deeply interested in the particular fault, we could probably get an answer tomorrow that would identify what it is for you.

**Senator BERNARDI:** No, I know there is a fault. But it would be concerning if we could not rely on the figures because of this fault—

**Senator Chris Evans:** The impact of it, yes.

**Senator BERNARDI:** and it was a meaningful dislocation. I do not know how many complaints you would have received or how many jobs that are still active have been filled, but if you can measure that that would be great. That will give us a suggestion of whether there is a greater impact.

**Ms Paul:** I think the fact that we are not familiar with it would suggest it is something which is not impacting significantly, but we will spell that out for you. Thank you for raising it.

**Senator BERNARDI:** It is a pleasure. I have plenty of other stuff to raise as well. I'm always happy to oblige! I have nothing further on that, so I will jump to the relocation pilot if you do not mind. For the record, I have just been advised that the JobSearch data is definitely included. This is the miracle of technology.

**Ms Paul:** Sure. That is fine. I was just suggesting that there may be other things as well. But we will come back.

**Senator BERNARDI:** I am sure there are other things. I do not doubt that. But that is what my advice has been.

**Ms Paul:** Thank you for that.

**Senator BERNARDI:** At the last estimates there were 52 job seekers who had relocated under the Connecting People with Jobs pilot. How many job seekers have now been relocated under this pilot?

**Ms McKinnon:** 185.

**Senator BERNARDI:** Where have they mainly been relocated to?

**Ms McKinnon:** The highest is Queensland, with 93 of those job seekers.

**Senator BERNARDI:** Is there a majority that have relocated from another location?

**Ms Paul:** A source location?

**Senator BERNARDI:** Yes.

**Ms McKinnon:** ACT and New South Wales is at 83 and Queensland is at 85. The job seeker can relocate within Queensland and be in both.

**Senator BERNARDI:** Really, it is 158 from that region—from Queensland, New South Wales and the ACT—out of 185 in total?

**Ms McKinnon:** Yes.

**Senator BERNARDI:** Have any job seekers that have relocated under this program voluntarily left their new employment within the first six months?

**Ms McKinnon:** We do not have that detail. But if what you are asking is, 'Have any of them been penalised?'—

**Senator BERNARDI:** That was my next question.

**Ms McKinnon:** There were three job seekers of that 185 that were being investigated by Centrelink, and none of them were breached—for want of a better expression.

**Senator BERNARDI:** Okay, so none of them would have been required to wait the 12 weeks before they could be eligible for income support.

**Ms McKinnon:** That is right.

**Senator BERNARDI:** Does the department know the average cost per job seeker of this relocation pilot?

**Ms McKinnon:** The average spend per job seeker is \$1,929.

**Senator BERNARDI:** And just remind me: the target for this scheme was 4,000?

**Ms McKinnon:** Yes.

**Senator BERNARDI:** Over what period of time was that?

**Ms McKinnon:** Up until 31 December 2012.

**Senator BERNARDI:** You have a long way to go.

**Ms McKinnon:** We have a long way to go.

**Senator BERNARDI:** Specifically, you have 3,815 to go.

**Senator Chris Evans:** A couple of points about this are that the take-up has not been great, but it is a program that, as I said, we want to persist with because if it provides an opportunity to assist someone then it is worth doing. Therefore, I am not concerned about the numbers. Actually, we have extended eligibility to include the displaced timber workers from northern Tasmania and the BlueScope workers made redundant to try and provide support for some of those regional issues that are emerging in the economy for those people who might be displaced. But the reality is that firstly, all the evidence says that people in work are more likely to move than people out of work, in the sense of confidence and what have you—whatever the other factors are; and, secondly, labour mobility in Australia is an enormous problem. We actually have difficulty moving labour.

As a West Australian I know this; we get most of our labour that we need Western Australia in from overseas because we cannot get people to move in sufficient numbers to fill labour vacancies. Successive governments in West Australia have run a successive range of recruiting programs et cetera. What we have going on in Australia now is effectively a movement of jobs from the south to the north, and this issue of labour mobility is a big challenge for us. This program is a sort of microcosm of that.

**Senator BERNARDI:** Where did the 4,000 come from? Was that just, 'We are going to allocate this chunk of money to facilitate the 4,000 people,' or was it a target base built around requirements, or what you assessed as job requirements, elsewhere?

**Ms Paul:** It is the outer limit of what we can afford, I think, as a funding envelope, and so—

**Senator BERNARDI:** Okay, it was built on cost.

**Ms Paul:** Obviously, you cannot coerce people to move so the momentum will be, as the minister is saying, that really we will find a natural level. But it is really important to have the choice before people to be able to access this additional assistance to move. Clearly it has worked, for example in Queensland in response to the floods, which is a really good thing.

**Senator BERNARDI:** But the floods in themselves were a once in a decade or more event.

**Ms Paul:** Sure—that is just one example, obviously.

**Senator BERNARDI:** Which says that without that need, the demand is even less.

**Ms McKinnon:** Up until 31 July, we did only have 85 job seekers move. In the past six weeks we have had a further 100, and that does go to the eligibility in some of the measures that the minister talked about.

**Senator BERNARDI:** The eligibility?

**Ms McKinnon:** Yes.

**Senator BERNARDI:** For the BlueScope Steel workers et cetera?

**Ms Parker:** And for disability. We have expanded it for them as well.

**Senator BERNARDI:** With the 85, though; there were additional places allocated for the flood victims, were there not? Is that right?

**Senator Chris Evans:** Yes.

**Senator BERNARDI:** Or people affected, flood damaged communities and stuff like that?

**Ms Parker:** Yes, that is right, the second phase.

**Senator BERNARDI:** How many of those were taken up in total? I presume that would have taken place up until 31 July or whatever your date was.

**Ms McKinnon:** I have a total of 89 job seekers relocating for the Queensland floods.

**Ms Parker:** Just to clarify, they are people assisting with rebuilding et cetera. They are not victims of Queensland floods as such; they are people going there to work.

**Senator BERNARDI:** To assist in the rebuilding.

**Ms Parker:** That is right.

**Senator BERNARDI:** I understand. I can also understand why the demand is probably somewhat less, given the depressed nature of the Queensland economy prior to the floods. There would have been a lot of tradesmen and other people out of work already.

**Senator Chris Evans:** Actually it has been interesting that the impacts have been not quite what we thought. For instance, the construction industry in South-East Queensland has been quite subdued. In fact, there is quite high unemployment—six or more percent—in the construction trades in that area, I think partly because of delays in insurance claims being settled and a lot of the work has been more minor repairs than major construction work. It is a complicated picture. Naturally you thought: floods, therefore a lot of construction work and construction would be busy. But on the Gold Coast there is quite serious unemployment and a downturn as a result of the high-rise market being very flat, and construction in South-East Queensland is flat. So some of the impacts are quite counterintuitive.

**Senator BERNARDI:** We are in agreeance on that. I understand where you are at, Minister.

**Senator Chris Evans:** Some of the things we thought we were responding to have not been quite—

**Ms Parker:** The Queensland Treasury is saying the state is growing quite strongly—their midyear review is 3¼ per cent in 2011-12—and that they are back to the level from pre-disaster peaks.

**Senator BERNARDI:** I do not want to quibble about economics but the point is that there is a difference in growth in certain sectors, a depressed construction industry and so on.

**Ms Parker:** That is right.

**Senator BERNARDI:** I asked a question before about the average cost per job seeker of this relocation pilot. You said it was \$1,929. What was the maximum spend?

**Ms McKinnon:** \$9,000, and that is the maximum allowed under the program.

**Senator BERNARDI:** How many people accessed that maximum?

**Ms McKinnon:** I am not sure. I will take that on notice.

**Senator BERNARDI:** Thank you. In August this year the eligibility criteria were expanded to people with a disability as well.

**Ms McKinnon:** That is right.

**Senator BERNARDI:** I do not think you mentioned that, Minister.

**Senator Chris Evans:** No, one of the officers did.

**Ms Paul:** Ms Parker mentioned it briefly.

**Senator BERNARDI:** Have any taken up the pilot to date?

**Ms McKinnon:** Four participants have relocated.

**Senator BERNARDI:** Going back to the streaming question, what stream would they be in if they were in one of the other programs—stream 4 or 3 or 2?

**Ms Parker:** In the disability program we do not have streaming. We have two different programs, but they are not streamed as per JSA.

**Senator BERNARDI:** But, as Senator Siewert raised, there are people within the streaming categories who have disabilities as well. They are eligible to access this program, aren't they?

**Ms Parker:** Yes.

**Senator BERNARDI:** Have people who have been within one of the streaming categories accessed this program for people with a disability?

**Ms Parker:** In Job Services Australia?

**Senator BERNARDI:** Yes.

**Ms Parker:** Yes.

**Ms McKinnon:** There have been four DSP participants who are not streamed and, for example, 51 of the job seekers in JSA that have relocated were in stream 4. Is that what you were asking?

**Senator BERNARDI:** I will refer to the *Hansard* and, if it is not, I will ask on notice.

**Senator Chris Evans:** Can I just make the point that there is focus, perfectly appropriately, on the numbers and it has been encouraging that we seem to have seen a bit of a take-up, but I make the point to people that if the average cost is \$1,900 then we are getting good value for money if people move and stick in a job. I have been encouraging widening of the eligibility where appropriate on the basis that, compared to paying Newstart allowance, supporting job providers with funding to look for jobs for people is a good investment, so I have been keen to widen the scope to help someone get a job. The numbers are smaller than predicted, but there have been some signs of a bit of an uptake as it becomes better known. We will have to see how it goes in the next little while.

**Senator BERNARDI:** I have a few questions on the Family Centred Employment Project. How many families are being assisted under this pilot project?

**Dr Morehead:** At the moment 133 families have volunteered to be part of the Family Centred Employment Project.

**Senator BERNARDI:** How many do you expect will ultimately benefit from this project?

**Dr Morehead:** At the moment about one-third of them now have earnings. Obviously over the course of the program we hope to assist all of them to get an employment or an education outcome.

**Senator BERNARDI:** When does the pilot conclude?

**Dr Morehead:** It runs until 1 July 2013.

**Senator BERNARDI:** What is your expectation of the number of families that will participate in it in that time?

**Dr Morehead:** At the moment when we are talking about the families it is probably a good idea to include the children. For example, at the moment there are around 600 people involved in this.

**Senator BERNARDI:** Not individuals, I beg your pardon; I was wondering how many families. Is there a target of 500 families to be assisted?

**Dr Morehead:** We are hoping to get around I think 356 families all up.

**Senator BERNARDI:** So you are just over a third of the way there.

**Dr Morehead:** Yes. A lot of these programs and trials do gain momentum, as we have already heard. We are certainly getting a higher take-up rate as the program progresses.

**Senator BERNARDI:** When did it start?

**Dr Morehead:** It started on 1 July 2010.

**Senator BERNARDI:** So you are halfway through—

**Dr Morehead:** Yes.

**Senator BERNARDI:** and you have about a third of the families thus far.

**Dr Morehead:** Yes, so it is on track.

**Senator BERNARDI:** You said a third of the 133 families have earnings coming in. Does that meet the department's expectations of what you thought it would be able to achieve? Is it a success?



**Dr Morehead:** It is definitely a success. Obviously, we would like them all to be earning. A lot of these families have had no earnings for many years. Some of them have had a little patch of earnings in the past. There is entrenched joblessness amongst families who live in the pilot locations that we have chosen—we chose locations that were heavily disadvantaged. Each family member that gets a job is quite a celebration in the community. The providers we have working on the ground have really integrated with the community. They make sure that when a family does have a success and when a family member gets a job that there is a celebration around it and that other people are involved. It is quite lovely to see the effects that the program is having on the ground in those communities.

