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STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

Reference: Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

MONDAY, 20 APRIL 2009

SYDNEY

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SENATE STANDING COMMITTEE ON

EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

Monday, 20 April 2009

Members: Senator Marshall *(Chair)*, Senator Humphries *(Deputy Chair)*, Senators Back, Bilyk, Cash, Collins, Crossin and Siewert

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

Senators in attendance: Senators Abetz, Back, Bilyk, Collins, Fisher, Marshall, Siewert, Xenophon

Terms of reference for the inquiry:

To inquire into and report on:

Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

WITNESSES

Committee met at 11.00 am

CHAIR (Senator Marshall)—I open this public hearing. On 19 March 2009 the Senate referred to this committee an inquiry into the provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 for report to the Senate by 7 May 2009. This bill is the first of two bills which make transitional and consequential provisions in relation to the new workplace relations systems set out in the Fair Work Bill 2008. The bill repeals the Workplace Relations Act 1996, other than schedules 1 and 2. It makes transitional provisions to employers, employees and organisations from the old Workplace Relations Act system to a new system and makes consequential amendments to Commonwealth legislation essential to the operation of the Fair Work Act.

Witnesses appearing before the committee are protected by parliamentary privilege. This gives them special rights and immunities because people must be able to give evidence to committees without prejudice to themselves. Any act which disadvantages a witness as a result of evidence given before the Senate or any of its committees may be regarded as a breach of privilege. I ask participants in this inquiry—those appearing before us and those in a public area—if they could switch their mobile phones to off or to silent; it would be appreciated.

[11.01 am]

BROWN, Ms Leah, Senior Workplace Policy Advisor, Australian Business Industrial

GROZIER, Mr William Dickson, Director Industrial Relations, Australian Business Industrial

CHAIR—Welcome. Thank you for your submission. Did you have any additions or alterations to your submission?

Mr Grozier—No.

CHAIR—I invite you to make some opening remarks to the committee, to be followed by questions.

Mr Grozier—Thank you. I thank both you and the committee for inviting us to follow up on our written submissions. Introducing ourselves, ABI is the successor of the New South Wales Chamber of Manufacturers and the registered industrial relations affiliate of the New South Wales Business Chamber. The Chamber of Manufacturers was established in 1885. During the last century, the Chamber of Manufacturers represented members and was an active participant in both the federal and the New South Wales state political and industrial systems. Through its membership and the membership of the New South Wales local chambers of commerce network, New South Wales Business Chamber represents over 30,000 employers throughout New South Wales. ABI is a peak council of employers in the New South Wales industrial relations system and one of the first transitionary registered employer associations under the Workplace Relations Act. It is responsible for New South Wales Business Chamber workplace policy and industrial relations matters.

The transitional and consequential amendments bill that is before the committee has been subject to comment and union interests during the latter part of its drafting through the COIL process. ABI was a part of that process, and on behalf of its members it appreciates the opportunity given. I would also like to record my appreciation and recognition of the departmental officers who worked with the COIL. They were highly professional and seemingly tireless.

The bill before the committee is a significant piece of legislation in its own right. As has been commented upon in a number of places, it is very complex and detailed. It is dealing with the transition of employment arrangements, which were regulated under the various state systems as well as employment arrangements developed under a number of different sets of federal rules. The bill is also providing a two-step transition with two different start dates. ABI does not support the intended 1 July start date, but we recognise that the government has made a decision on that matter. Also, as I note later in the submission, we do not support the retrospective application of the National Employment Standards on agreements which are continuing after the proposed safety net commencement day.

As we said in our 17 February submission to this committee, when it was looking at the Fair Work Bill, we are very concerned about the potential for cost increases and negative impact on business confidence arising from the new system and transition into it. The rapid deterioration in economic circumstances and outlook and the extraordinary measures which the government has put into place to blunt its impact do not make this a good time for a major shake-up of employment regulation. Businesses, particularly smaller businesses, are looking to their survival. Some bigger members are rationing hours. We are part way through a series of seminars throughout New South Wales about the new system. One of the strong messages we are getting from these seminars is that making big changes to industrial legislation is just adding to the list of problems businesses currently face. We are not suggesting that the government put this legislation on hold or anything like that, but we do urge that it be sensitive to the potential for harm from increasing costs or new inflexibilities in today's economic circumstances.

I might also add that because the bill is complex and detailed, it seems likely to us that problems will come up in the future, which were not picked up on either through this process or the preceding COIL and higher level government officials processes. We can see that there may be a need to amend the transitional provisions or even the main act to deal with these. Our written submission flags a number of concerns. The general rule during a bridging period is that things that took place before the bridging period started should be subject to the present legislation and those which take place on or after its commencement should be subject to the Fair Work Act. We support this approach, but we think that the current provisions will mean that some matters starting before the commission could end up before Fair Work Australia because of a procedural development. This seems to us to be potentially confusing.

The bill has a number of implications for award modernisation and modern awards. Currently modern awards will start on 1 January. We ask whether modern awards, or at least their wages provisions, could actually apply in individual workplaces on the first day of a pay period which starts at that workplace on or after 1 January. The bill protects employees' take-home pay where the start of a modern award would reduce his or her take-home pay for the same work. Award modernisation is not intended to disadvantage employees, or indeed add to employers' costs. We believe that the take-home pay provision is one-sided and will end up adding to employers' costs. We think that the need to avoid increasing employers' costs should also be dealt with in the bill, or perhaps by an amendment to the minister's request.

We are also concerned that the proposed interim review could end up adding to the costs and changing awards soon after they have been completed. We agree that there should be a way of addressing unanticipated consequences, but do not support a wholesale review if it means that modern awards are to be assessed against different criteria from those they were made against. We think that the current requirement in the act that the commission have regard to the impact of the modern awards that it is making, with special reference to their likely effects on the level of employment and inflation, should be retained to the remainder of the award modernisation process. We also think that special consideration of their impact on employment and inflation should be retained for modern awards into the future under the Fair Work Act, at least until the economy improves.

ABI supports the government's decision that enterprise NAPSAs, and in New South Wales preserved collective state agreements which were deemed to be enterprise agreements, can be made into enterprise awards. We generally support the proposed modern enterprise awards objective—

CHAIR—Sorry, my phone is ringing. I did not take my own advice about phones. I apologise for that.

Senator SIEWERT—Now apologise for the actual ring!

Mr Grozier—We generally support the proposed modern awards objective, although, as I have just submitted, we do not support the current form of the proposed modern awards objective. We have proposed that, when considering an application to make a modern enterprise award from an enterprise preserved collective state agreement, Fair Work Australia should have regard to the fact that wages will usually bargained wages rather than fair minimum wages.

Finally, we make two comments about the bill's arrangements for agreements. We do not support the retrospective imposition from 1 January of the National Employment Standards on agreements made before the standards started. Our preferred option is that the standards will not apply until a transitional agreement is terminated or replaced. Failing that, we ask that the standards at least not apply where the agreement deals with a matter which is under the standards.

We generally support the changes made to the greenfields agreements provisions; however, ABI does not support requiring an applicant for approval of a greenfields agreement having to show that the agreement is in the public interest. We believe that what this would require is unclear and that it is likely to give rise to extended approval hearings where there is a minority union which is unhappy. Thank you for allowing me the time to make this statement. We are certainly happy to take any questions that you might wish to ask.

CHAIR—Thank you, Mr Grozier. I was interested in one of the things and maybe you might like to explain it in some more detail. You said that maintaining take-home pay for existing employees will lead to increased costs for employers. I am just wondering how that naturally follows.

Mr Grozier—The confusion is probably because I was trying to abbreviate a little. Our concern is not that there might not be some provision of this kind but rather that, as it is currently in the bill, it is one-sided. It seems to us that the situation the provision will give rise to is that employers lose both where costs increase and where they do not. Our suggestion is not that take-home pay is not protected as is being proposed by the bill but rather that there is some mechanism which would enable employers facing an increase in costs from the commencement of a modern award—and that might be in the same workplace as other employees are being protected from a loss of take-home pay—have some way of protecting themselves against those increased costs.

One possible way is to make a provision in roughly similar sorts of terms. One way might be to provide a mechanism where an employer, in rather the same way as an employee could seek a take-home pay order, could seek some redress from Fair Work Australia from the immediate imposition of increased costs. Another possibility might be that the minister amends her request in such a way as to provide greater certainty of that

part of the requirement on award modernisation, which would impact on the actual process of making modern awards.

CHAIR—The end result, though, of what you are suggesting is that there will ultimately be no change anywhere, will there?

Mr Grozier—Not quite, Senator, but the immediate impact would be that employers are lawfully employing under the diversity of instruments which are coming into the system or have come in but only been partially integrated into the system. There are ways of phasing things in which do not add to costs associated with the increases of the change of system, as opposed to increases which come about from award reviews or minimum wage reviews.

CHAIR—There is another thing that I would like to cover with you quickly. I do not mean this at all disrespectfully, so please accept that from the beginning, but I have been involved in industrial relations for a long time. Even if we accepted—which I do not—at face value that this will increase costs for employers, your argument is that now is not the time to do it. I have been involved in industrial relations during a number of boom times and during a number of recessions. I have never heard employers argue that this is the time when we should be doing these kinds of restructurings. I do not do this disrespectfully, but I think that this needs to be put and you need to respond to it: isn't this the same position that employers have always taken, with it just being the case that there is another convenient argument at this point in time as to why these reforms should not be taking place? On other occasions, other things going on at those times have been used as matters of convenience. I put it to you that that argument is a convenient argument, not a real argument.

Mr Grozier—I certainly do not take any offence from the question that you are putting. The first point that I want to make—fairly strongly—is that I have not come across any of our members who see a benefit of their current economic circumstances as being able to argue for a better outcome. All of our members would like economic circumstances to be other than they are. We need to distinguish two sorts of things here. While obviously employers would be pleased if costs of any kind did not go up—not just their employing costs but material costs and so on—they also live in the real world. We, for the first time in many years, argued in a wage submission to the Fair Pay Commission that in this review of wages it in fact should pass on a zero increase. That has not been our practice in the past. We may have accepted lower increases than individual perceptions of equity might suggest is reasonable, but we have never opposed an increase outright. These are exceptional economic times.

The other aspect in your question is that what we are talking about with respect to the restructuring of the safety net is taking a range of situations which are lawful until a certain date and then imposing new costs. It is not quite the same thing as reviewing what fair levels are from time to time. It seems to me that—

CHAIR—Are you talking about the NES?

Mr Grozier—I am talking in particular about the NES, but we recognise that there are some costs in that that cannot be avoided. It is also more expressly in respect of award modernisation and modern awards. Increases that come about from re-regulation are of a different kind than those from minimum wage reviews. It is obviously an argument that is about, because times and outlook are so uncertain, but it is not a convenient argument and it is not our practice to seize the best available argument for the times to seek zero outcomes.

CHAIR—I guess it just occurs to me that you would argue against whether we were in a boom time or not, anyway.

Mr Grozier—We do not unfortunately have the luxury to test that in actuality.

CHAIR—Yes.

Mr Grozier—But if one were to look at our response to the government's development of its pre-election policy, for example—and that clearly was being developed in a time which was much more fortunate—I do not think that it could be argued that we were saying, 'You shouldn't do this because it might increase costs,' as a matter of course. We were trying to provide a balance response to what the then opposition, now the government, was developing at the time.

CHAIR—Thank you, Mr Grozier.

Senator SIEWERT—You asked a question that I want to follow up on. There were some comments made about award modernisation and take-home pay. You believe that the AIRC should continue to hear matters after 1 July. The FWA are the same people, so I am just wondering how you see it making a practical difference if they remain sitting as the AIRC.

Mr Grozier—The senator is quite right in her underlying assumption: the appointments of Fair Work Australia are also appointments of the commission. There is nothing in the transitional arrangements which suggest that the person would change or anything like that. It is rather that it just seems to us that it is potentially confusing for parties if they lodge things with the Australian Industrial Relations Commission and get something back from another body called Fair Work Australia. It will probably be even slightly more confusing, because under the operations of the Fair Work Act, Fair Work Australia is going to have its own rules and procedures and to some extent different legislation than in its operation when assuming the role of the commission. It seemed to us that it would be cleaner if things starting in the commission finished in the commission. Let us say that an unfair dismissal case goes before the commission and is determined eventually by the commission and is appealed. If the appeal were to go to Fair Work Australia, that would be fine. It seems to us that there is potential for interaction with Fair Work Australia, against the background of the commission continuing and things like us, to be unnecessarily complicated for no good purpose.

Senator SIEWERT—It is going to be a confusing period, come what may. As I understand the bill, matters are still being considered under the Workplace Relations Act. But wouldn't it be more confusing to have FWA revert to the commission? Or are you saying that FWA should not start until January?

Mr Grozier—That observation is not about that larger agenda of whether there should have been a two-phase start. We are perfectly content for a termination which took place prior to—let us assume—1 July but is not notified until after 1 July to go to Fair Work Australia. We are more concerned about the ones that are notified prior to that. Fair Work Australia might assume a role, then go away, then assume another role and then go away again. That seemed to us disorderly and not helpful to the parties, most of whom do not spend a lot of time in this area.

Senator BACK—Before asking my question, I will say that I look forward to the opportunity to at some time join a discussion with you, Chair, on the question that you asked Mr Grozier. I want to confirm the concern that you raised about the 1 January date. The concept of making it the first pay period after 1 January would be much more sensible in terms of the administrative process. That would make it for most people Thursday 7 January. You mentioned that areas of concern have been raised in the seminars that you are conducting for employers. I am particularly keen to know whether you can categorise any specific ones that are likely to cause a greater degree of concern to small businesses and to businesses in rural and regional areas and are likely to create a greater degree of reluctance to take staff on or perhaps to let staff go. If you could advise us of those, that would be good.

Mr Grozier—With respect to the first issue, timing, hopefully the commencement of the whole modern award but certainly the commencement of wages should be linked to a particular business's pay period. I am hopeful that that is an uncontroversial request—

Senator BACK—So am I.

Mr Grozier—and it will come to be. Our written submission draws attention to the fact that the reviews of Fair Work Australia on minimum wages in the normal course would be handled that way. It seems to us that it is not likely to be particularly controversial, but it is important particularly for enterprises which have shift operations.

Turning to your second question, there are obviously concerns apart from the timing of the introduction of new legislation which members have raised. I do not think I say anything novel if I indicate that one of those is that numbers of small businesses are concerned about the operation of the new dismissal procedures from 1 July. That has been well publicised and, certainly, we are not being told different things by our members. Small members are also a little worried about what in certain circumstances can become a compulsory bargaining system. We have tried to be at pains to suggest to them that this is not going to happen overnight, that it will filter through, but there is no doubt that some of them have concerns, particularly those in industries where wages are close to the pay scale rate, where there may not be a long history of bargaining. They are concerned about the low-pay authorisations and the potential for arbitration out of those.

