COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

Fair Work Amendment (Corrupting Benefits) Bill 2017, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017

(Public)

WEDNESDAY, 12 APRIL 2017

CANBERRA

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SENATE

EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

Wednesday, 12 April 2017

Members in attendance: Senators Cameron, Marshall, McKenzie.

Terms of Reference for the Inquiry:

To inquire into and report on:

Fair Work Amendment (Corrupting Benefits) Bill 2017, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 and Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017.

WITNESSES

STRONG, Mr Peter, Chief Executive Officer, Council of Small Business Australia

Committee met at 09:00

CHAIR (Senator McKenzie): I declare open this hearing of the Senate Education and Employment Legislation Committee's inquiry into the Fair Work Amendment (Corrupting Benefits) Bill 2017, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 and Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017. I welcome you all here today. This is a public hearing, and a *Hansard* transcript of the proceedings is being made. The hearing is also being broadcast via the APH website. Before the committee starts taking evidence, I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee generally prefers evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. If a witness objects to answering a question, the witness should state the grounds on which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the grounds on which it is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

I now welcome Mr Peter Strong from the Council of Small Business Australia. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I invite you to make an opening statement and, at the conclusion of your remarks, I will invite members of the committee to put some questions.

Mr Strong: Thank you very much for the invite. I will start off by saying: today we are arguing for simplicity. You never solve a problem with more complexity—not in the workplace, not with business plans, not with any of those sorts of things. You have to keep it as simple as possible. I learned that when I went to some training courses at the Clyde Cameron College in Wodonga, which was part of the Trade Union Training Authority back in the late 1970s. It was an amazing place. To see all these union people flying in there regularly was good for the local economy as well. That is a truism, and my members are all over it.

Last week we confronted this issue of 7-Eleven—of nonpayments, of the problems with people not paying at all in some cases et cetera. We ran a round table about fair and compliant workplaces. That was last Monday in Melbourne. You can see the full communique on our website. Why we ran that is we wanted to send a message loud and clear—and my members backed this totally—that, when it comes to workplace relations or anything, the rules are the rules and the law is the law. Those people out there that are doing the wrong thing—and 7-Eleven is a good case—give the rest a bad name. Most of us are fine employers, of course, otherwise we would have a much bigger problem. They mistreat their workers, and their workers are often our workers. One of my members said, 'They are often my kids or my nephews and nieces.' There is a personal need for people to follow the rules. The other one is competition.

My members, the heads of the membership, have said that non-compliant business—backyard hairdressers, for instance, who take cash and do not pay their tax or do not pay their staff properly—have a leg-up in competition, which is completely unfair. I went to my members and said, 'I'd like to run a day where we confront this, where we show leadership on workplace relations and we say, "Not good enough," to those people that are breaking the rules.' Indeed, some of our members would be in that group—without a doubt. I thought some of my members would say: 'Hang on—be careful. Don't do that. You're opening a can of worms.' I did not get that from any of my members. Every one of them, from the chairmen down, said: 'Do it. That's a great idea.' It was quite fascinating to have that reaction. The only organisations that said, 'Hang on—be careful about that,' were a couple of non-member organisations, which I found interesting as well.

So we ran this day and, at the end of it, the people said, 'Yes, the rules are the rules.' We even made a point of not talking about penalty rates—I think one person might have mentioned it—because we said, 'It's not about penalty rates. That is an important debate but it is a different debate. This is about people doing the right thing and paying the right money.' We made a real point of that—as much as I wanted to talk about it. We invited Allan Fels and he came along and gave us a description of what is happening out there. And, as you know, Allan does not spare any punches. The Fair Work Ombudsman was there—not Natalie herself, as she was on leave. She was actually going to cancel her leave but we said, 'No, you're doing a great job; have some leave, Natalie.' The Fair Work Commission and the Small Business Ombudsman were there. Bruce Billson turned up and our chairman was there. We had quite a range of people come along and represent the community, to a degree.

We also broadcast it online live. It was us saying, 'Not good enough,' and 'What are we going to do about this?' We workshopped it in the afternoon, and one of the things that came up was: 'How do we make it easier for our

regulators to regulate?' At the moment, it is very complicated for them. It should be easy. They should be able to go to a workplace—or not even go to a workplace—and say, 'These people are doing the right thing—great, great, move on,' and 'Hang on a minute—we've got a problem here; let's go and have a look at it.' It is really obvious: complexity helps those who want to cheat. I have no doubt.

I employ people—as I am sure we all have. You look at the awards—you normally have a screen these days—and, when someone asks how much it is per hour on, for example, a Sunday, you go into the award and eventually you find something that talks about Sunday and you find that it does not tell you how much; all it says is that Sunday will be paid at a certain rate and there are a few other words. So you think, 'Well, where is that?' and you go back and see 'pay rates' and you flick to pay rates and you find great big columns of pay rates and you think, 'Hang on a minute; now we have to go back to that bit and forward to this bit; is there anywhere else we've got to look?' It is difficult and complicated.

So, at the end of the day, we said, 'Let's have simplicity in the system,' so that the regulator finds it easy and an employer, who is not an expert in these things, and an employee, who is not an expert in these things, can look at something and both see that it is, for example, $19.25 an hour or 150 per cent—and they even know what '150 per cent' means. Even some of the terminology in these awards is so archaic. I have to give Ian Ross credit. He is trying to write awards in plain English, which is quite a job. It is being resisted by the unions and big business associations—by the workplace relations club. Of course, they would resist it. I would resist it too, because it might take away some of my job. But we do not resist it; we want to see something so simple that I can understand it, that my mother, who is 87, can understand it and so that anybody can understand these things—and it is possible to do that. But it is only possible if people want to do it—if people want to remove the complexity from it.

If you fail us, the small business person, you fail their worker. If you make it hard for them, you make it hard for their workers. I will give you some examples of where we have been let down. As I say, at the end of the day, we are saying, 'Let's keep it simple.' We also have at least 1.2 million invisible small business people out there. They are in their own workplaces and nobody cares at all about them. So, if you fail us, you fail the worker.

Let's talk about domestic violence leave. At the moment there is a push to have domestic violence leave. Domestic violence is, of course, a terrible thing. I have put it to many people, 'This is complexity. This is bringing a social issue into the workplace.' What if the victim is the employer? What if there are 10 people in the workplace and two victims—one is an employee and one is the employer? What society is saying is, 'We don't care.' Society is saying to the employer, 'Sorry; you can't be a victim,' or 'If you are, we are not going to care about you one little bit, but you must care for this employee. You must take time out of your schedule—

Senator MARSHALL: What does this have to do with the bills in front of us?

Mr Strong: This has everything to do with the bills, because this is about the complexity—

Senator MARSHALL: Regardless of who might be the victim—

CHAIR: Senator Marshall, over the years we have been deputy chairing and chairing together we have had a lot of lengthy opening statements. Mr Strong is still completing his opening statement and then you will have ample time to ask about the bills.

Mr Strong: Thank you. Mental health is a very important issue. If there are five people in the workplace, we look at the mental health of four of them. If I am in a workplace and my employer has deep depression, I care about that and we as a society should care about that. When you create complexity, Senator, then you make it more difficult for that individual who is suffering their own life crisis. What we are saying is, 'We don't give a toss about you; we care about the workers'—as we should and as we do as employers. But why don't we care about that person who is suffering a life crisis?

Senator MARSHALL: [*inaudible*]

Mr Strong: I am going to finish, Senator.

Senator MARSHALL: I should ask you as the employer.

CHAIR: Senator Marshall. Sorry, Mr Strong, please go back to your opening statement

Mr Strong: What about the issue with late payments? At the moment, we have people around the country paying on 120 days, so here we have a problem with superannuation where someone is not being paid. We have wages. We have tax payments. We have $26 billion owed to small business by big business, and small business owes the tax office $22 billion. There is an equation that tells you something, does it not? The small business ombudsman Kate Carnell has released a report today about the payment situation in Australia and it is disgraceful. And that is big business; that is not unions. That is big business that are taking advantage of the fact that the left

and right do not want to treat small business as people and, therefore, they can just create as much complexity as they want, and they do.

Let us talk about loans. If I am a worker, I can go to the bank and say: 'I've got a job. I've had the job for three years. Here's my pay advice.' And the bank manager goes, 'Fantastic, here's your hundred thousand bucks.' I, as the employer, wander in and say, 'I'd like to borrow $100,000 as well.' 'What do you do?' 'I run my own business.' 'Sorry, you are high risk.' 'But hang on, you just lent my staff member some money?' 'Yeah, they've got a good job.' 'But I employ them,' and the bank manager says, 'That's why I'm not going to lend you money.' How stupid is that. This is the message that we send out there to people.

We have regulators. The Fair Work Ombudsman is world-class. It is a world-class regulator. Nobody is perfect, but if we think there is a problem there they know we will ring them up and we say we think this was over the top or whatever. We work so closely together because we are on the same team. The Fair Work Commission—some of the commissioners need to resign or retire, I think they have retired already—with Iain Ross, certainly Iain Ross is looking for reform and they are doing a good job.

Beyondblue is another one. We have spent many years saying to them can we talk about small business. Small businesses run down by one side of the political thing because it suits their purpose. Ladies and gentlemen, complexity makes it hard for the people out there that want to look after their workers, and they look to COSBOA to help remove that complexity and make sure that an award, or legislation in this case, is easy to understand, is fit for purpose and makes sense. At the moment, all we are doing is adding complexity which will help the dishonest people and do nothing at all for the 90 per cent of people who are honest.

Senator MARSHALL: I am glad you had a day's session to work out that rules are rules and you should apply them.

CHAIR: Oh my, let's be respectful, shall we. It is 9.15 and there is a long day ahead.

Mr Strong: I know there is a union leader who does not seem to think rules are rules.

CHAIR: All right, Mr Strong! Senator Marshall, you have the call.

Mr Strong: Sorry.

Senator MARSHALL: I am surprised that you do not really have an understanding on how the workplace relations system works. You do understand that the award rates are the lowest legal amount you can pay—the lowest. That is why in overtime rates or shift penalties it is described as a percentage because the general assumption would be that not everyone wants to pay the lowest possible legal minimum rate to their employees. So the lowest possible legal minimum rate is not reflected everywhere else in the award because it is not assumed that everyone should pay the lowest legal minimum rate.

Mr Strong: And most don't; most pay above that.

Senator MARSHALL: So then, what were you complaining about?

Mr Strong: The complexity that makes it hard for people to understand what the laws are. So that when—

Senator MARSHALL: Because something is expressed in a percentage rather than a figure? Because that is what you were complaining about.

Mr Strong: No, Senator, you missed the whole point of what I was saying. I was talking about the language used. The language should be something that people understand, not something that you understand because you should understand it. If I talk to my employees and I say 150 per cent—and I have had them, they have been young people—they go, 'What does that mean?' They say to me, 'What does that mean?' because they not trained to think in those terms. We should spell it out in plain English, not in mathematics, 'It's what you get plus half extra again.' Explain it twice if you have to. But, Senator, do not look at me. I understand it. Talk about the people you represent, which are the workers out there and the employers you represent. Talk about them and make sure they can understand what is written on that paper.

Senator MARSHALL: So you would be happy if instead of presenting a penalty rate as 150 per cent, that we express it as, 'What you are paid, plus half again?' That is your answer.

Mr Strong: If that works. I would be happy with two expressions of how it works. You can make fun of it all you want. I will make fun of anything you want to do as well and then we can both 'mansplain' each other to death.

Senator MARSHALL: Let's move on. Which of the Fair Work commissioners need to resign?

Mr Strong: About half of them, but I am not going to name them. There are some there that do not—

Senator MARSHALL: You cannot—

Mr Strong: I am not going to name them. I will just make the broad statement—

Senator MARSHALL: A broad statement.

Mr Strong: You can change the conversation from, 'Let's have a simple system,' to tearing my words to shreds if you wish. Let's have a simple system. We do know that there are people who have complained about who is on the Fair Work Commission. We know that. We have seen it in the paper. We need to make the Fair Work Commission more transparent—do we not?—so you can look at a commissioner and know what their history is. There is nothing there at the moment to tell you that—why?

Senator MARSHALL: So you read something in the paper about someone complaining about a commissioner and your organisation's presentation to this committee is that half of them should now resign.

Mr Strong: Don't be ridiculous, Senator! How can you take what I just said and summarise it in such a trite way of trying to make me look silly? We are here about making things simple, not complex. I was giving you some examples of how people work. Carry on all you want. I can do the same thing. I can sit back and look at the ceiling and be childish. This is about making the system understandable for everybody that is out there, not just for unions.

Senator CAMERON: I have a point of order, Chair. This witness should stop being so aggressive and he should answer the questions. If he wants to have a game like this he should not make an appearance.

CHAIR: There is no point of order. I take your point, Senator Cameron, but we have had a lot more aggressive witnesses and senators than we have had thus far this morning in this committee over its history.

Mr Strong: Thank you. I apologise, Chair.

Senator MARSHALL: So we are not quite sure how many Fair Work commissioners should resign.

Mr Strong: No, I am not.

CHAIR: Other than half.

Senator MARSHALL: We are not sure which half. What do you say about the bills?

Mr Strong: I have had a look at the submission from the Franchise Council of Australia. Bruce Billson has got involved with them. Prior to Bruce, there was a bit of a war between COSBOA and the Franchise Council. What they have put up is similar to what we would have put up if we had had time to write a submission. It is about looking at what works for business and what works for the employees and what can be regulated. Certainly, with Damien Paull as the CEO and Bruce as the chairman, that is the submission that I recommend you have a look at and consider.

Senator MARSHALL: So your submission to us today is to support someone else's submission.

Mr Strong: It is not the first time that I have done that, just as in the past other people have supported COSBOA's submission.

Senator MARSHALL: I am just wondering why you have taken the trouble to come.

Mr Strong: Because we have a crisis here.

Senator MARSHALL: You have not told us anything about the bills, apart from referring us to someone else's submissions.

Mr Strong: I am talking about the bill. The bill needs to be simple. That is what I started my opening statement with; it needs to be simple and easy to understand.

Senator MARSHALL: So where is it not simple and where is it difficult to understand?

Mr Strong: Well, I will write you a submission and I will point out, word by word, the words that are difficult to understand and the words that are not. Now, to even ask that—no, I have to be careful.

CHAIR: Have you finished, Senator Marshall?

Senator MARSHALL: I am still struggling to find out what contribution you are making to this inquiry, Mr Strong.

CHAIR: I think Mr Strong has made a contribution around complexity—that came through in his opening statement—and he gave some views around language simplification in the modern awards.

Senator MARSHALL: So he is actually going to put some of that in writing, he said to us.

CHAIR: I do not think our committee minds how it gets its evidence, Senator Marshall—verbally or written.

Senator MARSHALL: But the point I am making is that there has not been any.

Senator CAMERON: Mr Strong, you have argued for simplicity. Was it a problem of complexity that caused the 7-Eleven rip-off of workers? Was it complexity that caused Caltex to rip their workers off? Was it complexity that caused Domino's Pizza to rip their workers off—or Pizza Hut, or United Petroleum, or Bakers Delight, or the students who come over here on 457 visas? When Gold Coast employers paid $8 an hour, was that about complexity? Deliveroo, the delivery company—was that about complexity? What about George Calombaris and his restaurants, Gazi, Hellenic Republic and the Press Club—was that about complexity? What about the apprentices that were being ripped off across every state in the country—was that complexity? What about the farmers that are turning a blind eye to the rip-off of workers that are being employed by some of the mafia type organisations in that industry—is that about complexity?

What about the trolley collectors that are getting ripped off every day of the week in our country? Is that about complexity?

CHAIR: There was a lot in that question, Senator Cameron. Mr Strong.

Mr Strong: All those that you talk about—I will not say all of them, because some of them I would have to go and check—we ran our day last Monday around that. We think that that is really wrong that that happened. We send that message loud and clear, through leadership, that the rules are the rules and the law is the law. Those people did not follow the rules or the law. There is no ambiguity about I have just said.

When it comes to complexity, the problem that I see is for the regulators who went in there. They found it very difficult to go in there. They spent a lot of time with 7-Eleven—Allan Fels talked about that case—and I am sure it was similar with the other ones. The complexity for the regulators is the thing that that group last Monday recognised as a problem that we need to fix. Without the complexity they can move quickly, much more quickly, than they can move now. The fines and the paybacks would probably be more because it would be much easier to prove because it is simple.

My understanding with the money that has been repaid by some of them is that there is probably more, but it became too complicated to try and prove what that back payment should be. So, yes, I agree with what you are saying. As I have said, we have made that public statement and we will continue to do so. On the complexity for the regulators—I am sure, Senator, you would agree—we have to make it easier for them to go and do their job.

Senator CAMERON: I just want to make sure that the regulators make sure companies comply with the law of the land. Laws sometimes become complex, and there is an obligation, if you operate under the law, that you can understand the laws. If you breach the laws, you breach the laws, and there are various consequences for a company that breaches the law. But these are not isolated issues. You raised, first-up, 7-Eleven as if 7-Eleven were an outlier. You agree that 7-Eleven is not an outlier, don't you?

Mr Strong: We ran a day last Monday and we went through it. We did not just talk about 7-Eleven; we talked about some of the other ones that you talked about there.

Senator CAMERON: But in your initial submission you spoke about 7-Eleven as if they were the problem and they were the exception to the rule. You have all these terrific little small businesses just full of really goodhearted people that really just want to get on and make a profit and employ people, but the complexities are getting them. That is not really what is happening in the real world, is it?

Mr Strong: It is what is happening in—

Senator CAMERON: This is big business, it is small business; it is farmers; it is retailers—

Mr Strong: It is unions.

Senator CAMERON: I am talking about your members.

Mr Strong: But I am talking beyond my members—

Senator CAMERON: If you are going to get aggressive again and you are going to do this again—

CHAIR: Sorry, Senator Cameron, that was not aggressive.

Senator CAMERON: I really think you have to think through how you present evidence.

CHAIR: Senator Cameron, please reflect on your questioning of Nigel Hadgkiss over the last five years, if you want to see aggressive.

Senator CAMERON: How about going to some of these issues? I have asked you: is this about complexity, or is there a systemic problem in not only your industry but in industry generally?

Mr Strong: I am trying to think how to answer this. The figures show the great majority of employers do the right thing. The figures show the great majority of people in society do the right thing. What they also show in those areas that you mentioned and in franchising is that there is a problem that has to be addressed. The

Franchise Council went to Bruce Billson—that was a big call—and asked him to be executive chairman, which he accepted. One of the things they are looking to do is clean up what you just mentioned.

We are not walking away from it. Last week we talked about it and we are still talking about it. It is not good enough. There is no excuse—no excuse. Complexity is not an excuse. What we said at the end is: it does make it hard for the regulator to regulate.

Senator CAMERON: You also indicated that you had a good relationship with the Fair Work Ombudsman. I think you used the words 'on the same team'.

Mr Strong: Yes. I said, yes.

Senator CAMERON: The regulator is on your team, is it?

Mr Strong: Thank you, Senator, for trying to put something in there that is not. What I meant was we all—

Senator CAMERON: I am trying to clarify—

Mr Strong: I am clarifying it now.

Senator CAMERON: I am trying to clarify: you said you are 'on the same team'. I have real criticisms of the Fair Work Ombudsman, and I am of the view that when you say you are on the same team there is some regulatory capture here.

Mr Strong: Well, you are totally wrong. I have members—

Senator CAMERON: But why did you say that?

Mr Strong: Because when we talk to the ombudsman and their staff we want people to comply. We want people to follow the law, and we want things to work. I have had my members—and I have taken this to the Fair Work Ombudsman—complain about the behaviour also of the Fair Work Ombudsman. But I believe that the world is not a perfect place and that, as long as you are in a dialogue, you can sort this out.

With the ombudsman, we agree that in the great majority of cases things are fine, and we agreed we would work together as best we can to fix that. That also means that, if one of my members complains about what they are doing, we can get back to them and say, 'Why did your staff member go over the top on this particular behaviour?' Sometimes they do, but that does not mean that there is a big problem. What it means is we have to have a dialogue, and we have it.