**Senator BERNARDI:** One-third of the families have earnings now. How many individuals is that?

**Dr Morehead:** That is individuals, so about a third of the 133—

**Senator BERNARDI:** So 42 families now have earnings in their family?

**Dr Morehead:** Yes, where they did not before.

**Senator BERNARDI:** Could it be that, for example, a husband and wife both start earning in that family?

**Dr Morehead:** We do have a few instances where both the husband and wife have earnings.

**Senator BERNARDI:** So there could be more individuals than families?

**Dr Morehead:** Yes, that is correct.

**Senator BERNARDI:** Do you have the number of individuals?

**Dr Morehead:** We have 119 individuals who have had more than one outcome—they are doing pathways, moving through things like education, getting their drivers licence and things like that. We have had some multiple successes. In terms of the families, sorry I do not have here exactly how many are doubling up.

**Senator BERNARDI:** It is not just about doubling up. How many family members have gained employment? How many people have actually gained work, not so much the training and other stuff? I am interested in actual work. Are you able to tell me the average cost per family thus far?

**Dr Morehead:** I will have to take that on notice. The total expenditure to 31 August 2011 has been a little over \$3 million, and so one could divide that by the case load.

**Senator BERNARDI:** Divide \$3 million by 133?

**Dr Morehead:** Yes. Obviously a lot of that is the set-up cost. When we start up with a provider they have to employ staff, get an office space and purchase various things.

**Senator BERNARDI:** All these things are relevant, so I would like the figure if you can provide it at all.

**Mr Kovacic:** Total expenditure under the project as at the end of August was \$3.3 million.

**Dr Morehead:** It will be a total of \$4.5 million over the course of it. That is set in contract.

**Senator BERNARDI:** So there is a considerable start-up cost. My question then is, if you remove that, what is the average cost per family to facilitate them into this? You might not be able to provide me with that now.

**Ms Paul:** We will probably have to take that on notice

**Dr Morehead:** We will take that on notice.

**Ms Paul:** Of course, these are absolutely the most disadvantaged families; so, compared with the cost of income support for, say, five years prior to one of them actually cracking a job under this scheme, I am told it is quite a cause for celebration.

**Senator BERNARDI:** Ms Paul, I am just interested in the number.

**Senator Chris Evans:** I think Dr Morehead's point was that there is a \$4.5 million budget, so if the numbers pick up the cost per head will be lower at the end. If they are helping 133 and they have 200 in by the end of the year—I am just saying that the contract costs, as I understand them, are established because we are funding organisations to do the work—that figure might be different tomorrow to what it was today.

**Senator BERNARDI:** I am trying to exclude the hefty upfront cost of getting office space and staff and things of that nature. I just want to know what it costs to service a family in this program.

**Ms Paul:** We will take that on notice. We will have to separate it.

**Senator BERNARDI:** If you do not mind, that would be good.

**Ms Paul:** That is fine.

**Senator BERNARDI:** Was this pilot used as a guide for the pilot announced in the 2011-12 budget for jobless families?

**Dr Morehead:** It is a little different to the trial.

**Senator BERNARDI:** That was my next question.

**Dr Morehead:** We are quite pleased to be able to have the two different approaches in place. Both of them are focusing on very disadvantaged families living in very disadvantaged areas. The Family Centred Employment Project is voluntary and the aim is that you engage not with Centrelink but with a provider who will help you and shepherd you through a pathway towards employment. The teen parent and jobless family trials announced in the budget are not so much an employment service focus; they are for parents who are on parenting payment and thus have children who are below school age. When your child is below school age there is no requirement for you to join up with an employment service or to seek work, so that trial is about more early intervention with families to ensure that they are focusing—for want of a better phrase—on their own human capital development at the same time as they are focusing on getting their child ready for preschool and school.

**Senator BERNARDI:** Within the Family Centred Employment Project, have any of the people who have now gained employment done so through a Work for the Dole scheme?

**Dr Morehead:** No.

**Senator BERNARDI:** Are they not eligible?

**Dr Morehead:** They would be eligible for the dole.

**Senator BERNARDI:** Would they be counted as having gained income or earnings?

**Dr Morehead:** No.

**Senator BERNARDI:** So there is no double counting or double dipping?

**Dr Morehead:** No.

**Senator BERNARDI:** That has satisfied the things I have asked to cover urgently, given our 8.30 deadline, but there are some questions on compliance with JobSearch, and things of that nature, which I know Senator Siewert wanted to go back to.

**Senator SIEWERT:** We were looking at the outcomes from providers and having a discussion about 13-week outcomes.

**Ms McKinnon:** Yes, post-program monitoring after three months.

**Senator SIEWERT:** Are we able to go through each of the streams for those outcomes for the post-program monitoring?

**Ms McKinnon:** Shall we start with stream 1?

**Senator SIEWERT:** Yes.

**Ms McKinnon:** Just to clarify, the post-program monitoring is how these figures are derived. A job seeker is encompassed for the post-program monitoring if they exit a period of stream services—that is, transfer to another provider—or they complete a phase of assistance: the initial service period, the work experience phase.

**Senator SIEWERT:** I need a bit more of a breakdown because I need to understand at exactly what stage people are measured for each of their outcomes, do I not?

**Ms McKinnon:** I can tell you the post-programming monitoring. I can also give you by stream—which is a different thing—how many stream 1s have a job placement, a 13-week outcome and a 26-week outcome. The post-program monitoring program, with the scope of job seekers, is ask the job seeker three months after that, 'Are you currently in employment? Are you currently in educational training?'

**Senator SIEWERT:** For each stream?

**Ms McKinnon:** For each stream.

**Senator SIEWERT:** So there are two possible outcomes.

**Ms McKinnon:** Yes, and one is collected, simplistically, via payments to providers. That is how we know we have a job placement, a 13-week outcome and a 26-week outcome. The other is from the post-program monitoring where we contact job seekers and ask them.

**Senator SIEWERT:** In that case, I think it is better if you take it on notice. Can I have both of those things that we have just talked about, against each of the streams?

**Ms McKinnon:** Yes.

**Senator SIEWERT:** How many of those who have gained employment or have got an outcome may have then cycled back in less than the 12 months—in other words, people that have come out of employment and gone back into the program?

**Ms McKinnon:** We would have to take that on notice. The last data we have for them is at 26-week outcome and the evidence shows that that is sustained period of employment. You are asking about the next six months if they lose the employment and return.

**Senator SIEWERT:** Exactly.

**Ms McKinnon:** I will have to take that on notice because it goes to a job seeker ID. I think that is quite complex.

**Senator SIEWERT:** Half a year, 26 weeks, sounds good but what happens after that? How sustained is it? In terms of the 31.9 per cent outcome going back to stream 4, that is for education outcome, is it not?

**Ms McKinnon:** That is the job seeker at that time saying they are in employment or education or training.

**Senator SIEWERT:** Do we know which is which?

**Ms McKinnon:** So 21.8 per cent of the disability equity group are employed and 13.1 per cent are in education and training, which gives us a total of 31.9 per cent having a positive outcome.

**Senator SIEWERT:** I have obviously written something down wrongly because 28 per cent and 13 per cent do not add up to 31 per cent.

**Ms McKinnon:** Someone has just told me that you can achieve both in education and employment. We double up a lot.

**Senator SIEWERT:** We know that 28.8 per cent have employment. Some of those could also be getting training.

**Ms McKinnon:** No, 21.8 per cent have employment and some of those are also in training.

**Senator SIEWERT:** The figure is 21.8 per cent and some of them are getting an education as well.

**Ms McKinnon:** When we ask a job seeker a question it is valid for them to say: 'I'm doing more than one thing. I've got part-time work and I'm also doing some training.'

**Senator SIEWERT:** This is the percentage of these people in stream 4.

**Ms McKinnon:** Yes, stream 4 disability.

**Senator SIEWERT:** Is that for all of stream 4?

**Ms McKinnon:** All stream 4 who have a disability as a characteristic.

**Senator SIEWERT:** So there is about a 32 per cent success rate for sustainability?

**Ms McKinnon:** On the survey, yes.

**Senator SIEWERT:** You are taking the question on notice for all the other streams in the table.

**Ms McKinnon:** We have the broad figure here, is you would like it. For stream 3, a positive outcome—both employment and education—is 44.4 per cent, 32.7 per cent being employment. Of stream 2, 54.8 per cent of job seekers with a disability have a positive outcome and 45.6 per cent of that is employment. Of stream 1, 58.1 per cent have a positive outcome and of that 49 per cent is employment.

**Senator SIEWERT:** In stream 4, 31.9 per cent were identified as having a disability.

**Ms McKinnon:** Yes.

**Senator SIEWERT:** Can we get a breakdown of the others?

**Ms McKinnon:** I can tell you the figures for Indigenous, CALD and sole parents, noting that there will be some doubling up.

**Senator SIEWERT:** That would be great.

**Ms McKinnon:** In stream 4, positive outcome for Indigenous is 28.7 per cent of which 17.6 per cent is employment. For CALD, 36 per cent have a positive outcome of which 18.2 per cent is employment. For sole parents, 36.4 per cent have a positive outcome of which 23.6 per cent is employment.

**Senator SIEWERT:** You may need to take this on notice. As I mentioned earlier, I am also focussing on older workers. Can you tell me the outcomes for them?

**Ms McKinnon:** For stream 4 people 50 years or more, 26.1 per cent have a positive outcome of which 19 per cent is employment.

**Ms Parker:** I should say that participation requirements for mature age people are quite different. For example, they can volunteer at 55 and that is it. You would expect these statistics to be slightly lower because they do not have the same requirements as other job seekers.

**Senator SIEWERT:** Do you have a breakdown for stream 3?

**Ms McKinnon:** For stream 3 people aged 50 years or more, there is a positive outcome for 42 per cent of which 31.5 per cent is employment.

**Senator SIEWERT:** That is a significant difference.

**Ms McKinnon:** For stream 2 people aged 50 years or more, there is a positive outcome for 56.5 per cent of which 50.1 per cent is employment. For stream 1, there is a positive outcome for 60.4 per cent of which 53.9 per cent is employment.

**Senator SIEWERT:** Thank you for that. I think they are all my statistics for the time being. I have some more but I think they are too detailed; I will put them on notice. But that is really helpful, thank you. Going back to JSA—and I do not know if this was asked before I came in—what evaluations are currently taking place for JSA and any of the other employment programs that are being undertaken?

**Ms Paul:** No, we did not cover that.

**CHAIR:** While officers are coming to the table, what we will do is go through to 9.30 pm on outcome 4, have the evening break till 9.45, then come back and start on outcome 5—just to give you an idea of the timing.

**Ms Parker:** Senator, there are a number of evaluations underway which we can list. We are currently looking at an evaluation of the Employment Pathway Fund, how it is operating et cetera. We have a series of project based reports, including impacts of the GFC on JSA—just some acronyms!

**Senator SIEWERT:** As you tell me, can you give me the dates by which you expect to finalise them?

**Ms Parker:** Certainly.

**Ms Kidd:** Yes, there are a range of evaluations, either planned or underway, across a suite of programs. The most recent is for the Building Australia's Future Workforce package—a

large evaluation program there. The interim report is due December 2013 and the final report, October 2014.

**Senator SIEWERT:** So that has been put in place for the program?

**Ms Parker:** Yes, as an overarching evaluation.

**Senator SIEWERT:** Okay.

**Ms Kidd:** For the Jobs and Training Compact, there is an overall evaluation due late in 2011, so quite soon. There is an evaluation of the Job Services Australia 2009-12 program, with the final evaluation report due in December 2013.

**Ms Parker:** That was the one I just mentioned, Senator Siewert. I was weighing what that one was, but this is a higher level. We will give you the higher level first.

**Senator SIEWERT:** Okay. So the Employment Pathway Fund evaluation is part of that; is that correct?

**Ms Parker:** That is right, and the GFC—there are whole range of components within that particular one.

**Senator SIEWERT:** Okay. If there are a whole range of components for that, can you take on notice to tell us what those components are, and the reporting dates.