I was about to confine myself to the transitional, but the senator's question obviously raised things that people are saying about the main legislation and I felt I should answer. If we go to the transitional legislation, yes, people are confused by it. That obviously could be a result of who is giving the presentation—I perfectly accept that—but it is detailed. There is a feeling that there are lots of problems at the moment, and 1 July looks pretty close. There is starting to be a realisation that people have to find time to look at the modern awards which are being issued by the commission, as that is happening. I think there has been an insufficient

understanding that the bringing together of a relatively large number of pre-reform awards and NAPSAs into one means that there will be changes, and people are starting to realise that.

Senator ABETZ—I have a few questions. First of all, thank you for your submission. On a small but potentially important area there is suggestion that wage increases start as at the next particular pay that would be paid to the employee. I am trying to cast my mind back and I cannot recall, but how did employers deal with that situation back in the eighties and the nineties? I recall that I was an employer at that time and there were national wage increases et cetera. When were those payments required to be made? Was it from a fixed date, like is being suggested here, or was it to take effect from the employee's next pay?

Mr Grozier—I am forced to rely a little on my memory which is unfortunate.

Senator ABETZ—Mine completely evaded me and that is why I am asking.

Mr Grozier—I do not recollect increases starting on a set date in the federal system for a very long time, with one relatively recent exception. That was the first decision of the Fair Pay Commission, which had a 1 December start date. It was the experience of our members who were giving effect to that—this prompted me to have a look at this issue, and independently of that our council also raised it—that there is no doubt that a number of employers were highly inconvenienced by a pay increase starting in the middle of a pay period. Some of them found that the administrative difficulties of working out proper pay were so great that they actually back paid to the beginning of the previous pay period.

CHAIR—What is the norm for the pay period cycle in the areas that you would cover? Is it weekly, fortnightly or monthly pay?

Mr Grozier—That depends. We have a fair diversity of members. It is by no means a rule, but I suppose that the higher the likelihood that employees are directly award-reliant the more likely that the pay period is short. So at the extreme end, away from modern awards, salaried professionals and the like are monthly. It is unlikely that you would have more than a fortnightly pay period for most award-reliant industries, and it could well be weekly.

Senator ABETZ—In relation to award modernisation, you suggest in your submission:

… award modernisation is not likely to develop the "neutral" outcome which seems intended …

We have received a number of submissions in relation to that. If I recall correctly, some of us in fact tried to move amendments to the Fair Work Bill quoting the good Deputy Prime Minister's words as to no extra cost to employers and no detriment to employees, but my good friend the chair and a few others found it important to vote against that proposed amendment. Would you have any particular drafting in mind that might give effect to what you are suggesting? Last time we suggested it, unfortunately the wording was not to the chairman's satisfaction, so it did not get up in the Senate, but I am just wondering whether there is another approach that we might be able to take. This was delivered with a degree of fanfare, if I might say, that employers would not be adversely impacted, and nor would employees, and it was seen as a win-win. Now with this legislation we are seeing that it will be enshrined in the legislation that employees will not be worse off, but I am not sure that the reciprocal in relation to employers is going to be contained. I would be interested in your views and comments on that.

Mr Grozier—I think that, in trying to see a way through for our members, we were conscious of the committee's findings in the inquiry into the Fair Work Bill. We have approached the issue by suggesting a number of different possible ways of achieving that end. I say that merely by way of preface because I do not have a suggested drafting with me. In part we have suggested that there may be one or another approach which could be made legislatively or that it may be something which could be addressed in the minister's request. I am certainly happy, if the committee would think it useful, to perhaps come back with proposed legislation. I do not presume to try and cover all of the possibilities, but I am certainly happy to propose some draft words.

Senator ABETZ—If you would take that on notice I would be much obliged. I fear that if the minister's request were to be amended it would in fact be amended to reflect the fact that, quite frankly, the minister's request, that nobody is going to be worse off, cannot be delivered upon. That will be very interesting in the totality of what we are facing. I think that was a realisation that struck the government when they refused to support our amendments. If it would have been easy to implement with no problems associated with it, you would have thought Labor would have said, 'Look, it is completely unnecessary to do this but we are more than happy to legislatively enshrine the minister's request and the minister's promises prior to the election.' Anyway, that is why I think an amendment to the minister's request would be fraught with danger because I think the minister would have to back down from her promise. If you could have a look at that for us I would

be much obliged. I was also interested in your views that Fair Work Australia should pay special attention to employment and inflation when it is performing its functions. I am reminded of the father of the Minister for Trade, who said, in the language of the day, when he was the Treasurer that one man's wage increase is another man's job. I think that still holds true in the economic circumstances of today. Are you able to flesh out for us why Fair Work Australia should be concerned about its decisions on employment levels and inflation?

Mr Grozier—As the current legislation stands, this is a special requirement with respect to those economic implications of what the commission is doing. Currently the Fair Work Act provides that Fair Work Australia is to have regard to a range of factors including those. I should also say that, on our understanding of the transitional legislation, that requirement on the commission during the bridging period, when it finalises the third and fourth rounds and also completes the first and second rounds, will not be an obligation on the commission. We would be supportive of the ongoing requirement that these are economic consequences of special consideration both for the commission and for Fair Work Australia. But, if the government is of the view that these are factors which in ordinary times should be balanced against other factors roughly equally, then until we move to better economic times we would like to see that these are issues of special consideration and not just one of a number of factors which are under 'have regard to'.

Senator ABETZ—It is interesting that you should make those observations because the Prime Minister is of course very strongly of the view that in these times parliamentarians should not be given wage increases. In my home state of Tasmania at the moment the Labor Premier is talking about not increasing public servants' wages, to try to maintain employment levels within the public service, and denying them rights to imported cars—but I will not get on to the luxury car tax and the green car guide—and mobile phones et cetera. So clearly we are living in economic times that are making the biggest employers in the country concerned, which are governments. At the federal level they are shedding jobs through the tax office and elsewhere. The state governments are pursuing a similar line. So job protection and maintaining people in employment clearly needs to be a very important consideration at this time. But I understand Senator Fisher has some questions.

CHAIR—I am surprised there is time after that little speech! It is over to Senator Fisher.

Senator FISHER—Mr Grozier and Ms Brown, has your organisation been part of the COIL process around the transitional bill?

Mr Grozier—In my opening statement I advised the committee on that.

Senator FISHER—Thank you. What are your expectations of the future COIL process in that respect?

Mr Grozier—My understanding of the government's proposals with respect to putting the Fair Work system into place is that it anticipates a second bill with a mixture of further consequential amendments—primarily other pieces of legislation—and perhaps also dealing with any referrals which states may have made in time for the legislation. I have no idea whether the government proposes that that be a matter for the COIL or not. We have asked that the government give consideration to a COIL meeting when it develops the regulations.

Senator FISHER—Are you able to discuss the substance of the discussions that have happened at COIL?

Mr Grozier—No.

Senator FISHER—Why not?

Mr Grozier—The COIL process is such that parties are requested to sign, and indeed do sign, a confidentiality agreement to that effect.

Senator ABETZ—Operation Sunlight did not quite hit that!

Senator FISHER—Is the committee able to see a copy of the confidentiality agreement?

Mr Grozier—I am just trying to think whether I have a copy of it left. I think I faxed it off and I might not now have a copy of it. But I do not understand it to be a confidential document.

Senator FISHER—If you could provide to the committee a copy of the confidentiality agreement, that would be appreciated. In respect of the award modernisation provisions, have you formed an understanding of the reason why the government would seek, with a transitional bill, to legislate one part of its no disadvantage promise—that is, in respect of employees—but not legislate the other part of its no disadvantage promise—that is, in respect of employers? Do you understand why that may be so?

Mr Grozier—I have no insight into the government's thinking on that matter.

Senator FISHER—What is your presumption, Mr Grozier? You are a man of equal experience to, if not more than, our good chair in this area.

CHAIR—I seriously doubt that, and I do not think Mr Grozier would want to compare his experience with mine!

Mr Grozier—The chair is correct: those are heights to which I do not aspire! What prompted the government's thinking with respect to the transitional provision, I do not know. Of itself, it is not unreasonable that, in a situation of change, where there has been no change of the kind I have talked about there should not be a change imposed on employees. Our concern with the take-home pay provision is not the fact of it, but the one-sidedness of it.

Senator FISHER—So it is fair to suggest that the government is attempting to bolster its part of its promise to employees that they will not be disadvantaged through the award modernisation process in respect of the take-home pay provisions. However, is there any other way, in your view, that employees could be disadvantaged by the award modernisation process that will not be covered by the take-home provisions, even if they were to be passed in their current form? Are there other ways in which employees could be disadvantaged?

Mr Grozier—I am not sure of the senator's question.

Senator FISHER—Well, the Deputy Prime Minister has promised that the award modernisation process will not disadvantage employees. It was quite a broad statement. There are now provisions in the transitional bill that talk about something in respect of take-home pay. There may be ways in which an employee could be disadvantaged by the award modernisation process, other than those which could be addressed by these take-home pay provisions even if they were to be passed in their current form.

CHAIR—Can I clarify that question before you answer it? Senator, just so I understand what is being asked: you are asking about the award modernisation request. That is the—

Senator FISHER—I am asking about the transitional bill provisions—sorry. Keep going, Chair. Obviously the award modernisation request is part of the background to the question.

CHAIR—You keep referring to this promise, but I think you are actually talking about the award modernisation request, which talked about the intention of the award modernisation process being not to increase costs for employers—

Senator FISHER—For the purposes of the hearing, yes, Chair.

CHAIR—or reduce conditions for employees. That was the intention of the request.

Senator FISHER—Yes, Chair.

Mr Grozier—Thank you. I think, if I understand the question correctly, the answer is no. I say that in part because the transitional legislation would appear to preserve more favourable entitlements in awards and NAPSAs than might be in, for example, the National Employment Standards. Also, the reach of the general protections in the Fair Work Act seems to us to be very wide.

Senator FISHER—What is the detail of the consequential impact of that on employers' costs in the award modernisation process? You have given us an outline in the broad. Can you give us some detail as to the impact of those other examples you have just given?

Mr Grozier—I think I have to answer no to the senator's questions.

Senator FISHER—You might take that on notice, Mr Grozier.

Mr Grozier—I might.

CHAIR—Is that because you did not like the answer 'no'?

Mr Grozier—One difficulty with respect to the modern awards which have already issued—and clearly this has not been done with those which are yet to issue—is that the award transitional provisions have not been inserted. The difficulty, therefore, we are facing in trying to identify specific losses and/or gains is that in a sense we do not know what level an award is going to come in at once the transitional provisions have been included. I think there has been an amount of publicity in some industries—and at the moment they seem more to have been state regulated industries—about the impact of the modern award as issued on the costs of employers either in sectors of the coverage of the modern award or perhaps in some states where that modern award will apply.

CHAIR—Isn't that the real problem, though? I would be interested to see if you have a solution for this. The modernised award system picks up the concept of a safety net provision of awards, as opposed to the state regulated system, which actually is a set of awards that govern the terms and conditions of employment. I think I used in previous hearings the old—if you have been around as long as I have, as Senator Fisher suggests—concept of minimum rates awards—

Senator FISHER—Very old.

CHAIR—and paid rates awards. It is that dichotomy there. But that is actually the seriousness of the problem, isn't it, because the modern award system in terms of take-home pay, because of the minimum rates concept behind it, is not going to reflect the paid governing terms and conditions, as state awards and NAPSAs will in this situation, particularly in the state of New South Wales. That is a real problem: how do you transfer from paid rates awards, effectively, to minimum rates awards without protecting the take-home pay? How do you do that?

Mr Grozier—Thank you for saving the easy question until last! I think that New South Wales is interesting in that, as you have alluded to, in some industries perhaps, like transport, the New South Wales award regulation has led to higher outcomes than might end up in the modern award. Equally, in some industries, such as retail or hospitality, the reverse is true. Part of the difficulty is that it is not simply that federal awards have now for some time provided minimum standards whereas state awards, depending on the jurisdiction, have provided fair and reasonable wages and award conditions—or some other phrase like that. The situation is more complicated even than the driving requirements of the various acts would suggest.

CHAIR—That is right. It is difficult.

Senator FISHER—Mr Grozier, what is the duration of your COIL confidentiality agreement?

Mr Grozier—The senator has again taken me unawares. I suspect for life, but—

CHAIR—But, as we know, you will forget soon!

Senator FISHER—Is that your answer, Mr Grozier?

Mr Grozier—My recollection is that—

Senator ABETZ—Even cabinet documents are allowed out after 30 years; a COIL should be allowed out after 30!

Senator FISHER—Fail FOI!

Mr Grozier—My recollection is that there was no time limit on the confidentiality agreement. Quite clearly—

Senator FISHER—All right, then. If that be the case, to what extent are you able to speak and is your organisation able to speak about the substance of this bill, and when?

Mr Grozier—I think there might be a difference between a bill which is tabled in parliament and documents which may or may not be in the same form which gave rise to its drafting. I feel under no inhibitions in talking about the transitional legislation or indeed the Fair Work Act. My understanding of the confidentiality agreement goes to the proceedings of the COIL when it was meeting.

CHAIR—I think we did this to death in estimates, didn't we, Senator? Can we—

Senator ABETZ—These people were not at estimates. We got the government version at estimates; it is interesting to hear the players' version at a forum such as this.

CHAIR—Did the committee ask the government for the confidentiality agreement?

Senator ABETZ—I think that if Mr Carter could do so for our Canberra hearings that would be very helpful.

CHAIR—Yes, I do not see why we should not have a copy of that if that is what you want. I do not think it is a problem.

Senator ABETZ—We do not want to embroil you, Mr Grozier, in the grubby art of politics, of course, but—

CHAIR—Or put him in a difficult situation, which—

Senator ABETZ—Of course, that goes without saying, I would have thought, Chair.

CHAIR—So the committee will ask the government for a copy of the standard confidentiality agreement. I do not see why we should not have that.

Senator FISHER—Thank you.

Senator ABETZ—If a minister of the government dines out on the COIL process et cetera—

Senator JACINTA COLLINS—Dines on it?

Senator ABETZ—relies on it et cetera—they can talk about it, saying how good, bad or indifferent it was.

Senator JACINTA COLLINS—Mr Grozier said he thought it was good—

Senator ABETZ—I was just about to venture into that area.

Senator JACINTA COLLINS—He said that in his opening comments—

Senator ABETZ—Yes, I was just about to venture into that area—that Mr Grozier did not feel constrained about saying how good the process was. I am just wondering about whether even saying good things about it might put you in breach of your confidentiality agreement.

CHAIR—I do not know, but we might—

Senator ABETZ—But I am sure we will get a Federal Police investigation into it nevertheless, to ascertain one way or the other!

CHAIR—I think you are probably protected in these proceedings, anyway, Mr Grozier—

Senator ABETZ—Oh, that is interesting!

CHAIR—insofar as you might be—

Senator ABETZ—I think you might be right, Chair.