Senator CAMERON: Well, there is a big problem. There is a massive problem out there of noncompliance—a massive, systemic problem of noncompliance. That list I went through this morning is just the tip of the iceberg. I could go on and on. When you say the Fair Work Ombudsman and you, as an employer, are on the same team, I find it very concerning that any employer organisation would see the regulator as part of their team.

Mr Strong: I have to say: I think working with regulators is so important. It is such an important thing that we do. We are not enemies, and neither should we be. The enemies are the people that do the wrong thing. Now, if the rules are wrong—

Senator CAMERON: But that does not mean working with them and coming here and making a submission that you are on the same team.

Mr Strong: It is a term that people use: 'We're on the same team. We think the same way. We are doing the same thing.' If you want to turn that into some specific thing, I withdraw the comment.

CHAIR: Mr Strong, if I may assist—

Senator CAMERON: You withdraw the comment.

CHAIR: The Fair Work Ombudsman herself in estimates hearings of this committee has often spoke about working collaboratively with a range of employer organisations and how important that is for her to be able to do her work in an appropriate manner, with no question of her being compromised as a result.

Senator CAMERON: I have questions about compromising. You may think there is no question; I do.

CHAIR: When Ms James is here, you can ask those questions.

Senator CAMERON: When we have an employer organisation coming here and claiming they are on the same team I have a bigger question, because I have been concerned about the slaps on the wrist that the Fair Work Ombudsman gives.

CHAIR: This might be about the use of plain language.

Senator CAMERON: That is why this simplification and use of plain language sometimes just does not work. I think that has been an example—

CHAIR: Isn't it President Ross who is seeking to—

Mr Strong: Plain English awards. President Ross is pushing for plain English awards because he sees problems for workers in having an award they cannot understand.

CHAIR: I hope that you support that, Senator Cameron?

Senator CAMERON: I am not here to answer your questions. Can I come then to the Fair Work Amendment (Protecting Vulnerable Workers) Bill. Do you have any comment on that?

Mr Strong: As I said—and I quite often do this with our members. We have some exceptional members, and we talk among ourselves and say, 'What are we going to do with this submission?' They will say, 'Let's look at yours, and we'll support yours rather than say the same thing.' In this particular case we have had good discussions with the Franchise Council, gone through what they have and said, 'This is what we support: the changes that you are recommending, which adds some simplicity to what is a complicated bit of regulation.'

Senator CAMERON: What about the proposition we have had here from the ACTU that, in accordance with the Productivity Commission's report and recommendation, we amend the act to make it clear that the Fair Work Act applies to all employees irrespective of their status under the Migration Act 1958. Do you agree with that?

Mr Strong: Why wouldn't I? Again, you are asking me technical questions. Can I ask—

Senator CAMERON: This is an inquiry into—

Mr Strong: I am not an employer.

CHAIR: Mr Strong, you can take it on notice and then review the *Hansard* and have a think about your response, if you would like to.

Mr Strong: I will take that on notice, thank you, Chair.

Senator CAMERON: What about the requirements for the Fair Work Ombudsman to publish a Fair Work information statement containing information for employees about their rights under the act, the relationship between workplace laws and the Migration Act and the right for overseas workers to seek redress for contraventions of workplace laws. Do you agree with that?

Mr Strong: Again, I want to take it on notice. I want to go and look at the words now that you have pulled my words apart. But let me answer—

Senator CAMERON: This is—

CHAIR: He has taken it on notice, Senator Cameron.

Mr Strong: Transparency is what we want to see. We want to see all workers know exactly what their rights are. And, if that means giving them that bit of paper, that is fine. In my experience, most of them throw it straight in the bin. So we need to communicate better than just giving them a bit of paper.

Senator CAMERON: You have not read the ACTU submission?

Mr Strong: No, I have not.

Senator CAMERON: But you are coming here as an expert witness?

Mr Strong: I have been hearing that plenty of people have not read my statements, let me tell you that, Senator. Just because I do not have time to read every statement—

Senator MARSHALL: You did not present anything to us.

Mr Strong: No, I did not. That is right. Thank you.

Senator CAMERON: These go to aspects of the bill that we have to consider.

Mr Strong: Yes.

Senator CAMERON: And these are specific issues. I am asking you about your view on these specific issues. And if you want to hide behind taking it on notice because the chair tells you, 'Just take it on notice,' I just do not know why you are here.

Mr Strong: I am here to present the case for small-business people. I am not here to present the case for small business. And the case that I have been presenting for years now is that we are people. We are not businesses like BHP. We are people. And we have to be treated that way. Then we will have a much fairer society, even more fairer than we have at the moment. That is what I am here to argue and that then extends its way into regulation. All regulation should be simple, easy to understand and take into account the fact that a small business is a person.

Senator CAMERON: What we hear continually from the Fair Work Ombudsman is record keeping failures. We have propositions here that there should be increased penalties for failure to keep proper records. Do you agree with that?

Mr Strong: I do not agree with more penalties. That has never solved anything that I have ever come across, really. What I think with the record keeping—

Senator CAMERON: Except in your submissions on the ABCC and your submissions on general attacks on unions, that is when you want more penalties. Is that right?

CHAIR: Mr Strong, you were beginning to answer Senator Cameron's question.

Mr Strong: Thank you. I will take that as a point. Having more penalties for small-business people for record keeping is an issue that we take umbrage with because, if a lot of people are struggling with keeping records, the problem is what we are asking them to do. That is the problem. We have said that with a whole range of things. If the problem is endemic, either we have a societal problem—we have to go and fix it another way—or what we are asking people to do is too difficult.

Senator CAMERON: Why shouldn't an employer keep records of what they pay employees?

Mr Strong: They should keep records of what they are paying their employees—of course they should. We are talking about—

Senator CAMERON: But if they do not, you say that they should not be penalised. Is that right?

Mr Strong: My understanding is 'proper' records is the word. You have to keep records. If you do not keep records, you are not even a true business. We are talking about how much records you have to keep and in what form. That is my understanding.

Senator CAMERON: But a simple record—how much you pay employees, when the employees have worked and whether you are complying with the law. Why wouldn't there be a penalty if you do not comply with that very important but simple obligation?

Mr Strong: I totally support it. I think you need more on a pay advice than what you have just said. And in records, you need a whole range—of superannuation. There are leave issues—rec leave and all the different types of leave.

Senator CAMERON: I was just giving an example. I agree with you on that, but what I am talking about is: if you do not do that, and there is a systemic problem with small business not keeping proper records. They are your members, and I am asking you: why shouldn't they face a consequence for not complying with the law?

Mr Strong: They should face the consequence for not abiding by the law. What we are saying is: if it is not possible, then we need to go and investigate as to why. There was one industry group of ours, the Pharmacy Guild, for which in Queensland 43 per cent of their pay advices were wrong. We said, 'These are not dumb people. These are people that we rely upon for drugs and a whole range of things. What's gone wrong that 43 per cent that are failing on pay advices?' We went back and reviewed what they were asked to put on the pay advice. Forty-three per cent of pharmacists are not dodgy. They are not stupid. They follow the rules. I would rather they were watching the drugs than dealing with very complicated pay advices, to be honest. But that is the sort of approach we have. Let's make it simple so that the regulator can go in and say, 'They haven't kept records.' Of course, you have to keep what those things you mentioned are, but, gee, when the pay advice becomes like a book then you think you are going to make a mistake. Of course you are going to make a mistake! It is too complicated, and that is not good for the worker either. Let's keep it simple.

Senator CAMERON: Isn't it that what is good for the worker is that there be a record of what they have been paid so that if they are underpaid they can get some redress?

Mr Strong: Absolutely. If—

Senator CAMERON: Well, why—

Mr Strong: If I were a worker I would want to know how much I am supposed to get paid, what I have been paid and why.

Senator CAMERON: And that goes for superannuation, leave entitlements and all the issues that go in. I do not know that any pay slip is like a book, but there is a requirement for certain employer obligations to be kept on record clearly and for pay slips to reflect that. You do not have any argument with that, do you?

Mr Strong: No, as I said, you have to keep records; it is business.

Senator CAMERON: So do you have any view as to why the Fair Work Ombudsman comes in here time and time again—you get that part of your team. Why do they come in and say constantly that this was just an

oversight, 'We're warning them'? Why should there not be a financial penalty for not keeping records consistent with the legal obligations?

Mr Strong: What we do with the ombudsman—all the ombudsmen—is talk about the behaviour of human beings. If a person gets something wrong then we go to see why. Now, they might have done it on purpose, in which case that is an issue that you would deal with—

Senator CAMERON: How do you determine whether it is on purpose?

Mr Strong: That is a good point. It is the same thing as for an employee: we are all people in the workplace. When you have an employee we have rules and regulations to make sure that an employer just cannot sack someone because they think they stole something. We want the same rights for us as we have for our employees. Natural justice is a thing—it is not a racehorse—that should apply to everybody. The fact is that the ombudsman, the tax office and the other ombudsmen—the good ones—are the same: if you make a mistake they recognise that pretty quickly and they move on from it. Either you pay someone back or, in some cases, you still pay a fine if you make a mistake. But they investigate it from the point of view that you are a person in small business—you are not a big business—and they take into account the situation you are in.

If one of my members is going through a divorce, or they have a child who is ill or whatever they are going to make mistakes at work. Let's have the mistakes not in safety and let's have the mistakes not in areas of high importance; if they make a mistake because their mind is elsewhere then we have ombudsmen that will take that into account, and that is a fantastic thing.

Senator CAMERON: So you do not have to comply if you have some personal issues, is that what you are saying?

Mr Strong: Of course you have to comply! I did not say that.

Senator CAMERON: But what are you saying?

Mr Strong: I am saying there are reasons for why people may not be 100 per cent perfect in following the rules. Sometimes those reasons—

Senator CAMERON: Ah!

Mr Strong: It is the same with the employees, is it not? If an employee gets something wrong, you go to look at the reasons why. Sometimes you find out that that employee is having a big life crisis and you do what you do for that employee, but you do not sack them on the spot or fine them.

Senator CAMERON: Do you have any comment on the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill?

Mr Strong: I think that four-yearly reviews need to happen, because society is changing so quickly at the moment that we have the situation where we need to have a look at what we have written and what the regulations are. Do they take change in societal values into account, perhaps? Do they take into account any change in technology? And that is changing all the time. Ask, 'What do they take into account?' and let's have a look at that. I have no problems with that.

Was that a bad thing to say or should I have said something else, from the way the senator is laughing there?

Senator MARSHALL: No, I am just trying to check. My memory is that the submission you referred us to and that you support actually takes a contrary view, but I will check.

Mr Strong: Does it?

CHAIR: I think Mr Strong made it clear that he supports the Franchise Council submission when it comes to the protecting vulnerable workers bill. Let's be clear, senators: we are doing three bills across 1½ days—

Senator MARSHALL: I do not think he made that clear, but—

CHAIR: So in the vulnerable workers bill you are supporting the Franchise Council of Australia, but for the bill that Senator Cameron asked you about—the four-yearly reviews and other measures bill—you have a different view? That is what I understood Mr Strong to say.

Senator CAMERON: Nodding does not come up in *Hansard*!

Mr Strong: Sorry, okay—thank you, Senator. That is basically where we stand. Again, change happens too often to leave things in place too long. That is what my members say. They say, 'Look, we'd rather not have all these reviews; we'd rather not have this, that and the other.' But the reality is that there are things that need to be looked at because of the changes that we have.

Senator CAMERON: Do you support the submission we have from the ACTU that if a 457 worker or a migrant worker is exploited by one of your members—there are plenty of examples of that—because of them being victims of exploitation they should not be immediately removed from the country?

Mr Strong: It is an interesting point. One of the things we talked about when we addressed these problems in our meeting in Melbourne was what we do with that. We said to the ombudsman that was there, the Victorian Small Business Commissioner that was there and to the Fair Work Commission, which spent a long time talking about this exact issue, 'We need to go away and come up with solutions to that exact problem that fit in with the community and fit in with what those people need.' We all know they are between a rock and a hard place. If they have a bad employer and they go and complain they can be sent home. This is a conundrum that needs to be sorted out. I agree with you that it needs to be sorted out. I am not going to agree with other submissions until we go into it in more detail with our members.

Senator CAMERON: Basically, we have a bill before us and what you are saying is that small business has not really considered the issue, so you cannot help us in that area. Is that right?

Mr Strong: That is probably right because we have not been given a lot of time, Senator. The small business community is not flush with cash.

Senator CAMERON: Have you raised that with government?

Mr Strong: We raise it with everybody regularly. We need support.

Senator CAMERON: I am asking if you have raised it with government.

Mr Strong: We have. Yes, we have.

CHAIR: Senator Cameron, I have some questions, and we have Mr Strong for five more minutes.

Senator CAMERON: When did you raise those issues with government?

Mr Strong: In private meetings we talk about it. As I say, with the ombudsman we talk about it, saying, 'What do we do?'

Senator CAMERON: How many private meetings have you had with government on these bills?

Mr Strong: On this bill?

Senator CAMERON: On these bills.

Mr Strong: They were private meetings. Do I need to tell you how many?

Senator CAMERON: I am just asking.

Mr Strong: Probably four or five.

Senator CAMERON: Is that with the minister?

Mr Strong: The bill was mentioned as part of discussions we would be having on a range of things. This would come up. That is the way it normally works.

CHAIR: Thank you for your evidence on behalf of small businesses, Mr Strong. In response to one of the answers you gave to Senator Cameron, who was asking you about 7-Eleven, is 7-Eleven part of your representative cohort?

Mr Strong: Our members are associations.

CHAIR: Who do you represent?

Mr Strong: Our voting members are associations. The Australasian Convenience and Petroleum Marketers Association has 7-Eleven as one of its members. They have other people as well. They have Caltex as well. Their CEO presented at this day we did last Monday. They gave a very firm presentation about the fact that their membership have said, 'You've got to follow the rules.' They are disappointed that some of them did not, and they are working with them to rectify that problem.

CHAIR: On the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill, you mentioned that it is good to review awards because societies change. Do you have any comments to make about the recent review of the modern awards penalty rates decision?

Mr Strong: Of course, we know that penalty rate decision caused a great furore. What it created, in my opinion, was similar, if I can say—no, I will not go down that path. What I will say is that what it highlighted is that at least 50 per cent—according to the McKell Institute—of Sunday workers were already on the lower penalty rates. What it highlighted is that you get some people on weekends in McDonald's, for instance, who get very low penalty rates, and in some cases none at all. To do that, of course, there was a make-up in that the base

rate was higher in those organisations and businesses that signed this enterprise agreement that removed the double time on Sundays.

The political debate is that the vulnerable Sunday workers have been hit hard, and this is really wrong. We have argued back and we continue to say that vulnerable Sunday workers had their penalty rates removed in agreements between the union and about 100 businesses, and that happened five or six years ago. It has been in place for a long time. I think the argument is a political argument; it is not an argument about facts. Certainly, there are businesses out there that do close because they cannot afford double time. When I had my shop, I would have people say to me, 'I'm happy to work for you for time and a half, Peter, on a Sunday.' I did not open my shop on Sundays. I would say, 'Well, I can't do that.' They would say, 'Well, I can get time and a half at Coles or Woolies; why can't I get it with you?' I would say, 'That's just the way it is.' I think that the whole argument is false.

Senator CAMERON: It has got a lot of support though.

Mr Strong: I think that we need to get the facts out there. If 50 per cent of people have their Sunday penalty rates removed by agreements between the union and businesses, well, we have to have a justification for that. You have to say, 'Okay, it paid higher salaries during the week, but what about those people on Sundays?' My question, if you ever had an inquiry, would be, 'Were Sunday workers informed, before the vote on the enterprise agreement, that they would be worse off as a result of the agreement?' My understanding is that they were not. I understand that Penny Vickers, a woman in Brisbane, is taking Coles and the SDA to court because she ended up being worse off under the enterprise agreement than she would have been under the award. I do not know where the union movement is on this. I think that they should be supporting her, because she is a fighter for the worker.

CHAIR: Thank you, Mr Strong, for your evidence today.

Senator CAMERON: Can I put some questions on notice?

CHAIR: Yes, you can put them in writing.

Senator CAMERON: Just quickly: on the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill, the submission from the department is that the bill provides for the modification of the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act to apply to Fair Work Commission members. Are you aware of that?

CHAIR: That is all on notice. Senator Cameron will submit them on notice. We have got to move to our next witnesses.

Mr Strong: The complexity of the name confused the heck out of me already. I am not sure what you are talking about.

CHAIR: Mr Strong, your time is up. Mr Stewart is dying to get here, and Senator Cameron is going to submit some questions on notice.

Senator CAMERON: If you would have just let me ask the question it would be over by now. Could go to page 9 of the submission from the department. Could you, on notice, give me your view as to whether this act should apply to situations like what happened with, I think it is deputy president Watson, who attended the HR Nicholls Society and participated in an organisation that was biased in terms of their view? Would that breach this act?

Mr Strong: Thank you. I will.

CHAIR: Thank you, Mr Strong.

STEWART, Professor Andrew, Private capacity

[09:47]

Evidence was taken via teleconference—

CHAIR: Welcome. Information on parliamentary privilege, and the protection of witnesses and evidence has been provided to you. Do you have anything to add to the capacity in which you appear today?

Prof. Stewart: I am from the University of Adelaide.

CHAIR: I now invite you to make a short opening statement. At the conclusion of your remarks, I will invite members of the committee to put questions to you.

Prof. Stewart: I have made a written submission on the three bills which are before the committee. I will touch on each of those briefly. The repeal of four-yearly reviews and other measures bill, I strongly support each of the proposals in this bill. I have raised one technical issue about the wording of the proposal to give the Fair Work Commission a discretion to overlook minor procedural or technical errors that are made when making an enterprise agreement. I suggested that the appropriate test to use for determining whether or not that power should be exercised is not whether the relevant workers have been disadvantaged—because that is not the point of the procedures involved—but whether or not the relevant error is one that has significantly impaired their capacity either to be informed of their right to be represented or to genuinely agree to the agreement. I would suggest that with that change it would more accurately capture the objectives of the amendment, which I strongly support.

With the vulnerable workers bill, again, it seems to me that this contains a series of measures which are all very welcome. The explanatory memorandum sets out in great detail a strong case for each of the changes that are proposed. And of course this also reflects an election commitment by the coalition.

Again, there are one or two technical issues which I feel could helpfully be addressed. One is that for the proposal to increase penalties for serious contraventions, one of the threshold criteria for a contravention being serious is that it be deliberate. It is not clear to me that the amendment provides sufficient detail about what level of knowledge typically an employer must have had before their contravention can be regarded as deliberate. Is it enough that they did an act deliberately? Did they need to know it was unlawful? If they knew or thought that it might be unlawful, does it matter that they do not know exactly which law they have breached? Those are all matters I think could helpfully be clarified in the legislation.

Another point is that it is not clear to me from the legislation whether it is intended that if somebody has engaged in a serious contravention, that any other person who is knowingly involved in that contravention should also be liable for the higher penalties. Assume for example that a company engages in serious contraventions of obligations to pay the required level of wages to its workers. That company then is taken to court but becomes insolvent with insufficient assets to meet any penalties. In that situation with an ordinary contravention we would expect the applicant, which would very often be the Fair Work Ombudsman, to pursue managers, directors or advisers who had been knowingly involved. If it is established they are knowingly involved in a serious contravention, can they be liable for 10 times higher penalties? I suspect that the intent is that it should be possible, and in my view that would be the right position to obtain. But the set of amendments in this bill are not clear about that. Again, I think that could helpfully be clarified.

Otherwise, I strongly support the measures in this bill. In particular, the provisions for giving the Fair Work Ombudsman greater investigative powers are fully justified when compared with the powers available to other regulatory agencies. To me, to safeguards that are in the bill on the use of those powers are sufficient to strike an appropriate balance.

Finally, on the corrupting benefits bill, again it seems to me there is a legitimate basis for the government to seek to both prohibit certain forms of corrupting payments to officials of registered organisations and also to do something about secret deals or secret benefits between employers and trade unions in connection with enterprise agreements. But the drafting of the bill is highly problematic, and I think this is also apparent from the number of other submissions put before the committee, some of which I have had the opportunity to read.