**Ms Parker:** Sure.

**Senator SIEWERT:** Because 2013 is obviously the higher-level reporting date.

**Ms Parker:** All of it, yes. They will all pull together for December 2013, all of those subpoints.

**Senator SIEWERT:** Will some of those be reporting earlier, though?

**Ms Kidd:** Yes.

**Ms Parker:** Yes.

**Senator SIEWERT:** So the employment pathways evaluation is underway now; when will that be reporting?

**Ms Parker:** We will give you that on notice, if that is all right. I do not have that particular one.

**Senator SIEWERT:** Okay. Sorry to interrupt you, Ms Kidd.

**Ms Kidd:** That is okay. The disability employment services evaluation final report will be in June 2013. We also have some evaluations of some budget measures related to disability employment services, with a draft report due in, it looks like, December 2011. There is also the DSP employment incentive pilot, with the evaluation report due in July 2012; and the evaluation of the new, reformed Job Capacity Assessment program is due in October 2013.

**Senator SIEWERT:** That is under the new job capacity process?

**Ms Kidd:** That is right, yes. There is an evaluation of the Indigenous Employment Program, but I do not have a date for that. There is an evaluation of the Jobs Fund project, due December 2011. I think that is about it in terms of the mainstream employment services.

**Senator SIEWERT:** I will follow up the Indigenous one on Friday, rather than spend time on it now.

**Ms Parker:** Actually, that one is on hold at the moment, Senator.

**Senator SIEWERT:** Why?

**Ms Parker:** Just because of resourcing. As you see, we have enormous numbers of evaluations in train, so we are trying to prioritise at the moment.

**Senator SIEWERT:** Yes. Okay. I will go to that specifically on Friday. I do want to follow that one up.

**Ms Paul:** Thanks for telling us that. It is useful, actually—then we can have the answers for you on Friday.

**Senator SIEWERT:** I have been trying to work out from the Australian employment compact what jobs come out of that, and I cannot work it out, which is why I am interested in the evaluation.

**Ms Paul:** That we have made this year—yes, that is right.

**Senator SIEWERT:** There are various claims made about various programs, and you cannot actually get the data to justify those claims.

**Ms Paul:** It is hard to disaggregate, isn't it?

**Senator SIEWERT:** I have tried very hard.

**Ms Paul:** But it is useful to know which bits you are interested in, because we can bring the data along on Friday to the extent that we have it.

**Senator SIEWERT:** That would be appreciated.

**Ms Paul:** Yes, that is fine.

**Senator SIEWERT:** Is that all of the evaluations?

**Ms Paul:** Yes.

**Senator SIEWERT:** Thank you. Just going back to the DSP process, is that looking at the new process in terms of the 18 months—the new participation requirements before you go into DSP? Is that what that does? Does it include that?

**Ms Paul:** The employment incentive pilot is to do with the National Mental Health and Disability Employment Strategy. Yes, I understand that is the case, but Ms Buffinton may be able to answer.

**Senator SIEWERT:** Yes—the DSP one.

**Ms Buffinton:** The DSP pilot was actually a wage subsidy for people who are on disability, so it is actually separate.

**Senator SIEWERT:** Is that what you mean by that one?

**Ms Buffinton:** That is correct.

**Senator SIEWERT:** Thank you. There are two—sorry. Now I am confused. There are two DSP evaluations that you listed.

**Ms Buffinton:** DES evaluations, not DSP—Disability Employment Services.

**Senator SIEWERT:** Okay. There is a DES one.

**Ms Buffinton:** Yes.

**Senator SIEWERT:** So is the new process that is being put in place also being assessed? Is there a process already—

**Ms Buffinton:** The disability support pension process belongs to FaHCSIA. So, although it has an implication for the employment services, the evaluation of the DSP changes will be under FaHCSIA.

**Ms Parker:** They will be evaluated. All of those budget measures—one of those is the one you mentioned—will be evaluated in the overarching sense through the Building Australia's Future Workforce evaluation. But for FaHCSIA it is the same as for us: for the measures we own or run, we will do specific evaluations on each of them, and FaHCSIA will specifically evaluate the DSP changes.

**Senator SIEWERT:** Okay, I will ask then. We did disabilities—

**Ms Buffinton:** Yesterday.

**Senator SIEWERT:** No, we did them this morning. FaHCSIA is actually tomorrow. Anyway, I will have to put them on notice. But how do you then intersect that? As you know, what I am concerned about is the extra pressure it is going to put on providers—both JSA and, particularly, Disability—

**Ms Buffinton:** Yes, Disability Employment Services.

**Senator SIEWERT:** Yes, those services. How will you evaluate that? How will that be included?

**Ms Parker:** The pressure?

**Senator SIEWERT:** The additional workload.

**Ms Parker:** We have done quite a bit of work on that in terms of putting that up through the budget. We have been working with providers on that. We do not envisage huge pressure on providers. It is a demand-driven program. The providers do not appear to be concerned; in fact, they have been wanting to be able to access more clients. So we think they are very well placed to handle the changes.

**Senator SIEWERT:** The second issue there—and we have traversed this, so I am not going to try to traverse it again—is where, when people start failing the process and cannot demonstrate that they have sustained employment, the decision is made about when they are reassessed and those sorts of issues. I do not want to have another discussion about that, but I do want to know whether the assessment process will actually take that into account—how that is happening and whether it is being effective.

**Ms Buffinton:** So whether the evaluation is going to take—

**Senator SIEWERT:** We did discuss during the process the fact that it may not be that you have to demonstrate the 18 months.

**Ms Parker:** No, that is right.

**Senator SIEWERT:** So how will you know whether it is being effective or not and whether the providers are actually able to cope with that?

**Ms Buffinton:** I think there are a couple of issues. One element is that, as part of the DSP changes, we have extrapolated and we think that there will be about 13,000 additional people flowing into the employment services—about 80 per cent—

**Ms Parker:** Nationally.



**Ms Buffinton:** Nationally. About 80 per cent will go into the Disability Employment Services and about 20 per cent into Job Services Australia.

**Senator SIEWERT:** So 80 per cent to DES and 20 per cent to JSA.

**Ms Buffinton:** As Ms Parker has outlined, this is actually a demand driven system. If we take DES as an example, there is a currently a caseload of 146,000. The employment services are aware that people are going to be flowing in, obviously, through these measures. One of the discussions we had specifically when we met on the DSP measures was: what is the role of the employment services. Other than running an employment service their role is not to be an assessor for DSP. They are going to be filling in our employment system and then FaHCSIA, together with human services, in doing their assessment will be looking at the evidence but will not directly involve our employment services in having to assess somebody for DSP.

**Senator SIEWERT:** I understand that. When do you put the flag up and say that this person is consistently failing?

**Ms Parker:** Our providers have expertise in this area. We rely on them to have conversations and work with DHS and others around this. We would expect them to be saying that they tried all the mechanisms and it is not working.

**Ms Buffinton:** There is in fact a working group which has stakeholders including the disability peak bodies and the other employment service peak bodies. DEEWR is on it but it is run by FaHCSIA. It is working through things as the new system comes in and transitions. It is an ongoing dialogue in that that group as to how the measures are being implemented.

**Ms Parker:** We are told that many of the people on DSP would like to work, therefore they will be positively disposed, and providers should work positively with them in that regard. But of course we need to monitor it carefully. We need to ensure that no-one falls through the cracks, as you are obviously concerned about.

**Senator SIEWERT:** I want to ask about the National Green Jobs Corps. Can you tell me about the funding? Where is it at? Is it winding up? What replaces it?

**Ms Parker:** It is part of a suite of work experience programs. There are very many of those. If providers are not referring to the National Green Jobs Corps they will need to look at the entire suite of activities that is available and match the job seeker to those.

**Ms Paul:** You will recall it was a stimulus measure as part of the response to the global financial crisis so it was time limited, but it is a large suite of support. All the other things remain, of course.

**Senator SIEWERT:** Was there an evaluation done?

**Ms McKinnon:** The program does not formally cease until 31 December this year. We have negotiated with the providers that they will be able to place participants right up until 30 December, so it will take another three to six months. Given it was a time limited program, we are looking more at lessons about program implementation.

**Senator SIEWERT:** That is where I am going. I have had lots of positive feedback about it. That is where I am going with it winding up, but are there evaluation lessons from there that can flow onto other programs?

**Ms McKinnon:** We would be looking at doing a program review for lessons learnt when we implement programs for young people or through panels of providers or similar.

**Senator SIEWERT:** Has that evaluation started?

**Ms McKinnon:** No. It probably will not start until early 2012 because, as I said, we will not have the total sum of it. We are also interested in the lessons learnt from winding up a program.

**Senator SIEWERT:** Some of the providers, as I understand, are finalising. Are you going to be able to make sure, for the providers who have been working in that space, that you will get them to do their evaluation?

**Ms McKinnon:** The providers are paid payments, and they have to complete the placements or otherwise. We have a strategy to ensure providers do that. Do you mean they will participate?

**Senator SIEWERT:** What I mean is that, as I understand it, some of the providers put in for specific programs, and initiatives under those. Some of those are in the process of finalising now. Is there a process of capturing their data as they are finalising their programs?

**Ms McKinnon:** Yes.

**Senator SIEWERT:** That is what I wanted to know. You would not be producing a report on that until sometime next year?

**Ms McKinnon:** Yes.

**Senator BERNARDI:** Before I get on to compliance for JobSearch; I asked Ms Morehead before about Work For the Dole, which prompts me now to ask how many people are on Work For the Dole?

**Ms Parker:** As at 31 August, 13,667.

**Senator BERNARDI:** Do you have a comparison with the previous 12 months? It might be in the record of another estimates.

**Ms McKinnon:** In the month of May 2011 there were 3,633. In May 2010, for example, there were 1,996.

**Senator BERNARDI:** Sorry, did you say there were 13,000 now?

**Ms Parker:** 13,667.

**Senator BERNARDI:** And in May of this year there were 3,600? Is that right?

**Senator Chris Evans:** I suspect one is a monthly figure and one is an annual figure.

**Ms Paul:** Yes, I think so.

**Ms Parker:** Yes, I am sorry. My answer was activities.

**Ms Paul:** The large number is activities. The small number is people, I believe.

**Senator BERNARDI:** So there were 3,633 people on Work For the Dole, and that compares with 1,100—or something?

**Ms Paul:** In the same month in the previous year.

**Ms McKinnon:** Can I take it from the top because what we were quoting was locations. There are locations, placements and participants.

**Ms Paul:** With lots of numbers.

**Ms McKinnon:** But if we look over the life of a JSA contract there have been 75,919 placements in Work For the Dole.

**Ms Paul:** That is since 1 July 2009.

**Senator BERNARDI:** How many are on it now?

**Ms McKinnon:** On 31 August there were 9,310 placements.

**Senator BERNARDI:** How does placement differ from a person?

**Ms McKinnon:** A person can do two placements.

**Senator BERNARDI:** Can you tell me how many people?

**Ms McKinnon:** No.

**Senator BERNARDI:** You cannot tell me how many people?

**Ms McKinnon:** We will take it on notice, obviously.

**Senator BERNARDI:** Yes, please. I am interested in individuals.

**Senator Chris Evans:** Adding a human touch to it.

**Senator BERNARDI:** Let's do that! I have some questions about compliance for JobSearch. How many job seekers currently have an exemption from JobSearch?

**Ms Milliken:** As at the end of August, 66,412 job seekers had exemptions from their activity test or participation requirements.

**Senator BERNARDI:** Can you tell me what the percentage of the total caseload this is?

**Ms Milliken:** It was 9.3 per cent of total job seekers. That includes job seekers who are in Job Services Australia or Disability Employment Services, or who may only be connected to Centrelink. So it is not a representation of the JSA caseload, if that was your question.

**Senator BERNARDI:** I appreciate the information you have just given me, but do you have the percentage of the JSA caseload that is exempt from Job Search?