CHAIR—I think you are too, but we would expect Mr Grozier not to breach his confidentiality agreement.

Senator ABETZ—Why?

CHAIR—But, if he does, he is probably protected. But that is a matter for lawyers like you, Senator Abetz, to indulge in forever. Mr Grozier, did you have anything you wanted to finish off by advising the committee, because we are probably out of time?

Mr Grozier—Thank you, Senator. It is probably now coals to Newcastle, but, as I recollect, in my opening statement I was drawing attention to the highly professional work of the DEEWR officers. I doubt that that is offensive to the agreement, but it is certainly true.

CHAIR—Thank you for your submission and your presentation to the committee today.

[12.00 pm]

HART, Mr John, Chief Executive Officer, Restaurant and Catering Australia

CHAIR—Welcome. Thank you for your submission. Do you have any alterations or changes to make?

Mr Hart—No, I do not.

CHAIR—I invite you to make some opening remarks to the committee, to be followed by questions.

Mr Hart—Thank you. Firstly, I say that the views expressed in our submission and the views I will express today are those of our organisation and the state associations which are members of our organisation; we have come to these views through our process of negotiating such matters. I start out by saying that we believe that this bill will decide the fate of the Australian restaurant industry. We know that our businesses survive by the slimmest margin; the ABS reports a 3.8 per cent margin for our businesses, and we believe that whole margin has the capacity to be wiped out by this one activity, the process of award modernisation. We believe that it is this critical scenario that makes the handling of award modernisation, particularly by the Australian Industrial Relations Commission, even more contemptuous. We believe the commission have disregarded what appears to be the most extensive submission that they have received by simply extending the current federal hotels award to cover restaurants. We believe that, rather than building relevant awards from the ground up as was the promise in the policy position taken to the 2007 election, what has taken place is a simple and lazy extension by the commission of the hotels award to cover restaurants around Australia. We believe that this is not what the government wanted, not what the hotels wanted, not what the relevant union wanted and not what we wanted; it is simply a lazy extension of the hotels award by the commission.

We believe that, if this bill is allowed to take effect, we will see an incredible impact on our industry that would take place in spite of not having had any assessment of the impact. This committee has received, obviously, a considerable number of submissions in relation to what the impact of this bill would be but has no objective analysis undertaken by the government as to what the impact would be. You can question the data that we put before you and have put before you in the past, but the reality is that you do not have independent data that you are able to question it with. We have undertaken the analysis, and it appears to me that others have not undertaken an analysis to contrast with ours. If you do not believe that the 8,000 jobs that we refer to will be lost, that the $150 million to $250 million impact will materialise in our industry or that the thousand businesses will close as a result of award modernisation in our industry then I would like to see our figures challenged. They can only be challenged if there is data available to contest and refute the claims that we make as to the impact of award modernisation on our industry.

We believe that, whether the modern award for hospitality is phased in over five days, five months or five years, it will still have the same impact. All that the phasing-in process does is extend the pain over a greater period of time. A 15 per cent increase in wage costs is a 15 per cent increase in wage costs whether it occurs over five years or five days.

I will briefly summarise the key points and key recommendations we make in our submission. We suggest that the bill provides for a complete deferral of provisions of a modern award where the award is clearly in conflict with the modernisation request, and that that conflict cannot be remedied through the process of this bill—and we are clear about the fact that we are suggesting 'remedied', not simply spread out over a five-year implementation period. We suggest that the tax cuts that have been announced for 1 July 2009 be used to enable the objectives of the award modernisation process to be achieved. We suggest that the guarantee of no additional cost for employers in the modernisation request be subject to a guarantee in the bill, as the take-home pay guarantee is made. We suggest that there be a small-business exemption to the administrative procedures around take-home pay orders, as we believe the administrative process will be onerous. We suggest that the transition process provide guidance to the commission in relation to when cost impacts should occur. We also suggest that in the passage of the bill a commitment is made to resourcing agreement making in the transition period.

We are pleased to be able to present today; we were disappointed that we were unable to present to your committee in relation to the Fair Work Bill. We submit our thoughts for your consideration and questions.

CHAIR—Thank you, Mr Hart. I recall that previously, in your submission to this committee with respect to the Work Choices legislation, you submitted that wages at that time in your industry were too high and you looked forward to using the opportunity of Work Choices to actually drive down wages and remove penalty rates from the industry. How did you go with that?

Mr Hart—I think the submissions that we made previously were in relation to the overall wage costs of individual businesses rather than the wage costs of individuals. We were suggesting at that time that we were looking to lower the proportion of wages to turnover in our businesses. How did we go with it? Very poorly, Senator. In fact, over the five-year period since the work was done to look at wage costs we have had a 10 per cent year-on-year increase in the wage costs of individual businesses. But, as I did at a time in response to your questions at the time, I make the point that we were concerned about the proportion of wages to turnover rather than the wages of individuals.

CHAIR—I have quoted your submission rather frequently about the place and I think you were specifically talking about wages costs and the removal of penalty rates, but we will not split hairs about whether you meant that generally or individually. The employment ombudsman tells us that in your industry over 40 per cent of employers do not pay the legal entitlement to wages and conditions now. What do you do in your industry to ensure that the minimum rates and conditions are applied to the workforce as it exists presently?

Mr Hart—I will firstly deal with the issue of the Workplace Ombudsman's data. If you turn to that data you will see that the areas of noncompliance are greatest where there are awards of the complexity and intensity of those proposed under the modern award and that the level of compliance is highest in areas where the awards are currently targeted to be phased out. So it is, in fact, the complexity and the onerous nature of the conditions in awards such as those in the ACT and Victoria that create the noncompliance that you speak of. So we certainly target—

CHAIR—Mr Hart, come on! What you are talking about are proposed—

Senator ABETZ—I am sure you are allowing the witness to finish his answer.

CHAIR—Yes, we will, but we are going to have a bit of a discourse, Senator Abetz. It will be all right. I am sure Mr Hart can look after himself—he has on many previous occasions.

Senator ABETZ—Yes, but usually the chair looks after the witnesses.

CHAIR—Mr Hart, are you feeling intimidated?

Senator ABETZ—He cannot answer that. That is justice, Labor style!

CHAIR—Mr Hart, what you are suggesting is that modern awards which are not there yet are where the noncompliance happens and your existing awards that apply do not have noncompliance. But that is not—and you know it is not—what the Workplace Ombudsman found.

Mr Hart—The reality is that the award that is being proposed is a cut-and-paste from the hotels award. Our award in Victoria is also, in the main, a replication of the hotels award. If you look at the Workplace Ombudsman's data as to levels of compliance, you will see very clearly that the highest areas of noncompliance are the ACT and Victoria, both of which jurisdictions have an award that is almost identical to that proposed for 1 January 2010 as the Hospitality Industry (General) Award. The difference is not slight. The difference in negative compliance outcomes in Victoria and the ACT is nearly double what it is in any other jurisdictions. So I can be absolutely categorical in saying that it is the very formulation that is proposed for 1 January 2010 in the Hospitality Industry (General) Award that leads to increased noncompliance in our industry.

As to the question you asked about what we do about it, we have an incredible amount of activity that our state associations, my members, undertake in every one of those jurisdictions to bring members up to date with what their obligations are and what they are required to do to maintain the highest level of compliance they can. What they cannot do is take responsibility for their members' activities, but what they can do is undertake educational campaigns and provide information to members to assist them to be compliant. But we are very concerned, I have to say, at what will happen to compliance when we have a modern award with conditions that are totally and utterly out of place in restaurants overlaid onto the conditions of every business that is respondent to a federal award in this country.

CHAIR—Except for Victoria and the ACT, where you say that it is going to be similar.

Mr Hart—Absolutely.

CHAIR—How do businesses survive in Victoria and the ACT?

Mr Hart—The reality is, which was a point made in one of the 2,000 pages of evidence we put to the Industrial Relations Commission, that businesses in Victoria, in the main, have been respondent to the minimum conditions that were available to visitors in Victoria in the past. When common rule came in in

2005, the transition for them was to move to a series of agreements that simplified the conditions under which they were engaged. So there is still quite a way for those businesses that are currently covered by agreements—agreements that were based, it in many cases, on pre-Work Choices type arrangements—to move to what will be the conditions under the modern award. What I am suggesting to you is that in Victoria, particularly, there are many businesses that have never been respondent to that particular award that causes those difficulties.

CHAIR—How many, roughly? What is the break-up, do you think, in percentages?

Mr Hart—If I recall correctly, around 65 per cent were not respondent to the award. I will have to check that figure to be sure. It is certainly in that sort of range.

CHAIR—Thank you.

Senator ABETZ—There are just a few quick preliminaries. Firstly, thank you for your submission. Does your organisation cover franchisees? If I, let us say, owned a McDonald's outlet, would I potentially be a member of your organisation or not?

Mr Hart—Perhaps. We have some but they do not join as franchisors; they join as franchisees. In that case, they would join franchisee by franchisee. So we will have some but not all.

Senator ABETZ—Yes, but what is your coverage, do you think—minimal?

Mr Hart—It will be low in those quick-service restaurant areas.

Senator ABETZ—You indicated to us the marginality of a lot of the businesses in your sector. Would it be fair to say that the employment cost is in fact one of the highest, if not the highest, outgoings for these businesses?

Mr Hart—It is absolutely the highest cost.

Senator ABETZ—Are you able to give us a percentage on that?

Mr Hart—It is approximately 40 per cent.

Senator ABETZ—About 40 per cent of overheads is wages.

Mr Hart—Forty per cent of turnover.

Senator ABETZ—Thank you. You indicated in paragraph 7 that labour costs have risen by an average of 10 per cent. I looked through the other statistics you provided and nothing else seems to have increased by the same margin, be it turnover, profitability et cetera. Is that a fair reading of the submission?

Mr Hart—Absolutely a fair reading.

Senator ABETZ—What is the total wages bill for your sector? Do you have a figure that you can provide us?

Mr Hart—It would be in the order of $6 billion.

Senator ABETZ—That is quite substantial. You indicated that, with the changes that have been proposed, it could cost about 8,000 jobs in this sector. That has nothing to do with the global financial crisis, it has nothing to do with a world recession or other things; you are saying that, as a result of changes, with the award modernisation and the adoption—cut and paste—of the hotel awards, this could potentially lead to the loss of 8,000 jobs?

Mr Hart—That is correct. The 8,000 jobs figure was from modelling that was undertaken by KPMG Econtech into the impact of the introduction of the modern award on restaurants and catering businesses in Australia.

Senator ABETZ—Thank you for that. I assume that that would not necessarily be an average reduction across Australia. Are there any particular areas that would be hardest hit? I am thinking of my home state of Tasmania, for example—rural and regional areas where the imposition of penalty rates or higher costs on Sundays of 175 per cent et cetera might lead to catering facilities simply saying, 'It's not worthwhile opening our doors.'

Mr Hart—The impact is certainly felt very differently across the country. The greatest impacts are in South Australia, New South Wales and Queensland. Particularly, in relation to penalty rates that you refer to, those are the areas in which there will be the greatest impact. We have put on many pages of submissions to the Industrial Relations Commission descriptions of practices such as businesses not opening on Sundays, not opening on public holidays or surcharging on those shifts, which will have just as dramatic an impact because

it impacts on the number of customers who are prepared to go to those businesses and spend their money. The impact is unfortunately quite differential from business to business—that is, businesses that open on Sundays are going to be hardest hit in New South Wales and Queensland and, of course, the impacts will be very different from jurisdiction to jurisdiction.

Senator ABETZ—Could I just tease that out. Why South Australia, New South Wales and Queensland? Chances are that Senator Xenophon and Senator Fisher may be interested in why you mentioned South Australia—

Senator FISHER—Indeed.

Senator ABETZ—and I would be interested in why you did not mention Tasmania.

Mr Hart—In South Australia the impact is caused in the main by the increase in the casual loading from 20 per cent to 25 per cent. In a state like South Australia, where a large number of businesses employ a large proportion of casuals, you get a very large impact created simply by that one provision.

Senator ABETZ—So it relates to the degree that the businesses or the business culture in each state relies on a casual workforce?

Mr Hart—That is correct. That is what happens in South Australia particularly. Just to backfill that a little bit, if I could, in South Australia particularly, a larger proportion of the market is domestic restaurant consumers—that is, less of the market is tourism and less of the market is the corporate market. Therefore you have peakier peaks, if I could put it that way. Saturday nights and Sundays are stronger than mid-week type markets where you have corporates to backfill. It is in those sorts of markets where casualisation has the greatest impact and, particularly in South Australia, that is where the greatest movement in the casual loading is through the modernisation process.

To answer the second part of your question, certainly in Tasmania there is not currently a 20 per cent casual loading, for example, so you do not see that same sort of impact. Nor do you see the same sort of impact as you do in New South Wales and Queensland through a very large shift in penalty rates on Sundays. You do not have that sort of differential occurring in Tasmania. It really occurs where we have those sorts of conditions that have been negotiated—the 20 per cent in South Australia, for example—that are offsetting other parts of their award that have in the past provided additional levels of cost for employers. Now we are also seeing the casual loading catching up. It is a very delicate balance in all of the jurisdictions. The ones that we are seeing the greatest impact on through award modernisation are South Australia, Queensland and New South Wales.

Senator ABETZ—What about the differential between rural and regional areas and city areas?

Mr Hart—It is very difficult to determine that because the comparisons that we have undertaken are award by award, and the award coverages currently are in the main, other than in Queensland, state based. That is the way we have been able to cost the impact. I would say, though, that most rural and regional areas have a different market mix to what that of capital cities. The corporate market is not as strong in some of those rural and regional areas, and they might have a different mix of tourism. We can certainly undertake the analysis, but the modernisation will be most impacted by what the current or prevailing award conditions are today, and that is why we have done the breakdown state by state.

Senator ABETZ—You indicated in your submission at paragraph 18 that 15 per cent are covered by Australian workplace agreements/collective agreements. Will there be any particular or special impact in relation to that segment?

Mr Hart—By far the majority of those, I should say at the outset, are individual agreements, as we stand today. Collective agreements have not been as large a feature of our workforces in the past. Obviously, as those Australian workplace agreements or interim agreements, as many have today, come to an end and they pick up the award modernisation process, we are going to see different working arrangements in those areas. We have not costed what that means because we do not know that the conditions are in each of those Australian workplace agreements or even the collective agreements. So that is not something we have modelled.

Senator ABETZ—I noticed that in your submission you referred to the number of classifications that would now be under the hotel award. Was it 60-something?

Mr Hart—Yes, indeed.

Senator ABETZ—In comparison to what you were recommending, which was—can you remind me?

Mr Hart—Seven.

Senator ABETZ—Are those sorts of examples of having such a huge range of classifications the sorts of difficulties that small operators have difficulty with in deciding where a particular employee ought to fit in relation to this plethora of 60-plus classifications as opposed to when you have only got seven to choose from, when one would assume that it is easier to put the employee into the right category.