I have raised a number of points in my submission, but among other things there is some real uncertainty about what might be regarded as absolutely standard and legitimate practices between employers and trade unions that are prohibited by these amendments. These are things such as employers providing catering or transport in relation to bargaining meetings or employers agreeing to provide trade unions with email facilities to communicate with their members. I find it very hard to imagine that those are to be seen as corrupting benefits and yet arguably the bill prohibits them.

There are also some real problems with the disclosure obligations. These come about because the approach taken in the bill—which to be fair reflects the approach recommended by the Heydon royal commission—is to come up with an overly broad prohibition. Then it tries to cut it down by defined exceptions, rather than by attempting to identify the kinds of practices which are to be considered inappropriate and then framing prohibitions around those specific practices. To me, this is a bill that needs to be rethought. As I say, I am happy to support the objectives of the bill, but I do not think the drafting achieves those objectives. It involves considerable regulatory overreach, which will have a great deal of cost and quite possibly some unintended consequences for businesses and registered organisations.

Senator MARSHALL: Thank you, Professor Stewart. You have referred to the word 'improper'. Can you tell me whether mere disclosure of any of these benefits removes you from the penalties of the act, and how does that sit with 'improper' in the first instance?

Prof. Stewart: There are a number of different prohibitions. I assume we are talking here about the corrupting benefits bill?

Senator MARSHALL: Yes.

Prof. Stewart: There are three separate sets of prohibitions. One is specifically about payments being made to registered organisation officials. One of the touchstones for that liability is inducing an official to discharge their duties improperly. I have highlighted, in my submission, that it is hard to know exactly what improper means. Some of the examples given in the explanatory memorandum seem to suggest that it would be improper for an official to behave differently to how they might be expected to behave; or for their organisation, for which they are an official, to be caused to behave differently to what might be anticipated. I would much rather see something that is targeted at payments to organisation officials that are intended to induce them to breach their duties to the organisation. If there is to be some idea there of not acting in the best interests of members of the organisation, again, it seems to me that should be written in.

Then we have the separate set of provisions which deal with the provision of benefits from employers to organisations or related parties. There the prohibition is simply on providing any kind of payment, goods or services, subject to some fairly ill-defined exceptions, which, as far as I can tell, do not catch a number of pretty standard and unremarkable arrangements.

Then, finally, we have the disclosure obligations. Again, the disclosure obligations, which apply to both employers and registered organisations, are expressed in this very, very broad sense of any financial benefit directly or indirectly obtained. An employer by definition, for example, would expect to receive a range of financial benefits indirectly as a result of making an enterprise agreement. On the face of it, they have to formally disclose that to their employee. That seems to involve going line by line through an enterprise agreement, figuring out every possible indirect benefit, unless it can be said the benefit is one obtained in the 'ordinary course of the employer's business'. I have no way of knowing what that phrase is meant to mean, but it seems to me to create a major problem for both employers and organisations. I am not sure if that has answered your question, but, hopefully, that has got at some of the concerns.

Senator MARSHALL: Probably as much as it can be answered. The HSU 'tragedy', I guess is probably the right word, with Williamson, in particular the corrupting benefits there, as I understand it, were more from vendors and people the union worked with, contracted to or pretended to rather than with any employers they were negotiating with on the whole. That is my recollection of some of the charges—

Prof. Stewart: I believe that is right.

Senator MARSHALL: None of that seems to be picked up in this bill. Is there a reason for that? Is that because that can be dealt with through existing law?

Prof. Stewart: I obviously cannot speak to the government's intention. To be fair to the government, it seems to me that these are proposals which fairly closely match specific recommendations from the royal commission into trade union misconduct. But what you said, I believe, is correct. Certainly there were many episodes or examples of wholly improper—and, in fact, often criminal—conduct revealed both during the HSU affair and then later in the royal commission. Many of the matters involved with the HSU would not be picked up by these proposals, but, on the other hand, there are clearly criminal laws to deal with that. We have seen both civil and criminal liability being imposed or sought against a range of HSU officials. Some of those matters are still before the courts. I think it is fair enough for this bill not to have to deal with those matters, because, on the face of it, they are already adequately dealt with either under the general criminal law or under the registered organisations legislation. Bear in mind that the registered organisations legislation has already been amended twice since the

problems with the Health Services Union became apparent—firstly by the former Labor government in 2012 and then just before Christmas with the further amendments proposed by the current government.

Senator MARSHALL: In terms of improper influence, does that only apply to enterprise agreements, or does it have a broader implication in between agreements?

Prof. Stewart: I will just go to the actual wording of the bill. Forgive me, I am trying to get on top of three rather disparate bills in a short period of time.

Senator MARSHALL: We have the same problem.

Prof. Stewart: Each of these bills has, in a sense, been flagged—with the possible exception of the corrupting benefits bill, where I rather suspect this could usefully have had a longer genesis and some more consultation, judging in particular by the comments of some of the other stakeholders. The other two bills, certainly, have been long flagged by the government. We are talking about the amendments in schedule 1, and, no, they are certainly not limited to enterprise agreements: it is anything to do with providing a corrupting benefit that induces or is intended to induce an official of a registered organisation as to the way in which they perform their duties. But, as I said, it uses this term 'improper', which I struggle to interpret. It seems to me that what is regarded as improper there is clearly not limited to breaching your duties as an official—those duties generally owed to the organisation, not to its members—but also includes performing functions under the Fair Work Act or the Registered Organisations Act improperly, and that would include functions as a bargaining representative. But, again, what is 'improper' there? If you bargained really hard in the interests of your members, but in doing so you crossed the line and failed to bargain in good faith as far as another bargaining representative was concerned, is that improper? I am struggling to see in practice how we draw this dividing line between what is proper and improper.

Senator MARSHALL: I refer you to schedule 1 and amendment No. 6:

In working out whether an advantage would not be legitimately due to a person, disregard:

(a) whether the advantage might be, or be perceived to be, customary, necessary or required in the situation; and

(b) the value of the advantage; and

(c) any official tolerance of the advantage.

I am struggling to work out what that could possibly mean. Do you have a view on that?

Prof. Stewart: I think the language here has been taken from other more general laws with which, I must confess, I am not particularly familiar. We are getting into areas of criminal law that are outside my expertise. As I understand it, this is drawn from provisions dealing with bribery. Let's take an example from a completely different context to illustrate this. A company pays money to an official of a foreign government in order to be able to do business in that country. That is an advantage which might be perceived to be customary, necessary or required—indeed, it might even be officially tolerated by the government of that country—and yet it is still to be regarded as bribery.

So the idea, I think, with this particular offence is that if, for example, it was shown that the way in which you get an agreement with a particular union is that you slip some bribes to an official of that union—that is customary, it is regarded as necessary—this provision says that just because it is customary or necessary does not mean to say that that advantage being provided to the official is legitimately due. So I understand why this provision is there; I think, in context, it is probably necessary. This is assuming that the kinds of situations we are talking about are not already covered by existing criminal law, which arguably they are.

Senator CAMERON: Can I go to page 1 of your submission. You open up by saying that the Fair Work Amendment (Corrupting Benefits) Bill 2017 is 'too wide or too uncertain, or both, and it has a danger of regulatory overreach'. I have missed some of the commentary on it, but that is basically what it is.

Prof. Stewart: That is a fair summary.

Senator CAMERON: On page 2 you go to the difference between 'advantage' and 'genuinely agree'. I think that is the third paragraph on page 2.

Prof. Stewart: We are talking about different bills there. The first thing you quoted was from—

Senator CAMERON: The first one is the Fair Work Amendment (Corrupting Benefits) Bill and the second one is the four-year measures.

Prof. Stewart: Yes, correct.

Senator CAMERON: Let's stick with the Fair Work Amendment (Corrupting Benefits) Bill at the moment. You have put some proposals up to try and address that.

Prof. Stewart: I do not think I actually have in relation to the Fair Work Amendment (Corrupting Benefits) Bill. In relation to the four-yearly measures, there is a very specific change. It seems to me that the proposal is a sensible one; there is just something which could be fixed up. I have put a specific proposal there.

With the Fair Work Amendment (Corrupting Benefits) Bill there is one proposal—and this is something I was just discussing with Senator Marshall—in relation to the idea of regulating improper performance of duties or statutory functions by an organisation's official. I have suggested that that might be recast to talk about a breach of their duties. Other than that, I think I am highlighting the fact that the general approach to drafting in the Fair Work Amendment (Corrupting Benefits) Bill leaves too much uncertainty and too much risk of prohibiting what any person experienced in industrial relations would regard as an entirely ordinary and unremarkable arrangement.

Senator CAMERON: So there is that proposition that it should be dealt with in terms of a breach, not improper conduct.

Prof. Stewart: Yes.

Senator CAMERON: Your proposition there is clear. You then go on to do a critique in relation to corrupting benefits, which are defined as 'benefits received or obtained in the ordinary course of the employer's business'. You have some difficulty in understanding what that means?

Prof. Stewart: I do. Employers, by definition, figure to benefit indirectly from arrangements they make. So the approach taken in the bill is to presume that any benefit which either an employer or a trade union receives out of enterprise bargaining is a corrupting benefit unless it falls within an exception. And there is one clear exception, which is the receipt of dues from members. What that means is that, to the extent that a union might hope to gain more union members out of doing an enterprise agreement, the financial benefit there is the increased payment of union dues. And that is an exception, so that is safely excluded. Otherwise, though, the main exception for unions is any benefits to employees. We are left there with a problem where the employer is providing a benefit to a union, which is representing the employees, by providing facilities for it. Is that accepted or not? I do not know.

For an employer, the employer expects to receive any number of financial benefits from an enterprise agreement, but the exclusion is for 'a benefit received or obtained in the ordinary course of the employer's business'. The ordinary course of an employer's business would involve receiving payments and benefits from customers. If they do a deal where they get benefits from employees or from representatives of employees because they are prepared to agree to something that advantages the employer, is that received or obtained in the ordinary course of their business? Well, it is received or obtained in the ordinary course of workplace relations. But is that the employer's business? I do not know. And there is no explanation in the explanatory memorandum of that term.

I would contrast here the explanatory memorandum for the Fair Work Amendment (Corrupting Benefits) Bill and the explanatory memorandum for the other two bills. For the other two bills, the explanatory memorandum answers almost every question one could have—not quite all. And I have raised a couple of issues, but they are issues around the margins. The case for those measures is very carefully and comprehensively documented.

For the Fair Work Amendment (Corrupting Benefits) Bill, however, the sense I have is that this has been put together as a more or less faithful translation of some very inchoate proposals from the royal commission. I suspect the assumption is that the government will look to use regulations to fix up any problems. I always think that is a very dangerous way to proceed. When you have phrases that are broad—like 'improper' or 'received or obtained in the ordinary course of the employer's business'; and in the case of the latter there is no explanation of what that means—it seems to me that we have a problem with the drafting of legislation.

Senator CAMERON: Listening to you now, I am thinking about what could be caught in this. You have raised the question of providing a lunch during a negotiating period. Is that a corrupting benefit? Years ago, when I was a union official, there were many lunches provided by the MTIA while we were discussing significant changes to the awards. Would that be in or out?

Prof. Stewart: I think it depends on the circumstances. If we are talking about providing some sandwiches or some pizza, which is an incredibly common occurrence—and the Australian Industry Group submission raises the same issue—no-one could conceivably think that is corrupting. On the other hand, if an employer takes a group of union officials to a city's most expensive restaurant and it is bottles of Grange all the way and you have a $10,000 or $15,000 dinner bill, it seems to me that in that circumstance it might suggest that perhaps there is something out of the ordinary. The problem is there is nothing in the bill to try and draw those distinctions. On the face of it, both would be caught.

Senator CAMERON: What if George Calombaris takes the union to one of these high-class restaurants to try and fix up the problems he has got? Would that be a corrupting benefit?

Prof. Stewart: Again, within the terms of the bill, it seems to me that almost everything is assumed to be corrupting—unless you can find a specific exception. And the exceptions either appear to be too narrow or are too vague—as in 'received or obtained in the ordinary course of the employer's business' or 'for the primary benefit of employees'. There is just no way of answering these questions.

Senator CAMERON: Just let me try again—

CHAIR: Is this another hypothetical, Senator Cameron?

Senator CAMERON: No, it is about the bill. I am trying to understand the bill.

CHAIR: Professor Stewart was quite clear. He is doing his best to answer your hypothetical questions.

Senator CAMERON: I accept that. I do not need your help, thanks. Professor Stewart, if during a bargaining process a union has a training organisation, or is affiliated with a training organisation, and part of the negotiations is that the workers will attend that training establishment—which would mean they would increase their skills and come back onto the job with higher skills benefiting the employer—would that be a corrupting benefit?

Prof. Stewart: That would probably be okay because the benefit there is for employees. You can tie the benefit to the employees—as opposed to officials of unions, in their capacity as officials, or to the union itself or to a related party. I am not suggesting that everything is caught by this bill. Again, I think the Australian Industry Group submission is particularly helpful in this regard. It has a series of examples where they correctly point out that similar situations end up being treated differently according to whether technically the people concerned who have benefited are employees or not employees. And I think that is wrong; I do not think it should depend on that alone.

Senator CAMERON: What if the training establishment make some profit for the union? Would that then be a corrupting benefit?

Prof. Stewart: The answer is 'possibly'.

Senator CAMERON: How then could you work this through? The employee gets a benefit and the employer gets a benefit. But the only benefit that is excluded is because the union provides a service with a profit. That would be a corrupting benefit. It seems crazy to me.

Prof. Stewart: It might be or it might not be. I think the point in the end here is that it is too hard to work out what is prohibited and what is not.

Senator CAMERON: Well, who then would make the determination, in your understanding, under the bill?

Prof. Stewart: A court. It is somebody who is charged with an offence—

CHAIR: Market rates, I think.

Prof. Stewart: There is a separate exception, Chair, for the provision of benefits at market rates. If, for example, money is provided for a benefit that is not directly for employees but is for the employer's benefit, and the arrangement involves paying well over market rates, that would be a corrupting benefit. If it is below market rates, or if it is at market rates—if is a fair price for those benefits—then that is not the case. I can understand why that provision is in there and what it is intended to do. The problem is that there are too many situations which do not neatly fall into the current exceptions. I believe the intent of the draft is: 'We'll wait and see what happens in practice with this legislation and then we'll introduce regulations to fix up all the problems that the bill may have created.' I would much rather see the bill being more specifically targeted. If, for example, the intent is to prohibit certain kinds of income protection insurance arrangements or certain kinds of training arrangements, or certain kinds of treatment of union officials, then be more specific about those, rather than the blanket approach of, 'Let's prohibit any benefits unless we can then find an exception.'

Senator CAMERON: In terms of market rates, how would you determine a market rate for the provision of training when you have so many shonks out there under the current system undercutting reasonable rates and providing no real service but that would be seen to be part of the market rate? What would you compare with?

Prof. Stewart: What a court would need to do, almost certainly, is receive expert evidence about that and then there would potentially an argument. I accept the point behind the question, but you may well end up having an argument about what is a market rate and what is not.

Senator CAMERON: Yes.

CHAIR: In respect of the four-yearly review of modern awards repeal bill, I want to clarify your position that you support the PC recommendations and this bill?

Prof. Stewart: Yes, I do, with only one exception. Once again, it seems to me the drafters of the legislation have actually picked up exactly the language used by the Productivity Commission, but in doing that they have introduced a potential uncertainty. Let's take a situation: in making an enterprise agreement, an employer makes a mistake. Let's say there is a computer failure and a small number of employees are not able to vote. That would be a technical error. Another example would be the employer provides a notice of representation rights one day too late. I strongly support the intent of the bill. Having been involved in my role as a consultant and advising employers being caught up in these situations, there have been many situations where it is clear that the error concerned does not have any significant effect. If the commission were given the discretion to overlook it, the commission would be prepared to do that.

CHAIR: That was my question around that area of your submission—that in taking a common-sense approach, the Fair Work Commission would, in that example you have provided, would be able to exercise its discretion.

Prof. Stewart: That is right. The only problem I have is the wording, which I will say again is straight out of the Productivity Commission report. They are not lawyers and I do not know that their recommendation is meant to be taken absolutely word for word. But they said and the bill says that the commission should exercise its discretion when employees have not been disadvantaged. My concern is where you have a technical error which does call into question whether employees have been properly informed of their representation rights or whether they have genuinely agreed, the employer is then able to say, 'But this is a highly advantageous enterprise agreement; therefore, they have not been disadvantaged.' I do not think that is the intent at all. Surely, the intent is that the objectives of the act in terms of genuine agreement and proper notification of representation rights have been substantially met. It is a technical change that I am proposing which simply aligns the drafting of the amendment to the intent behind the change. But the intent behind the change I strongly support.

CHAIR: Thank you. Just turning quickly to the Fair Work Amendment (Protecting Vulnerable Workers) Bill, there has been some suggestion that the vulnerable workers bill imposes joint employer liability. I just want to understand the difference between joint employer liability and accessorial liability.

Prof. Stewart: The difference is this. In my view it does not impose joint liability at all, for two reasons. Firstly, it does not purport to make a franchisor or a parent company responsible right from the time someone is hired for the provision of employment entitlements. It is not, for example, saying, where a person is hired to work for a franchisee, that the franchisor and the franchisee—where the franchisee is actually the employer—are jointly liable to ensure that that worker is paid correctly. That is what joint liability is. The bill does not even come close to proposing that. What it proposes, very sensibly—and again it seems to me the case for this is very cogently set out in the explanatory memorandum—is that if there is a breach then an applicant, who might be the Fair Work Ombudsman, an employee or a union acting on their behalf, could seek the imposition of liability on either the franchisee or the franchisor or both.

There will never be double recovery there, so you cannot have a situation where an employee gets paid twice; that could never happen. There might be a situation where penalties are imposed both on the franchisee and on the franchisor, but that conceptually is no different from the current act, which allows for the imposition of penalties simultaneously on both an employer and a person knowingly involved in an employer's breach, such as a director, a manager or an external adviser. So to me the argument about joint liability being imposed is misconceived.

CHAIR: Thank you. I just want to understand a little. There has been the Yogurberry case.

Prof. Stewart: Yes.

CHAIR: I am not sure if you have read some of those submissions.

Prof. Stewart: I have certainly read some of them, so I am familiar, I think, with the argument about that decision.

CHAIR: Do you have a view of the issues raised in the submissions that detail concerns around that case itself?

Prof. Stewart: It seems to me the argument is that, because we have had the Yogurberry decision, therefore we do not need the kind of extension that was promised by the coalition in the last election and which is delivered in this bill. It seems to me that it is wrong to say that Yogurberry is an answer and that that tells us that this extension is not needed. The Yogurberry case is a highly unusual case where you have a franchisor and a set of franchisees that are essentially the same business; they are all associated people. They are different members of

the same family. Their entity is set up by those family members. The use of section 550, the accessorial liability provision, in that case is facilitated by the closeness of the relationship between each of the parties involved.

By contrast, in the 7-Eleven situation or many of the other types of franchises which have been identified or alleged to have been involved in extensive underpayment of workers, it is far harder under the existing section 550 to show that a franchisor who is an entirely independent business is knowingly involved in breaches by franchisees. Effectively there, franchisors have the ability and indeed even an incentive under the current act to simply not make inquiries about what is going on. They might suspect things, but they do not know. Therefore, they cannot be involved under section 550. What the bill does—again, I would suggest, very sensibly—is to introduce a scheme whereby a franchisor that has reason to believe, including from the financial arrangements between the two parties, that contraventions are happening cannot simply then turn a blind eye to that and escape responsibility. It is still, in a practical sense, going to be hard to make a franchisor or a parent company liable, but the bill provides valuable tools, particularly for the Fair Work Ombudsman, which are not there under the current act.

CHAIR: Thank you so much, Professor.

Senator MARSHALL: Professor Stewart, could I come back to the intersection between corrupting benefits and disclosure. Does the disclosure process turn a corrupting benefit into a non-corrupting benefit?

Prof. Stewart: No, it does not, because we are talking about separate provisions here. We have these three sets of prohibitions. You could have a situation where an employer and/or a trade union make disclosures to disclose the availability to them or the provision of certain benefits—that that discharges their disclosure obligations. That does not answer the question of whether or not the provision of those benefits from one to the other is a corrupting benefit for the purpose of the separate provisions about provision of benefits. I hope that makes sense. Disclosure does not turn a corrupting benefit into a non-corrupting benefit.