**Ms McKinnon:** Just so that I am clear about your question, there is—

**Senator BERNARDI:** I do not want to be bamboozling.

**Ms McKinnon:** I know, and we bamboozled ourselves last time. Exemptions and suspensions are overlapping but different mechanisms. Suspension from the JSA caseload means that the JSA provider is not receiving service fees, nor required to service that job seeker. I can tell you the figures for suspended JSA caseload.

**Senator BERNARDI:** Yes. I would be interested in that.

**Ms Parker:** Some of those are from exemptions, which is what Centrelink applies because the job seeker might be sick or have a medical condition or other things. They can be the same thing. When a job seeker has to go to Centrelink to say that they are doing the activities they are required to do to get their income support, Centrelink can exempt them because of medical or other reasons.

**Senator BERNARDI:** That is what I am interested in. Not the ones where JSA has not been paid.

**Ms Parker:** Some of those people who go to Centrelink are job seekers and some are not. Some of them do not have any requirement to be with Job Services Australia; they might be parents or they might have exemption.

**Senator BERNARDI:** JSA exemption?

**Ms Parker:** Those who are then exempt are still on the JSA caseload if they are job seekers. They are then suspended from Job Services Australia servicing. They may have an exemption for a medical condition.

**Senator BIRMINGHAM:** You are bamboozling me again, Ms Parker.

**Ms Parker:** It is confusing, but there are two sets of people we are talking about.

**Senator BERNARDI:** Exemption from JSA.

**Ms Parker:** Exemption from JSA is a suspension, but we will go from there.

**Ms Paul:** Do you want numbers for those?

**Senator BERNARDI:** Yes.

**Ms McKinnon:** There are 6.8 per cent of the JSA caseload suspended due to a Centrelink activity test exemption.

**Senator BERNARDI:** They would receive that exemption on the basis of medical clearance or other issues of that nature. That means that the JSA provider is not being paid for those people?

**Ms Parker:** Yes.

**Ms McKinnon:** That is right.

**Ms Parker:** They are not required to service the job seeker. They do not get paid because they are not doing anything with them.

**Senator BERNARDI:** So 6.8 per cent of the people. Can you tell me what percentage of these job seekers are the people on two years plus—the very long-term unemployed?

**Ms Parker:** We will take that on notice.

**Senator BERNARDI:** You may be able to tell me—you may want to take this on notice as well—of the job seekers who have an exemption, as we have just clarified, what percentage are in receipt of Newstart allowance? Do you need to take that on notice too?

**Ms Parker:** We will have to take that on notice too.

**Senator BERNARDI:** I might run through these, if you can answer; and if not, could you take them on notice? They should be available maybe tomorrow; I understand that in the past you have been pretty good in providing this sort of stuff.

**Ms Parker:** We kind of put on notice last time.

**Senator BERNARDI:** I would be interested in the reasons for these exemptions, specifically.

**Ms Parker:** We can tell you that. Is it for that cohort or generally?

**Senator BERNARDI:** No, for that cohort of Jobsearch exemptions.

**Ms Paul:** Would you also like the reasons for the whole cohort or Jobsearch now?

**Senator BERNARDI:** Not necessarily now. Once again, in a timely manner if you can.

**Ms Parker:** As I mentioned, they are things like a personal crisis, illness or injury. We mentioned last time we were here that if job seekers are pregnant, within six weeks of giving

birth they will be given an exemption. Unexpected caring responsibilities can mean an exemption.

**Ms McKinnon:** For around 16 per cent of the JSA clients who are exempted it is due to incapacitation due to illness, injury or disability of a temporary nature—and that is by far and away the largest category.

**Senator BERNARDI:** Has it changed depending whether you are very long-term unemployed or anything else?

**Ms Parker:** No. It has not changed substantially.

**Senator BERNARDI:** But it does not change across the demographics, I mean.

**Ms Paul:** We would probably have to look at that.

**Ms McKinnon:** I would have to take that on notice.

**Ms Paul:** I think Ms Parker is referring to change over time; change by profile.

**Senator BERNARDI:** I understand about the demographic, yes: profile is the correct question.

**CHAIR:** Senator Bernardi, I am just a bit worried about Senator Fifield's opportunity—

**Senator BERNARDI:** Of course. I am happy to put these questions on notice—they are pretty straightforward.

**Ms Paul:** Sure, that is fine.

**Senator FIFIELD:** A number of stakeholders have indicated that the government's reforms of the assessment process for eligibility for the DSP could place increased pressure on DES and disability employment providers in referring to the requirement for certain DSP applicants to participate in a program of support. Has there been any noticeable increase in demand for DES services? I know that it only came into effect on 3 September—

**Ms Parker:** We have just answered that question, Senator, with Senator Siewert. Do you want me to run through it again?

**Senator FIFIELD:** That is fine, I will go to the *Hansard* for that.

**Ms Parker:** Just to recap, it is a demand-driven program. We have not had a sudden influx of job seekers in that category. Providers are ready to manage that category of job seeker and we have provided them with training and support and so on.

**Ms Paul:** Ms Parker described before for Senator Siewert that we have done a lot of training and consultation with providers and, because it is a demand-driven program, they will of course receive the funding to support new clients like this. We think they are pretty keen, actually. But we said before to Senator Siewert that we will of course monitor that issue of demand and whether there is particular pressure arising from that type of new client.

**Senator FIFIELD:** Thanks. I will consult the *Hansard* for the rest. I know that there is a Senate inquiry looking at the ESS tender issue—and, again, stop me if this has already been traversed. How many disability employment providers will need to re-tender for their business under the decision as it currently stands?

**Ms Buffinton:** At this stage, because the figures used will be the 31 March 2012 star ratings, those that are four-and five-star at 31 March star ratings will be given an extension through to 2015. For those that are three-star and below, or where there is insufficient data in

a particular ESA, there will be the opportunity to tender. At this stage, we will not know those figures, but if you take the figures—

**Senator FIFIELD:** But generally, it is about 80 per cent—

**Ms Buffinton:** Yes, it is just over 80 per cent based on the last stats.

**Senator FIFIELD:** How many providers does that represent? I know that there are providers who can have multiple sites and contracts—

**Ms Buffinton:** Just doing a very crude comparison, from memory there are 207 Employment Support Service providers. It is very hard to see scale, but theoretically you would say that it would be 160. The reality is, we are talking about different ESAs. Whereas one provider may be five-star in one ESA, they may be three-star in another ESA, so in reality it is probably likely to be about 90-odd per cent of providers one way or another being involved in the tender.

**Senator FIFIELD:** Is there an allocated cost or budget to the department for undertaking that tender?

**Ms Parker:** Yes, we have a budget for running the tender?

**Senator FIFIELD:** What is that?

**Ms Buffinton:** We have been allocated \$6.413 million for the 2012 procurement process. That is going to be taking on the procurement of the employment support service, which is what we were just discussing, but it will also cover the contract extensions for the disability management service, the extension to the national panel of assessors, JobAccess and the extension to the national disability recruitment coordinator as well. They were packaged up as part of the policy proposal.

**Senator FIFIELD:** Does the department have a handle on what the typical costs are for a provider to prepare for the tender?

**Ms Parker:** No, we do not. That is for the provider.

**Senator FIFIELD:** How many DEEWR staff will be dedicated to undertaking the tender?

**Ms Parker:** We will take that on notice. We have done some calculations on that, but we do not have it with us.

**Senator FIFIELD:** Thank you. I want to move to the remote servicing review. I think there were consultation forums for that occurring between August and September. How many disability employment organisations have been consulted as part of the process?

**Ms Kidd:** There were 42 consultation forums held in that period across I think five states. They were open consultations. A lot of providers in the local areas would have been invited. We do not have information on how many disability employment services providers actually attended.

**Senator FIFIELD:** It is not something you can take on notice? It is just something you would not have a record of?

**Ms Kidd:** I could check to see if there are attendance records, but I think it would be unlikely there would be that level of detail.

**Senator FIFIELD:** Could you provide it if you have it, thank you? I want to move to the national disability recruitment coordinator. The 2010-11 PBS shows that the KPI utilisation of

program capacity—I think that is the number of new job opportunities created—listed that as 1,000. The 2011-12 PBS shows what looks to be the equivalent KPI as 700.

**Ms Parker:** Yes, that is right.

**Senator FIFIELD:** So there is a decrease of 300-odd. What is the story behind that?

**Ms Parker:** It is quite a challenging contract. It requires this coordinator to negotiate memorandums of understanding with large private sector employers. That is quite a challenging project. At the moment they have signed 24 agreements but it is proving a challenge.

**Ms Buffinton:** This is why simultaneously we are doing a review of whether we have got the right focus on the national disability recruitment coordinator role. So they have been doing a very good job in engaging with large employers that have never thought about or who have had only quite minor disability programs. What they have found is that you start off at head office, whether it be a major retail chain or bank or whatever, and you have that conversation, but it takes time for it to go out to the regions and so forth and become part of the process. We certainly have a lot of confidence in the organisation that is conducting the national disability recruitment coordinator role, and they have been signing a range of MOUs but, more than that, doing a lot of disability confidence work with those organisations. I think that is the foundation. But they also know that this year is the year that matters. They started in March last year. You do that foundation work and this year is the year that we are looking for the positive outcomes.

**Senator FIFIELD:** DEEWR's annual report says there are only 154. That was for last year. It was this challenging environment which prompted the review you referred to before.

**Ms Buffinton:** That is correct.

**Senator FIFIELD:** How many MOUs have been entered into?

**Ms Parker:** At 31 August there were 24.

**Senator FIFIELD:** How many people have been placed as a result of the program overall?

**Ms Buffinton:** There has been two separate contracts. There was a national disability recruitment coordinator that existed before 1 March 2010 under a previous contract. The contract was relet and a new provider came in. I would have to take on notice the breakdown for 2009-10 because the figures would go up to 28 February. I have a figure for the whole year of 430 but there would be a split. So I would need to take that on notice. Then there is 154 for the last full financial year.

**Senator FIFIELD:** Going to the jobseeker classification instrument, how many people assessed have been referred back to Centrelink in the 12 months from July 2010 to July 2011?

**Ms Buffinton:** First of all, the jobseeker classification instrument can be—I am checking that I am hearing the question correctly—run by both Centrelink and the employment service.

**Ms Parker:** Are you asking about job capacity assessments, where DHS has taken over the role of managing those?

**Senator FIFIELD:** Correct. Sorry, I used the wrong term.

**Ms Parker:** So, the question is: how many are now with DHS. The background is that the new arrangements have come into play from 1 July this year. We now have DHS conducting

all the assessments. Previously JSAs were undertaken by 18 providers including Centrelink, CRS Australia and 15 non-government organisations. We now have transitioned all of those to management under DHS. We have two streams of those, one is for those who are more job ready and one is for those who require more ongoing assistance through job capacity assessments. To get a disability support pension, basically, is the second phase of that. Does that assist with your question?

**Senator FIFIELD:** It does. It will assist me to reframe my questions on notice.

**Senator BERNARDI:** Chair, I understand that previously the department has been quite helpful in receiving some basic questions about facts and figures and being able to provide answers the following day. I wonder, with your permission Chair, whether I might be able to give this to Ms Paul, who might be able to provide the information tomorrow.

**Ms Paul:** Yes, we will do our best.

**CHAIR:** That concludes our questioning in outcome 4. We will now go to a break.

**Proceedings suspended from 21:31 to 21:45**

**CHAIR:** We will now resume these estimates hearings. We have now moved to outcome 5.

**Senator ABETZ:** First, a double accolade, if I may, for Ms Paul. I understand she got a gong, namely an AO, in the Queen's Birthday list, and she was also named as the Federal Government Leader of the Year by the Chartered Accountants Leadership in Government Awards. So we are sitting in very distinguished company. Congratulations, Ms Paul.

**Ms Paul:** That is very kind of you, Senator. Thank you very much.

**Senator ABETZ:** A pleasure. Minister, how many 15-year-olds do you employ in your office? Before you answer that, I happen to have discovered you do have a Twitter account, whether you know it or not.