Mr Hart—There is no doubt about that. When you move to 60-plus classifications, not only are a large number of them irrelevant but the divider lines between each of those classifications become even more difficult to determine, because they are based on working arrangements, in this case in hotels, that bear no resemblance to working arrangements in restaurants. In fact, the classifications that our front-of-house staff—waiters, for instance—are going to be classified in are less relevant and there are fewer of them than there were in our seven. Our seven gave more possibility for the expertise of individuals to be recognised in the restaurant sector than do the 60-odd classifications in the hotels award. So it is going to be a very difficult environment for very small businesses, such as the businesses I represent, to be able to cope with, because it is incredibly complex and we know, again, that that complexity leads to a lack of compliance.

Senator ABETZ—Senator Back kindly advise me that it is in paragraph 44 of your submission. Within paragraph 44, mention is made of the fact that the Hospitality Industry (General) Award is a 47-page document of which pretty well one-third, or 18 pages, has no relevance whatsoever to the restaurant industry. One could assume that that in itself would add complexity for a small business operator trying to determine what does and does not apply, let alone the 68 classifications. Are you telling us that the 68 classifications are all defined within the 47 pages, or are the classifications an appendix?

Mr Hart—They are defined somewhat within those pages, but there are further classifications that are in an appendix, so in fact both are true.

Senator ABETZ—So when we are talking about a 47-page document it in fact is bigger than 47 pages because of the appendices attached to it.

Mr Hart—Correct.

Senator XENOPHON—I have a question in relation to the impact on South Australia. Mr Hart, you are saying that the impact would be disproportionately higher on South Australian industry, referring to the KPMG report that was commissioned, which predicted a 15.7 per cent wage cost impact compared to the next highest, which would be Queensland, at 5.35 per cent. Are you confident of those figures in terms of the impact, firstly, and are you saying that for some restaurants the impact would be much greater where there is a greater degree of casualisation in that particular business?

Mr Hart—Yes, I am confident with the numbers. Certainly in a circumstance like in South Australia the impact is much greater because of the greater degree of casualisation. I should say that there is another factor that comes into play when looking at the overall impact in the various jurisdictions, which is the proportion of businesses in each state that are covered in the federal system compared to those that will be left in the state systems. In some jurisdictions we have quite a high proportion of sole traders and partners, which in fact washes back the overall impact. In those numbers where you see figures around the five per cent mark, that is the impact overall in a jurisdiction where some 40 per cent of businesses may not be in the federal system; therefore those businesses that are in the federal system have a much greater impact. But we have to measure the overall impact on the local economy. Yes, certainly the South Australian result, as I mentioned earlier, is that robust because of the proportion of casual staff and the increase in the casual loading.

Senator XENOPHON—You have estimated, in correspondence to my office, that there will be 8,000 jobs lost nationally but 2½ thousand of those job losses will, disproportionately, come from South Australia. Again, on what basis do you get to that figure? Have you surveyed members? That is quite a staggering figure, 2½ thousand job losses in South Australia, which is a relatively small state.

Mr Hart—The job losses figure is based on the impact of an increase in wage costs and then the impact that that increase in wage costs has on the number of people able to be employed. It is a formula not dissimilar to that that the Deputy Prime Minister recently referred to in looking at minimum wage increases when talking about the fact that wage increases cost jobs. The methodology for those assumptions is detailed in the submission that we have provided previously on the impact of the modernisation undertaken by KPMG Econtech, and they detail exactly how those jobs numbers are arrived at. It is based on an elasticity between increases in wage costs and job losses.

Senator XENOPHON—Finally, you refer to the Econtech computable general equilibrium model: it would be equivalent to a shop at the state level. Is that what you are saying?

Mr Hart—That is correct.

Senator SIEWERT—I go to the issues you have raised around the NES and the three concerns you have got about unpaid parental leave, which you say will have a disproportionate impact on the hospitality sector. I am wondering why you maintain this is going to have a disproportionate impact or a new impact when it is basically an extension of a right.

Mr Hart—The logic around those claims is detailed in our submission to the previous inquiry. It was made on the basis of information in the explanatory memorandum to the Fair Work Bill, which in itself said that there will be a disproportionate impact on those businesses with particular characteristics. In particular, they said that there would be more of an impact on industries that engage more female workers than male workers, because that was where the extra impact was likely to be. So what we have done is taken that information in the explanatory memorandum and compared it to the profile of our industry, and we can see that in our industry and retail the makeup of our workforce will provide a disproportionately larger impact in our industry than in other industries.

Senator SIEWERT—In terms of your comments around take-home pay and a point that the tax system should be used to provide additional take-home pay, I was going to ask you about that but I presume your point there is the point you raised earlier and you see tax cuts as the mechanism to provide that. When you talk about the taxation system being used, you are talking about tax cuts.

Mr Hart—That is correct.

Senator SIEWERT—The other issues I was going to ask about we have discussed pretty thoroughly.

Senator JACINTA COLLINS—The Econtech KPMG report you are talking about, is that publicly available?

Mr Hart—Yes, and I believe we submitted that with our submission to the Fair Work Bill.

Senator JACINTA COLLINS—It is not with the summary we had. I will find it.

CHAIR—That is a submission to the Fair Work Bill.

Senator BILYK—You might like to take this on notice because I know we are short on time. Specifically in regard to those concerns about the high rate of casual employment and the impact it is going to have, on one hand you are saying that it can be predicted when the peaks are going to be, so why then would the businesses not consider restructuring or reclassifying employees and putting them on permanent part-time or some sort of more appropriate work where the casual loading is not so great?

Mr Hart—The proposed modern award also has some conditions in it that make engaging people on a part-time basis les favourable as well. Not only does it provide a disincentive to engage people on a casual basis but it also provides a disincentive from engaging people on a part-time basis. So that might be moving from the frying pan into the fire, so to speak. But the reality is that the part-time provisions would then need to be flexible enough for us to be able to engage people for the number of hours that we need to engage them for. We engage people on a casual basis because we have peaks on a Saturday night, Sunday lunch and Friday night. If the casual provision is the only option—that is, part-time provisions do not allow us to engage people for the hours of those peaks—then we are not going to engage them on a part-time basis. The reality is twofold. No. 1, the type of advantage in engaging part-time is not going to be possible under the modern award. Secondly, even the current part-time arrangements are not flexible enough for us to be able to engage people for those very peak periods to the extent that we need to. So the only solution really in terms of restructuring is for those of us who want to go out on a Friday and Saturday nights to instead go out on Tuesday and Wednesday lunches. It is the customer demand that creates the peaks, not the industrial arrangements.

Senator JACINTA COLLINS—Are you saying that the award prevents part-time employees being engaged for, for example, a Friday evening and a Saturday evening? Are you saying that the provisions are so rigid as to prevent that roster?

Mr Hart—I am saying that the proposed part-time arrangements would be very inflexible if you were only to engage them for those hours, if you are only engaging someone for two shifts of presumably three hours, you are operating on a very small number of hours. In an ultimately flexible part-time provision, you could move additional hours into those part-time provisions. There are limitations in the current proposed award as

to part-timers working overtime, for example, whereas that sort of flexibility exists in engaging someone on a casual basis.

Senator JACINTA COLLINS—The retail sector went through this transition quite significantly, particularly with the major retail players. The capacity of businesses to have a balance between casual and part-time staff is not new.

Mr Hart—Yes, but I think perhaps we are comparing apples with oranges. The peaks in the retail industry are very different to the peaks in the hospitality industry. We have much sharper peaks over a much more confined period of time.

Senator JACINTA COLLINS—Are you suggesting that the problem is the minimum hours, the two- rather than three-hour minimum? Is it that sort of issue you are talking about?

Mr Hart—What I am suggesting to you is that in retail, for example, you might have a peak that goes all day Saturday, for a four-hour period at some other time of the week. The peaks are much longer than they are in our industry. We have very short peak times that run for three hours at a time on two days. The period of engagement and the number of hours that we want to engage people for are what determine what employment arrangement they fall under. At this point and in the proposed award the casual engagement arrangements much better suit an engagement that will run for a range of between three and five hours on two shifts a week.

Senator FISHER—You have essentially said that delaying the impact of award modernisation will not change the impact of award modernisation on employers. The department's submission to the inquiry suggests that delaying the impact will effectively erase the impact for employers. What do you say to that? Presumably it will not or cannot.

Mr Hart—Well, it cannot. Logically it cannot. How does spreading an impact negate the impact? It doesn't. We make the point in our submission that there are two very different characteristics to the undertakings made between remedying and delaying.

Senator FISHER—If it did negate the impact or moderate it—that is, if it did ameliorate the impact for employers—what would be the consequences for employees and their take-home pay?

Mr Hart—The reality is that the less the impact, the more likely we are to be able to employ the same number of people for the same number of hours.

Senator FISHER—I will finetune my question a little. If the phase-in period were to benefit an employer, what would be the impact on employees' take-home pay at that workplace, and in particular would it again need reassessing in accordance perhaps with the provisions of the transitional legislation?

Mr Hart—If the employer benefits, the employee benefits. If the employer benefits, there will not be a detriment to the employee. The reality is that, as we spoke about a moment ago, the biggest danger here is that we get a negative impact for the employer and then jobs or hours leave the system.

Senator FISHER—The government has acknowledged the looming impact of the so-called global financial crisis. Does the transitional bill take appropriate account of the global financial situation in respect of the five-year phase-in, even if it were to work and provide some relief?

Mr Hart—No, because the reality is that, even if you put off the increases, they are still increases. If you put them off because of the global financial crisis or any other reason, it has no bearing on the fact that eventually you have to pay.

Senator FISHER—If a business were to contemplate arguing a threat to their viability, as envisaged by the transitional bill, how would the business prove that? Do you have any concerns about what may then ensue regarding the length of the process of proof, the sort of evidence that may need to be preferred and the extent to which that can then be seen by third parties?

Mr Hart—Absolutely. We have said in here that we are very concerned about any requirement for businesses to demonstrate hardship, current working arrangements, past working arrangements, past hours, past pay rates or any of those things—they will cause an incredible amount of burden on the business. The point that we make in the submission is that, for our businesses, that means outsourcing that function to a third party to generate the evidence that they require to demonstrate any of those things.

Senator FISHER—You have made your point about the viability provisions in the bill. To go back to the modernisation request, which talks about award modernisation not being intended to increase costs for employers, will award modernisation increase costs for employers in ways that will not necessarily threaten

the viability of an individual business? If so, what provisions are there in the transitional bill to redress that to ensure that costs are not increased for employers?

Mr Hart—The answer is yes. A business may be impacted through award modernisation in a way that does not affect the viability of the business.

Senator FISHER—In terms of increased costs?

Mr Hart—They will have increased costs. They will have increased costs that they will remedy by reducing the number of hours people are engaged for. They will remedy by changing the product they are offering—that is, serving cheaper food and adopting other business practices to reduce their costs in response to having their costs increased in other ways.

Senator FISHER—And potentially by cutting jobs so as not to threaten viability, I suppose.

Senator BACK—I have one question. I want to explore the characteristics of the 8,000 jobs that are predicted to be lost. I know something of the industry and have been an employer in it. It is an industry that employs a lot of students; in many instances, it is their first foray into employment. It is an industry in which often one partner is released because of the timing when there is a need for this. Could you give us any indication, from the KPMG report, of the characteristics of who is likely to be represented in this group? Who are most likely to lose their jobs?

Mr Hart—The report does not specify who is more likely to be the first off, if I can put it that way, but the reality is that our business is defined in terms of the types of people that we employ. We employ so many young people that there is no doubt that they are the people who are going to be the ones who will have to leave the system. Between ourselves and retail, we engage 42 per cent of young people—42 per cent of the young jobs, the young people engaged in the system are working in our industries—so they are the ones who are going to obviously be displaced by these 8,000 job losses. It is an industry that is not only engaging that profile of person, but we are also engaging part-time people, as you rightly point out. We are engaging a large number of part-time people for whom this is their only source of income. They also are under threat through these 8,000 jobs that will be lost. There is no doubt that we occupy a position in the labour market that engages a number of people who are disadvantaged in the labour market.

Senator BACK—And are unlikely to pick up alternative positions if they do lose their jobs in retail?

Mr Hart—Correct.

Senator BILYK—How can you predict that?

Senator BACK—I am asking the question. I cannot predict it; I am just saying that if 42 per cent are in retail and this sector, my concern is: where do they pick up alternative jobs?

Mr Hart—As I think I said in my opening remarks, we are concerned that those who will be displaced are those who are the least likely to be able to easily move into other jobs.

CHAIR—We will finish there. Thank you, Mr Hart, for your submission and your presentation to the committee today.

Proceedings suspended from 12.46 pm to 2.00 pm

CALVER, Mr Richard, National Director, Industrial Relations; and Legal Counsel, Master Builders Australia

HARNISCH, Mr Wilhelm, Chief Executive Officer, Master Builders Australia

CHAIR—Welcome. We have your submission. Are there any additions or alterations?

Mr Harnisch—There is an error we made in paragraph 8.6.1. It is in the fourth last line, where it reads 'published by the commission on 3 April 2009 is active'. The word 'active' should be changed to 'instructive'.

CHAIR—I don't know how I missed that myself!

Mr Harnisch—That is what happens when you have spellcheck. It was spelled correctly.

CHAIR—Thank you for that. I now invite you to make some opening remarks to the committee, to be followed by questions.

Mr Harnisch—Thank you. Master Builders thanks the committee for the opportunity to appear today. I want to highlight three matters in my opening remarks. One deals with complexity, another one with the issue of the no detriment test and the third is the importance of representation orders. If I could deal with the first one, complexity. This is a bill of considerable complexity. The complexity is compounded by the government's decision to implement the system in two stages. Master Builders recommends that the government defer the introduction of the changes so that there is a consistent date for the implementation of 1 January 2010. We appreciate that this is a big step, but it is one where we believe the community and industry will be better served. Education about the fundamental overhaul of the system will have greater time to be absorbed by Australian business, and we believe the interaction of the new rules, particularly as reflected in the modern awards, will be so much clearer as a result of that.

In terms of the no detriment test, this could occur for the entire system. In the alternative, we would urge the government to at least defer the new agreement-making system until that date. The necessity to have different arrangements during what is defined in the bill as the bridging period creates problems both in communications and in the application of the legal test that is to be applied—the no detriment test. The test is discussed at section 6.3 of our submission.

Of course, from 1 January 2010 enterprise agreements made during the bridging period, along with all other workplace agreements covering federal system employees, will be subject to the National Employment Standards. The no detriment rule will be applied to ensure that the term of an enterprise agreement has no effect to the extent that it is detrimental to an employee when compared to an entitlement under the NES. We note that instruments that are made in the bridging period do not need to comply with the NES but with the relevant reference document and with the Australian fair pay and conditions standards, so in effect an agreement made during that period could have two different reference standards applied to it within a matter of weeks, adding to complexity.