Senator MARSHALL: I take you to the example that you raised in response to Senator Cameron's questions about, say, income protection. There may be a benefit derived to an organisation that can use its buying power across many thousands of workplaces to provide a benefit which is then in the enterprise agreement. They would disclose any benefit the organisation got. Would that then be considered under the bill a corrupting benefit?

Prof. Stewart: It might still be is the answer. Again, what I am endeavouring to explain here is that you have separate prohibitions—and they are not linked—on provision of benefits on the one hand and disclosure of benefits on the other hand. You might say that if the benefits are disclosed they are no longer secret—that is certainly true. But it does not mean that they are not corrupting benefits as the bill defines it. If an arrangement involves the provision of cash, goods or services, that is automatically treated as a corrupting benefit unless it can be brought within one of the exceptions, and we are then left to argue about whether or not a particular benefit is one primarily or predominantly for employees or we are in the realm of arguing whether or not a particular benefit has been provided at market rates. While the fact that all of that has been disclosed and that there is nothing in the slightest bit secret about it will satisfy the disclosure obligations, it will not resolve the question of whether or not it is a corrupting benefit in terms of the prohibition on payments of corrupting benefits.

CHAIR: Thank you, Professor, for your testimony.

Proceedings suspended from 10:33 to 10:44

CLARKE, Mr Trevor, Director, Legal and Industrial, Australian Council of Trade Unions

CHAIR: Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. Could you please make a short statement and, at the conclusion of your remarks, we will go to questions from senators.

Mr Clarke: It is a bit hard to know where to start. We have three bills to work through. On the vulnerable workers, we acknowledge that there is a problem that demands a government response and many of the provisions in the bill are a step in the right direction. There are regulatory and other responses that should also be considered to address multiple factors that are at play in creating the present environment where workers are exploited. In terms of the centrepieces of this bill—the franchisee and franchisor and holding subsidiary type regulation—there are a few different ways to go about that. You have the accessorial liability position at the moment where the person going after the accessory needs to have knowledge of the relevant facts—whether they know that it amounts to a breach of the law—or you could go for a model that creates positive obligations for supply chain participants to effectively audit down their supply chain and satisfy themselves that there are no exploitative labour practices. These measures are part way along that continuum. They are not rising to what we say is the gold standard, but we are making some headway from the present accessorial liability.

There is the point that you raised, Chair, about the Yogurberry case and what has been made of that in various submissions. I simply observe that those who click on the link and read the case will see it was actually a judgement by consent, where liability was admitted, including the liability of the accessories. Not to take any credit away from the Fair Work Ombudsman for resolving the matter, but to suggest that it is some outstanding legal precedent that every court will follow is a bit rich. In terms of where we have landed on that continuum, our issue, I suppose, is the way it creates two different standards, depending on whether you are looking at a franchising relationship or a holding subsidiary relationship. Regarding the way we see it, what those two types of arrangements have in common is that, although holding companies and franchisors like to think of themselves as profiting from the exploitation of capital—holding companies earning profits or dividends off the corporate entity that it owns and the franchisor is exploiting the capital resource in terms of effectively licensing intellectual property rights that they own—the reality of the situation is that in both cases their capacity to derive that income relies on the engagement of labour. Because of that, we say—and the bills effectively say—that deriving a benefit from those people's labour requires that you take some responsibility for those people, for their wellbeing. We say it should not be necessary, as the bill currently does for the franchisee and franchisor relationships, to require that a franchisor have a significant degree of control or influence over the affairs of the franchisee. That additional test that applies only to that type of relationship need not be there. You should, in fact, be assuming that that connection exists, qualified only by the type of negligence test that already exists in those provisions.

The other issues we have with that bill is the ABCC is for everybody and the coercive powers it contains, with the exception that there are fewer checks and balances than there are with the ABCC. It is a bit opaque to be sneaking this in under the cover of a bill that purports to be a targeted response to issues to do with worker exploitation, because the powers clearly go much further than that. It is also rather curious that, in their submission, the Fair Work Ombudsman forgot to mention the ABCC in the list of agencies that have coercive powers. Also, the first time that they publicly supported getting additional coercive powers was when they put in the submission for this inquiry, after the bill was already introduced into the parliament. If you pick through their submission and look at their caseload for noncompliance, with the coercive notices they already have for their statistics last year, there were eight cases out of 29,990 complaints to the ombudsman. So 0.03 per cent of their workload relates to noncompliance with their investigative powers. The creation of coercive powers ought to be based on more than a wish that you had them in your back pocket for a rainy day when somebody does not return your phone call.

The other problem with these powers—and this is a pretty important one—is that they might hamper the capacity of the ombudsman to run successful accessorial liability cases. This is an important point, and it is why the National Retail Association does not have a problem with these coercive powers. When you introduce these coercive powers, it is conventional and appropriate to have immunity rights attached to them—use immunity, derivative use immunity—which means that when you go into that room, whatever you say cannot be used against you personally. You lose your privilege against self-exposure to a penalty, you lose your right to take the fifth, but anything that you do say will not be used against you personally.

As Professor Stewart referred to in some discussion about hypothetical examples today, it is not uncommon for the ombudsman and others to be faced with a situation where they go after a business which is effectively often a one-person company business, and the one-person company business gets wound up either before, after or during the proceeding, so it would not have to pay the penalty, it would not have to make the underpayments. These

accessorial liability provisions say, 'If you've got somebody who's knowingly concerned, you can go after them and you can get the penalty and you can get the compensation off that person individually instead.' You can do that, the ombudsman has done that and the court has made orders about that. If they get a person from one of these single-director companies or small entities into a room and say, 'We have to get you in a room and compulsorily interrogate you about what's going on here,' and that person tells them what is going on here, they have then lost the capacity to ever get that person on knowingly concerned or accessorial liability, because they cannot use what has happened inside that room against that person. So if they use these notices, they are reducing the capacity to claim accessorial liability against the person they have in the room, who knows what is going on. I suspect that is going to be a bit of a trap for them and not be of tremendous assistance.

The other thing we would say about the bill generally is, 'Please, don't leave it at this.' There are some other types of complementary measures that are needed for it to be a more fulsome response, including the prohibition on some of this ABN work, extending the work of serious contraventions to include the sham contracting arrangements, allowing workers in breach of visa to be compensated by dealing with this void contract of employment issue, insulating them from Immigration and Border Protection when they come forward with these issues, funding outreach activities to educate them and licensing of labour hire. There are a whole host of complementary measures that would do much.

In relation to the four-yearly review bill, the bits to do with the four-yearly review itself are largely uncontentious. In our submission there is just one question that we have raised in relation to the operation of the transitional provision, which might bear some consideration by the drafters. In relation to this issue about streamlining agreement approvals, we have been hearing for years people complaining about, 'We put a staple in something and that meant the agreement couldn't get approved.' Again, read the decision: the case was not about the staple. It is all very well to say it was about a staple, but the case was not about the staple; it was a case where the employer conceded and volunteered in evidence that it had supplied one document that was a modified notice of representational rights. Yes, the various pages of it were stapled together, but their evidence was that it was one document and they had modified it. That was the issue, not the staple.

The Uniline case that has attracted some commentary in the submission is a case where somebody missed a time limit, there were procedural consequences because of that, and they could fix it. I do not like to think that I am terribly old, but for as long as I have been involved in workplace relations and agreement approvals there has always been some form of time limit around the processes for having an agreement certified, as it was then called, by the commission, or approved or even submitted to the department, the delegate or whatever the authority was called during Work Choices. There have always been time limit issues. That is not a new requirement.

To pick up on what Professor Stewart was saying, the real issue here ought to be to fix the actual cases where there are problems, and do not pare back the whole thing. The rider should be more along the lines of what Professor Stewart was proposing, because, as we point out in our submission, you have a choice when you frame a regulation around this that is all about ensuring people get adequate information and the opportunity to be represented and all get to have their say. You can put that sentence together and have everybody out there wondering what exactly it means, including a troop of employers saying, as they often do, 'Don't give us these discretionary sorts of descriptive tests; just tell us in black and white what we have to do, so we can tick off the checklist and know we've complied.' Legislatures and regulators often create prescriptive requirements, so you can adopt a tick-a-check-box approach, which are designed to meet the policy objectives of ensuring that fairness and opportunity to participate in the majority of cases. As the procedural safeguards have a bigger substantive role to play, we are very concerned that what you are opening the door to here is going much further than fixing minor and technical problems. We also have some uncertainty about how this thing is going to operate in practice.

On the thing that ended up being called the corrupting benefits bill, which came out of the royal commission into union corruption or whatever it was called—it certainly had corruption in the title—I think if you did a word find on the royal commissioner's report, he used the word 'corruption' or forms of it multiple times but nonetheless has recommended that nobody knows what corruption means, so he needs to go ahead and frame things that do not talk about corruption at all and deal with these matters.

CHAIR: So you have a problem with the name. Anything else?

Mr Clarke: Yes, we have a problem with the name, because it targets payments that are in no view improper. The first part of the bill, which does make some reference to impropriety, also talks about benefits that are not legitimately due, and it does not restrict the transfer of benefits not legitimately due to a person's exercise or capacity as a union official. It has broken from the drafting that it was based on, which is the drafting in the Criminal Code in relation to bribing of public officials, which requires that there be a connection between the illegitimate benefit and the intention to influence the official in the exercise of their duties as an official. You have

lost that in translation, so you have a situation where two people will be treated under different bribery laws depending on whether one of them happens to be an officer of a union, most of whom, as we know, do not work in full-time jobs for the union. They are electricians, they are builders, they are dishwashers; they are all these sorts of things. If they take a sling on the side in the course of their duties as an employee for their employer, they will be treated differently depending on whether or not they also hold the title of officer of a union, even though the corruption—if you want to call it that—has absolutely nothing to do with any part of the union or their duties as a union official whatsoever. These sorts of things happen when you rush them.

The second part of the bill is about creating arbitrary distinctions between legitimate and illegitimate income sources for a union, and it has missed the mark quite obviously because, among other things, it makes it illegal for unions to settle unfair dismissal cases for their members or in fact do anything for people who are not current employees of the employer whence the money comes. From an international law perspective, it is highly objectionable to have this arbitrary list of, 'This is what a union can get money for; this is what a union can't get money for.' They are supposed to be able to function freely and organise their activities. It is a highly illegitimate restriction on free-functioning democratic unions.

The disclosure obligation is coming from the right place. We have no issue with an obligation to disclose during bargaining—we know this money is going to come to the union, or this money is going to come to the training company that the union owns, operates or is interested in as a result of this agreement—but tying it to the definition of related parties in the registered organisations act makes it a bit of an unreasonable burden, because the way the registered organisations act uses related party regulation is for the union to identify when its officers are entering into dealings with themselves or are causing the union to enter into relationships with people to disclose, 'These are the related parties and this is the money that's going.' Here you have a situation where an employer, in implementing the terms of the agreement, might make an arrangement with a business who, unbeknownst to the union officials in that branch, has some stepbrother company related person in some other branch of the union in another part of the country who derives a benefit as a result of that, and that is casting too wide a net. I think you need to concentrate on moneys that the union or a branch of the union are receiving, rather than having this sort of related party. It cascades down too far.

That is a precis of the million-and-one issues that we have.

Senator MARSHALL: In relation to the disclosure and the reference to training companies and other things unions might provide, does the market rates exemption protect that?

Mr Clarke: The market rates exemption is not part of the disclosure bit; it is part of this arbitrary criminalisation of money flowing into unions. The difficulty with the market rates or fair market value is that I am not entirely convinced, as Professor Stewart said, that if it were cheaper than the market, it would be okay. A great concern is that if a union offers something of benefit to the employees and the employer in terms of skills development that is particularly targeted—for example, health and safety training that is tailored to the types of risks that people working for that employer might face, based on years of industry experience—at a rate that is perhaps cheaper than a private training college. Is the union deemed to be criminal or corrupt because they offer something tailored, cheaper than the general market, to the employer who thinks it is a good idea? Is that a reason somebody should go to jail? I do not think so.

Senator MARSHALL: I do not think a reasonable person would say that, and the act may have that inadvertent consequence, which is something we would look at, but isn't it meant to stop services being provided at inflated rates wherefore a benefit is derived?

Mr Clarke: I think it cuts both ways.

Senator MARSHALL: Can you provide such a benefit or such a service in the first instance? It would appear not, unless the market rate exemption allows that to happen. Personally, I think that is fair. I cannot see why that would be unfair. Why should services be provided at an inflated rate?

Mr Clarke: The exemption does not just relate to market rates; it also contains provisions to do with market rates in the context of the ordinary activities of the—

CHAIR: Can you answer Senator Marshall's direct specific question first, rather than the secondary option that you are now flicking through the bill to find?

Senator CAMERON: Or you can take your time and answer it however you like.

Senator MARSHALL: Let me just come back and focus on this. I know there are some deficiencies in the act, but the general principle is that if a service is being provided at a market rate and it is disclosed could it be construed as a corrupting benefit? I think Professor Stewart was indicating probably not. I am just wondering what your view would be.

Mr Clarke: I support that view. I thought you were asking me a different question.

Senator MARSHALL: I do not think I was.

Mr Clarke: Sorry. There is no point of disagreement on that. My apologies.

Senator CAMERON: The AiG support the ACTU's proposition that the Fair Work Ombudsman should not have coercive powers. Are you aware of that?

Mr Clarke: I did read the Ai Group's submission.

Senator CAMERON: Do you have any comment on their submission on that particular point?

Mr Clarke: I think that they might not have made the same points that we did in reaching their view. Our difficulties with the coercive powers are for the reasons I have expressed today and in our submission.

Senator CAMERON: Do any of these bills breach our international obligations?

Mr Clarke: The corrupting benefits bill certainly does—certainly the part 2 provision, which is the criminalisation of all money a union receives from an employer unless the government says it is okay. Sorry to put it in such blunt terms, but when you do you get to understand what it is about. This is what we are talking about. That breaches the International Labour Organization's conventions—potentially both 87 and 98, one of which is more concerned with bargaining and one of which is more concerned with freedom of association and the structures that are required for that and the capacity for them to function freely. This is a matter we would raise in the usual cycle of our reporting to Geneva on these matters.

Senator CAMERON: In terms of the definition of market rates, have you had a closer look as to how that could ever be determined—what a market rate is?

Mr Clarke: The difficulty is that there are two things. This is perhaps where I got confused by your question, Senator Marshall. The market rate exemption is for the sort of thing that is in the usual course of the defendant's business. Often if you are bargaining or trying to resolve an industrial situation you will create a new agreement or perhaps bargaining be for the first time with an employer for a new agreement. So you are necessarily asking them to do something differently from that which they have done in the past. So it could be very difficult to satisfy that their agreement to a demand by a union that something happen—the somebody be trained or that sort of thing—for the benefit of the workforce and the members. You do not have the history to show that is in the usual course of the employer's business because you necessarily need something new compared to what they have done before.

Senator CAMERON: Would it be deemed to be corrupting if an employer was using, say, an AiG training company and the union had genuine concerns about the training that was being undertaken and believed they had a training company that could deliver better quality outcomes? Can you bargain on that without it being argued that that is a corrupting influence?

Mr Clarke: One of the real difficulties with the interplay between these provisions and the Fair Work Act as it stands is that the Fair Work Act permitted matters in agreement, the sorts of things you are allowed to bargain about and have in an agreement, include matters relating to the relationship between the unions covered by the agreement and the employer covered by the agreement. So on the one hand the act says it is fine to bargain about anything which could be described in that way and have it in an agreement. But you have another thing here saying: 'No. If you do, you will go to jail.' That may well mean that the combined effect of that is to reduce the scope of matters that are permitted in an agreement. That is, on the face of it, not something that any of the material in relation to this bill has been up-front about, quite frankly.

Senator CAMERON: Do you have the permitted matters section there?

Mr Clarke: Yes. That is section 172 of the act.

Senator CAMERON: I do not want you to go through them. I just wanted to have a look at them again myself later. So you are saying that these bills further prescribe the bargaining rights of unions?

Mr Clarke: Yes, because if a payment was received an arrangement between an employer and a union that resulted in, among other things, the union deriving a benefit would become something that was unlawful, notwithstanding that it was a matter about the relationship between the union and the employer. So, yes, it is restricting the scope of bargaining, which also has the obvious and international implications that are already a problem with the act as it stands.

Senator CAMERON: ILO conventions 87 and 98?

Mr Clarke: Yes.

Senator CAMERON: The AiG submission proposed a number of amendments. Have you had time to have a look at those amendments?

Mr Clarke: I only looked at them very briefly. With the nature of the amendments that are proposed, this type of process does not give you enough time to fully consider what some of the unintended effects might be. This is a bill that really ought to go back to the drawing board, because the corrupting benefits bill never came through the normal consultative mechanisms. The other two bills did. They came to the committee on industrial legislation. You had experts not only from unions but from employer associations go through the drafting with the members of the Public Service who were involved in that to ask, 'Why have you chosen to do this?' or 'Is this is a better drafting convention? or 'Have you forgotten this subparagraph?' I am happy to say they went through the consultative process.

CHAIR: I know that is what you are saying, but does that mean that those are now somehow bills that the ACTU would support as a result of going through that process?

Mr Clarke: No, we do not—

CHAIR: No. So it does not change your view.

Mr Clarke: The fact that they have gone through a process does not change our view as to whether we support the outcome or not, but we do think that it is an important process for these things to go through. The risk is that when you rush something as important as this or do not pay attention to it, for one reason or another, you will end up in a situation where it is already before the parliament, it is in a rushed Senate inquiry and the government's priority becomes, 'I don't want to get egg on my face; I just want to slam the thing through and claim the victory,' rather than having a good policy outcome. You are more likely to get things right if you consult on these types of things properly.

Look at even the broad policy objectives of the Fair Work Act and ask yourself: 'How do criminal law provisions fit within this? How does criminal enforcement fit within this act? Why is it going in this act?' If there is a problem with bribery, shouldn't we be having some consultative process around bribery with the state and territory governments? If the royal commissioner is right—and we do not think he is—that there is some deficiency in the way that state and territory criminal law applies to organisations that represent people in terms of bribes, maybe that is a bigger national problem. Maybe there are other types of representative organisations, like PR or political lobbying firms, with personnel who are closely connected to political parties. There is a problem with the way that these types of slinging-favour arrangements apply to them in the general criminal law. If there is an issue, deal with it as a criminal law issue. The difficulty you have here is that you are saying that you are trying to do something specific and, in fact, in the first part of it, you are not. In the first part of it, you are allowing people to be charged under industrial laws for bribery related conduct that has absolutely no connection to their conduct as an officer of a union. As a constitutional case, it will not happen till the first time you pull the trigger on this, obviously.

Senator MARSHALL: You mentioned that earlier. The example you used was that of someone is receiving a sling—to use your word—as an employee. They also happen to be an officer of the union, so if they are caught receiving the sling, which we are assuming is an illegal sling in any case, they will face higher penalties because they will come under this act. So what? Why would we care about that?

Mr Clarke: I think you should care about it. If you are saying that this is an industrial relations related issue and that you are dealing with specific industrial relations related problems and that the reason you need high penalties is because these people are officers of unions and they have some higher moral duty than others perhaps—

Senator MARSHALL: Yes. Don't they? Personally, I actually think that they do.

Mr Clarke: But even if you accept all of that, shouldn't the bribe that is targeted be something that is in some way connected with the fact that they are an officer of a union? That is what the royal commissioner clearly said that he wanted to do, and it is not what the department has done in—

CHAIR: Hang on, Mr Clarke, I think Senator Marshall—

Senator MARSHALL: This is where I am unclear. I accept what Professor Stewart said about problems with the words 'improper' and other things, and I think we need to look at that. But in giving, receiving or soliciting a corrupting benefit—this is at 536D—they commit the offence and it goes through a whole range of things. But then in (b) it says:

… the defendant does so with the intention of influencing a registered organisations officer or employee …

It then goes on to give some details about that. So the person who is a union official and who is receiving a sling that has got nothing to do with any industrial negotiations is probably not going to be picked up by this bill. I am not actually worried about that—that is a small point. Doesn't that provision in the bill actually narrow the scope to purely those things that, as it says, do so 'with the intention of influencing a registered organisations officer or employee'?