**Senator Chris Evans:** I was told the department tweet my press releases.

**Senator ABETZ:** Aha.

**Senator Chris Evans:** I stand by my earlier advice. I cannot imagine (1) why we would do it or (2) why anyone would receive the tweets, but there you go.

**Senator ABETZ:** I hate to spook you, but I am a recipient. It lets me know what you are up to, or at least what the department alleges you are up to.

**Senator Chris Evans:** I suggest you get a life if you are one of my Twitter friends.

**Senator ABETZ:** I trust it is not 'friend', but perhaps 'Twitter acquaintance' might be a better term in the circumstances. Down to serious business. On 12 October the *Age* indicated: Workplace Relations Minister Chris Evans is in discussion with the Greens ...

That was in relation to the 'building watchdog', as the title of the article calls it—the ABCC. I accept that any discussions you might have may be confidential, but are you having discussions with the Australian Greens about any revised BCII Amendment Bill?

**Senator Chris Evans:** The decision-making process, as I indicated earlier regarding the bill, is still going through the Labor Party and government processes. I think my staff may have briefed Mr Bandt about it, or about the fact that it was going to come, but we have not got to that stage. We were talking about legislation that would come up. There have been



some discussions with him, and I have spoken to him, but I am not sure I have spoken about that. We have yet to finalise, through the Labor Party processes and the government processes, the shape of the bill, and when that is done it will be brought into the parliament and we will engage and seek the support of the opposition and minor parties for that legislation.

**Senator ABETZ:** Well, you will not be receiving it from the opposition, but I am sure that does not come as a surprise to you. Talking of the ABCC, we recently appointed two deputy commissioners—although when I say 'recently' that was in July. Is that correct?

**Mr Kovacic:** I think that is correct.

**Senator ABETZ:** And these positions were vacant for a number of months?

**Mr Kovacic:** Certainly one of them had previously not been filled for quite some time. If memory serves me correctly, it was probably around about the middle of last year, if not earlier.

**Senator ABETZ:** So why did it take so long?

**Mr Kovacic:** I think the positions were only advertised formally post the election last year.

**Senator ABETZ:** All right.

**Mr Kovacic:** I would want to be precise in terms of the timing, but they were certainly both advertised last year. With the appointment of a new commissioner it was considered important that the incoming commissioner had an opportunity to be involved with the selection of the deputy commissioners, so a priority for filling those positions was putting in place the new commissioner, and then the deputies.

**Senator ABETZ:** And no representations have been made to either the new commissioner or deputy commissioners as to what their fate may or may not be in the event that the legislation, of which the minister and I just spoke, is enacted?

**Mr Kovacic:** When the positions were advertised, the information material provided to all applicants indicated that the appointment is for a period of up to three years, from memory, subject to the passage of any legislation which might implement the government's policy in respect of building industry workplace relations, and that there was a possibility that they would be appointed to any new body that might be created should that legislation pass through the parliament.

**Senator ABETZ:** Turning to Fair Work Australia, we have had the appointment of three commissioners and Mr Lee was one of them. Did Mr Lee apply for the position or was he approached?

**Mr Kovacic:** He applied for the position.

**Senator ABETZ:** No approach was made to him?

**Mr Kovacic:** None whatsoever.

**Senator ABETZ:** For this round of appointments—and there were three of them, as I understand it—how many were on the short list that was submitted to the minister's office?

**Mr Kovacic:** From memory, there were 10.

**Senator ABETZ:** Can I have a breakdown of those 10?

**Mr Kovacic:** I do not have those details with me, but I am happy to take that on notice.

**Senator ABETZ:** Yes, on a similar basis as we have used before. It seems yet again serendipitous that union backgrounds do feature. I am sure it was all merit based and it is just serendipitous.

**Ms Paul:** It was merit based, as was the previous one.

**Senator ABETZ:** As were the other seven. It seems amazing how the merit of these trade union officials outshines all other contenders. That is what we are told, but a lot of people find it difficult to believe that it is fully merit based.

**Senator Chris Evans:** I make the point that I do not know any of the three successful applicants well. In fact, I do not think I met two of them. All had extensive experience in a range of areas. Two of them, as I understand it, had some union connection in their background, but they all had public service, industry or legal backgrounds. I think to characterise them in the way you have sought to do is not accurate or fair. I want to put that on the record.

**Senator ABETZ:** That is fine. We hope that Mr Lee's decisions will be a little quicker than his investigations into the HSU matter which we heard earlier today has lumbered along for over 2½ years.

**Senator Chris Evans:** As you know, Senator Abetz, Mr Lee was not the investigating officer.

**Senator ABETZ:** These things are often not just subject to the investigating officer. Those that do these things are often required to do other things as well, as determined by the manager. I turn to the decision regulation impact statement in relation to the harmonised work health and safety laws. The minister issued a press release on 14 September entitled 'New health and safety regulations to boost national productivity'. Is that correct?

**Mr Kovacic:** That is correct.

**Senator ABETZ:** It is a pity I have to ask these questions because they were written and provided on 16 September. We are now over the thirty days, but hopefully I will get an answer to some of my questions.

**Senator Chris Evans:** You put them on notice in the parliament?

**Senator ABETZ:** Yes, in a question on notice: 'On what date and time was the attachment, the regulatory impact statement on harmonised occupational health and safety laws, uploaded to the website?' I can confirm that my office has checked and it is on your website, Minister. We want to know the exact time it was uploaded. My office had made inquiries at Safe Work Australia and they were saying it was not available. You issued a press release about them. So we issued a press release and then we were told it was all publicly available on the minister's website.

**Senator Chris Evans:** Before you leap to another grand conspiracy theory, I raised this with Mr Kovacic and he can explain to you what happened in that process, why there is a link through my press release to that and why Safe Work Australia have not put it on their website. He can tell you the answer to that.

**Ms Paul:** Yes, we will take you through that now.

**Mr Kovacic:** The Office of Best Practice Regulation provided the advice to Safe Work Australia on, I think, 9 September that the regulation impact statement complied with the COAG guidelines. The approved RIS, if I can describe it that way, was circulated by the minister to members of the Workplace Relations Ministerial Council on 13 September. Subsequently, on 14 September, Safe Work Australia provided its members with a copy of the approved regulation impact statement. On the same day the minister issued a media release announcing the findings of the regulation impact statement, and a copy of the approved regulation impact statement was attached to the media release on 15 September at 10:45 am.

As Mr Hoy indicated when Safe Work Australia was appearing here earlier this evening, the approved RIS had not been placed on Safe Work Australia's website. The intention is that that will not occur until such time as the consideration of the model regs and codes of practice by the Workplace Relations Ministerial Council has concluded.

**Senator ABETZ:** That is the point, that the ministerial council is in charge of this. It is allegedly cooperative federalism. It is allegedly something that was going to be agreed to by the ministerial council. Clearly, somebody jumped the gun.

**Mr Kovacic:** No, Senator, if I can correct you there, the regulation impact statement is not a document that is approved by the ministerial council. Under the COAG guidelines the Office of Best Practice Regulation is the body that assesses whether or not the regulation impact statement complies with and meets the requirements of those COAG guidelines. OBPR, on this occasion, came to that conclusion on 9 September and certainly prior to the attachment of the RIS to the minister's media release. It advised the department that it had no difficulties with the approved RIS being attached to the media release.

**Senator ABETZ:** Yes, but what's that got to do with the issue as to who should be releasing this? Is it a unilateral decision of one of the ministers of the ministerial council?

**Ms Paul:** I think Mr Kovacic has made clear it is not a matter for the ministerial council. It is not a document owned by them as such, although it was of course circulated to each of them.

**Senator ABETZ:** Who paid for the RIS?

**Mr Kovacic:** Safe Work Australia would have paid for the RIS. Safe Work Australia was responsible for the development of the RIS. The Office of Best Practice Regulation was responsible for the consideration of whether or not the RIS complied the COAG guidelines. The issue of the approved RIS is that Workplace Relations Ministerial Council cannot make a decision to endorse the model or approve the model regulations and priority codes of practice until the RIS had been assessed as compliant with the COAG guidelines. The ministerial council, as I mentioned, does not approve the RIS. The decision for the ministerial council is to approve the model regs and codes of practice.

**Ms Paul:** I think the telling point here is that OBPR prior to the media release on the 15th did advise that it was fine from their point view for the RIS to be attached to a media release.

**Senator ABETZ:** I am not worried with great respect about those; I am worried about the courtesies to state governments, whose cooperation allegedly the government is seeking, and also how this report was released to select journalists prior to its public release. Can anybody shed light on that?

**Senator Chris Evans:** Senator, to make the point: (1) we have had good cooperation from ministers, despite some disagreements on some parts, and we have good working relations, (2) the ministers received the RIS before it was released publically, as did the members of Safe Work Australia. Quite frankly, there were a lot of copies in circulation before it was released in my press release, because those parties had all been treated appropriately in terms of being informed. The question that you seem to be posing is: should have I released it, been open and transparent, or should I have hidden it? I would have thought normally you would be suggesting why would I not release it publically—that is your normal line. It is the normal line of oppositions. Now it seems you are unhappy that I have made it available publicly.

**Senator ABETZ:** Who funds Safe Work Australia?

**Mr Kovacic:** Sorry, I am not with you.

**Senator ABETZ:** From where does Safe Work Australia get its budget?

**Mr Kovacic:** It is funded jointly by the Commonwealth, states and territories.

**Senator ABETZ:** Exactly. A cooperative body, cooperatively funded. That cooperatively funded body did not see fit to put it on its website—for what I would have thought were very astute reasons—and none of the state governments—albeit they have been provided with copies—did not see it appropriate to do so either, because of the protocols involved. We have heard some spin this evening as to everything but the actual issue, that if it is the property, did you say, of Safe Work Australia, that document?

**Mr Kovacic:** I would not say property, it is a document that Safe Work Australia developed.

**Senator ABETZ:** That they developed with a regulator.

**Mr Kovacic:** They developed in the Office of Best Practice Regulation's approving body, for want of a better description.

**Ms Paul:** The funding is not a connection. We should clarify that there is not a connection between the funding of Safe Work Australia and the responsibility for that document, which as Mr Kovacic has outlined, is not a matter for the ministerial council and which—

**Senator ABETZ:** But it was for Safe Work Australia?

**Ms Paul:** and which OBPR agreed was okay to attach to a media release.

**Senator ABETZ:** With respect, it is none of their business when it is prepared for somebody else. It is not usual for that office to be asked—

**Ms Paul:** It is their business because they are the approving body.

**Senator ABETZ:** They do not determine when these things are released, Ms Paul, it is the minister.

**Ms Paul:** We did not ask them to determine when, we asked them whether it was appropriate.

**Senator ABETZ:** Do you know of any other instances when the Office of Best Practice Regulation, or whatever it is called, has of its own volition released—

**Mr Kovacic:** Yes. Certainly. The general practice is for once a decision is made by a ministerial council for OBPR to, as a matter of course, publish the approved RIS on its website.

**Senator ABETZ:** But no decision has been made by the ministerial council.

**Mr Kovacic:** There is. It is not a confidential document—

**Senator ABETZ:** But no decision has been made.

**Mr Kovacic:** Bear with me, because certainly before it was released we checked with OBPR as to whether there was any impediment to its release and the advice from the Office of Best Practice Regulation was that there was none.

**Senator ABETZ:** It is a pity that you did not check with all your partners with whom you are trying to get harmonised laws as to whether this would be a pre-emptive act or whether it was an appropriate act. I will not take it any further.

**Senator Chris Evans:** Let me just point out for you that the states were anxious to get it, and secondly, since its release, I have not received one complaint about it being released from a state government. I do not know whether the department has, but it has not been raised with me as an issue.

**Mr Kovacic:** Not that I am aware of.

**Senator Chris Evans:** I heard there was allegedly the calling of names.

**Senator ABETZ:** They would begin to feel like me here tonight. They would simply be wasting their breath and talking to a brick wall.