All industrial instruments are amended by operation of law and will need to comply with the NES. Master Builders is concerned about the need for employers to be educated in this regard, especially as the agreements in place will go through no change other than by operation of law. In other words, there is no process for amending the terms of agreements, thus potentially confusing employers and employees, particularly small business. Therefore, Master Builders commends the government for establishing the Fair Work Education and Information program, where just under $13 million has been allocated for the task of educating the community. That is a great initiative. I think it is important that that education of business be undertaken.

Master Builders, however, is concerned that the required comparison under the no detriment test is proposed as a line-by-line test rather than a global test. We have recommended that prior trade off against entitlements that might otherwise be guaranteed by the NES but where the employee is better off overall should be permitted to continue to be recognised for the purposes of the no detriment test. That is covered in recommendation 3 of our submission.

The third item of concern is representation orders. Master Builders would like to emphasise the important aspect of the bill relating to representation orders. We support the provisions. They are necessary to stop the problems with demarcation disputes that we mentioned at length to this committee in our previous appearance before you when providing evidence on the Fair Work Bill and which we expanded upon in our supplementary submission. This is of particular concern to the building and construction industry.

A recent example will reinforce this concern. The Federal Court in Melbourne has ordered a halt to ongoing action that has interfered with work at the Westgate Bridge strengthening project. The order was handed down on 24 March 2009 by Justice Jessup extended previous injunctions stopping picketing at the site. The relevant employer is now able to stop protesting unionists abusing its employees, damaging its property and publicly urinating near one of its offices. The judgment, which stems from the ongoing Westgate Bridge dispute, also considers the meaning of coercion and undue pressure under the BCCI Act and the operation of agreement-making provisions in the Workplace Relations Act.

Earlier in March, AMWU and the CFMEU members and organisers started a protest each morning outside the project office. They blamed the company for the dismissal of 32 workers previously employed by a labour hire provider on site because it refused to approve a pay deal between the unions and the provider that replaced a previous agreement with the AWU. So there are clearly demarcation issues at play. We believe that this will become a greater risk.

The court heard evidence that while most of the unionists protested peacefully some abused company employees as they entered the office, damaged property—including the office door—and urinated on the office or in public places nearby. On one occasion, the company alleged, one of its managers was surrounded and abused by 15 men, several of whom were noticeably intoxicated, while he was outside the office entrance. This reached the newspapers and the ugliness of it illustrates why predetermination of these matters is so vital in an industrial relations system with integrity and for this industry.

We have been following the debate about the utility and the way that it should be implemented. We ask the Senate to note recommendation 13 in our submission, which deals with the relevant conduct of the organisations concerned. This must be a consideration when dealing with the need to issue a representation order. In addition, we support Professor Andrew Stewart's call for the bill to make it clear beyond doubt that Fair Work Australia be given the power to issue a representation order where there is the potential for a demarcation dispute to arise so that the ugliness that occurred on the Westgate Bridge project can be avoided. In all, we believe that the bill has a sensible mechanism for dealing with demarcation disputes but a mechanism that could be improved.

Senator ABETZ—I might as well start where you finished off. You highlighted to us the ugliness of the Westgate Bridge situation. Just as an aside, I daresay that that is a very good argument for the maintenance of the ABCC regime, but that is not the purpose of today's inquiry. Do you believe it appropriate that employers, potentially, can go to Fair Work Australia for these representational orders in relation to which union should be seen as being representative of the workers on a particular site or workplace?

Mr Harnisch—That has been a long held position of ours. We believe that it is important for employers to have certainty. We also see it as being important that employers be given appropriate powers or rights to negotiate with their employees. If their employees choose to deal with a particular union and there is agreement between the parties, I see no reason why an employer should be held hostage and therefore bear the cost of inter-union disputes.

Senator ABETZ—That was exactly the point that I was going to get to. I could foresee circumstances in which say there was a demarcation dispute and both unions thought that they might be on a winner. They would not mind having a protracted situation develop at the expense of the employer, who undoubtedly has contracted time frames in which to complete a project. Therefore, it would be in the interests of the long-term viability and therefore employment capacity of that business to seek an order from Fair Work Australia. Are you seeking that as a specific amendment?

Mr Harnisch—Yes.

Senator ABETZ—And should the conduct of the various unions be taken into account as well?

Mr Harnisch—Very much so.

Senator ABETZ—Should that include the leadership of particular union as well?

Mr Harnisch—We are focusing on behaviours rather than individuals. It is important that we address behaviours rather than individuals.

Senator ABETZ—Yes. But what would happen, for example, if a union official were to say: 'I don't know who was responsible for the activities that you described earlier in your evidence. But we as a leadership group condemn it and you can't pin it on us.' On the other hand, if the leadership group is involved in those

sorts of antics I would have thought that that may be of greater importance for Fair Work Australia in making its determination.

Mr Harnisch—Obviously, if there is a publicly demonstrated role that a particular union official has played then, yes, there could be an argument for that to occur.

Senator ABETZ—Including making telephone calls to radio stations pretending to be another person. That seems to be part and parcel of it. We had a Labor politician in Tasmania trying that stunt as well.

Senator BILYK—Was there a question in that or was that just an argument?

Senator ABETZ—It is unfortunately part of the culture, Senator Bilyk, as you would well know, coming from Tasmania.

CHAIR—Senator Abetz, are you moving on from that?

Senator ABETZ—Yes.

Senator BILYK—Ask your question, then.

CHAIR—You said something about employees choosing a particular union to represent them and how that should be respected. How do you deal with a case in which employees do choose a particular union to represent them and do not agree with an agreement that has been negotiated by someone they did not choose to represent them and then consequently get terminated as a result of that? How should we deal with that?

Mr Harnisch—I will refer the technical part of that to Mr Calver.

Mr Calver—With respect, the scenario that you postulated would, under the good faith bargaining regime established by the Fair Work Bill, be highly unlikely. Each member of a union present at the workplace would be entitled to be represented by that particular union. We think that there is a built-in mechanism there. This is more to do with disputes about who has coverage and rights to represent.

So one of the factors that Fair Work Australia should be able to consider is obviously and categorically, as Mr Harnisch was saying, what the employees want. However, in circumstances where that is not clear, where there might be a division between the those employees, as there clearly has been in a number of the demarcation disputes that have occurred, then the other factors about which we are speaking should be categorical—and whether a union has acted lawfully or unlawfully in those circumstances is why conduct and the sort of misconduct Mr Harnisch articulated is very important.

CHAIR—So, if the Fair Work Bill and those genuine bargaining provisions as you have put out were in place, we might have avoided the ugly situation with Westgate Bridge in the first place?

Mr Calver—Maybe not.

CHAIR—It may have.

Mr Calver—Maybe not, but maybe. It is a scenario that would be difficult to paint.

CHAIR—And it is always difficult, especially when current situations are still in dispute. We are not being asked to make a judgement on this. We take the position that you have put on the table, but we acknowledge that that is challenged—the facts of that dispute there are obviously still in dispute.

Mr Calver—There has been a finding by Justice Jessup—

CHAIR—Sure, in so far as—

Mr Calver—sufficient to found orders for injunctive relief. So he has determined that there is a case to be argued—

CHAIR—Indeed.

Mr Calver—Yes. And one of the important factors in his judgment is the difference between coercion and undue or adverse action, which is a matter articulated in the BCII Act but not in the workplace relations legislation.

CHAIR—No—and we appreciate the difference between the level of evidence to get an injunction and the level of evidence for a final determination.

Mr Calver—Yes.

CHAIR—All right. I just wanted to clarify where we were at with that. Senator Abetz.

Senator ABETZ—Thank you, Chair, because I was also going to get into that.

CHAIR—I thought you had moved on from the subject; that is why I took it up.

Senator ABETZ—No, I was going to get onto that later, but the chair had a very convenient question there. I want to refer to paragraph 25.1 of your submission. Just so I get it absolutely clear in my mind, you are not suggesting that workers should not have the right to choose which union they want to represent them, just as long as it fits in with the rules of the union.

Mr Calver—I think the ground rules have changed. You need representation orders now because the basis upon which unions have rights in workplaces is if they are eligible to represent the interests of employees. In the building and construction industry, that eligibility is held by the three unions of which Mr Harnisch spoke, and we believe that—the list of ground rules is quite clear—there will be, unfortunately, more demarcation disputes instead of fewer, which is one of the reasons we are keen on these provisions about representation orders.

Senator ABETZ—So how would that work in practice? I am a worker at the Westgate Bridge. I am appalled at the behaviour of a particular union and—

CHAIR—Maybe we should try not to use the Westgate Bridge as an example, if we could. It is difficult, given the—

Senator ABETZ—It is on the public record and in the media. So, rightly or wrongly, I am appalled by the behaviour of that particular union and join one of the other unions. If that union were to represent a minority of the workers, what rights would that union then have in the circumstances?

Senator JACINTA COLLINS—So it is a hypothetical.

CHAIR—Yes. Just to clarify: we are asking a hypothetical question about an existing situation.

Mr Calver—The factors that are in place in proposed sections 137A and 137B are supported now. We would like to have those factors extended so that Fair Work Australia could examine the conduct of the relevant organisation—which would link to you giving evidence as to why you resigned from one union and joined another, because the conduct had been distasteful to you—but also the effect on the employer, so that the employer could provide views about the matter to Fair Work Australia and have those views be given weight in a formal sense. So that is the reason that we framed recommendation 13 in the way that we have: to support the current factors that are articulated in legislation but to seek to add those as matters of some consequence.

Mr Harnisch—It is a mechanism to come to a speedier resolution. As you said earlier, these things could be dragged out for some extended period of time.

CHAIR—Just to clarify, you are suggesting that, if your recommendations were picked up, there would unlikely be the position where that sort of behaviour would need to be taken into consideration. I am trying to get the egg and the chicken scenario.

Mr Calver—We used the Westgate Bridge example of a situation that we think the legislation should be primed to avoid. This is going on now; let's not have that as a component of an industrial relations system with integrity. Let's have a system where, rather than the employer getting injunctive relief and most matters being dealt with ex-post-facto, we line up beside Andrew Stewart and say, 'Yes, there should be a pre-emptive representation order able to be obtained and add to it the factor that we have articulated.' That will be a system that is a lot better than the one that induced the Westgate Bridge dispute.

CHAIR—I agree. I think the legislation should avoid any situations of dispute. That is the purpose of having intervention. I would have thought that the problem actually involves a situation a little bit before that step—maybe in terms of greenfield sites in particular. Doesn't the ability of the Fair Work Bill to effectively allow these agreements to be negotiated in secret prior to going to the commission as a negotiated agreement actually invite demarcation disputes?

Mr Calver—They are not secret in that sense.

CHAIR—You do not tell all the unions that might be involved.

Mr Calver—The probity of matters is reinforced by the fact that the organisation concerned has the capacity to represent the interests of the majority of the employees who will be employed on a particular site. In our conception there is no issue of probity. If it were done in a manner which had the potential to oppress those employees, one would imagine, although it is quite unclear from the legislation at present, that the public interest test would be invoked. We think that there is plenty of probity and plenty of protective mechanism in

the way the greenfield agreements have occurred. What we find unacceptable is the response of unlawful conduct, the culture of not adhering to the rule of law and the culture where, going through lawful processes, matters are held against you—ignoring them and taking the law into your own hands. It is better that employers and unions are pre-armed with representation orders so that the step of not having acceptable behaviour in response to lawful orders can be nipped in the bud earlier. That is why we think it is essential, for the proper and lawful conduct of industrial relations, that—before we get to a situation like Westgate—there is the ability to have a representation order.

CHAIR—Probably the ability to intervene and stop people being sacked simply because they do not agree with a particular agreement that the employer wants to impose upon them should be available to employees as well, shouldn't it?

Mr Calver—That is certainly covered by the Fair Work Bill. The proposition that you put out—

CHAIR—Unfortunately, the Fair Work Bill is not in operation yet.

Mr Calver—No, but at any tick of the clock.

CHAIR—Indeed, and it cannot come quick enough.

Mr Calver—Although we are asking for it to be deferred.

Senator ABETZ—Whilst we are on registered organisations, there is the suggestion that in the regime that is going to be adopted there will be a separate piece of legislation dealing with the way registered organisations are dealt with. Is that something that you support and accept?

Mr Calver—Yes.

Senator ABETZ—You support the government's view on that?

Mr Calver—Yes. Some time ago it was proposed that registered organisations legislation should be separate. As we say in our submission, a small business may want to access the legislation to look up their rights on unfair dismissal. They do not particularly want legislation to be even more difficult to read by having detail on how the accounting processes for unions or employer associations in the same piece of legislation. We have no difficulty in them being separated.

Senator ABETZ—So you would not condemn the government for excising those provisions and having a separate act in relation to that?

Mr Calver—No.

Senator ABETZ—Like Mr Arch Bevis did on 21 August 2001, when the Howard government did it. But it is interesting that you would not condemn it, and I am sure my Labor colleagues after these years will not condemn it either.

Senator BILYK—Senator Abetz, I could not quite hear you, so I am not sure—

Senator ABETZ—The *Hansard* will show.

Senator BILYK—Did you say something about balaclavas and dogs?

CHAIR—Let's move on.

Senator ABETZ—Going to the line-by-line test, at paragraph 6.3.2 of your submission you indicate:

At clause 83 of the EM the statement is made that "the no detriment test applies on a line by line basis."

That, I suppose, does not marry in well with the other test in the legislation, the BOOT—the better off overall test.

Mr Calver—That is right.

Senator ABETZ—Would you expand on that a bit for us.

Mr Calver—Certainly.

Mr Harnisch—We believe the higher principle is the BOOT. We believe that is a more appropriate global test than line by line, because that reduces the flexibility for an employer and employee to negotiate an outcome that is satisfactory. Doing it line by line is very restrictive and, we believe, a very narrow interpretation of BOOT.

Senator ABETZ—Yes, and, of course, it could lead to the consequence that if it is done line by line an employee could potentially be denied being better off overall by the line-by-line analysis.

Mr Harnisch—Yes.

Senator ABETZ—Thank you for that. Going to paragraph 8.14 of your submission, you note, as have other people submitting to this inquiry:

> The Bill does not … contain a similar provision reflecting that the Award modernisation process is not intended to increase employer costs—

which was part 2(d) of the ministerial request. Do you have any form of words or a suggestion on drafting that might be able to be used for the legislation to incorporate the minister's request? It is clear that the legislation will look after the requirement that the process is not intended to disadvantage employees, which I think we are all agreed with, but a further promise was made in relation to employers which is not in the legislation. Do you have a form of words or would you like to take that on notice?

Mr Harnisch—I might get Mr Calver to comment on that in the first instance.

Mr Calver—Broadly, we agree that, as with most things, there should be a balance. We have suggested in our recommendation 9 that Fair Work Australia:

> … is empowered to determine whether the reduction in take home pay occurred as a result of a need to balance employer costs against employee disadvantage.