Mr Clarke: Yes.

Senator MARSHALL: So the intention has to be there. The intention has to be to influence.

Mr Clarke: A person.

Senator MARSHALL: Yes.

Mr Clarke: A person who happens to meet that description.

Senator MARSHALL: Yes.

Mr Clarke: But if you then go through the Roman numerals, the first says that it is the intention of influencing a registered organisations officer:

(i) to perform his … duties or functions as such … improperly …

Senator MARSHALL: 'Improperly', and I accept absolutely that 'improperly' is a problematic word.

Mr Clarke: So to do something related to your union functions improperly—you are targeting union activity. Then there is:

(ii) to exercise his or her powers or perform his or her 11 functions under this Act or the Registered Organisations 12 Act improperly …

This is still sort of relating it to what you do with your union hat on. But the third one says:

(iii) to give an advantage of any kind, which would not be legitimately due …

That is where you break the link. If you go back and have a look at clause 70.2, I think it is, of the Criminal Code, you will see that they do not approach it in this way. You will see that everything that is regarded as criminal in those provisions in relation to public officials is clearly linked to them acting in their capacity as a public official, whereas in (iii) you lose that connection between what you are criminalising and the person acting in the capacity of a registered organisations officer or employee. That is the point.

Senator MARSHALL: Are you suggesting a simple amendment to make clear that it is only in the capacity of an officer in a registered organisation?

Mr Clarke: The better way to address it, given the concerns that others have also raised with a benefit that is not legitimately due in this connection, is perhaps to get rid of (iii) and deal with the issue around 'improperly' in the manner raised by Professor Stewart. But this is a very difficult issue to confront and constructively resolve in the context of something that is already three-quarters of the way down the road, as opposed to having a discussion with the legislative drafters in the department and the head of the workplace relations legal branch and so forth, who come to these discussions with an open mind and say, 'Oh, actually, when we go back and see what the royal commissioner said, he clearly intended that each of these matters in this part needs to be related to what a person does in their capacity as a union official.'

Senator MARSHALL: I hate to think that I am going to agree with Mr Strong from COSBOA this morning, but maybe this bill is unnecessarily complex.

CHAIR: Who would have thought, after the exchange at 9 am, that that would be the outcome!

Senator CAMERON: In the AiG submission, they go to the issue of these 536F(3) exemptions. That is on page 7 of their submission. What areas do the ACTU see as being problematic in this bill in the context of something that could be a legitimate exercise under the act by a union or a union official but that now falls foul of this bill?

Mr Clarke: Ai Group raised the catering and so forth issues—I think that was their submission?

Senator CAMERON: Yes.

Mr Clarke: There are employers who—for the purposes of consultative meetings that are required to held by the agreement—bring representatives in from remote worksites to a central place. They use the employers' facilities to drive them to head office to have the meetings. That is the sort of thing that you would not be able to do anymore. I have raised the issue that, when you go to the commission with your union member who is no longer an employee and resolve, in discussions with a commissioner of the Fair Work Commission, a settlement for an unfair dismissal claim, you are now acting illegally. That is a pretty big problem. If you sue an employer

for breach of an agreement and, even in a court-ordered mediation, the employer agrees to pay an amount in lieu of the penalties the court would award directly to the union, you would be acting illegally. They are all pretty serious impediments on the things that unions do and are permitted by the act to do. I raised the example in our submission of—contentious as it is—an American statute that was referred to by the royal commissioner in his discussion of these issues, but the exemptions provided in that bill did not suffer from those defects of a union engaging in these types of compliance activities and resolving the matters.

Senator CAMERON: What if a worker is killed in the construction industry, which is not uncommon, unfortunately, and the union makes a claim on the employer that the employer should set up a trust fund for the kids?

Would that be legitimate, or would that be a corrupting benefit?

Mr Clarke: It would depend on whether the trust fund was structured in a way that met the requirements of the provision of the tax act that is referred to here—a passing-around-the-hat type arrangement.

Senator CAMERON: Say it is legitimate under the tax act; that is not the issue for me. The issue is whether it is legitimate for a union to make that claim on an employer and whether this bill outlaws that.

Mr Clarke: There may be ways to do it depending on how it is structured, but I cannot confidently tell you either way. I think it is fraught with risk.

Senator MARSHALL: Could you come back with that too? I know that the act is broader than just division 2, but I come back to 'the defendant does so with the intention of influencing a registered organisations officer'. I think that is key. Setting up a trust fund with the intention of influencing an officer, as opposed to setting it up to support a family, is one thing, but there may be other elements. Luckily I am not a lawyer in life, so I do not have to understand all the particular clauses and how they intersect, but you are, so you might be able to give us some advice about why you think that might fall foul of the act specifically.

Mr Clarke: Yes. I am not in a position to do that on my feet today, I am afraid.

Senator MARSHALL: No, of course not.

Senator CAMERON: I suppose—

CHAIR: Senator Cameron, I do have a few questions, and we do have other witnesses.

Senator CAMERON: I think I have asked three questions, and when I was asking questions I was cut off by yourself mainly—

Senator MARSHALL: Mainly me!

CHAIR: Mainly Senator Marshall—from your own team, Senator Cameron!

Senator CAMERON: I have got a couple of questions that I need to ask. Where a union has got an organisation established to help with the mental health of its members and it either seeks to negotiate a payment to that or seeks a payment to that from an employer, would that be a corrupting benefit?

Mr Clarke: Perhaps it would. I do not want to be taken to agree with the notion that it is a corrupting benefit but, in terms of whether or not it would be legal under the provisions in division 3, I think that it hinges on the breadth of the exemption for gifts or contributions deductible under section 30.15 of the Income Tax Assessment Act. They are generally, as I understand it, charitable type contributions, but it may well be that there needs to be a particular structure in place in order for it to be—

Senator CAMERON: And what if an employer organisation reaches agreement with the government that it will go out and vocally support certain government legislation and it then receives a grant from the government for training? Could that be considered a corrupting benefit?

Mr Clarke: It depends on the training. If the payment is made for the training, that is one thing—

Senator CAMERON: But as a result of their agreeing to take a political position in support of the government?

Mr Clarke: Yes, it is potentially a problem.

Senator CAMERON: So that could put a cloud over grants. For instance, COSBOA is arguing in support of cuts to penalty rates and then it gets a grant from the government. Unless there were a federal ICAC type organisation, how would you deal with that? This is our difficulty here. You have now got one—

Mr Clarke: I have made an error in my evidence.

CHAIR: I am not sure that example applies, Senator Cameron, because that was a decision of the Fair Work Commission; it was not a decision of government.

Mr Clarke: Can I correct an error in my statement to you before in relation to arrangements between a union and its related entities and a government? That would not fall within the purview of this unless the government were an employer of the members of that particular organisation. That is the scope, if you like, of these division 3 matters.

Senator CAMERON: So a government could act in its own interests—that is, corruptly—by providing grants to an employer organisation or an individual employer in return for political support?

Mr Clarke: Yes.

Senator CAMERON: Would that be covered here?

Mr Clarke: That would not be covered by these provisions.

Senator CAMERON: So you would need an ICAC type—

Mr Clarke: You would need other provisions to deal with that type of comfortable arrangement.

Senator CAMERON: Yes.

Mr Clarke: I might add, though, in relation to the four-yearly review, grants are pretty hard to come by. The funding that we were, and the Australian Industry Group would have been, provided to conduct this has been withdrawn.

Senator CAMERON: That is not the issue. For me the issue here, if it is about corruption, is that this is an area of political corruption that would not be covered—

Mr Clarke: Correct.

Senator CAMERON: and you would need a federal ICAC type approach to deal with it.

Mr Clarke: That type of an approach could deal with it. These provisions do not deal with the situation you have described.

Senator CAMERON: So these are focused on basically employer organisations, but predominantly unions, and there are no checks and balances for the broader corruption that could apply?

Mr Clarke: That is right. This is an initiative that is pushing towards the industrial relations area, which is, as I said earlier, one of the difficulties. If you want to have these broad prohibitions on corrupt, criminal conduct—bribery et cetera—criminal law is probably a pretty good place for it. Industrial laws that talk about enhancing harmonious workplace relations and productivity and so forth are probably not the best place for it.

Senator CAMERON: In relation to criminal penalties, the Ai Group do not support criminal penalties for the bill. Is that your position as well?

Mr Clarke: I do not support the criminal penalties in the form that they are expressed here.

CHAIR: What would you support?

Mr Clarke: I would support an inquiry to examine whether criminal laws of the Commonwealth and the states are effective at preventing and punishing corrupting—

CHAIR: You would support a review, Mr Clarke? Sorry; your voice is very low and I missed what you said.

Mr Clarke: No, you did not miss it; I just had not finished. What I would support is a review to examine whether there are gaps in our corruption and bribery laws and so forth and then a proposal, through the Standing Committee of Attorneys-General, COAG or whatever, to bring forward measures that would apply equally to all sectors of the community where there were deficiencies.

CHAIR: I have a couple of questions and I will put the rest on notice because we have just run out of time. Should unions be permitted to receive payments from employers that are not disclosed to members, which are not for legitimate purposes?

Mr Clarke: We have already said we support the principle of disclosure in our submission.

CHAIR: I just wanted to clarify that. In your opening statement you went to issues that unions should and should not get money for, and I want the next level of detail down. What are some practical examples of what you think constitute matters that unions should not get money for. What should they not be receiving money from? We have answered a lot of hypothetical questions here this morning, so let's go Mr Clarke.

Senator CAMERON: You can take it on notice if you like.

Mr Clarke: They should not receive money for murdering people. The principle really is that unions are democratic organisations. There are international normative principles in relation to free functioning unions, providing they are controlled by their members. If their members take a view that the union adopting a particular

course is in their interests and they vote that that ought to be done then that ought to be permissible within the boundaries of general criminal law. It is not an efficient or appropriate exercise to attempt to arbitrarily say this is a good one and this is a bad one. If you have a widely recognised principle for knocking things out, like bribery or corruption, that is probably a pretty good yardstick. The difficulty with this bill is that provisions in the centre of it do not have that type of intent. What is the intent here? What is the influence here? What is the impropriety? Are we trying to bribe someone? Are we trying to do something illegitimate? We are not. We are just saying the money comes from this source. Any money that comes to the union is illegal unless one to six are okay. That is not a legitimate exercise for a government to engage in.

CHAIR: If it is difficult to put our finger on specifics, what about a union invoicing a business for back strain research that never arrives? Is receiving money for that appropriate?

Mr Clarke: So the union raised an invoice for a service and it did not perform the service?

CHAIR: The money was paid to an employer for a service that the union never received.

Mr Clarke: The employer was supposed to deliver the service to the union.

CHAIR: But the union still paid the employer for nothing, essentially.

Mr Clarke: You would think that if that is what happened, the members would be pretty unhappy about that. But that is a governance issue.

CHAIR: Yes, it is a governance issue.

Mr Clarke: I think it is a bit rich to assume, where a union makes payments for things and for whatever reasons the services are not fully completed or not completed at all, that it necessarily means that some—

CHAIR: Or indeed phantom services—if we are talking about the AWU John Holland issue.

Mr Clarke: Sorry, but I am not intricately familiar with the sort of matters in individual case studies in the royal commission, and even if I were I would exercise extreme caution commenting on them publicly.

CHAIR: But as a matter of principle, Mr Clarke—you cannot answer the hypothetical and you are refusing to answer the specific—when is it legitimate for a union to take moneys from an employer—

Senator CAMERON: Point of order, Chair. You cannot assert that the witness is refusing to answer. The witness has done nothing of the sort. You should just exercise some control of yourself.

CHAIR: There is absolutely no point of order, Senator Cameron. I think Mr Clarke is doing quite well and *Hansard* will reflect that.

But a specific example would be where a union has raised a false invoice to provide a service to an employer—whether it be training, whether it be research—and that service is not delivered by the union to the employer, yet the employer provides the union with money. Is that appropriate behaviour? Is that a legitimate source of income?

Mr Clarke: That certainly is not, and it is different from the example you described before because, on this occasion, you have described it as the union raising a false invoice. I have a problem with that. That should not be done.

CHAIR: Excellent—thank you. I am trying to get to what you see as legitimate and illegitimate sources of income and behaviour. Are you aware of behaviour within unions—and between employers and unions—that is inappropriate and should be captured with the types of bills that we are discussing today?

Mr Clarke: If there is that sort of thing happening, the nature of my role in the ACTU does not expose me—

CHAIR: You would not know about it?

Mr Clarke: No. Although I am a lawyer, I have a corporate practising certificate to the ACTU; I am not instructed to represent individual union officials or union members. I am permitted to represent affiliated unions in the Fair Work Commission. These types of matters have not arisen in the work I have done in the Fair Work Commission. From my usual working relationships, I would have difficulty accepting that those types of practices were common.

CHAIR: I think there are issues around revenue raising by unions and an appropriate way to do that. I think you go exactly to the heart of the point, around governance. If there are unions that are abusing their members' trust, that needs to be able to be captured within the law. I have a suite of questions that I would appreciate you turning your attention to, but given the time we do need to move on. Thank you for your evidence.

Mr Clarke: How long were you planning on giving for the answers to the questions on notice? We have the minimum wage reply submission due tomorrow, and then there is Easter, so I would appreciate being given time after Easter.

CHAIR: The committee will be making a decision on that later today, but you will have time. We will not need them by tomorrow morning. Can you get that submission in quick smart?

DWYER, Mr Gerard, National Secretary-Treasurer, Shop, Distributive and Allied Employees' Association

[11:43]

CHAIR: Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I now invite you to make an opening statement and, at the conclusion of your remarks, I will invite members of the committee to put questions to you.

Mr Dwyer: I will open my remarks by turning to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, in the first instance. I note that my organisation has made submissions to this committee previously on the question. There was no bill before the parliament at that point, but it was in terms of the investigation of the 7-Eleven incident. At the outset, our organisation supports in principle a bill to provide better protection for vulnerable workers in this country. We note that, now, some 10 per cent of the labour force in this country is working under a visa arrangement of some sort. We see the bill as an important first step in bringing better regulation to this area, but we see it as a work in progress. There are elements of the bill that we strongly support—in relation to the increased penalties, record-keeping provisions et cetera—but there are some areas that we would submit need much further work.

In relation to, specifically, the franchisor and the liabilities, I think the bill now talks about where the franchisor knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them. Our experience is that words to that effect are not necessary, and we would submit that the liability should be chuted up the chain of command and, ultimately, to the head office if necessary. I would cite the 1996 New South Wales Industrial Relations Act section 127, where liability was deemed to automatically proceed up the chain. We find those types of qualifications unnecessary. The franchise agreement is capable of dealing with responsibilities on a range of front.

We note that, from our work in the industry, some franchised brands are able to get compliance across a very broad range of issues and get good compliance from their franchisees, and other brands will complain that they do not have the levers necessary to ensure compliance across a similarly broad range of areas. Our assessment is that those brands all operate under the same franchising codes in the various jurisdictions and, if it is possible for one, it must be possible for others to ensure compliance of a high standard across a range of issues. We do not see the payment of wages as being something that should stand outside that area of responsibility. We would say that, if that responsibility was enshrined in the legislation, it would actually give rise to some very effective compliance processes inside those brands. In that way, I think we would see far greater protections for those people who are currently working under a variety of visa arrangements. I should state that our exposure has primarily been to the student visa category and not to the 457 or others.

The other comment I would make is that we do not believe the bill effectively addresses the issue of protection for those people who come forward with complaints. I note that the ACTU has referred to protocols for victims and is looking at the Migration Act as the relevant statute to address that. Rather than identifying the appropriate statute, we would certainly propose that visa workers, prima facie, should have some form of automatic protection as soon as they come forward. I have proposed to this committee previously something like an amnesty visa or something similar where the onus moves from the individual on the visa to the department to show that they are somehow liable to deportation. As soon as I have come forward citing exploitation or coercion or being paid incorrect wages—which we would submit is taken as evidence of exploitation—we would then say that, if I have come forward with that as a complaint, prima facie, I am offered protection under our system, by whatever necessary statute, and the onus would be on the relevant government authority to show that my claim is not justified. The deportation threat really does lie at the heart of a lot of the exploitation in the convenience sector and other fast-food operations where recent examples have come to light.

The other thing I would note with this bill is the need for complementary measures elsewhere in the legislative framework. I think the ACTU made note of the labour hire regulations as an area of interest. I would submit, or the organisation would submit, that one thing that is missing in this is the restoration of the general inspection powers for trade unions. When I started as an official it is something that we had. We could do general inspections.

Having lived through the 7-Eleven examples—where we had some 400 7-Eleven workers come forward on our website seeking pro bono assistance, which was delivered—the common theme in all of that was their fear of being identified, their fear which then led to possible deportation. That 400 figure out of what we estimated to be a potential 7,000 or thereabouts of affected employees at the time or in recent times is a very small number to have come forward to have their underpayment claims processed without charge and doing all what we could to provide confidentiality. That is a very small number. The system works against these kids, overwhelmingly.

To the fourth of matter that I was going to call out: we would regard the restoration of the general inspection powers for unions as a necessary element in addressing this problem and providing better protections for vulnerable workers. With regard to the Fair Work Ombudsman, there may be a case for some additional resources, but it is an overwhelming task when you look at the size of their inspectorate at the moment compared to the size of the Australian workforce. That may be the case, but we certainly do not agree with the granting of coercive powers to the Fair Work Ombudsman.

The other thing in relation to the Fair Work Ombudsman is that they should be completely separated from the Department of Immigration and Border Protection. My understanding at the moment is that they do have joint powers when it comes to 457 visas and that they operate both as Fair Work Ombudsman inspectors but also as inspectors for the department of immigration. That was an issue for the student visa victims because they automatically thought that those people were inspectors from the department of immigration. They are for 457s but they are not for the others. We would submit that those powers should be separated right across that visa spectrum and have a system more akin to the US model where the Department of Labor operates completely separately to the department of immigration in terms of their inspectorates.

Further to my opening comments in relation to the bill that deals with the abolition of the four- yearly review, the SDA support this in principle. We specifically support the ACTU submission on this matter and do note that the ACTU has called out two matters in relation to schedule 1 of the bill which should be addressed—that is, the fact that it should not necessarily be a default position that any application to vary an award goes before a full bench.

CHAIR: Sorry, Mr Dwyer. Senator Cameron, do you have an issue with the SDA supporting the ACTU submission?

Senator CAMERON: It is not for me to have an issue.

CHAIR: Okay. Senator Marshall?

Senator MARSHALL: No, I do not. Why would I? The problem I had with COSBOA was that they said they supported someone else's submission and then gave contrary evidence. That was the problem. They could not both support someone else's submission and put the position they were doing.

CHAIR: On the vulnerable workers bill, they did support the submission of the franchises.

Senator MARSHALL: I did not raise it under that context; I raised it under the other two issues.

CHAIR: Okay.

Senator MARSHALL: A point not well made, Chair.

CHAIR: Just asking the question.

Mr Dwyer: In terms of the procedural requirements in relation to the EBAs, we note those and again support the ACTU's submission, as we are a major affiliate of the ACTU. My final opening comments go to the corrupting benefits bill. The SDA support appropriate legislation and statutory mechanisms in relation to the efforts to stamp out corrupt behaviour. I would note that my organisation was a participant in the ACTU Congress of 2015, where the entire trade union movement unanimously supported the establishment of an independent national corruption body with powers to address the issue of corruption across various institutions of government, the corporate sector, financial sector and also membership sectors in our community.

However, the SDA cannot support the bill currently before the parliament, on the grounds that we too do not believe that proper consultation has taken place in the development of this bill, despite the fact that there are mechanisms in place for that consultation—and I note the National Workplace Relations Consultative Council and various subcommittees; that is a council I am familiar with, being a member of it. The bill also targets unions, for—I would submit—politically partisan reasons, whereas a better approach to fighting corruption should see it done on a broad basis across the entire community, with the focus being any sector where corrupt behaviour is identified. I think we put it in our submission that we believe the UK Bribery Act 2010, which likewise has a very broad approach to fighting corruption in the community, is a model that would be worth exploring.

The other position we would like to note is that, in our mind, criminal behaviour should properly be dealt with in the criminal system. If that means that there needs to be a corruption body overseeing our institutions to identify this and then feed that back into the relevant criminal system, so be it, but I guess our principle is that criminal behaviour ought to be dealt with in the criminal codes.