**Senator Chris Evans:** You can be as deliberately unpleasant as you like, but I enjoy constructive relations with those ministers and I think that is not the characterisation of how we operate. But how you behave, as you have behaved tonight, is obviously a matter for you.

**Senator ABETZ:** You can engage in self-praise, but some people have said things about self-praise, Minister: self-praise is no praise at all. So you keep that in mind. Can we move on to consideration—

**Senator Chris Evans:** You are a charming bit of gear, Senator!

**Senator ABETZ:** Well, thank you very much for that! I have always waited for a compliment from you and I think I have finally got it. I will ignore that pathetic attempt at irony.

**CHAIR:** Let us hope that that is as good as it gets, Senator Abetz.

**Senator ABETZ:** Can I ask whether or not the government is going to bring forward the review of the Fair Work Act?

**Ms Paul:** Sure.

**Senator ABETZ:** Will it bring it forward?

**Senator Chris Evans:** No. The—

**Senator ABETZ:** That is what I thought. What preparation has occurred—

**Senator Chris Evans:** Senator, do you want answers to your questions or do you just want to keep talking?

**Senator ABETZ:** I asked whether it has been brought forward. You said no. That answers that. We then move on to the next question.

**Senator Chris Evans:** I was going to tell you the time frame which was required, which is that it commence by 1 January 2012.

**Senator ABETZ:** We know that, and there have been public calls to bring it forward. It is up to the government to either agree or not agree to those calls. You have just said no, the government has not agreed to that call; therefore, we move on to the next question.

**Senator Chris Evans:** No, I was going to inform you that I think it is 19 October. It is due to start before 1 January 2012. I have indicated we would be meeting that commitment so, in the next six weeks or whatever it is, it is due to be announced and commenced. Therefore, it is not being brought forward, because it is on track, as I have said publicly a number of times, to be conducted, as was indicated at the time of the passage of the legislation.

**Senator ABETZ:** Previously, any suggestion that it be brought forward has been rejected. Are you now saying that it is on the announced timetable?

**Senator Chris Evans:** I am saying exactly the same thing I have said for the last few months when asked about it.

**Senator ABETZ:** That is exactly what I was suspecting. Thank you. What preparations have been undertaken for the review, to date?

**Mr Kovacic:** We have been providing advice to the minister about issues such as the terms of reference and who would undertake the review. As you would be aware, the minister indicated when he spoke to the National Press Club in late September that it would be conducted independently of the department. As part of that, there has also been some consideration given to the sorts of data and evidence that might be of assistance to the reviewer or reviewers.

**Senator ABETZ:** So we do not have the head of the review et cetera? When do we think that might be able to be announced?

**Senator Chris Evans:** It is a decision that is before government. When we have made the decision, I will make the announcement.

**Senator ABETZ:** But are we anticipating an announcement before the end of the year, before the end of the month?

**Senator Chris Evans:** You may not have been paying attention, but I told you that we have committed to commencing it before 1 January and I told you we were on schedule. The conclusion from that, if you put those two things together, is that it will be announced before 1 January.

**Senator ABETZ:** Yes, and believe it or not, if I look at a calendar, there are approximately still 70 or 80 days left between today and the date that you mentioned—1 January. So I am inquiring, within that range of 80 days or so, if we can be given an indication? Will it be announced on Christmas Eve, or do we think that we will be able to announce it earlier so that interested parties can potentially get ready to get stuck into it as soon as the new year commences?

**Senator Chris Evans:** As I said to you, it is a decision before government. An announcement will be made. I am going on leave the week before Christmas, and I will be taking responsibility for it, so I think you can be assured it will not be Christmas Eve.

**Senator ABETZ:** As always, that is very helpful. Undoubtedly we will read about it on a website somewhere.

**Senator Chris Evans:** You at least are very attentive to my websites, Senator, so I know where to put it if I want you to see it—or Twitter; I might tweet it to you.

**Senator ABETZ:** If you were to do that, it is interesting that that particular one, I think, was not. Anyway, on the fair work review, we were told on 12 August 2011:

THE Gillard government has indicated that an imminent review of the federal workplace laws will not result in any significant changes ...

That was not in quotes—I make that point. But is that the government's approach to this—that there will not be any significant changes—or is the government going to be open to any changes? If the case is made for a significant change that is in line with the government's views, will it consider making substantial changes? I do not want to get hung up on a word—'significant', 'substantial' or whatever—but it seemed from that story on 12 August that the government was not necessarily interested in any major or wholesale changes.

**Senator Chris Evans:** I have commented on this a number of times in public, so you do not need to rely on what the papers have said. There is plenty of accurate reporting. What we made clear is that it would be a serious review taken by someone independent of the department but that the commitment was to review the operation of the act and whether it was meeting the objectives set out for the act. That is what it would be doing. I have made the point on a number of occasions that this is a piece of Labor legislation, and we will not be reviewing it with a mind to turning it into Work Choices or any other form of legislation that does not reflect the sort of approach that the Labor Party has to industrial relations.

**Senator ABETZ:** I would have expected—

**Senator Chris Evans:** If there are practical matters that need to be addressed, that are identified by parties and that are evidence based rather than ideologically based, the review will deal with those issues and make a report to government, and we will obviously take those recommendations or findings seriously. But I do make the distinction with people thinking we are going back to a debate about individual contracts or something. That is not going to happen. That is not what this government is envisaging the review doing.

**Senator ABETZ:** The language you just used then is similar to language I have heard from time to time about 'practical solutions for practical problems', so we will see what happens with that review. Undoubtedly individual flexibility arrangements will be part of that review.

**Senator Chris Evans:** I do not know whether you have failed to remember, but we had a discussion about that earlier today and you were reminded that the provisions of the Fair Work Act have a process for a review of individual flexibility arrangements. I think that after three years—

**Mr Kovacic:** Correct—section 653 of the act.

**Senator Chris Evans:** That provides for a review specifically looking at those issues. So I suspect those individual flexibility agreements would not be a core or key focus given that the act commits to a separate review of those provisions.

**Senator ABETZ:** I was hoping you would say that, because on 7 October you were reported as speaking at the Australian Labour and Employment Relations National Conference in Fremantle, Western Australia. The report from there says, 'On IFAs, Senator Evans said there was no doubt that the government's individual flexibility arrangements

would be examined in the review,' but it said it was the operation that would be the focus. So fine—they will not be part of this review.

**CHAIR:** That is not what the minister said.

**Senator Chris Evans:** There is a review of IFAs under the act. It is a requirement of the act, a statutory obligation.

**Senator ABETZ:** That is right, but IFAs—

**Senator Chris Evans:** That is a factual answer. It is the law of the land.

**Senator ABETZ:** would be examined under the review, and the review that you were talking about was the review we were talking about earlier: the one to commence on 1 January 2012. We did hear about a three-year review of IFAs earlier today.

**Senator Chris Evans:** They released three reviews.

**Senator ABETZ:** That is right.

**Senator Chris Evans:** It is required as part of their input. I think it is two statutory and one—

**Senator ABETZ:** Yes, but just then at the beginning you were ruling out using the general review, if I can call it that, for IFAs because there was a separate review of IFAs to take place, whereas you are on the record—

**Senator Chris Evans:** No, I think the words I used were that it would not be a key focus.

**Senator ABETZ:** It would not be a key focus now.

**Senator Chris Evans:** These are statutory requirements. The government will be meeting the obligations under the statute.

**Senator ABETZ:** All right. Let's get back to the basics. Will the general review that we have just been talking about include a review of the operation of the individual flexibility arrangements in the legislation?

**Senator Chris Evans:** as I have just explained to you, there is a separate provision of the act that requires a review of those individual flexibility arrangements. Therefore, I would not expect them to be a central key focus of the general review. If parties make submissions in relation to them, obviously they will be attended to, but the obvious response is that there is actually a specific review of those provisions required by statute that will occur at some later date. The date, Mr Kovacic, is—

**Mr Kovacic:** 1 July or 30 June 2012.

**Senator Chris Evans:** It seems to me that it makes clear sense, therefore, that they would not be a major focus of the more general review.

**Senator ABETZ:** Who was talking about 'major focus'? You introduced that just then—

**Senator Chris Evans:** Yes, they are my words.

**Senator ABETZ:** to try to cover your tracks in relation to your inconsistent answers. Can I get it clear: it will be open for people to make submissions—which will be taken seriously—to this general review about IFAs? Yes or no?

**Senator Chris Evans:** I am not going to play your games. All submissions will be treated seriously by the review.



**Senator ABETZ:** Thank you.

**Senator THISTLETHWAITE:** I have a couple of questions, Ms Paul, about the Domestic Violence Workplace Rights and Entitlements Project. Could you explain the aims of that project for the committee and some of the progress that has been made through the project?

**Ms Devereux:** The project that you are referring to is the domestic violence clearinghouse project?

**Senator THISTLETHWAITE:** Yes.

**Ms Devereux:** The project was intended to engage with Australian employers and unions to inform them directly about domestic violence issues and the impacts on both workers and the workplace and to build their capacity to support workers affected by domestic violence through the provision of training and resources as well as examining ways to address this through collective bargaining.

**Senator THISTLETHWAITE:** And can you tell us how many employers have participated in the project?

**Ms Devereux:** I do not think I have that level of detail here. We essentially funded an organisation to deliver the project for us rather than doing it ourselves.

**Mr Kovacic:** We might take that on notice.

**Senator THISTLETHWAITE:** Okay. Could you tell us what some of the outcomes were? As far as I understand it, it was aimed at promoting bargaining between employers, employees and unions for the negotiation of specific clauses in workplace agreements. Have you been keeping tabs on how many clauses have been negotiated in agreements to provide those?

**Ms Devereux:** Not specifically. We are aware of a number of organisations that have negotiated clauses in agreements—for example, the Surf Coast Shire, the University of New South Wales, Thoroughbred Racing Limited and the New South Wales government—but we do not have comprehensive lists of all the organisations who have done so.

**Mr Kovacic:** I think it was also intended to raise general awareness about issues of domestic violence and how it might impact on the workplace—the extent that victims might be confronted in the workplace by a partner who is behaving violently to them, how to deal with those sorts of circumstances, the support that employers might be able to provide to employees who are affected by domestic violence. Those sorts of issues. Some of the clauses that have been negotiated in agreements have been about providing paid leave in circumstances where victims need to attend court proceedings around, for instance, orders which preclude their partner from coming near them. I cannot remember the precise term, but those sorts of things are part and parcel of the program.

**Senator THISTLETHWAITE:** Can you tell us how much the funding for the program was?

**Ms Devereux:** Yes. It was \$440,000 over 18 months.

**Senator THISTLETHWAITE:** Has that period now expired?

**Ms Devereux:** It concludes in December 2011.

**Senator THISTLETHWAITE:** Is it envisaged that the program will go beyond that period? Is it subject to funding?

**Mr Kovacic:** We have had some representations from the clearinghouse in terms of extension of funding, and that is something that is currently under consideration.

**Senator THISTLETHWAITE:** Which organisation is it? I think you mentioned earlier that an organisation was running the program for you.

**Ms Devereux:** It is the University of New South Wales as represented by the Centre for Gender-Related Violence Studies.

**Senator THISTLETHWAITE:** Those organisations that you mentioned earlier appear to all be in New South Wales. Is that the case? Are there other organisations in other states?

**Ms Devereux:** I do not have that information here, so—

**Senator THISTLETHWAITE:** Perhaps you can take that on notice to see if it is wider than New South Wales. That is all I have about that. I have another couple of questions regarding outworker regulation. As far as I am aware there are different state laws that still exist in respect of outworker regulation in some states. Is that the case?

**Mr Kovacic:** That is correct.

**Senator THISTLETHWAITE:** And there are the national provisions in the Fair Work Act?

**Mr Kovacic:** There are provisions in the Fair Work Act which recognise the unique circumstances of outworkers, and there are also provisions in the relevant award that deals with outworkers.