I can give you an example about that. In its submission to the Australian Industrial Relations Commission in relation to award modernisation, the government has suggested that, as a way to rationalise the very large number and cumbersome drafting of the allowances and special rates that have built up in the National Building and Construction Industry Award 2000, all-in payments be permitted which would absorb one or more of the current allowances in the award. Our concern would be that, if the commission then did that and the employee could show that they were exposed to a number of the allowances which were supposed to be encompassed by the all-in rate and that award modernisation had caused the all-in rate to be applied to them rather than the individual allowances, there will be a retrospective ability to go back and say, 'That all-in rate did not adequately compensate me; I want those allowances now.'

We are concerned that Fair Work Australia be allowed to maintain that balance between employee disadvantage and employer cost so that, if an all-in rate is established which subsumes those allowances, there is no ability to go back and say, 'No, sorry, I want more than that all-in rate because if it weren't for award modernisation it would not exist and if it weren't for award modernisation I would have been paid more.' That has the potential to undermine employer certainty, which is absolutely essential in a recession, and it does not take the notion of balance, which was in the request, into the legislation, which is our main concern. Do we have a form of drafting? No, we are not draftsmen, but that is the idea which we think would bring a balance. We are not being vociferous about that, but we are strongly making the point that if you do have a request, which we have been operating under for some considerable time now, that seeks that balance then the legislation should similarly reflect it

Senator ABETZ—A balance was promised, and a balance has not been legislated but only one side of it has been put in the proposed legislation, and that is your concern.

Mr Calver—That is the view of our members.

CHAIR—Couldn't that situation that you use as the example only apply for the length of that particular project?

Mr Calver—No, because there is no—

CHAIR—But isn't that the experience of the individual? The circumstances of every project must be different and you could only run that argument as if it applied to that particular project. Every site is different, in terms of how much of what is going to apply.

Mr Harnisch—But the different awards still stay. The construction industry has lots of different site allowances and different allowances. These should be extinguished where they are part of the trade-off in terms of an all-up rate.

Mr Calver—If it was daily hire employment and you re-engaged them on an all-in rate—but let us start with a couple of the basic propositions about our industry. Largely, small business do not want to deal with administration, so if they can pay an all-in rate then it is much better than tracking all the allowances. And they are more likely to re-engage you on an all-in rate from project to project, so the problem would be compounded. That is one of the other reasons why we have said there should be a three-year time limit on these issues at the very least. That is not as difficult for employees as some employers are suggesting. The AiG

has suggested no retrospectivity at all and we are suggesting that this right should end after three years, which is a reasonable period. So if they are engaged on daily hire work or on a number of projects into the future, then they would have the capacity to go back and compare their entitlement to those allowances as against the all-in rate over all of those projects.

CHAIR—I do understand the argument, but it would surprise me if that was the intention of this provision. It strikes me that it may not be.

Mr Harnisch—It may well not be.

CHAIR—Is that your only concern about this?

Mr Calver—No, that was an illustrative example.

CHAIR—What if that were fixed? I do not know but, just off the top of my head, it seems to be an unintended consequence. It may not be and I will have to think more about it. What are the other examples?

Mr Calver—The very basis upon which a take-home pay order can be made is if the employee is otherwise adequately compensated. The difficulty is in knowing when the commission or Fair Work Australia, which will supersede it, will determine whether or not the employee has been adequately compensated. So the feedback we have got from our members is: what does that mean? We cannot, on the face of a bill, tell them that.

The other thing is: how can you have the commission empowered to bring about transitional arrangements which may well, over five years, take away an entitlement? I will give you an example: district allowances in the Northern Territory. At first the commission postulated that district allowances should disappear, and maybe they will phase them out. But how can you phase them out if you are reducing that employee's take-home pay? On one conception of this provision, it actually defeats the object of the matter that the government wants to bring about—that is, transitional provisions. How can you have transitional provisions which slowly decrease and take away an entitlement of employees if, on the other hand, they can grab them back through a take-home pay order? With district allowances, there will be nothing to substitute—there will be nothing that adequately compensates them.

CHAIR—But it is only the existing employees we are talking about, aren't we?

Mr Calver—With respect, that is not—

CHAIR—You are saying new employees also have that right to retain them.

Mr Calver—No. With respect, that is not apropos to the argument I am suggesting. It is that if I am engaged as a building and construction industry employee and I am in the Northern Territory I currently get the district allowance. The commission have said that district allowances should no longer apply because they are no longer relevant to our modern award, which was a preliminary conclusion that they came up with, and they take it away in five steps transitionally. But if I am an employee who gets annoyed about that I would say, 'No, my take-home pay must be maintained and therefore, even though there is a transitional provision to get rid of it, because I am an existing employee you have got to keep paying me that district allowance. There is no time limit on me bringing an action to claw that back.'

CHAIR—I see, so it is about whether people make a claim for it to begin with and if they are not allowed to lose it as an individual. Take that district allowance that you are talking about. Say it does disappear under a modern award system. If you were getting it now—and this is my understanding so tell me if I am wrong—you would continue to maintain that rate because it was part of your normal take-home pay. But it is only for you and that provision does go for all time. Anyone starting tomorrow or the next day is not entitled to it; it is gone.

Mr Calver—It does not go for all time. It would go with transitional provisions. It is right, Chair, that in respect of new employees these take-home pay orders will have less utility. But it does not detract from the argument that one of the very mechanisms which were conceived of by the legislation can be defeated by another mechanism which only takes up part of the balancing process.

CHAIR—Yes, I understand what you are saying.

Mr Calver—That is our argument.

CHAIR—Sorry, Senator Abetz, I have interrupted you.

Senator ABETZ—I have had a very fair go and if I may have one last question. I cannot pinpoint it—and usually I put paragraph numbers next to my proposed questions—but if I recall correctly you were suggesting a regulatory impact statement as to small business. Is that right?

Mr Harnisch—Yes, we did. It is in one of the earlier recommendations. We are very concerned.

Senator ABETZ—So can I ask you this then. If that was part of your recommendation—

Mr Harnisch—It is No. 2.

Senator ABETZ—Do you know what: it is the one that I put an asterisk next to on page 3. Thank you, as I have now found it. Can you tell us what you believe the benefit would be of having a regulatory impact statement and a small business impact statement covering the effects of this bill?

Mr Harnisch—The concern that we have is in terms of good public policy. I understand the commitment by this government that they want things to be accountable. A regulatory impact statement is warranted to give an indication of what the likely costs would be for small business and the community and obviously the business sector. In the end it depends on what the results of that review might be.

Senator ABETZ—Thank you.

Senator SIEWERT—I want to ask you about enterprise agreements negotiated before 1 July and about the mechanism whereby those that are already currently in negotiation finish on 1 July. If I understand your submission correctly, what you are saying is there should be provision for a continuation of bargaining where there is progress being made. Is that right?

Mr Calver—It is a quite technical recommendation. It is where the employees have been provided with an employee information statement prior to that time but no changes have been made to the proposed agreement after that date. Quite frequently in the practical negotiation of an agreement, particularly if it is an industry like ours with employees across a number of sites, it can be some time before the employee information statement has been provided to the employees and the actual agreement has been lodged. If you are in that circumstance, we think that there should be a carryover from the old system into the new system. Other than that, yes, we agree with the proposition that post 1 July 2009 they should be in the new system.

Senator SIEWERT—What happens to any industrial action provisions that have been provided? Do they get carried over as well?

Mr Calver—One would hope that if you were that advanced in your bedding down of the agreement that there would be no industrial action related to it. However, if there were to be industrial action at that point, I would imagine that our members would want the new agreement-making system to come into play with good faith bargaining and the like. The employer information statement is there. So far as the employer and the employee are concerned, the agreement has been made. It would be just a question of administration. Something would have to go horribly wrong for there to be industrial action at that point. If it were to occur after 1 July 2009, I think we would want the new system to apply.

Senator SIEWERT—Thank you. The other questions that I had have been covered.

Senator FISHER—Gentlemen, you have outlined the association's view of the take-home pay provisions. In respect of the award modernisation request reference to not increasing costs for employers, are you suggesting that the take-home pay provisions effectively render that a self-fulfilling prophecy in a way?

Mr Calver—They would only if employees made an application. But we think the take-home pay order provisions, as we articulated before, raise a question about the commission's capacity to introduce transitional provisions for existing employees. We think that, if you are balancing matters, there should be a concomitant ability of FWA to take into account the need to balance employer costs against employee disadvantage when one of those applications is before them. That is the very matter that they have been considering in designing these modern awards. In that sense, it did appear to us that there was a need to restore the balance that the request reflects.

Senator FISHER—In respect of the provisions for phasing for employers and the need to prove matters relating to the viability of the business, does your organisation have any observations to make about how that provision might work were a business to contemplate embarking on that path?

Mr Calver—From past experience it is often very difficult to get businesses to provide evidence about their own viability.

Senator FISHER—Why would that be?

Mr Calver—It is because it becomes a self-fulfilling prophecy. The last thing your banker wants is for you to go to a tribunal and say your business is not doing so well. From experience in other industries, it is very difficult to get, for example, farmers to come forward and say that they are in need of assistance. One, there is

the matter of pride in your business and, two, that is the last message you want to send to your lenders or put in a formal presentation. It is quite difficult to get employers to take that step. We are not particularly pleased with anything that requires a public airing of less-than-efficient or less-than-solid business because you just do not get your people to come forward and give evidence about their own failings.

Senator FISHER—Has your organisation had any discussions with the government about those concerns and about the concerns that information as to viability might need to be disclosed to third parties in the process?

Mr Calver—I am bound to rules of confidentiality about what I know about anyone in the Committee on Industrial Legislation upon which I serve.

Senator FISHER—What does that mean if your organisation has had discussions with the minister about an issue, be it inside as part of the COIL process or outside the COIL process?

Mr Calver—I might leave that to the CEO.

Senator FISHER—When might you be at liberty to discuss?

Mr Harnisch—I can only reiterate what Mr Calver has said. We are bound by the code that we sign onto in being part of COIL.

Senator FISHER—So the COIL gag in your view extends beyond discussions that are actually held at COIL to any discussions with the government about issues covered at COIL, even if those discussions are outside COIL. Is that right?

Mr Harnisch—I would not characterise it as a gag. I think we went into COIL in good faith and we are intending to stick to the agreement we entered into.

Senator ABETZ—Which was not to talk about it, which some people unkindly described as a gag.

Mr Harnisch—We participate with government in a number of areas on a confidential basis.

CHAIR—It is not new, is it?

Mr Harnisch—No, it is not new.

CHAIR—It existed prior to this government.

Senator ABETZ—I just want to know where Operation Sunlight has gone.

Senator FISHER—It nonetheless renders the utility of inquiries like this one somewhat blunted.

CHAIR—I do not know how.

Mr Calver—I am happy to answer your questions, Senator Fisher, but not in relation to discussions we have had with the government. I can answer them on a policy basis, but I am not completely prepared to answer them on an open basis.

Senator FISHER—In respect of the capacity for the award modernisation process to increase costs for employers, does your organisation see a potential for impact of increasing costs for employers that stops short of threatening the viability of business?

Mr Calver—We have had a very unusual decision about which I have been in the press in relation to redundancy. The Australian Industrial Relations Commission unacceptably, in our view, reinserted a definition of redundancy which includes resignation and dismissal for any reason, say, for misconduct, on what we respectfully say is a misapprehension as to the current provisions of the law. So, if that is to be reinserted in our award—and that was a provision of the award published by the commission earlier this month—then the potential for increased costs for employers is quite huge and will add to the cost of building infrastructure in Australia. That is a real problem.

Senator FISHER—Does the bill offer any relief in that respect?

Mr Calver—No.

Senator FISHER—None at all. Does your organisation have a view as to why the government would have chosen to legislate one part of the terms of the award modernisation request of the commission in respect of the stated intent to not disadvantage employees, yet not legislate the other part of the intent of this bill, which is to not increase cost to employers?

Mr Calver—I think that is a question you need to ask the government.

Senator FISHER—Does your organisation have a view?

Mr Harnisch—Our view is that the government made a commitment not to increase costs to employers and not to disadvantage employees. We believe that there are risks that could be incorporated that could increase costs for employers. All we are asking is for this committee, and obviously the government, to consider those risks and, hence, our recommendation in terms of a regulatory impact statement to perhaps identify what those costs might be and to get the Senate to give a better context for any amendments that it might make or recommend to government.

Senator SIEWERT—I want to clarify your answer to a question by Senator Fisher. You talked about redundancy payments to workers being taken out of Work Choices.

Mr Calver——The full story is somewhat complex, and I will try to simplify it, if I may. Clause 16 of the National Building and Construction Industry Award 2000 had in it a definition of redundancy that extended well beyond its traditional definition. It included resignation being treated as redundancy and also dismissal for any reason, say, for misconduct. So, when a project ended, all of the workers were entitled to redundancy. It was a very large cost and led to the establishment of a range of contingency funds—redundancy funds in our industry. When the Work Choices legislation was enacted, it substituted, by operation of law in relation to allowable matters in sections 513 and 514 of the Workplace Relations Act, the definition about which I spoke for the community standard definition—that is, an employer not wanting the job to be done by anybody else, essentially. Since March 2006, we say by operation of law in our industry that prior definition has not obtained.

However, the commission is of the view that it is a current provision, which is a matter of law. As we say in our submission, that question—a nice legal question—is currently before the full Federal Court in a test case that was taken about that matter, but unfortunately the full Federal Court has not yet handed down its judgment. Our concern is that, if the full Federal Court goes against us and the finding is that the provision about which I spoke, the broader definition of redundancy, is in fact allowable as an employee entitlement, then not only will we be liable for that employee entitlement—because the full Federal Court trumps the AIRC, so the provision will go ahead as an employee entitlement provision—but the National Employment Standards will kick in and they will be entitled to redundancy as well. That would be a massive, massive cost for the building and construction industry, and therefore we have been quite vocal in the press about opposing that provision being in the award, at least until the full Federal Court hands down its judgment on that case. We are also vocal about it in forums such as this so that the full extent of the problem and the full extent of the cost blow and the additional costs for Australian infrastructure can be articulated.

CHAIR—Is that full court case being run against the legislation as it is right now?

Mr Calver—No.

CHAIR—What is it being tested against?

Mr Calver—What happened was that there was a judgment of the South Australian industrial magistrates court, which is a court of record, an appeal from which is to the full Federal Court, where the magistrate found that the prior provision, about which I spoke, was allowable not as a redundancy provision but as an employee entitlement. So it had utility and it carried on from March 2006, contrary to what we believed to be the case under the Work Choices legislation. That interpretation of the prior provision is being challenged in the full Federal Court. The CFMEU intervened on the side of the employee, and Master Builders Australia was also concerned with that case.

Senator ABETZ—It has been five months since that case was heard—is that right?

Mr Calver—Yes, since November 2008.

Senator ABETZ—So when are we anticipating a decision?