Senator MARSHALL: Is there no provision under the Fair Work Act now for unions to conduct time and wages inspections?

Mr Dwyer: Yes, there is, but the problem with it is that you really have to have the consent or the permission of the individual. The individual member could request the union to carry out an inspection of time and wage records. We have to identify that individual, and I do not think we are alone as a union that have then had to subsequently deal with adverse actions or unfair dismissal.

Senator MARSHALL: In the case of vulnerable workers who just cannot afford to be identified, if that right were given, not based on identifying the worker concerned, do you think that would help compliance in this area?

Mr Dwyer: Absolutely, because the individuals are quite vulnerable, but the use of a collective approach can be a great security for these people. If it were able to be done across the board, those—in our case—student visa workers would be most appreciative of the fact that they would then receive their proper wages and conditions. But there is a risk that they run as individuals in that workplace but also individuals within that community. We have seen that often it is members of the same community, who perhaps own the business and then work for the business—there are a whole lot of other pressures that come to bear on the students, through family ties or through cultural attitudes that they are not comfortable in disrupting, whereas an anonymous approach, where the workforce as a whole in that workplace is being addressed and no-one is being singled out, would be a far greater protection for them.

Senator MARSHALL: Do you think it is reasonable that an employer should know the wages and conditions that they intend to provide to the employee?

Mr Dwyer: If I understand the question—that the employer is aware of their legal obligations in terms of wages and conditions?

Senator MARSHALL: Well, to actually know what it is they are supposed to pay them.

Mr Dwyer: Yes, absolutely.

Senator MARSHALL: You would assume that they would in fact know what they intend to pay them. Do you think it is reasonable to expect that they would provide that, outlined in writing, to every employee so the employee also knows what the employer is supposed to pay them?

Mr Dwyer: Yes, I think that is reasonable.

Senator MARSHALL: Does the act provide for that at the moment?

Mr Dwyer: I do not believe it does.

Senator MARSHALL: So employees who feel that they may be underpaid will not really know unless they are aware of what they should be paid?

Mr Dwyer: That is correct. My union has taken steps in terms of O weeks and feeding information back into the host countries—throughout Asia, in particular. We have asked sister unions to provide the information to the bodies that set up these student arrangements. We have got flyers in multiple languages now going to kids. That information or educative plank is important, but I would submit that it does not actually adequately address the issue unless you have got these other compliance pieces in terms of the collective approach to underpayments so that individuals are not singled out. I also think that if there is pressure, particularly in a franchising model, where a number of these examples have come up, liability should be sheeted home, ultimately, to head office. We are not saying that that should be the first port—obviously it should be with the franchisee—but, failing that, the liability should automatically go up the chain. If that was the case, we would submit that there would be some very effective compliance processes put in place by head office to rightfully protect their interests in this and to make sure that the franchisees do pay.

Senator MARSHALL: It appears to me—and given some work that we have done on a related inquiry—that often an excuse is that employers do not understand or have made a mistake about what they should be paying. If they had actually put that in writing to all of their employees to begin with, first of all it would be an easy check to find out whether they think the wages that they intend to pay are in fact correct in the first instance, and then the employees would be able to check against that to work out whether the wages that they were told that they were going to be paid are in fact what is being paid.

I think that there are some basic things that seem to be missing from this legislation. If we are really talking about protecting vulnerable workers, let us make sure that employers know what their obligations are. That should be an easy test. The employer must know what it is that they intend to pay their employees. They must know that. If they do know that, surely they can reduce that to writing. The employees can then measure against that written offer of employment to make sure that they are being paid properly. Then, if we had the opportunity for relying not only on the ombudsman's meagre resources but also on unions who, historically, have always done this work, being able to test against those two things—whether the employer is, in fact, paying the right figure and then

whether employees are getting it—that would go a far further than some of the provisions in this act towards protecting vulnerable workers.

Mr Dwyer: I agree. I would also add, though, that a general principle in law is that ignorance is no defence. I think that it is reasonable obligation that an employer does inform themselves of what their legal obligations are. I would make that addition.

Senator MARSHALL: Yes, we often get told about the complexity of this. I know that I have gone on the ombudsman's website on a number of occasions and been able to wade through—assuming that I am an employer in this industry—'What are my legal minimum requirements of payment and conditions?' I must say, I have not found it that difficult nor complex.

Mr Dwyer: I agree.

Senator CAMERON: This morning, when COSBOA were here, they mentioned 7-Eleven. They sort of gave the impression that 7-Eleven was an outlier in terms of problems. I went through a list of areas where your members could be employed, like Caltex, Domino's, Pizza Hut, United Petroleum, Bakers Delight, and even trolley collectors. There is a widespread problem of underpayments in the industry, isn't there?

Mr Dwyer: Absolutely. With the exception of Bakers Delight—which I cannot comment on, because that is covered by another union—those examples are accurate. I must say that our experience since the 7-Eleven incident broke—setting up a compliance unit, which has always been in branches, but actually doing that at a national level as well. Senator Marshall, that is where that whole issue in terms of not being able to do the general inspections is a real limitation in terms of the capacity of a compliance unit to go into some of these sites. The other interesting observation, Senator Cameron, with those examples is that we would have small numbers of members in a lot of those brands. It has been interesting to note that in those sites where exploitation or wage theft has been identified, without exception there has been no union member. This comes back to general protection for people and the need for freedom of association provisions to be honoured, and, we would say, for compliance. A union can play a tremendous role with compliance. The veil of silence has come down on all those units. Sometimes it is a franchisee that might own two or three units in a brand; sometimes it is only one. But the exploitation goes on unchecked. We have even had recent examples with some brands where it was made quite clear to people that they were not to be members of the union, and, if they were, they would be terminated.

Senator CAMERON: You made the point that there was a need for improved access to information by the union to make sure workers are properly paid. Does that go to the extent of right of entry, as well?

Mr Dwyer: Yes. Regarding the right of entry, in terms of a wage records inspection, a 24-hour notice does give the capacity for remedial work to be done on records, unfortunately.

Senator CAMERON: What do you mean by remedial work? Doctoring the books—is that what you are talking about?

Mr Dwyer: Yes.

Senator CAMERON: So it is not remedial work—it is doctoring the books, is it?

Mr Dwyer: Yes, doctoring the books. So that is an issue in terms of shortening the notice requirement, but, more importantly, in terms of the absolute right of a union representing workers in an industry to be able to confirm that the workers are being paid as per their legal instruments.

Senator CAMERON: So this is a weakness in the general act as distinct from this—

Mr Dwyer: Yes. In terms of complementary measures that would need to be taken to better address this area, that would probably be an amendment to the Fair Work Act.

CHAIR: I want to follow up on a question that Mr Strong wanted asked about the penalty review decision from February. It concerns weekend workers and the penalty rate decision that SDA, for instance, brokered with McDonald's maybe five or six years ago. At the time that decision was taken, were the weekend workers made aware that they would be worse off as a result of giving a higher level of base pay to the weekday workers?

Senator CAMERON: A point of order. I want clarification, Chair, if you do not mind: are you asking this as chair of the committee, or are you asking this on behalf of Mr Strong? Are you part of the team as well?

CHAIR: I am asking as a senator of the Australian Senate—

Senator CAMERON: That is fine.

CHAIR: and I am within my rights. The issue was raised this morning, and I am interested to follow up with the appropriate person.

Senator CAMERON: Mr Strong's team is getting bigger and bigger.

CHAIR: You would be surprised how many small-business owners there are, employing people right across the country, Senator Cameron.

Mr Dwyer: I do not accept the premise of Mr Strong's question, in terms of those people being either worse off or disadvantaged. Very quickly, my understanding of Mr Strong's narrative on the penalty rates is that it goes to enterprise agreements where a penalty rate on a given day may be lower, and then conveniently ignores the fact that there are loaded rates—that is, higher rates of pay—right across the workforce. I might leave it at that. With McDonald's, for example, the fact is that was an agreement that was registered before the Fair Work Commission. He conveniently overlooks when it was registered—which was against a modern award that was in transition. If you look at the rates of pay in McDonald's and the compensation of the loaded rate, which is on par with a number of other fast-food operators, the reality that we are dealing with at the moment is that it is cheaper for franchisees to go back to the award than stay with their brand enterprise agreements. You cannot have it both ways. The agreements that we have been able to broker on behalf of employees in that and other industries deliver more in wages, across the workforce, than the relevant award would apply.

CHAIR: Can you clarify something for me? I am less interested in multinationals and more interested in, for instance, local fish-and-chip shop owners in Benalla or Wodonga having to pay their worker, on a Saturday, $8 more an hour than the worker would receive if they were working at a multinational, like McDonald's, down the road. I am trying to understand how that can occur. As a 21-year-old in a country town, I can choose to go and work for Pete's fish-and-chip shop in Benalla main street or I can earn less per hour on a Sunday, at McDonald's, at a multinational. How does that happen?

Senator CAMERON: Chair, on a point of order, can you point me to where this deals with any of the bills we are dealing with? Is it simply a political point you are trying to make against the witness?

CHAIR: No. It is a genuine question related to the process and outcomes of the four-yearly review process within the Fair Work Commission. Thank you for your concern, Senator. I am sure the SDA witness is big enough and strong enough to look after himself. Mr Dwyer, could you please explain it to me?

Mr Dwyer: Yes. It is called enterprise bargaining. It has nothing to do with the four-yearly review system, other than the penalty rates decision, which is part of that. The fact is enterprise bargaining comes up with agreements. When measured against the underpinning instrument, the workforce has to be at least equal, under the old no-disadvantage test, or presently better off overall.

CHAIR: So how is a worker in Benalla, either working in McDonald's or working at Pete's fish-and-chip shop—clearly, they are worse off working at McDonald's on a weekend.

Mr Dwyer: The problem with that example is you are looking at one particular shift. Enterprise bargaining provides benefits and wages across a workforce and across the entire spectrum of hours. The other thing that needs to be done, when you are looking at fast food, is to look at the workforce and the nature of that workforce. One day is, clearly, not a proper assessment of whether or not an agreement is better or worse than the award. Even a week is too short a time, in that industry, because the working population—a large part of it—are either school or university students.

The rule of thumb in the industry is you look at it over three months. What the younger workers do is beef up their hours during the breaks, school breaks or university breaks. If you look at it over the three months or the year, they should be able to take home more money, under the agreement, versus what the fish-and-chip shop operator may be able to provide.

CHAIR: My understanding is that under the agreement you negotiated, workers working, say, Monday to Friday received a higher base of pay at McDonald's than they would receive if they were working Monday to Friday at Pete's fish-and-chip shop. Correct?

Mr Dwyer: That is correct.

CHAIR: The trade-off for that is that Saturdays and Sundays at McDonald's would receive lower penalty rates than if that same young person were working at Pete's fish-and-chip shop. Is that correct?

Mr Dwyer: Yes, but it is not correct to compare one single shift with another shift on that same time.

CHAIR: I am appreciating that. But a lot of people who work in the fast-food industry—and I am not talking about multinationals, where there seems to be a very cosy deal done. I am talking about the small-business owners who are operating right across the country, who want to provide shifts, who want to be open on the weekends, who are having to pay, in a marketplace of working young people, significantly more than you have managed to cosily organise with a multinational like McDonald's.

Mr Dwyer: I do not accept the characterisation as cosy.

Senator CAMERON: Chair, I have a point of order.

CHAIR: It is not cosy?

Mr Dwyer: It is not. I absolutely reject that.

CHAIR: I reckon McDonald's just loves it.

Mr Dwyer: You can ask McDonald's what they think.

CHAIR: I will be.

Mr Dwyer: Can I just clarify for your benefit that they may be a multinational head office but most of their businesses are run by small business operators in this country. That is what they are: small business operators.

CHAIR: Mr Dwyer, with respect, to purchase a franchise operation off McDonald's is incredibly expensive in comparison to what is usually a family owned and run enterprise such as the local pizza shop or the local fish and chips shop in every country town and in every suburb across Australia. I really think you are gilding the lily to say that mum and dad Australia can go out and purchase a Macdonald's franchise tomorrow as opposed to setting up their own fast food enterprise.

Mr Dwyer: There are numerous fast food brands which do not have that entry level cost associated with them.

CHAIR: But you were talking about McDonald's, Mr Dwyer. How much would it cost to purchase a McDonald's franchise?

Mr Dwyer: Senator, I am not quite sure.

CHAIR: So don't come in here and use that as an example.

Mr Dwyer: I think you raised McDonald's. My issue was you framing that as some cosy arrangement, which I absolutely reject.

CHAIR: It was very cosy. I would like to know, Mr Dwyer, on notice, because we are running out of time, what proportion of your membership, the SDA, in McDonald's is full time as opposed to part time, and what say did those part-time workers, predominantly students, on the weekends have in the vote that determined the agreement that went through?

Mr Dwyer: Every—

CHAIR: It is on notice, Mr Dwyer. You can provide that on notice, in writing, to the committee.

Mr Dwyer: I am happy to, Senator, but every employee is entitled to a vote on an enterprise agreement.

CHAIR: I want to know the proportion of SDA membership. Every employee can vote on the agreement—

Mr Dwyer: Sorry, Senator, I won't be able to provide that. They are secret ballots. Our membership in McDonald's would hover around 10 per cent. So how I could actually determine—

CHAIR: I want to know the proportion of the 10 per cent of your membership from McDonald's—

Mr Dwyer: I couldn't tell you. It is a secret ballot.

CHAIR: employees is predominantly full-time employees, part-time students or casuals?

Mr Dwyer: Senator, with due respect, again, if the worker ticked on the application card whether they were full time, part time or casual—

CHAIR: You will be able to tell me. Thank you.

Mr Dwyer: I could provide that; but, unfortunately, that is the exception rather than the rule. People—

CHAIR: You will provide me with what you are able to provide me, Mr Dwyer—

Mr Dwyer: I am happy to, Senator.

CHAIR: and I appreciate you being as helpful as possible.

Mr Dwyer: I will. Thank you.

Senator MARSHALL: I want to come back to the line of questioning I was asking earlier, because Mr Strong left an important impression on me this morning. One of his concerns was that employers who do not do the right thing are undermining competitively those employers who choose to do the right thing, and that is a serious problem. Would the union being able to exercise a right to investigate employers that they believe are not doing the right thing help and assist small businesses that are doing the right thing?

Mr Dwyer: Yes. The concept of a level playing field is very important to our union—

CHAIR: Really?

Mr Dwyer: Yes, Senator—and other unions. The level playing field is critical in that we do not want competition to be on the basis of wages. It should be on the basis of the quality of your product and the service that you provide.

CHAIR: So why are you advantaging multinationals like McDonald's and disadvantaging mum and dad businesses in every day—

Mr Dwyer: I do not accept that.

Senator CAMERON: That is a political point you are making.

CHAIR: Senator Cameron, with respect, you have not made one political point this entire morning!

Senator CAMERON: That's right. Thanks. I'm glad you noticed.

Mr Dwyer: Maybe to be of some assistance: this level playing field, Senator Marshall, is, as I said, of concern to us. We are concerned in terms of some of the small business agreements that have been given the tick by Fair Work. Chair, I believe this is a mum and dad business: Balmain gelateria proprietary limited. It currently has an in-time agreement that expires in 2018. They are paying a 2.4 per cent loaded rate, which is well below what is generally accepted as loaded rates in the industry, and no weekend penalties, no public holiday penalties et cetera. There are, unfortunately, too many examples of that type, and they are small mum and dad operators.

Senator MARSHALL: I know you are appearing before us in our references mode for the corporate tax avoidance inquiry, and I am sure there will be more questions in relation to these issues then.

CHAIR: The committee now stands suspended until 20 past one.

Proceedings suspended from 12:19 to 13:20

BILLSON, the Hon. Bruce, Executive Chair, Franchise Council of Australia

GILES, Mr Stephen, Director, Franchise Council of Australia

PAULL, Mr Damian, Chief Executive Officer, Franchise Council of Australia

CHAIR: Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I now invite you to make a short opening statement, and at the conclusion of your remarks I will invite senators to put questions.

Mr Billson: Madam Chair, you know of my height, so I will only ever be short! To you and the senators, thank you for the opportunity for the Franchise Council to appear before your hearing today. I have circulated copies of our comprehensive submission to assist in our discussions. Our focus in that submission is, understandably, on the joint employer liability provisions targeting franchising that are contained in one of the bills of the package of legislation the committee is considering.

Let me at the outset make our position absolutely clear. The Franchise Council of Australia does not want to see any employee underpaid or knowingly taken advantage of in the franchise sector or, for that matter, in any workplace in any sector of the economy. Those who knowingly do the wrong thing in terms of Fair Work Act compliance, and those that are a party to these contraventions, need to be held to account. This protects employees and makes sure compliant businesses are not disadvantaged.

There have been a number of high-profile cases involving franchise systems, and these have shown how the regulator is actually doing its job and will be even better placed to do so with the government embracing the Franchise Council of Australia's recommendations to this committee on an earlier inquiry, into contraventions involving 7-Eleven and other complex related matters.

We welcome the government's boost of the resources available to the Fair Work Ombudsman. We support the increased penalties for Fair Work Act breaches. We support, and had proposed, enhancing the powers of the Fair Work Ombudsman to collect evidence.

Looking at an actual enforcement—the Yogurberry case—where the franchise business, the franchisee executive, the franchisor and the outsourced payroll provider were all fined amounts totalling many times the value of the underpayment of wages to student visa employees shows how powerful and useful the existing accessorial liability provisions of the act are. This case shows that, if a franchisor, or in fact any other party, is involved in the workplace relations arrangements of a franchisee, and the franchisee is contravening the Fair Work Act, the law enables all those involved to be held to account and punished for wrongdoing, as they should be.

The media and public attention afforded to other high-profile, bigger brand cases involving franchising and alleged Fair Work contraventions also shows that the current laws and enforcement processes are working. These cases have also prompted a great deal of re-examination and review by franchise systems about their models and their compliance performance. This is evidence of the power and the utility of the current accessorial liability provisions. It has emerged a number of months after various election commitments asserted that the law needed to be strengthened. It was this proof that the accessorial liability provisions of the law are useful and far-reaching, combined with the boost to the Fair Work Ombudsman's resources and evidence-gathering powers, that led the Franchise Council of Australia to put to the government, and to the opposition, late last year that further amending the accessorial liability provisions was unnecessary and unjustified at this time. Our view was to let that accessorial liability law be fully tested and used, mindful that the Fair Work Ombudsman has used it in nine out of 10 court actions in the year prior to that prosecution and will now be equipped with extra resources and tools. This should be fully deployed, in our view, before changing a law that is yet to be fully settled.

But, clearly, the reason we are having this inquiry is that the government has pushed on, and we are grateful for being invited to appear. And in the spirit of our cooperative and constructive engagement, we are here making our submission and having some input. We have sought to be a positive influence in this consultative process, despite believing that there is no case for change to the accessorial liability laws and, frankly, no compelling argument offered as to why franchising specifically should be targeted.

The separation of responsibilities between franchisors and franchisees underpins the competitive advantage that the franchise model offers to small businesses. It is vital that franchisors and franchisees work collaboratively, not in an adversarial mode. The proposed changes to the Fair Work Act to make franchisors liable for workplace law breaches by franchisees are well intended, but without amendments those law changes will undermine the very foundation of the franchise model and drive a wedge between franchisors and franchisees and the vital collaboration that makes this successful model work. Fine tuning is required, in our view, to avoid

significant damage—damage to the $146 billion contribution to the economy that franchising makes, to the 80,000 small business franchisees and franchisors that operate in the sector and to the half a million Australians who rely on franchising for their livelihoods.

In our submission, we have detailed how to overcome the significant overreach, the uncertainty and the unintended consequences from the joint employer liability provisions as currently drafted in the bill. To us, it was surprising that the legislation was not accompanied by a genuine regulatory impact cost compliance and policy implementation alternatives examination, and where the existing and building collaboration between the Fair Work Ombudsman and the sector, industry-led assurance programs and the workplace support and education activities that are being put in place, that are valued and recognised as adding a positive contribution, were not weighed up against a heavy and interventionist legislative proposal. We think working collaboratively is a better way of lifting standards and bringing about behavioural change and improving compliance.