**Senator THISTLETHWAITE:** Is there much inconsistency between the various state regulations and the national law?

**Mr Kovacic:** I would have to take the precise level of inconsistency on notice. I think it would be fair to say that there is a degree of commonality. Some of the areas of difference in some of the state legislation enable state governments to issue codes. My understanding is that those codes have been issued in New South Wales, possibly South Australia and Queensland, but I would need to double-check on that. We can come back with an answer on notice about any differences between federal and state legislation.

**Senator THISTLETHWAITE:** Is there any work being done by the department to look at harmonising those laws?

**Mr Kovacic:** At the laws Workplace Relations Ministers' Council the minister indicated that the Commonwealth would certainly like to discuss with the states and territories some possible enhancements to the existing outworker protections in federal legislation. I think there has been one meeting with state and territory officials around that issue, so there is some work occurring in that space.

**Senator HUMPHRIES:** You might recall, Minister, that on the last occasion we were here I asked you about ACT cleaning companies that have signed up to the Clean Start agreement. There were some suggestions that those companies were losing contracts with federal government departments apparently on account of the higher overheads which, having signed up to Clean Start, were entailed. You indicated that you would look into this and in

fact, I think, there was to be a progress report at a later estimates. I wonder whether you have anything to tell us about where that stands.

**Senator Chris Evans:** Senator, without saying too much, I think there is a submission in my in-tray and, if I ever get out of estimates this week, I hope to deal with it expeditiously. But having not made the decision, as I explained to you—

**Senator ABETZ:** We will expected in about four months.

**Senator Chris Evans:** we have been doing some work on that across government and I asked for some work to be done. That has happened, and now I have got a submission before me. I have not had a chance to read it yet but I understand that it is in my office.

**Ms Paul:** As you would imagine, in particular we have been working with the Department of Finance and Deregulation to see what can be done, which is what will be considered.

**Senator HUMPHRIES:** You did offer me in May, Minister, a briefing 'when I get to a landing point', so if you are at a landing point soon and feel inclined to give me a briefing, I would be very happy to accept it.

**Senator Chris Evans:** When I land, you will be the first to know, Senator.

**Senator ABETZ:** That will be 11.30 tonight.

**Senator HUMPHRIES:** I will be around then.

**Senator Chris Evans:** And if you want to check whether I have landed, ask Senator Abetz to check on my website for you—on the tweets. We are not far away, Senator. I hope to make a decision very shortly.

**Senator ABETZ:** Is it correct to say that the Fair Work Act has the same provisions in it when it comes to protected action as the previous Workplace Relations Act?

**Mr O'Sullivan:** I think we canvassed this, actually, in a question on notice, and I will refer to that if you will give me a moment.

**Senator ABETZ:** It is question 52, where we were told that it was reasonable and appropriate—all the things that I did not ask for. I wanted to know whether it was correct and we are studiously avoided answering that. In the context, it may have been reasonable and appropriate, but I was not asking for subjective value judgments; I was actually wanting to know whether or not that statement is true. It was question No. 52.

**Ms Paul:** Where you were referring to a particular case?

**Senator ABETZ:** Yes, or an assertion by the Treasurer. You go on in the answer to point out four significant differences, which would suggest that the assertion by the Treasurer was wrong.

**Ms Paul:** That is not what we say our answer.

**Senator ABETZ:** I thank you for that.

**Mr Kovacic:** There is a fairly detailed attachment to that answer to the question.

**Senator ABETZ:** Yes, there were four pages of the different language he has used. Yet we cannot bring ourselves to say that the Treasurer was wrong in making the assertion that the Fair Work Act has the same provisions in it when it comes to protected action as the previous Workplace Relations Act. So there has been no change there.

I then asked: do you agree. You do not say that you agree with the Treasurer; very wise. You just say that in the context it was reasonable and appropriate. They are value judgments and, with great respect, I do not think departments should be venturing into whether a minister's statement were reasonable or appropriate. I would have thought that is for the political discussion. A department should be providing advice as to whether it was correct or not. That is what was sought. I was not asking for your value judgment. I was asking whether or not this was correct.

**Ms Paul:** You are right. It would normally be the case that we are not giving value judgments. I am not sure we have given one here but I note it is what you asked us for. You asked: does the department agree. We have, respectfully, tried to answer you.

**Senator ABETZ:** You have, yes.

**Ms Paul:** The department considers that the Treasurer's observations were reasonable and appropriate in this context. When I look at this answer, again as I have seen it before, I think it is a comprehensive answer to your question with its comprehensive attachment. I am not sure where I want to go beyond it one way or the other. I think the answer stands and speaks for itself.

**Senator ABETZ:** Over the page you say that there are some differences. One of them, for example, is removal of employer's capacity to pre-emptively lock out employees. That is a clear difference. How you can seek to cover for the Treasurer when he says, 'The same provisions in it,' and say there has been no change there is clearly wrong. You know it is wrong. The evidence is there and you have given it to us. We still get fed a line that it is reasonable and appropriate in the context. He was under pressure in a media interview and made a mistake and that somehow puts it into a context that it was reasonable and appropriate to tell the Australian people that the provisions are the same and there has been change, yet you actually tell us there have been changes.

**Ms Paul:** I think you have said it yourself there. We have drawn attention to the context and I think the context is important. Our view was that the department considers that the Treasurer's observations were reasonable and appropriate in this context, which we spell out being the context regarding a decision of the full bench.

**Mr Kovacic:** I might just add to Ms Paul's comments. One of the key issues in the question was around a particular matter, the JJ Richards case, which really swings on the issue of whether the Transport Workers Union was genuinely trying to seek agreement in the context of seeking a protected action ballot order. That requirement is one, as we have previously indicated at earlier estimates hearings, consistent both in the Fair Work Act and in the Workplace Relations Act. The particular factors that go to determine whether a party is genuinely trying to seek agreement is one that will be determined by, nowadays, Fair Work Australia on the facts of the particular matter. In the context of the question, which refers to the JJ Richards matter, I think that issue around generally trying to reach agreement requirement is, I suppose, the primary factor which goes to the JJ Richards issue.

**Senator ABETZ:** Did you ask the Treasurer about his answer so you could get the context and whether it was reasonable and appropriate?

**Ms Paul:** The context was clear from the nature of the question. That is what we have referred to in our first paragraph.

**Senator ABETZ:** Absent the JJ Richards case. Is it correct to say that the Fair Work Act has the same provisions in it when it comes to protected action as the previous Workplace Relations Act? That is not correct, is it?

**Mr Kovacic:** The second page of our response highlights some areas where there are differences.

**Senator ABETZ:** So, it would be wrong to say that the Fair Work Act has the same provisions in it when it comes to protected action as the previous Workplace Relations Act?

**Ms Paul:** It could be correct to say it in the context that the Treasurer used it, but in the back page there, as you see—

**Senator ABETZ:** Ms Paul.

**Ms Paul:** we have given some dot-point differences.

**Senator ABETZ:** You did not even go there in the written answer, to suggest it was correct.

**Ms Paul:** Yes, we said—

**Senator ABETZ:** You said it was 'reasonable and appropriate'—

**Ms Paul:** I refer to our answer, which I think speaks for itself.

**Senator ABETZ:** in this context. You did not say it was actually correct, did you, in the written answer?

**Ms Paul:** Our answer stands:

The department considers that the Treasurer's observations were reasonable and appropriate in this context—

which was the context—

**Senator ABETZ:** Well, thank you for your value judgment—

**Ms Paul:** of the JJ Richards case.

**Senator ABETZ:** but I think, with great respect, in the future—

**Ms Paul:** You asked us for that.

**CHAIR:** We seem to be—

**Senator ABETZ:** we should let the politicians and commentators decide whether it is reasonable or not. All we want is technical advice as to whether the assertion is right or not, and I think we are—

**Ms Paul:** Well, you asked us did we agree, and so that is our answer.

**Senator Chris Evans:** Yes, you asked them for a judgment, Senator. You asked 'does the department agree' with the Treasurer.

**Senator ABETZ:** Yes, with the statement.

**Senator Chris Evans:** You cannot then complain that you get an answer that you say contains a value judgment. If you do not want that, do not ask the question.

**Senator ABETZ:** What? What?

**CHAIR:** All right. The position we are in is that the department are saying that they stand by their answer, and I think you have had a lot of opportunity to put your opinion on the record, Senator Abetz—

**Senator ABETZ:** Although it is clearly—

**CHAIR:** so we might try and move on.

**Senator ABETZ:** Let us turn to the annual report, pages 124 and 125, looking at some of our effectiveness indicators. Just so I read this correctly, there has been a diminution in productivity:

... GDP per hour worked in the market sector ... (trend terms) ...

Is that correct?

**Mr Kovacic:** Senator, the annual report shows there has been a decline in productivity in the course of the year.

**Senator ABETZ:** By how much?

**Mr Kovacic:** At the end of June 2010, it was 1.8 per cent; at the end of the June quarter 2011, productivity had declined by one per cent.

**Senator ABETZ:** 'Had declined'—or is that an absolute figure? Is the variation a one per cent reduction in productivity over the 12 months, or do you read that as minus 2.8 per cent?

**Mr Kovacic:** I am looking at the footnotes, and they do not really help me, so would you mind if I take that on notice?

**Senator ABETZ:** Yes. These are thick documents—voluminous, I should say, not thick.

**Mr Kovacic:** Perhaps this might assist. If you go to page 125, under the heading 'Productivity', the second line says:

... productivity growth ... decreased by 1.0 per cent (trend terms) over the year to the June quarter 2011, down from an increase of 1.4 per cent over the year to the June quarter 2010—

which does not necessarily align with the figures in the table.

**Senator ABETZ:** No. If you can take that on notice and provide, possibly, a footnote for me, that would be good.

**Ms Paul:** Although the text itself says:

It should be noted that short-term measures of productivity are prone to volatility and cyclical effects and should therefore be interpreted with caution.

**Senator ABETZ:** Once again, I am not going into the reasoning or rationale; I just want to understand the figure—time is short. The other one that I want to know about is working days lost per 1,000 employees. That has gone from 13.2 to 15.9; that is correct?

**Ms Paul:** Yes.

**Senator ABETZ:** And working days lost in federal bargaining have gone from 85,500 to 90,000. It stands to reason that you would only have figures in relation to federal bargaining, but would there be other days lost which are not related to federal bargaining?

**Mr Kovacic:** Senator, how we would do that is work out, through the ABS data on industrial disputes, the annualised working days lost per 1,000 employees, and we would extrapolate from those the number of federal bargaining disputes.

**Senator ABETZ:** So if we go to the ABS we would get the full figure, which would include other days lost apart from federal bargaining?

**Mr Kovacic:** That is correct. I think one of the important points here in terms of the whole issue of industrial disputation—and one of the points that we have made at previous estimates hearings—is that what we are continuing to see is a sort of downward trend in the level of industrial disputation. However, there are cyclical effects, if I can describe them that way, in a sense, that are related to the number of agreements that are expiring over a particular period. When you actually have a look at the—

**Senator ABETZ:** Look, with great respect, I am not asking for an explanation—

**Ms Paul:** I think we are still answering the question, Senator Abetz.

**Mr Kovacic:** we have a fairly significant increase in the number of agreements that expired in the course of last year.

**Senator ABETZ:** I am not asking for an explanation, thank you. I can read some of these papers. Thank you very much.

**Mr Kovacic:** It went from in the order of about 7,000 on average over the past three years.

**Senator ABETZ:** Chair—

**CHAIR:** Go to your next question, Senator Abetz.

**Senator ABETZ:** We are told in a footnote on page 124:

As a result, the 90,000 figure presented here is not fully indicative of the total number of working days lost in the federal jurisdiction.

I accept that it is very hard to be able to put a finger on it, but is the department able to provide any indication of how many more days should be included?

**Mr Kovacic:** In short, no. I refer you to the second last paragraph on page 125. When you have a look at the last two sentences of that paragraph, you see that they were not reported by ABS largely because the number of disputes in the March quarter was at such a low level that to provide a complete disaggregation would raise confidentiality issues from an ABS perspective. That is the explanation. We could not provide that because we cannot get it from ABS.