Mr Calver—That is in the hands of the full court.

Senator ABETZ—Yes, but no indication was given from the bench and there is no indication at this stage from the registry as to when a decision might be handed down?

Mr Calver—No.

Mr Harnisch—We are expecting it soon.

Mr Calver—It is a matter of some complexity, so I would imagine that three to six months after the minimum would be the case.

CHAIR—It does sound complex.

Mr Harnisch—The implications, though, are huge.

Senator ABETZ—Yes, the implications are huge. Whilst we cannot assist the judiciary in making its early determination, a determination prior to us having to consider this legislation may be very helpful.

CHAIR—How huge, though? Isn't most of your industry covered by severance schemes? Don't they allow for any redundancy not to apply if the severance schemes are in place?

Mr Calver—It would not be redundancy, you see. It would be construed to be an employee entitlement, so you would be entitled to redundancy on top of that.

CHAIR—So you are saying there would be both.

Mr Calver—It would be a matter of law that it stood as a non-redundancy payment, that it stood as a payment in respect of something else, and so the NES provisions about redundancy would also kick in, which would effectively be a crippling blow for an industry where there is likely to be a downturn. We are experiencing it now.

CHAIR—Thank you for your submission and your presentation to the committee today.

[2.58 pm]

de BRUYN, Mr Joe, National Secretary, Shop Distributive and Allied Employees Association

RYAN, Mr John, National Industrial Officer, Shop Distributive and Allied Employees Association

CHAIR—Welcome. We have received your submission. Are there any alterations or corrections?

Mr de Bruyn—We have just noticed that at the end of pages 13, 18 and 21, the sentence is incomplete—if you go to the following page the sentence is not completed. We have undertaken to correct that when we get back to the office to make sure that the final sentence on the following page will be completed in your submissions. That is relatively minor because I think the gist of what we say is there, but we will correct that.

CHAIR—Thank you. I invite you now to speak to your supplementary submission and make some opening remarks, to be followed by questions.

Mr de Bruyn—Firstly, I should thank the committee for the opportunity to appear to say something further and answer questions. I have a brief comment to make about one of the matters that we raised in our submission. The bill now before this Senate committee extends the definition of an enterprise award to include awards covering a multiplicity of franchisees of a single brand or franchisor. This extension of the definition of an enterprise award is contrary to the terms and intent of the Fair Work Act which was passed by parliament only late last month. It means that employees of an employer who are affected by the extended definition, who today can aspire to be covered by the modern fast-food award, which is being determined by the Australian Industrial Relations Commission and which will be effective from 1 January 2010, will be denied this by the terms of this bill. In other words, the government is legislating to deny to such employees improved rates of pay and better conditions of employment wherever an employer today is affected by the extended definition and the award terms are inferior to those already set in the modern fast-food award. Why the government would legislate against the interests of employees in these circumstances is beyond all comprehension.

What is even worse is that some employers who are favoured by this bill, as described above, have the audacity to say to this committee that the bill should be further amended to ensure that this favoured treatment should be made permanent. This means that parliament is being asked to legislate that employees who are caught in this unfortunate position be made permanently worse off than their counterparts in other parts of the fast-food industry and be relegated permanently into inferior rates and worse conditions than those determined by the commission to be the new safety net standard for the fast-food industry. In my 36 years of employment by the SDA, I have never seen such a deliberate legislative act directed against a class of employees as has been described above.

Extending the definition of enterprise awards in the bill also differentiates employers who are affected by this provision. It favours McDonald's over its competitor Hungry Jack's in the hamburger section of the fast-food industry, it favours Pizza Hut over Dominoes in the pizza sector and it favours KFC over Red Rooster in the chicken sector. It favours certain large companies over their smaller competitors who will be covered by the modern fast-food award from 1 January next year. Why does the government legislate to create an uneven playing field in an industry which is marked by intense competition? The SDA has always told all of the fast-food employers that it wants a level playing field within the industry and that we see the modern fast-food award as providing this to the industry. At the same time, this award provides a decent safety net for employees with the opportunity of bargaining on top of this base. For all of these reasons we ask the committee to recommend to the Senate that the extension of the definition of an enterprise award be removed from the bill.

Senator ABETZ—I now know who the person was in the submission where it said, 'I have never seen such a deliberate legislative act in my 36 years.' I was going to ask who the author was but, I confess, I had a fair idea. Thank you, Mr de Bruyn, for your written submission and your supplementary submission. I will start on the supplementary submission to get an understanding of it. What you are suggesting to us is that the government is intending in this transition bill to extend the definition of an enterprise award—is that correct?

Mr de Bruyn—Yes.

Senator ABETZ—And that would have implications only for the fast-food sector or would it have implications across a number of sectors?

Mr de Bruyn—Only in the fast food sector insofar as our coverage is concerned. I do not have enough knowledge about the situation in other industry sectors to know whether they have enterprise awards or awards which would be covered by the extension of the definition.

Senator ABETZ—If I were to take your submission at face value—and I am prepared to do so for the purpose of this questioning—I am just wondering if other sectors of the economy might be adversely impacted if we did not have the extension of the definition of an enterprise award as is being suggested.

Mr de Bruyn—I do not have the knowledge to be able to answer. I only know about the industry sectors that we cover.

Senator ABETZ—Right. After reading your submission, I made a note for myself—chances are, unfairly—that you did not seem to be all that supportive of or amenable to the franchisee sector. Then, having read this supplementary submission and heard it, I think it would be fair to say that your organisation has a number of issues with the fast food sector. Would it?

Mr de Bruyn—We have an issue with the content of the bill insofar as it extends the concept or definition of an enterprise award. We do not have an issue with employers in the industry or those who are franchisees. We deal with them all the time.

Senator ABETZ—What is your coverage in the fast food sector?

Mr de Bruyn—Broadly speaking, we cover the fast food industry where food is purchased to be eaten primarily off the premises as distinct from being purchased to be eaten on the premises, with the proviso that well-known brands like McDonald's and so on, where there is substantial provision for eating on the premises, are on our side of the fence and covered by the SDA.

Senator ABETZ—All right. Allow me to rephrase the question so that, rather than coverage, it is about membership or take-up rate of membership of your organisation. For example, it would be fair to say that in Coles or Woolworths your organisation has a relatively high take-up rate of membership. I am just wondering: is it comparable in the Macca's outlets around the country? Would you have a similar take-up rate of membership or not?

Mr de Bruyn—No, but it does vary from state to state and from company to company.

Senator ABETZ—I can imagine that, but would it be substantially less than you would have in the retail sector with Woolworths and Coles?

Mr de Bruyn—In terms of density, yes.

Senator ABETZ—Thanks. With the award modernisation request, we were told that the award modernisation process is not intended to disadvantage employees. I want to ask whether you consider that the take-home pay provisions in the bill will ensure that no employee will be disadvantaged by award modernisation.

Mr de Bruyn—No.

Senator ABETZ—I just have to check up on my question again. For the record, this question is on behalf of Senator Fisher. If you want to see, Senator Collins, I am struggling to read her writing, although it is a lot neater than mine! The question is whether the take-home pay provisions in the bill ensure that no employee will be disadvantaged, and you are saying no; the provisions will not guarantee that.

Mr de Bruyn—That is right. It is not an absolute guarantee. Clearly the policy behind it is to protect take-home pay, but because it protects only the rate of pay and some allowances it does not take into account the fact that if award modernisation alters patterns of hours of work—and all of the awards in the retail fast food area, community pharmacies and hair and beauty have already altered the patterns of working hours, which has allowed employers under a new modern award to have different rostering arrangements—then they alone will be able to have an adverse impact on some employees even if the rate of pay for an hour worked is maintained.

Senator ABETZ—Right, so one could not assert that no employee will be worse off in relation to this regime?

Mr Ryan—Yes, you could not assert that.

Senator ABETZ—You cannot assert that. Thank you. I did have a double negative in there, so I can understand why you considered your answer very carefully.

Mr Ryan—And you asked for positive answers. When you have a double negative, it makes it hard.

Senator ABETZ—Yes, I understand that. I want to take you to recommendation 10 of your submission, which deals with schedule 22. You had nearly won me, until I read that you were relying on the former member for Charlton as part of your authority for this. What is the actual disadvantage of having a separate piece of legislation dealing with registered organisations? And for what it is worth, paragraphs 124 through to 136 of your submission in relation to registered organisations: you have some good quotes there, including from the former member for Charlton, who I would have thought was not an authority that many people would rely on these days. But nevertheless, I am interested in what the difficulty is.

Senator JACINTA COLLINS—There are several other members who are referred to.

Senator ABETZ—Yes, that is why I said—

Senator JACINTA COLLINS—This is most unlike you, Senator Abetz.

Senator ABETZ—That is why I said they had nearly won me, until I read that they were relying on the former member for Charlton.

CHAIR—Just as a matter of courtesy to former members of parliament, I ask that we move on.

Senator ABETZ—Yes. I am asking: what is the difficulty with having the regime as a separate piece of legislation? Surely the issue is what is in the legislation as opposed to whether it is a stand alone act or whether it is part of another piece of legislation. I am trying to get the nuance here. Is it just a nuance, or does it go further?

Mr Ryan—No, it is not just nuance, and it is more than just the content of the legislation; it is whether or not there is an holistic approach to legislation relating to workplace relations or whether there is a segmented approach in which you divorce the organisations from the process. The splitting of legislation into two so that you have one piece of legislation which deals with the organisations and another which deals with all of the processes is divorcing the organisations from the process. The Conciliation and Arbitration Act 1904 was predicated upon keeping organisations of employers and of employees in and part of the system in order to ensure that the system operated at its most effective. It is not to say that you cannot have an effective system, but you have a more effective system if the legislation has that holistic approach of keeping the organisations which are key parts of it in with the processes which make the system work. I think that is exactly what the Labor senators, certainly, reported to the then government in 2001. That certainly is the debate. I have only quoted those members of parliament who spoke specifically on this issue. I did not choose the members of parliament; they were the ones who were recorded in *Hansard*.

Senator ABETZ—They self-identified, including Mr Bevis, who told us at the time:

This has been done as part of that global plan.

It sounds very ominous, but it looks as though the government is of the view that—

CHAIR—Finally 'fessing' up, are you, Senator Abetz?

Senator ABETZ—Well, the government now seems to be adopting that approach, which is of some interest given all of the acrimony in 2001. Paragraph 38 of your submission is recommendation 3. Do you agree that within the general framework there should be consideration by Fair Work Australia of the impact of their decisions on employment and inflation?

Mr de Bruyn—I think that the commission needs to take into account all of the factors which are in the award modernisation process the minister has asked for. What we are saying in recommendation No. 3 is that enterprise awards, with or without the extension of the definition, must not allow an employer a cheaper cost base than competitors who are covered by the modern award for the industry. So in the modernisation of enterprise awards, there should be a clear requirement that the enterprise award cannot sit at a level below the modern award already determined for the industry.

Senator ABETZ—Right, that is in relation to a modern enterprise award. In relation to the general concept of award modernisation, do you see a need for Fair Work Australia to consider those impacts on employment and inflation as being an important consideration in their deliberations, or not?

Mr de Bruyn—I think that Fair Work Australia needs to stick to the brief it has been given by the minister. Sorry, the commission is the body that is doing the modernisation of awards; it should stick to the brief that has been given to it by the minister.

Senator ABETZ—And to your knowledge, does that include considerations of employment levels and inflation?

Mr de Bruyn—No, to my knowledge I do not know that at the moment, and I have not got the brief that the minister gave the commission in front of me. But it is a question of fact as to whether those things are in there or not.

Senator ABETZ—Yes, but I am asking you whether it should or should not be. You say that whatever the minister gave them is good enough for you, but you are not able to tell us whether employment levels or inflation levels should be a consideration.

Mr de Bruyn—My view on that really is not relevant. I just believe that the commission should stick with the brief it has been given by the minister, and I believe it is doing that and awards are in the process of being modernised.

Senator ABETZ—I would have thought that you and your members, your organisation, may have had some views as to the desirability of maintaining employment levels, increasing employment levels and helping the community avoid the scourge of inflation which impacts adversely, especially on low-income earners. I think a lot of your members are in the category of low-income earners, so I was thinking that your organisation may have had a view to put forward in that regard.

Mr de Bruyn—If we did, it would be a bit late now because the award modernisation process has been progressing since about July of last year, and many awards have been finalised, including the ones for our industry.

Senator ABETZ—That is quite right, but it would be a strange world if we could not fix things if problems were shown or highlighted, and I would have thought that that may have been an area that would have interested you. But that is fine; let us move on.

In relation to this framework of legislation, is there any concept that you believe is relevant for what might be called, from an employer's point of view, 'unfair resignation'—for example, in a very busy period, let's say the Christmas period, when somebody resigns to take on a better job offer and gives, say, only a fortnight's notice, leaving the employer in the lurch, to use the colloquialism? Should those sorts of things be protected against in this type of legislation?

Mr de Bruyn—Awards generally provide for periods of notice for resignations, and if an employer believes that the notice in an award is not sufficient they should make an application to the commission for a longer period. If you look at what has traditionally been provided by awards, it has traditionally been a week's notice. Then there was a change and the period of notice was increased, depending upon the length of service of the employee, and that applied either way. In agreements, this matter is often the subject of discussion. Sometimes employers are quite happy for there to be just a week's notice of resignation. Other employers say, 'No, we don't want to be caught out like that and if we have to give the employee, say, three weeks notice then we would like the employee to give us three weeks notice as well.' If employers insist on that then that tends to be what goes into agreements.

Mr Ryan—It is also an issue which is much more properly dealt with in terms of the contract of employment, and longer periods of notice are generally required for more senior employees because they are the ones where the notion of unfair resignation may have a greater impact. Courts have even assisted employers to make certain that those employees who are critical employees at a very senior level are required to give certain amounts of notice in order to protect the economic value of the business. But it is not necessarily an issue that relates to those people who are on base, safety net minimum standards, which is all this legislation in the Fair Work Bill is setting. It is much more an issue for those things that occur above and beyond the minimum set by the legislation.

Senator ABETZ—I understand what you are saying. What is the redress, then, for an employer in circumstances where an employee, let us say just at the beginning of a shift, says, 'Blow it! I'm off'?

Mr de Bruyn—If it is a permanent employee and the employee simply resigns on the spot then normally the employer can deduct from the entitlements of the employee the value of the period of notice which has not been given.

Senator ABETZ—And if there are no accrued holiday or other entitlements?

Mr Ryan—They can do exactly what employees are forced to do, which is to sue for breach of the award. No employee has the right to deduct money from the employer when the employer does not give notice. All

employees have to go to court to get their rights. It is only employers who have been protected by being given special privilege as judge, jury and executioner in being able to say, 'You broke the law; you did not give notice. I will withhold money.' So it is a very much one-sided thing that already favours employers.

Senator ABETZ—I am not sure that is necessarily the case with occupational health and safety in New South Wales, but we will not go there.