In our submission, we have shown how we had to commission a survey in the absence of any regulatory impact data in the EM. That survey showed that the cost impact of these measures is very, very substantial. We asked the sector to inform us about their knowledge and preparedness for these changes, the actual cost of those already navigating a pathway like that proposed in this legislation, and the anticipated cost and likely impacts on their business operations, future investment plans, growth and their day-to-day operations. This independent analysis shows a very high compliance cost with joint employer liability legislation as it is proposed. This results in risks, costs and compliance obligations being forced on nearly all systems—not just the big ones that have been discussed—but on nearly all franchise systems, regardless of their model or involvement in any workplace relations decisions or responsibilities of franchisees. There are many franchise systems that have no line of sight, no involvement, and their model does not even foreshadow an engagement in the day-to-day operations of franchisee businesses. We heard before about Benalla. The sports goods store in Benalla is a franchise business, but under that model they get help acquiring stock.

CHAIR: Graeme Walker is the proprietor.

Mr Billson: They get help acquiring stock, so that is a stock cooperative model shaped as a franchise and there is no line of sight whatsoever to the day-to-day operations.

We believe sensible, measured and practical recommendations to amend the bill not only deal with this overreach, the uncertainty and the unintended consequences of the current drafting, but, combined, they are likely to reduce compliance costs by more than two-thirds. This is important because in the franchising world small businesses predominate and, in this case, the franchising world is literally watching what is happening in Australia. This parliament is considering going where no others have gone, and a poor legislative outcome will adversely affect the vitality, viability and appeal of franchising as a successful business model for our economy.

Our proposed amendments to the bill will substantially address, but not in every respect, the most significant franchising community concerns while preserving the policy imperatives that inspire it. The recommendations we put to you and ask you to consider touch on a number of key points. (1) Make sure that assurances that the law will be right-sized to deal with the diversity and the small-business nature of franchising actually have the law reflect that and have those reassurances embedded in it. (2) Use a trigger for liability being substantial control over workplace relations. If the franchise model has no line of sight or no basis of intruding into the workplace relations of a franchisee, the control may be over intellectual property, technology or supply chains—that does not mean there is a line of sight to day-to-day operations. (3) Require the courts—not just encourage, but require—and regulators to take account of the variety of sizes and resources in the franchise community. (4) Clarify what 'reasonable steps' actually means. For a small business franchise operator, they want to know: 'What is it you require of me? What is it I actually need to do?' That is very unclear in the current drafting. (5) Focus on underpayment, not paperwork and other technical judgements—some of them very legally orientated, such as who is and is not an independent contractor. And (6) provide, in our view, for the implementation of credible, approved compliance programs to be a clear defence against prosecution and plaintiff legal action.

I can assure you that the FCA will continue to engage constructively with this legislative process. Our aim is simple: to ensure vulnerable workers are better protected while not undermining the franchise sector and this successful model of enterprise, which contributes between eight and 10 per cent of all of our nation's GDP. I thank you for the time for our opening remarks and for receiving our submission. I am happy to answer any questions you may have.

Senator MARSHALL: Have you had a chance to read Professor Stewart's submission?

Mr Billson: No, sir. I understand that Professor Steward may have presented earlier in the day.

Senator MARSHALL: He did present earlier. I think Mr Paull was here for his evidence.

Mr Paull: Yes.

Senator MARSHALL: Professor Stewart—I will use my words. I think they reflect his intention, but they are certainly not his words. My takeaway from his evidence is that your concerns are a little bit over-egged. Mr Paull, you were here this morning. Did you have any comment on that? We actually went through some of that. He was of the view, I thought, that your concerns that the liability directly and always goes back to the head—

Mr Billson: I understand the point he was making. He was suggesting some uniqueness to the characteristics around the Yogurberry case to support that argument, as I understand it. What I would guide the committee to do is perhaps to look at the Fair Work Ombudsman's own words in her 3 November 2016 announcement on the Yogurberry case, explaining in the eyes of the regulator just what that judgement and the precedent it represented meant for franchising. What we are reflecting in our submission simply embraces the accounts of the regulator about what the current law means and in tracking discussions, including the ombudsman's presentation to our own national convention, about what kind of outcome she would be anticipating. So, I do not think they are overcooked. They are quite measured. We are not in the business of getting people overly excited just dealing with the substance and the information that we have, but Mr Paull might be able to add something.

Mr Paull: No. I think the point the senator was relating to was the joint liability issue and where the joint liability arose as a result of the legislation. Not only is it our view that it does arise under certain circumstances; it is also the view of the World Franchise Council, who have been briefed on this and who have looked at this issue. Some countries have been dealing with very similar legislation—the US and Canada in particular—and they have all characterised this under the umbrella of joint liability.

Mr Billson: Senator Marshall, can I invite Mr Giles, who is our legal expert, to add to that.

Senator MARSHALL: Sure.

Mr Giles: Under one of my hats I am the author of a book called *Franchising law and practice*, which is a textbook for the space—and also the vice-chair of the legal committee for the Franchise Council, which comprises basically the legal practitioners in the space. I think the view of that is that those concerns are not overcooked and that there are some real concerns. However, you will see in our submission that we are proposing some relatively minor amendments in a wording sense to those which would not detract from the purpose of the legislation and which would alleviate these concerns.

Mr Billson: And they are on page 17.

Mr Giles: That may well be enough for your purposes, senator.

Senator MARSHALL: The Yogurberry case, according to the ACTU, was done on consent—I am not familiar with it myself—and therefore does not actually establish any serious precedents that the courts will rely on in the future.

Mr Giles: No, so what happens, if I can just explain that, is—if you take the ACCC, for example, and their regulatory framework, many of the ACCC prosecutions are essentially 'you can fight City Hall and spend hundreds of thousands of dollars or reach agreement', so this is quite a common activity. The judge still has to make the decision. Yes, in that case, the Yogurberry case, they did not fight it tooth and nail and debate every point—they essentially agreed with the assessment and copped their fair whack—but that does not impact on the precedent value of a court decision and it is quite common in the prosecutorial area to have these sorts of processes.

Mr Billson: If I could draw your attention back to the statement from the Fair Work Ombudsman, it was '$146,000 in penalties imposed in precedent-setting court judgement', and then it goes into some lengths as to a shared account of what the meaning and implications are of that judgement. So we are pretty adamant we are on very solid ground there and turn to the regulator and a broad section of the legal fraternity for confirmation of that.

Senator MARSHALL: The ACTU also presented the argument, one which I am very sympathetic to, that the employees are at the end of the day an important and often the most important element of making money in the franchise system. Ought not it be the responsibility of the head—sorry, I am going to get the terminology mixed up.

CHAIR: The ee's, or's and er's.

Senator MARSHALL: Well, any of them or all of them, to actually take the responsibility for ensuring that those people are in fact paid correctly?

Mr Billson: In the franchise model, the most responsible party is the person that has engaged the employees, and that is the franchisee. That is where that relationship is and the message in the franchise community is that—

you are quite right—the team are often the most important predeterminant of success, and that is why you will find overwhelmingly that franchisees take very good care of their employees, because they work alongside them day-to-day. It is quite a small business environment, and small business owners, in my experience, aim to do the right thing. What this does, though, is say through that commercial agreement, where a franchisor has made certain intellectual property, technology, systems, insights, brands available through a commercial contract to someone else to deploy with the very support of the talented and valued team, that somehow that becomes an umbilical cord to send those workplace responsibilities off somewhere else. That is a very interesting call, and I know that has been the subject of quite a lot of debate for generations about whether that should be the case or not.

We do not think that is reasonable and appropriate, and it completely misunderstands the diversity of the franchising model, where it might be a buying group to make sure Babolat tennis rackets are available in Benalla at a reasonable price compared to, say, what a very large sports good manufacturer might get as a bulk discount. That is a franchise relationship, but there is no line of sight to the operations. Our recommendation is that, where there is that control over those day-to-day operations, if you are involved in that space then you are accountable. That is our view. We are not seeing there should be no connection, but the turning point needs to be control over workplace relations issues. If that is part of the franchise model then those accountabilities flow. If it is not, it would be odd for this parliament to be telling businesses how they should structure, organise, run and shape their businesses just for the convenience of regulation. We do not think that is a very smart way to go. So where that control is there on workplace relations issues, our amendments provide that as the way of building that connection and creating that accountability.

Senator MARSHALL: We hear a lot on this committee—not this particular inquiry, but this committee generally—not just small businesses but small businesses in particular saying, 'I wasn't aware that that was what I was supposed to be paying people.' Do you think it is too much to ask that the employer should actually know what their obligations are towards their staff before they employ them?

The other part of that equation is that employees do not seem to know what it is they are supposed to be paid either. If an employer knows, or should know, what employees should be paid, it should not be too much to expect that they can put that in writing so the employee knows what they should be getting paid as well.

Mr Billson: As we know, if you are running a small business, there are quite an array of responsibilities and accountabilities that are part of that decision to become an enterprising man or woman. How you become aware of those issues and those responsibilities is an issue for the broader economy. It is not something unique to franchising. In the franchising space, our survey shows that about three-quarters of systems help making that information available. They do that as part of the franchise model, which is in your own business but not on your own, and they provide some of that information. The proposition here is though, even though that might be a helpful information stage and step that is provided, somehow that would create a new liability from you doing what we would hope to be the right thing. This is why in our—

Senator MARSHALL: But shouldn't the owner of the brand effectively be able to say, 'I have confidence that this small business that runs under my brand is in fact paying the right thing'? Maybe there is an argument that they should not have to take day-to-day responsibility for making sure that that happens, but would they not have an obligation to ensure that the small business knows what they are supposed to be paying?

Mr Billson: In our proposition to the Senate, which we ask you to consider, there would be different levels, different layers, of burden on the franchisor. If it were of the type that you are talking about, then providing information links—

CHAIR: So a 7-Eleven, for example—

Mr Billson: They have a very different model, and the deeper the degree of engagement in those workplace relations day-to-day decision-making and operations, obviously accountability goes up; they need to be commensurate. But, in the case where there is a line of sight and a franchise system is just trying to help a franchisee run a successful and compliant business, the provision of information is something that the majority do now. As an industry, we have set up a free call line where people can just ring up, whether they are employees or employers, and just check it out. And we have been working quite collaboratively with the Fair Work Ombudsman on getting information provision recognised as a reasonable thing to do without gaining a risk of a new liability, a new penalty, where you may have no line of sight. That is that calibration piece that we think we have captured in our recommendations that discerns between a very big, complex, fully embedded, fully integrated system, right the way through to one such as BIG4 caravan parks, where it is about bookings, brandings and joint marketing. That is the franchise model, or even a group buying model. We have sought to

open the door on those varying degrees of calibration and pick up the collaboration and good work going on there, not hit the whole thing with a sledgehammer from a very expensive regulatory overreach.

Senator MARSHALL: But I bet the brands that get exposed and get the negative publicity wish they had taken a more hands-on and active role.

Mr Billson: I have tried to touch on that in my opening remarks—that a lot have taken stock and had a bit of a look themselves. There is one particular brand that has done that very extensively, and the cost of doing that audit was something that the business and the franchisees did not want to know about, and then, where there were problems identified and the brand thought, 'We had better terminate those agreements, otherwise we will be at risk of a broader liability'—that is perhaps not as supportive as we would hope, but that is a response to the kind of regulatory imposition that is envisaged in this law, and, under some businesses where they already have proactive compliance deeds, expectations are already being put on them through the existing regulatory tools, where there has been some example of irregularity. Is there anything you would like to add?

Mr Giles: I think the wake-up call for the whole business community, let alone the franchise sector, was probably just the nature of the breaches by the franchisees. They were not instances where the franchisees did not know which award; they were deliberate breaches, often linked to immigration, 457 visas—a very complicated set of circumstances. Mr Billson mentioned that the franchise sector already does a lot of additional things, but they are also doing more and more things, because the biggest concern they have, as you pointed out—the adverse publicity is massive. It is front page news; it is mainstream media. The brand damage is extensive. They are very concerned about these factors. But sometimes it is a challenge to solve them all.

Mr Billson: If I could add one other quick point. Some of those franchisors that people imagine are some big behemoth head office may have three or four people in them. So the depth of human resource expertise, the ability to navigate a complex system, may not be there either, and that is why as a sector we have stepped up and provided, through a service to our members, an opportunity—whether you are the franchisee, the franchisor or the employee—to ring up and just get a sounding on it.

Senator MARSHALL: Let us come to the employee thing, because I think, on deliberate breaches, people can get away with that much more readily when the employees are confused and potentially exploited through visa arrangements and other things, but in general they do not really know what their obligations are. They are young people straight out of school and there does not seem to be much education about these things. If they were more aware that they were in fact being ripped off and that there was something they could do about it, deliberate breaches would be less likely to survive into the longer term. Do you think, again, the legislation should strengthen the employee information? Secondly, given what you said about information being provided to employees, what do you do as an organisation about informing employees of their employment rights?

Mr Billson: A couple of things. On your first point, the more reliable and dependable the knowledge, the better. One of the things we are concerned about is that, if you create the adversarial, 'Who is going to be blamed?' that is not conducive to everybody bringing their A game to the task of making sure workplaces are compliant, employees are being properly paid—and be mindful that this applies right across the economy. We were keen to have some other people with us here today, but they were not quite as enchanted and able to get here in relation to that prospect as we were. In a number of parts of the franchise community, the employees are very empowered because they are in an area of skill shortage. Hairdressers, for instance, are very mobile. So there is a different picture across the variation of the franchise systems and areas of activity in the Australian economy. What we have been putting forward and what I thought we have been making good progress with, in partnership and collaboration with the Fair Work Ombudsman, was getting those tools available, working out what we can do to make them available not only to the franchisors and franchisees but also employees. That has been the trajectory we have been on, and then this arrived and everyone is turning their mind to this heavy legal compliance intervention model, when I think there is a credible case for arguing we were making pretty good gains.

Senator MARSHALL: Could an employee ring your peak organisation with a confidential complaint, and what would you do about that?

Mr Billson: Yes. Mr Paull can explain the call line.

Mr Paull: Certainly. We have engaged with one of our HR partners. They provide a 1300 FCA HR line, which is available to not only our franchisor and franchisee members but to employees within that system. We have advertised that extensively on social media and through our membership, and even in our survey results, given that we only launched at the beginning of March, I think 56 per cent of the respondents were aware of the helpline and the fact that we provide it. I met with the provider the other day, and they are getting calls from

franchisees and employees asking them, querying, 'How do we deal with issues related to employees?'—mental health, termination, onboarding, casual, awards. So, early days yet, but the provision is there for our members and their employees to engage with it.

Mr Billson: It is part of our aim to know what the right thing is to communicate. In recent days there has been a fairly high profile case where a major brand has had a lot of media attention.

CHAIR: Is that Red Rooster?

Mr Billson: Yes. I was not going to mention them, because I had not got their clearance to mention them, but, Madam Chair, it is that.

CHAIR: I had a question going to that anyway.

Mr Billson: In any reasonable assessment, they were doing everything you could reasonably ask of them. They intervened, they got involved, they remedied the underpayment. The only issue was, 'You did not let the Fair Work Ombudsman know early enough that you were fixing this and taking responsibility,' and they ended up being very prominent in the media. I would have thought we would be encouraging and recognising and celebrating the practices that were the kind that we would all aspire to see happening, not see them punished in that way. This is why clarity about just what is expected of people is something that we are calling for and that we are seeking to have supported through the amendments that we respectfully ask you to consider.

Senator CAMERON: Thank you for your submission. Mr Giles, are you serious that some of your members would not know what award they are operating under?

Mr Giles: No.

Senator CAMERON: That is what you said. You said, 'They might just not know what award they were operating under.'

Mr Billson: I think he was using that as an example of the kind of questions we might get.

Mr Giles: I am sorry if you have misinterpreted me.

Senator CAMERON: That is fine. Mr Billson, you represent franchisors and franchisees?

Mr Billson: Yes.

Senator CAMERON: What is the percentage of income you receive from both groups to run your organisation?

Mr Billson: It is overwhelmingly from franchisors. Part of the reason I accepted the role post-politics is I have running through my veins a belief that there is no successful franchise system without successful franchisees. It is not durable to run a system with only a franchisor view and expect it to be successful in the long term. That is part of a repositioning that is happening; if you have got any ideas, we would welcome them. We are not quite sure what the best membership fee model is for individual franchisees; we have not quite nailed that. You might have some thoughts that you can share with us offline about that.

Senator CAMERON: I can tell you online that if you are getting most of your money through the franchisors, then I assume that that is where your focus would be in terms of servicing them—

Mr Billson: That is not the case. As I was saying earlier, an essential precondition for successful franchising or for the prospects of successful franchisees—you would have seen that reflected in my work reforming the franchise code and in other areas of reform such as unfair contracts and competition law reform. There is no durable successful franchise model that looks exclusively at the interests of franchisors.

Senator CAMERON: I just do not understand how it can work. Maybe you can provide me with some details on notice. I am going back now to 1994. There was a committee report *Finding a balance: towards fair trading in Australia*—you are probably aware of that?

Mr Billson: Yes.

Senator CAMERON: It identified a range of problems in the franchising industry, many of which are still there, and there have been a couple of state inquiries since then as well. Can you advise me on how you deal with the conflict between representing franchisors and franchisees—I do not want you going into it now because it is a complex issue, and I would expect a detailed response to this—and how you can balance that dichotomy between representing the rights of franchisors and franchisees? The other issue you have raised is that you are now representing employees through your helpline. How can you balance all of those different stresses and strains in relation to how you operate? It is highly unusual. I do not accept the proposition that you can do it because you like everybody. I know everybody says you like everybody, Mr Billson—

Mr Billson: Well, I hope a few people are fond of me as well, but thank you for that!

Senator CAMERON: but this is a big problem, so maybe on notice—

Mr Billson: Can I give you a little bit on that just to start with? We represent the vitality and the success of the sector, and a model of enterprise. The more successful it is, the more supportive and beneficial it will be for all involved in it, and that is why half a million Australians derive their livelihood out of this model. Back in 1994, that report was—

Senator CAMERON: Some of them do not get much of a livelihood.

Mr Billson: Again, this is where—

Senator CAMERON: Some of them have been sent to the wall—have they not?

Mr Billson: I will come to that now. In 1994, that was the precursor to the initial franchising code. A code was introduced where there was full disclosure, and those sorts of things. In my time as the minister responsible, it was further strengthened; there are now penalties and sanctions for insufficient information, and there is now a burden of duty of good faith between the parties. The regulatory environment has evolved quite considerably. This is the education and employment committee; most of that sector regulation has been done through the Treasury portfolio, but I can share with you a lot that has happened there—

Senator CAMERON: Maybe if you do that on notice; I have got a number of questions.

Mr Billson: Sure.

Senator CAMERON: Mr Giles, if you look at your second recommendation, 558A—replacing 'significant' with 'substantial'—you have indicated that these are minor changes. What is minor about that?

Mr Giles: Probably—if you flip it over—it is what is major about the current drafting. If you are reviewing a piece of legislation with a view to making it consistent with the policy intent but without massive compliance cost and without catching organisations that ought not be caught, then those changes are intended to achieve that.

Senator CAMERON: These changes basically build a Chinese wall between the proposed legislation and your members. These are not insignificant. I just cannot understand how you could come here and argue that these are minor changes. These are fundamental changes. You should just be up-front and say, 'We don't like it. We want to change it. We think it is a crap piece of legislation,' but do not come and tell us, 'We just want to fiddle with it.' You do not. You want to destroy it through this.

Mr Billson: No. It goes back to the example that Senator Marshall provided. As part of providing information to a prospective franchisee, a small-business person looking to purchase that business opportunity, you provide information of a general variety about where you find specific information about award compliance, you would hate to think that that positive-action step to inform the employer where to go to get advice and assistance would all of a sudden trigger the kind of very substantial liabilities that are envisaged in this law. What that measure seeks to do is say, 'If you're all over the day-to-day operations of franchisees and are controlling their workplace relations'—and I think the precedent is in Spain. Until this legislation, Spain was the most aggressive in that idea. Even in Spain, the idea was that the franchisor had to select the staff, determine what they were paid and then nominate the rosters.