**Senator ABETZ:** All right. Let us go overseas, to the ILO. What is the size of our permanent delegation to the ILO?

**Mr Kovacic:** From the perspective of this portfolio, one person.

**Senator ABETZ:** Does the Australian government still own a residence for the head of the delegation?

**Mr Kovacic:** No, we do not own a residence. We rent a residence.

**Senator ABETZ:** Thank you for that. We were told in the May budget by the Treasurer that the government was looking at delivering half a million additional jobs in this financial year. Was there any consultation between the Treasurer's office or Treasury and the department in the development of that figure?

**Ms Paul:** We would have to take that on notice.

**Senator ABETZ:** There are varying figures floating around. Some suggest, in the first quarter of this financial year, there were only 3,200 jobs created. Somebody else tells me 5,300. Look, even if it were—

**Senator Chris Evans:** The ABS figures are on the public record. That is what we usually use, so I can get you the figures, if you like.

**Senator ABETZ:** It does not look as if we are tracking at this stage, at the end of the first quarter, for the establishment of the half a million additional jobs. With this budget prediction, is the department being tasked to do anything in particular to try to assist in achieving the outcome?

**Ms Paul:** I do not have anything with me at the minute to enable me to answer that, so I will need to take it on notice.

**Senator ABETZ:** Take it on notice, please.

**Senator Chris Evans:** Treasury will make an adjustment in any predictions it has for the rate of jobs growth et cetera every time it does a revised forecast, MYEFO or budget, so those figures are adjusted based on experience and projections. It is true to say that, despite the strong position in which we came out of the global financial crisis and the continuing creation of additional jobs in the economy, it has been softer in the last six months and there has been a bit of a shift from full-time to part-time jobs in some areas. We have also had some quite different results between states. Part of that is explained by the floods and the impact on Queensland; but international factors have also impacted upon consumer confidence, and so some areas like retail have been doing it a bit tougher than expected—although I think they had some slightly better figures more recently. But it is true to say that jobs growth and the jobs situation has been softer than expected and, as you know, unemployment ticked up from 5.2 to 5.3 and then held again this month at 5.3 per cent, which, comparatively with Europe and America—

**Ms Paul:** I think we are back to 5.2.

**Senator Chris Evans:** Are we back to 5.2?

**Mr Kovacic:** Yes, we went back to 5.2.

**Senator Chris Evans:** Whereas America is at nine-point-something and the eurozone is around the 10 per cent mark. But it has been softer in the last few months than was originally predicted.

**Senator ABETZ:** What figures do we have in relation to underemployment?

**Mr Kovacic:** I will have to take that on notice.

**Ms Paul:** We do have some figures on that, but we do not have them here.

**Mr Kovacic:** There is some ABS data that is available.

**Ms Paul:** Yes, it is from the ABS telephone survey. We can get that for you.

**Senator ABETZ:** The Roy Morgan group also has a survey of underemployment that comes out on a regular basis. Without taking up too much time, is the department of the view that that is generally a robust, reliable measure?

**Ms Paul:** I am happy to take that on notice.



**Senator ABETZ:** Coming back to the JJ Richards case, whereabouts is that in the system? Is it on appeal to the High Court?

**Senator Chris Evans:** There is a series of appeals.

**Mr Kovacic:** I think the appeal to the High Court has not been heard.

**Senator ABETZ:** Will the department, the minister or the Commonwealth seek to intervene in this case?

**Senator Chris Evans:** We have not at this stage.

**Mr O'Sullivan:** If I can clarify, the JJ Richards matter is currently before the Federal Court, not the High Court. The government has made no decision to intervene in that matter and did not intervene in any previous JJ Richards matters.

**Senator ABETZ:** Is the government satisfied that the decision in the JJ Richards case is an interpretation of the Fair Work Act that the government had expected?

**Ms Paul:** I do not think we can answer that, given the proceedings.

**Senator ABETZ:** I would have thought that is why the government might intervene by saying: 'This is an interpretation of the Fair Work Act which we did not intend. You argue your case. If the court agrees with you, all well and good. If the court decides that is what government might have wanted to say, but the legislation does not actually say that then we might have to move an amendment to clarify things.' Just because it is before the court does not stop the government from indicating whether or not this is a decision that was anticipated because that is how it intended its legislation to operate.

**Senator Chris Evans:** I will say a couple of things before the department responds. The first advice I give in these matters when parties react to initial decisions is to have a Bex and a good lie down. You might recall that in relation to the case involving the retail industry and casual schoolchildren workers after hours there was much angst—

**Senator ABETZ:** Yes, the minimum hours.

**Senator Chris Evans:** and gnashing of teeth. There were demands for all sorts of things. I suggest that we might let the appeal systems work as they are intended to work under the act. As you know, a couple of cases have run and appeals have been lodged. I think we still have one.

**Senator ABETZ:** It is now before the Federal Court.

**Senator Chris Evans:** I think we may still have one more to go. As you know, we have had a couple of decisions where one overturned the other or there was a different result. One of those was based on what was a pretty poor case being argued. I think if people react to every individual decision, we can get ourselves into a bit of a mess. We have designed the act with rights of appeal to higher courts. My general tendency is to let those run before I come to any conclusions about the act and how it is being interpreted. We have those appeal processes and we have the right to intervene. We have not, at this stage, taken a decision to intervene in the JJ Richards matters.

**Mr Kovacic:** I would add to the minister's comments a couple of points I made before. Clearly, the threshold issue in this matter is whether the TWU was genuinely trying to reach agreement. That is an issue that is common both to the Fair Work Act and its predecessor the Workplace Relations Act. The other extension of that is that, clearly, a determination of

whether a party was genuinely trying to reach agreement is largely decided on the facts of the particular matter. That has been the case to date and we would anticipate that to continue to be the case. As the minister said, you have a situation where the act provides mechanisms in appeals to address issues where parties are disaffected, and I suppose this really goes to—

**Senator ABETZ:** With respect, I know all that. Stop winding down the clock.

**Mr Kovacic:** I am not winding down the clock. I am trying to assist with the factors which the court would take into account.

**Senator ABETZ:** Yes, and I am aware of those. One of the issues in the J.J. Richards case is whether the protected action may only be taken after bargaining has commenced, and that is something that was stated very clearly in the explanatory memorandum. If the current decision in the J.J. Richards case, as it currently stands, were to be upheld on appeal then we might have a dilemma, would we not, between that which the explanatory memorandum asserts and that which the law would actually say, that there would be a conflict. In those sorts of circumstances, I would have thought it might have been good public policy for the government to consider its position and advocate for its position before the Federal Court.

**Mr Kovacic:** I will make one point. There was a question you asked at February estimates this year which went to the text of the explanatory memorandum. I cannot recall the number of that question but it certainly provided an explanation of the reference that you had to the words in—

**Senator ABETZ:** It is at paragraph 1630 and 1708, if I recall.

**Mr Kovacic:** From memory, that sounds correct.

**Senator ABETZ:** Not if I recall, it is in front of me! Has the department had a lot of input into the Safe Rates Advisory Group? I know the parliamentary secretary has been given the running on that. Is that being driven mainly by this portfolio or the transport portfolio?

**Mr Kovacic:** It is this portfolio which is taking the lead on the issue.

**Senator ABETZ:** So this is the lead agency?

**Mr Kovacic:** That is correct. We are consulting with our colleagues in the Department of Infrastructure and Transport.

**Senator ABETZ:** That is the one—infrastructure and transport—Mr Albanese's portfolio. The government is still in the process of finalising its response?

**Mr Kovacic:** That is correct. You might recall late last year there was a directions paper issued and submissions received.

**Senator ABETZ:** I know about all that. All I wanted to ask was, 'Has the government has formulated its responses yet?' The answer to that is 'no', so we can move to the next question.

**Senator Chris Evans:** As long as you do not then suggest that we did not give you the full answer. There is more information Mr Kovacic wanted to provide to you.

**Senator ABETZ:** If I want more information I will ask for it. Will the report or the response be made public?

**Mr Kovacic:** Ultimately, that is a matter for government.

**Senator ABETZ:** Minister?

**Senator Chris Evans:** We will make that decision when we get there.

**Senator ABETZ:** I notice that on 10 September we were advertising for deputy presidents and commissioners.

**Mr Kovacic:** That is correct.

**Senator ABETZ:** I thought we had a short list or long short list of previous applicants. Are we asking people that previously had applied but been overlooked to reapply, or are their applications still on foot?

**Mr Kovacic:** I will pre-empt what I am about to say as we have a slightly different process. Up until now we have largely advertised commissioner vacancies as those vacancies have arisen. That has been quite a resource intensive process, so what we are looking to do is the equivalent of what the Attorney-General's Department does, and that is an annual process of calling for expressions of interest to establish an order of merit for appointment as either a deputy president or a commissioner of Fair Work Australia and when vacancies arise they can be drawn down from the order of merit. So we are now looking to move to an annual process.

In terms of applicants, those that were shortlisted on the last occasion of commissioner appointments, in informing them that they were unsuccessful—

**Senator ABETZ:** We do that now?

**Mr Kovacic:** We do.

**Senator ABETZ:** Good.

**Mr Kovacic:** it was indicated that there were some further advertisements imminent and that they may wish to consider applying for those positions and it would be open to any previous applicants to again apply. We have in the order of 160 expressions of interest for that round of ads.

**Senator ABETZ:** I did not know that there were that many union officials! Let us hope that we will find our way to being able to appoint somebody from the private sector after the last 10 appointments. This be an annual event?

**Mr Kovacic:** That is correct.

**Senator Chris Evans:** Mr Kovacic is right, but I would also say it is a bit of an experiment. We had concerns about how long the process was taking and how resource intensive it was. What we found last time was that after we had advertised we then had an expression from the president that he had a vacancy somewhere else or someone else had resigned and it seemed to us we were going to have to start another process and another round of expense. The vacancies can be in different states, so we might have advertised for Sydney and then soon after that closed we have resignation in Queensland. So we just thought we would try to have a system that was a bit more efficient, less resource intensive, and took expressions of interest. They will obviously be state specific: some people will say, 'I'd like to apply for a job in Sydney but I'm not interested in anywhere else.' We are just trying to work through whether a better model works for us. We have got a couple of vacancies for deputy presidents and for some commissioners as well, and of course there may be more—for instance, occasionally someone indicates they are likely to retire early next year et cetera. We are just trying to manage that a bit better.

**Senator ABETZ:** I understand that. How long will previous applications be treated as live applications, for 12 months?

**Mr Kovacic:** They would need to reapply for this process. The process will deliver a short list to the minister of people who are assessed as suitable for appointment. If, for instance, there was a vacancy in South Australia late this year or early next year then that order of merit could be drawn upon. The order of merit would stand for about 12 months, until you establish a new one.

**Senator ABETZ:** Until you establish a new pool?

**Mr Kovacic:** The intention is for 12 months, yes.

**Ms Paul:** Yes, 12 months

**Senator ABETZ:** Do we have an indication as to how many vacancies we might be expecting this year?

**Mr Kovacic:** To be precise I would prefer to take it on notice, but the minister has alluded to a couple, probably one at the deputy president level and one at the commissioner level.

**CHAIR:** It will have to be the last question, if you have one, Senator Abetz.

**Senator ABETZ:** On the airline dispute, is the department in contact with in particular the tourism sector and alert to the consequences the disruptions are causing to a sector that is doing it very tough?

**Mr Kovacic:** We have been in discussions with a range of industry parties as well as public sector agencies, one of which is the Department of Resources, Energy and Tourism.

**Senator ABETZ:** Specifically about matters tourism?

**Mr Kovacic:** In the context of this one, primarily in terms of tourism.

**Senator ABETZ:** Thank you.

**CHAIR:** We will now adjourn until tomorrow morning.

**Committee adjourned at 23:00**