Mr Ryan—No, but it is in relation to termination of employment.

Senator ABETZ—So you do not deny the concept in relation to occupational health and safety in this state?

Mr Ryan—I am not commenting on that; I am just saying, in relation to the question you asked about termination of employment, that there is a very one-sided protection which has been built in for employers, both in the legislation and in the award system. It has been there for many, many years.

Senator BACK—The minister requested that in the framing of the legislation there be no disadvantage for employees and employers. It has found its way into the legislation for employees, and there has been concern expressed today and previously that it has not found its way in for employers. Would you support the commonality of there being no disadvantage for both employees and employers, going forward, with these transitional provisions?

Mr de Bruyn—In the award modernisation process, which is now progressing in the commission, the minister did say that employees were not to be worse off and employers were not to face cost increases. That issue has still not been finalised because, at whatever level a modern award has been determined to this point, the commission has not yet addressed how you move from your existing position to the terms of the modern award and over what period of time. So that issue is still to be addressed. I think all the parties understand that there is the potential for a five-year time period for that to be done. We certainly believe that, if you look at any issue over a five-year period, the transition to the modern award can be managed in such a way that there is not a significant cost increase for employers and that there is no disadvantage to employees. In the case of the retail industry, we have made submissions as to how we believe that ought to be done. There will be some areas where there is a change in a provision, and we believe that can be done over time in a way that will protect employees and also protect the interests of the employer.

Senator ABETZ—If I may butt in here, the question was: should it be enshrined in the legislation as it is that employees should not be worse off and employers should not be worse off? At the moment in the legislation we have the guarantee for employees but not for employers.

Mr de Bruyn—I think that is a matter for the government.

Senator ABETZ—Yes, but you are here suggesting a lot of amendments. You are not averse to suggesting to the government it should amend its legislation and I would be interested in your opinion on this.

Mr de Bruyn—That is not an issue that we have put our mind to, but I do not think it is necessary to be in the legislation because it is covered, I think, in the brief that the minister has given to the commission and I believe that the members of the commission are operating in accordance with that. I just do not think the issue arises in practical terms.

Senator ABETZ—If that is the case, why does the legislation have the other counterpart of that duopoly, if I can call it that—no employee worse off; no employer worse off? Why does the legislation need on the one hand that no employee is to be worse off but not—

CHAIR—Take-home pay is protected—that's all.

Senator ABETZ—Yes, the take-home pay, and not the employer. Would you therefore suggest that that be lifted out of the legislation?

Mr de Bruyn—No.

Senator ABETZ—Why not that duopoly in the legislation?

Mr de Bruyn—I think that is for the government to determine, but we are not asking for that.

Senator ABETZ—But I am wanting to know why not.

Mr de Bruyn—Because we do not see that as being our role. Our role is to look after the interests of the employees, and that is what we are here to represent.

Senator ABETZ—So the wellbeing of employers does not necessarily assist the wellbeing of employees?

Mr de Bruyn—If an employer becomes unprofitable that obviously affects the employees. But our brief is to represent the employees, so if they are provided with protection in legislation then we support that. But we are not here to represent the interests of employers.

Senator BACK—Excuse my ignorance here, gentlemen, but how is it that respectively McDonald's, Pizza Hut and KFC seem to have some advantage over their competitors? How has that emerged? You have given examples of favouring. I would be very keen for you to explain to me how that has occurred and is likely to continue.

Mr Ryan—Let us take, say, Pizza Hut. Pizza Hut has an award that covers the company and some of its franchisees. That award today is not an enterprise award. So, come 1 January 2010, that award will be replaced by the modern fast-food award, whose terms have already been determined by the commission. Domino's, similarly, has an award which covers the company and quite a lot of its franchisees. That is not an enterprise award. So, again, from 1 January 2010, it will be replaced by the modern fast-food award. So both companies from 1 January 2010 will face a common award base. That is the safety net that has been determined by the commission for the fast-food industry. They will both be subject to that and they will both, if they want to, be able to bargain for agreements on top of that.

These two awards are quite dissimilar. The Domino's award has rates of pay which are significantly higher than the Pizza Hut award. That has arisen historically, back in the 1990s. So they are quite different. If you make the Domino's award and the Pizza Hut award an enterprise award, it means that they will be immune from the award modernisation process that is going on at the moment. They may be modernised after 1 January 2010, but the immediate impact is that the two awards will remain in place—quite different awards, with one requiring Domino's to pay a higher rate than the one which is applicable to Pizza Hut. That is how it differentiates between the two, instead of allowing the creation of a uniform standard for the industry, which would happen if the change in the definition of 'enterprise award' did not occur.

Senator BACK—I do not want to—

Mr Ryan—You can do the same analysis, although it is complex, with the other companies that I have mentioned.

Senator BACK—Has it caused a movement of employees from one to the other?

Mr Ryan—No, because none of this is effective at the moment.

CHAIR—Mr Ryan, I just want to come back to some of the points you made earlier on about employees potentially being worse off. As I understand it, the only thing protected in this proposed legislation is the take-home pay of employees, and the award modernisation request, while it clearly gave the commission a difficult task, clearly outlined the intention that it should not provide for extra costs for employers nor reduce conditions overall for employees. That was the intention of the request, and I think that is a good intention to achieve in a very difficult process. So, in terms of fulfilling some of those commitments, what is being protected in this legislation is simply the take-home pay.

All other matters, and you alluded to them earlier—maybe you could expand on them a little bit for me—such as rostering, casual loadings, different allowances for different types of work or the way different things are done, the amalgamation of some or disaggregation of others, are swings and roundabouts issues for employers and employees. In fact, I put it to our first witnesses this morning, Australian Business Industrial, who were also suggesting that there needs to be a more balanced approach, that if we go and protect everything and say 'nothing can change' then nothing does change. We may as well not have gone through the award modernisation process at all. We may as well have kept all the awards and all the different provisions and all the different classifications. So how do you see the award modernisation process? If you take out the take-home pay issue, is the rest a balance of swings and roundabouts, and how do you view that outcome?

Mr Ryan—It is an attempt to get a balance of swings and roundabouts—and there are a lot of swings and roundabouts in it. Regarding the hours of work, you end up with a modern award which has one set of span of hours of work which will apply nationally. That replaces in the retail industry and in the fast food industry anything up to eight separate awards which have different spans of hours and different systems of allocating work. For example, in community pharmacy, a pharmacy assistant in Victoria only works ordinary hours until lunchtime on a Saturday, and the modern award will have them working ordinary hours seven days a week. A pharmacy assistant in a community pharmacy in Victoria can now only work Saturday afternoon or Sunday on overtime. So it is additional to their ordinary hours of work. The new modern award will make those hours ordinary hours able to be rostered. That will have a significant impact on some workers. Some might enjoy it,

but it will impact adversely on a number of workers. It has nothing to do with the issue of the take-home rate of pay; it has everything to do with the hours that a person can be rostered to work. That is a dramatic example. It is one of the few awards where ordinary hours finish at lunchtime on a Saturday. For Victorian pharmacy assistants, it is a major impact.

CHAIR—Is that an example where employers get an advantage through the award modernisation process?

Mr Ryan—They get an enormous advantage, because it goes from overtime with overtime rates of pay down to ordinary rates of pay with a Saturday loading. The Saturday loading is 25 per cent and the overtime is 50 per cent and 100 per cent.

CHAIR—We are running out of time, but you may want to provide to the committee some examples—a list of some common provisions where the employers get an advantage from the award modernisation process—to put some balance into the proposition that is being put to us. It seems to be all one way.

Mr de Bruyn—One of the very prominent examples is in the retail industry in Victoria where a casual today is entitled to a loading of 33 1/3 per cent under the modern award will be entitled to a loading of 25 per cent. So it will go from 33 1/3 per cent down to 25 per cent, and the employers never talk about the savings that they will make under that. We have made submissions to the commission as to how you might try to cushion that. But nobody can deny that that is a major benefit to employers in the retail industry in Victoria for casual employees, who are of course extremely common in the industry.

Senator SIEWERT—I want to go to your recommendation No. 2 In that recommendation you say that if the government does proceed with enterprise awards, they should cover the whole of the franchise rather than bits of it. Can you explain the issues there?

Mr de Bruyn—We are saying that, if the government wants to extend the definition of an enterprise award in order to cover what are multiemployer awards, where you have got a multiplicity of franchisees of a particular brand all covered by an award, it should only be applicable if in fact the award in question covers all the franchisees.

Senator SIEWERT—Like a Pizza Hut, for example?

Mr de Bruyn—Yes, all the franchisees of the Pizza Hut. If the award in question covers only some of them, you are actually differentiating between those franchisees who are in the enterprise award and those who are not. Of course, if you take the Pizza Hut award, the employers told us only in the last week or so that the majority of Pizza Hut franchisees are not covered by the Pizza Hut award. So the effect of this extension of the definition of an enterprise award will favour only those franchisees who are in the award and all the remaining franchisees—which is the substantial majority—continue to be subject to the modern fast-food award from 1 January 2010. Why legislate to create this difference among the franchisees of the single business? It just does not make any sense.

Senator SIEWERT—What happens if the modern award is actually better than your enterprise award? You articulated earlier the argument between, say, Dominos and Pizza Hut, where Dominos is here, Pizza Hut is here and the modern award is here. Wouldn't it be better for the people in those other franchises to be on the modern award?

Mr de Bruyn—It depends on where the company award—if I can call it that—sits in relation to the fast food modern award. That is not always easy to establish because you would need to do a calculation of the business costs under the existing instrument as against those of the proposed modern award for the fast food industry. If you take Dominos as an example, they may actually be sitting above the level of the modern fast food award. I am not sure about that, because I have not done that calculation. We as a union do not have the ability to do that because you need to know when people are working, when they are rostered and so on. Only a business can do that sort of a calculation for itself. Our argument here is really about the relative positions of the different brands against each other. That is where the differences arise.

Senator SIEWERT—My other question is this. If the government continues with the enterprise awards, would you look at considering a phase-out of enterprise awards if they are less than the modern award?

Mr de Bruyn—Absolutely. If the definition does not change then, after 1 January 2010, we would be making applications to Fair Work Australia asking for either the cancellation of these awards—so that the modern fast food award would apply—or the modernisation of those enterprise awards in order to bring them up to the level of the fast food modern award. We have said that to enable us to do that we would need to have the provision clear in the legislation—if the extension of the definition of enterprise awards is to remain in

there—that a modern enterprise award must on balance provide wages and terms and conditions of employment which are at least equal to those which are set in the modern award for the industry.

Senator SIEWERT—Hence recommendation 4?

Mr de Bruyn—I think recommendations 3 and 4 cover that. That is not clear at the moment, so it is possible that under what is being proposed—where you extend the definition of an enterprise award—there is no guarantee that in the modernisation of these enterprise awards they will be brought to the level of the modern award for the industry. That is not guaranteed. You could have a situation where you fall short of that. That is, firstly, unfair to the employees because they would then permanently sit lower than the safety net for the fast food industry that has been determined by the commission. It is also not fair amongst the employers as a group because you do not have a level playing field. Some have an advantage over others. This is why some fast food companies have perceived the potential for an advantage in this area and have made submissions to the government and to this committee to try to retain that advantage on a permanent basis. That is just not right. The government should not be legislating in favour of some employers and against others.

Senator JACINTA COLLINS—There is one matter relating to one area of your submission, where a glitch seems to have removed some of the information. It is the discussion about where old Work Choices workplace agreements can continue. I wonder if, for the committee's benefit, we could have an understanding of until what point in time such agreements might continue to apply and of, once a nominal expiry date is reached, the process you understand might be involved for an individual worker to withdraw themselves from such an agreement.

Mr Ryan—At the moment, the legislation does not contemplate any individual employee withdrawing from an agreement that has passed its nominal expiry date. If such a proposal were to be considered, there would have to be a mechanism whereby, once you get past the nominal expiry date, you are not required to get majority support. We have given a very clear example of an enterprise agreement where no employees at any one work site would know who the other employees under the agreement were—in which case, trying to get majority support across the whole of the agreement would not be effective. If it were able to be done at a work site then a group of workers, such as those at the supermarket in Queensland to which we have referred, could remove themselves from the Work Choices agreement after its nominal expiry date. If tho workers in that example could do that, they would then have the ability to bargain either with their employer, which was the Sydney based HR company, or with the supermarket owner—whoever wanted to become their employer. I suspect that, if they withdrew from the agreement, the HR company would refuse to honour the contract and force the workers back to the supermarket owner.

But the process would have to be able to be initiated by an employee or by a group of employees, or by a bargaining agent for an employee or for a group of employees. It should be able to be done by simply giving notice to Fair Work Australia that those persons have unilaterally terminated their involvement in the old agreement. It should not be a process that requires employer approval—because it would never occur—but, if it does require anything, it should be done by Fair Work Australia applying the standard public interest test. Any agreement that passes its nominal expiry date and, being a Work Choices agreement, fails the current BOOT test, would obviously pass the public interest test in terms of being able to be terminated in respect of an individual or a small group of employees, if they could identify themselves properly.

Senator JACINTA COLLINS—What would they need to do at this stage? With the bill as it is, would those in this Queensland case need to be seeking from the commission a majority determination as to what is the appropriate group to exit from the agreement after its expiry date?

Mr Ryan—No. Because the transition bill applies the old termination provisions of the act to the old agreement, the rule is simply that, past the nominal expiry date, the employees can terminate the agreement by majority. So you have to have a majority of the employees voting to terminate the agreement before they can make the application to the commission—and the commission has to be satisfied of certain tests relating to public interest.

Senator JACINTA COLLINS—Yes, but does the commission have the capacity to determine which group of employees—

Mr Ryan—Not at the moment, no.

Senator JACINTA COLLINS—So, at the moment, they would be considering the group of employees as being the group who first established the agreement—and with no flexibility on that point?

Mr Ryan—No. It is the group who are currently employed under the agreement. The difficulty with the legislation is that, when the legislation was first envisaged, it was not envisaged that someone would be sneaky enough to set up a HR company where they got the HR company's employees to create the enterprise agreement then on-sold the value of that agreement to other employees who simply bought into it and had their workers transferred over to the HR company. That concept was not mainstream, but it is now a reality. That is the problem: the current legislation does not provide a mechanism for groups such as those employed under the HRO Initiatives Pty Ltd agreement to ever get out of it.

Senator JACINTA COLLINS—But if Fair Work Australia had the capacity to consider amending who could make a decision about exiting such an agreement, that would solve that element of the problem?

Mr Ryan—It would be significantly superior to what we have at the moment, because at least you would have an independent body who could do a proper and independent assessment as to whether or not those workers wanted to get out and should be allowed to get out. That would be based upon implementing the bargaining provisions in the Fair Work Act, which is to promote collective bargaining on a fair and reasonable basis.

CHAIR—Thank you for your submission and for your presentation to the committee today.

Committee adjourned at 3.50 pm