Senator CAMERON: I am not interested in Spain.

Mr Billson: I am just explaining to you, though, why we have that material.

Senator CAMERON: I have limited time.

Mr Billson: That is what we have been trying to do: discern between those.

Senator CAMERON: Mr Billson, you have been around. You know how to get through these inquiries. You have participated on them. Going to Spain is part of the tactics of not answering the questions. I really want to get back to your changes to the legislation.

Mr Billson: I recommend you look at that.

CHAIR: Thank you for that additional information.

Mr Giles: It is often best answered by example. Our concern is that, if you take some of the 1,100 or, indeed, the majority of the 1,100 franchise systems—

Senator CAMERON: Can I come back to the question I asked?

Mr Giles: Yes, which is 'significant', not 'substantial'.

Senator CAMERON: The difference between 'significant' and 'substantial'. If you cannot explain it now, can you give us more detail on notice as to the implications of that?

Mr Giles: All right.

Senator CAMERON: I am unclear of what it means. Even reading your submission, I am still unclear. So, if you could give us a better definition—

Mr Billson: If we are able to, because we feel it is well canvassed in there.

Senator CAMERON: The next one is that you replace 'reasonably should have known' with 'in the usual course of business should have known'. Again, this diminishes that part of the bill, doesn't it?

Mr Billson: No. It seeks to bring it in line with what you could reasonably expect the franchisor to have had a line of view about. We have asked for clarification of what 'reasonably should have known' means. The explanatory memorandum talks to some kind of parallel circumstances. It does not talk about a breach or an alleged breach in your system. It is very broad. I would hate to think that this parliament is asking franchisors or franchisees to be mild clairvoyants in the ordinary course of their business. That says, 'Given the nature of the franchise relationship, if you've got that kind of information coming into your line of vision and you have awareness of it, there is a responsibility,' but if the franchise model has none of that connection and someone says, 'With this franchise model, they would have known. Why don't you?' we think that is a very hazardous drafting way to go, where you are asking for an undefined, extraordinary amount of awareness about things that might have no relationship to the business model.

Senator CAMERON: Are 7-Eleven members of yours?

Mr Billson: Yes, they are.

Senator CAMERON: Caltex?

Mr Billson: Not until recently.

Senator CAMERON: So they a member?

Mr Billson: Yes, they are.

Senator CAMERON: Domino's?

Mr Billson: No.

Senator CAMERON: Pizza Hut?

Mr Billson: We are checking our membership.

Mr Paull: Yes.

Senator CAMERON: United Petroleum?

Mr Billson: No.

Senator CAMERON: Bakers Delight?

Mr Billson: Yes.

Mr Paull: Yes.

Senator CAMERON: Some of those have some of the most egregious breaches of fairness and decency in the workplace relations system in this country, and you sit there and you say, 'This is terrible. We want—' What was the word you used? You want an, I think, synergistic relationship. What we need to do is make sure that your synergistic relationship—whatever that means—does not allow your members to rip off another group of your members and, even worse, the employees. That is why we are concerned.

Mr Billson: Senator, if I could go to that point: the reason that you can make that statement about those brands with confidence is that you have seen the publicity surrounding the enforcement activity that has occurred under the existing law and with the existing tools. So, in effect—

Senator CAMERON: The enforcement is absolutely not enough. The Fair Work Ombudsman are coming here later. I am highly critical of the feather duster that they get out and wipe across your faces every time that you rip workers off. I just do not think that they do enough. You are not going to get any succour from me by telling me that the Fair Work Ombudsman is this big tough person fixing you up, because they are not.

Mr Billson: My point being—a simple point—that you can make those observations because the tools that are there have worked. It is open to the committee to have a conversation about how well they are deployed. That is not our role—

Senator CAMERON: Well, they have not worked.

Mr Billson: but it points to the fact that the law is functioning, and that is how you are in a position to make those observations.

Senator CAMERON: How can you claim that they have worked? You cannot even tell me the depth of the problems in your industry. This is the tip of the iceberg, from what we are being told.

Mr Billson: Our point is that we have proposed—

Senator CAMERON: Do you disagree? Are you saying that this is it and this is the only problem that you have got?

Mr Billson: No, we are not advocating any evidence about that, because we do not have the capacity to do that in an authoritative, reliable way. What we are able to say though is that the challenges that you are describing are not unique to the franchise sector, yet here is a uniquely targeting-franchising proposition. We are also saying that transferring the responsibility from the person employing people, for where there may be a contravention, away from the person that is responsible for those contraventions and onto somebody else is quite an interesting policy idea. We are suggesting that that needs to be done with care, that the risk of regulatory overreach is huge and that the costs are very substantial. We are trying to put some constructive suggestions forward.

Senator CAMERON: I want to nail the position that these are very minor amendments. These decapitate the bill in terms of its capacity to deal with the issues. I go to No. 6 of your amendments: 'reasonable steps to prevent a contravention'. You are saying to add the words:

'such as by having in place and complying with a compliance program that meets the relevant Australian Standards or has been approved for use by the Fair Work Ombudsman'

One of you—7-Eleven, Caltex, Domino's, Pizza Hut, United Petroleum—can get out and, through the franchise system, rip workers apart in terms of their rights, and as long as the Fair Work Ombudsman gets the feather duster out and gives you a touch on the backside, that is the end of it—is that what it is?

Mr Billson: No.

Senator CAMERON: That is what happens.

Mr Billson: I think that is a nonsensical characterisation of our proposition—

Senator CAMERON: Well, what is it?

Mr Billson: but I respect your right to put it, Senator. What we are saying is that if you put in a statute with high risks of significant penalties and very significant obligations and say to a small business, 'Take reasonable steps,' a sensible move would be to make it clear what those reasonable steps are. For some of those brands that you have described, they have already gone through a process with the Fair Work Ombudsman, and have what is called a 'proactive compliance deed', which has a very significant, and in some cases very onerous, array of requirements on those systems because they have found contraventions in those systems. For systems that have not had that experience, where do they go to get a sure-footedness about what is expected of them? The pathway that we were going down was working with the Fair Work Ombudsman about what that looked like for small-business systems and for mid-sized systems. This says that if you have a credible plan and you are implementing it, that should amount to reasonable steps. That sounds pretty reasonable to me.

Senator CAMERON: What about 558A(3)? You want to add a new part in this place that says:

Nothing in this Part (2)—Liability of responsible franchisor entities and holding companies, shall cause:

(a) the creation of new liabilities for responsible franchisor entities and holding companies …

I am paraphrasing now; and:

(b) the relationship between a franchisor entity and franchisee entity to be deemed to be other than a contractual relationship between separate business entities …

What if the test is applied under the taxation act and these people are employees?

Mr Billson: There is all that law in place at the moment which currently does not reach to saying a franchisor and a franchisee have an employer-employee relationship. It currently is a commercial relationship, and we are arguing that should be preserved—and for fear of taking us off track I will not mention the country where that is actually in the law. We are saying: don't allow that to be confused because of this quite unprecedented reach into changing the commercial relationship between two individual businesses. The first point relates to examples such as payroll tax. We know the states take, if I might say so, an expansive view of who should and should not be caught for liability under payroll taxes, and we would hate to see that the added cost of this legislation, which is already of concern, is then added to by consequential costs from other sources of authority purely because this law has been introduced. That is an attempt not to see that roll-on effect.

Senator CAMERON: Did you say that Caltex is a member of your organisation?

Mr Billson: Yes, I did.

Senator CAMERON: Are you aware that when the Fair Work Ombudsman investigated them they were tipped off by the Fair Work Ombudsman and that Caltex wrote to the franchisees and said: 'You're going to get a visit from the Fair Work Ombudsman'? Do you think that is reasonable?

Mr Billson: I think most of the notice provisions that happened there are fairly consistent across the Fair Work Act. Unlike this legislation, which for no apparent justification is targeting franchising, I do not think those broader notice provisions should be anything different for a franchise business.

Senator CAMERON: If a regulator wants to investigate a franchisor or a franchisee, are you saying that it is okay for the Fair Work Ombudsman to advise them in advance that this is going to happen?

Mr Billson: You will find in some regulatory guidelines for organisations like the ACCC and the Fair Work Ombudsman that is ordinary regulatory and investigative practice. What we are actually supportive of is having those investigative powers strengthened. There is a compulsion to provide evidence and produce documents in this legislation. I know that has been of some interest in other parts of the economy, shall we say. In relation to the way in which the media is engaged, these are very mature and powerful investigative tools, and, for agencies like the ACCC, they are used in the frame of a quite disciplined enforcement and media protocol to make sure that people are not getting show trials out in the media. Maybe that is something the committee could turn its mind to, given the tools are being so much strengthened—and we argued for and support that strengthening.

Senator CAMERON: Thanks, Chair.

CHAIR: Thanks, Senator Cameron. I know you will have a lot more questions on notice. With respect, this committee has, over a number of years, been looking at the issues within the franchising sector and their underpayment, particularly of international students, so we are quite well versed with the behaviour of many of your members. I have just a couple of quick questions. I know Senator Cameron and Senator Marshall have each asked a lot of what I wanted to ask. You surveyed your respondents around this bill in particular. I know the results are in your submission, but can you summarise the results that are there?

Mr Paull: We did survey. To be fair, it was done over nine or 10 days. We got 160 respondents that were valid from CEOs or senior executives from across our membership. There are a couple of key points that I think confirm some of the contentions that have been put into this submission. Firstly, the proposed legislation is of concern to the industry, and whilst there was a percentage of respondents who were not familiar with the reforms and the changes, those that were were either concerned or extremely concerned about the impact. I guess that is the first thing.

CHAIR: Were they clear that the bill in no way creates a joint employer liability when they filled out that survey?

Mr Paull: I think there are a couple of things, just from talking to the systems, where these concerns are generated. I am sure Mr Billson and Mr Giles will have other views. Firstly, there are significant penalties. Secondly, coupling significant penalties with risks to brand means that they are almost compelled now to take action, and a lot of systems already have, as a result of the—

CHAIR: Sorry, Mr Paull. My question actually was: what information was provided to people filling out the survey, the survey respondents, around making clear to them that the bill, if passed as drafted, would not actually create joint employer responsibility?

Mr Billson: Just on that point, that is not correct. I am not sure why—

CHAIR: Well, that is not the evidence to this committee.

Mr Billson: I know one person has asserted that to the committee, but the overwhelming weight of evidence and legal analysis says that is a false conclusion to arrive at. It does create a joint employer liability. It does that under quite vague and difficult-to-nail-down circumstances. It does say that you can be relieved of that liability if you take reasonable steps, and all we are asking for is to know what that is. We are not sure what a defence would be. That is why we are saying: make it clear that an approved compliance program against the Australian standards or the Fair Work Ombudsman's processes should provide that certainty. It absolutely does create that joint employer liability, and that has been the constant advice across the sector, and not only from franchising system advisers. It is a very broad and shared consensus across the legal fraternity.

CHAIR: Have you tabled that legal advice?

Mr Billson: No, they are advising their own clients.

CHAIR: Is that in your submission, though?

Mr Billson: No.

Mr Giles: It is in a survey.

CHAIR: If you could, that would be really helpful for us, I think, because we are hearing, obviously—

Mr Billson: I have some of it here that has been circulated, and I can provide that to you.

CHAIR: I would appreciate that, because our advice from learned people in this area is that the bill in no way creates that joint employer liability concern.

Mr Billson: That is not correct.

CHAIR: My issue was: what sort of information did survey respondents have to accompany the survey?

Mr Giles: Can I answer that. The survey was conducted by an independent body, FRANdata. They were provided, as part of the survey materials, with a copy of the actual legislation in summary form. There was a question also that they were asked about their level of awareness, and I think it was only 17 per cent who indicated that they did not know. So there was quite a high level of awareness, just answering your specific question.

CHAIR: Thank you very much.

Mr Giles: Can I just clarify the point about the joint liability. There is a concept of joint liability in the US that has been the subject of academic debate. The legislation does not mirror that joint liability, so the learned professor is right in saying that, technically speaking, it is not joint liability as that concept is known in academic circles. This is, in fact, direct statutory liability. But, in the colloquial 'down the pub' test and the franchisor test, it is joint liability, because the franchisors are also on the hook. So it is a little bit of semantics, I think, for someone to say that there is no joint liability concept, which I think is the point Mr Billson was making.

CHAIR: But, at the end of the day, any breaches of law will not be prosecuted at the pub.

Mr Billson: No, and this is why, on the assurances that have been provided in the explanatory memoranda and in some of the public conversations about this bill, our plea to this committee is to reflect them in the bill, because what will be decided in the courts are these questions around what is actually in the law. At the moment, the assurances around the way the regulator will conduct themselves—'Don't worry; if you're a small franchise system and you simply provide information about where proper, reliable advice can be obtained, you will be okay'—are not what it says in here.

CHAIR: So you do not trust the discretionary oversight of those that will be looking at this.

Mr Billson: There are two things here. We can perhaps take some comfort in the regulatory and enforcement policies that the Fair Work Ombudsman articulates, but this opens up plaintiff-lawyer avenues as well, where the effort to create a sense of liability will be determined not by the policy and enforcement guidance of the regulator but will be on for young and old in the courts. If it is the parliament's intention to have this operate in the way that is explained in the second reading speech, for instance, and some of the remarks in the explanatory memorandum, I do not think it is too much to ask to have the law actually reflect those reassurances.

CHAIR: Thank you. In terms of your website, is it still the Franchise Council's goal to persuade the government not to legislate in this area?

Mr Billson: We aimed to point out that legislating was unsafe and unnecessary. We have not achieved that goal, so we are here. We are where we are. We think the case certainly has not been made for the specific legislative parameters that are in this bill—

CHAIR: But you do recognise, Mr Billson, that this sector or aspects or a particular model within the franchise sector is of severe concern not just to the government and I suspect the opposition but indeed average Australians, who assume that big brands in every community are not ripping off workers.

Mr Billson: Yes, and my point would be that, if the assumption is sound, fine. The assumption I would put back to you is that, where people have been found to be doing the wrong thing, there seems to be very strong appetite, particularly within the media, to make it widely known that those brands have done something wrong.

CHAIR: But it shouldn't be up to the media, with respect—

Mr Billson: Correct. This is my point.

CHAIR: or this committee's reference committee—

Senator MARSHALL: It is not only that; it is the business model. Some of these business models actually require breaches of—

Mr Billson: I know that has been spoken of, but under the current franchising code businesses have reliable information on which to decide whether to invest or not. If that information is false, there are stiff penalties there.

If somewhere along the line someone decides they do not want to be a small business person, with all of those challenges and responsibilities that we should be celebrating, but they want to be an employee, that is okay—they can make that decision—but to bring an employee frame to an independent business based on clear knowledge of what the business proposition is is a false assertion. That is not sound.

Senator CAMERON: But they are not small businesses.

CHAIR: I guess we are coloured on this side because before this committee we have had the head of 7-Eleven and we have watched and had to question that whole executive team—

Mr Billson: Yes, you have had some interesting conversations as well.

CHAIR: and then the next set of executives. We have a certain lens that we come to this whole conversation with.

Mr Billson: But is the argument one that says, 'Because there is someone else to blame'—a franchisor—'we should go after that someone else to blame?' Or is the issue really one of: where is this area of noncompliance? I would argue very strongly—and there has been no evidence to prove it to the contrary—that noncompliance is an issue across the economy. To single out one model where the support is there, where steps are taken to guard against noncompliance and where others are very actively involved in managing that where it occurs, to target that one sector, is very unsound and to see the survey results where 30 per cent decided whether they wanted to run a franchise at all—franchising is a model where a lot of mums and dads and small business people can get into a business—

CHAIR: Agreed, Mr Billson—

Mr Billson: and I do not think we should be nobbling one sector for an economy wide issue.

CHAIR: but it is overrepresented—

Mr Billson: I do not think there is any evidence to back that up.

CHAIR: in the current situation of—

Mr Billson: Maybe in media coverage, Madam Chair, but in actual occurrences of noncompliance I think—

CHAIR: Thank you for your sensible recommendations.

Mr Billson: You should say that, Deputy Chair. May I? He was acknowledging that I am right about that.

Senator MARSHALL: I actually think the noncompliance is a broader issue than anyone understands and hence we have got an inquiry—

CHAIR: We have got inquiry going to that now.

Mr Billson: We can be constructive in that process as well, because I agree with you.

Mr Giles: I want to make a point of clarification just to make sure that you are clear. Our position is not to get a complete exemption for all franchise systems from responsibility. Some of the examples that you have put forward are egregious and those levels of controls are over workplace matters. What we pointed out is that the current drafting would catch virtually every franchise system in Australia—co-ops and the smallest businesses. About 75 per cent of the franchise systems in Australia have fewer than 25 franchisees, the average head office count is seven people, there is no legal support and there is no internal HR support. One of our key points is to narrow the legislation now that the government has chosen to move on it.

CHAIR: Thank you for that clarification, Mr Giles. Thank you very much for your evidence.

Mr Billson: Thank you for having us. Thank you, Senators.

Mr Giles: Thank you, Senators.

LAMB, Ms Dominique, Chief Executive Officer, National Retail Association

[14:19]

CHAIR: Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I invite you to make a short opening statement, and then we will proceed to questions.

Ms Lamb: I want to commence my opening statement by addressing that in principle we support the repeal of the repeal of four-yearly reviews bill and that in addition we also in principle support the corrupting benefits bill. In our experience our members have been fortunate enough that the employee unions that they have dealt with in relation to enterprise bargaining have conducted themselves in a way that can be defined as in good faith and that if they have had any issues, they have used their rights to enter into dispute with the Fair Work Commission and certainly have not seen any of the behaviour which has been characterised by the royal commission.

Today I would primarily like to address you about the vulnerable workers bill. The National Retail Association is a not-for-profit industry association that provides professional services, critical information and advice to the retail fast-food services industry throughout Australia. Our membership currently represents approximately 15,000 shopfronts across the country, and approximately 45 per cent of those can be described as franchisors, franchisees, holding companies, co-ops, banner groups and brand houses. We predominantly seek to rely on our submission, which I understand is before you. Our members acknowledge and support the need to protect vulnerable workers and to hold to account those who seek to exploit vulnerable workers.

As an industry, we employ 1.3 million people, a third of which are youth, and many of which hold section 417 visas. Our members are passionate about young workers' rights and ensuring that their entitlements are met. However, we, like our members, are not convinced that the current legislation does not provide such protections or that the vulnerable workers bill is the answer to the issues that have arisen out of cases such as 7-Eleven. The Fair Work Ombudsman, Natalie James, has repeatedly warned employers, their managers, human resource staff, contractors, advisers and franchisors that the Fair Work Ombudsman intends to fully prosecute accessorial liability to build a culture of compliance within the Fair Work Act.

At the Law Institute of Victoria's conference on 28 October 2016 the Fair Work Ombudsman cautioned that it would use every tool available to it to right these wrongs. Indeed, during the last financial year 92 per cent of the matters that the Fair Work Ombudsman filed in court sought orders against third-party accessories. The Fair Work Ombudsman has expanded the types of orders it has sought against accessories. Where a corporate no longer exists, is uncooperative, cannot be found or appears to have insufficient funds, the Fair Work Ombudsman will seek orders against individuals or other organisations involved in an employer's underpaying of staff. The ombudsman has also demonstrated that it is willing to prosecute franchisors and third parties in relation to contraventions by franchisees.

The case of Fair Work Ombudsman v Yogurberry World Square Pty Ltd is precisely one of these examples. In this case the ombudsman brought proceedings in the Federal Court of Australia against Yogurberry World Square, frozen yoghurt store, for contravening the act by failing to pay employees in accordance with the Fast Food Industry Award 2010, failing to pay waiters in full by making unlawful deductions, and failing to keep records, including pay slips. Yogurberry World Square was part of a group of companies, and the director of those companies was joined, including also YBF Australia Pty Ltd, the master franchisor, and CL Group Pty Ltd, Yogurberry's payroll company. The Fair Work Ombudsman took successful legal action against all three, and the director, with success.

It is evident from this case that section 550 of the Fair Work Act is sufficient and adequately addresses concerns relating to the investigation of entities that are holding companies or franchisors in response to the Fair Work Ombudsman's focus on these provisions in 2015 and 2016. Our members have voluntarily commenced programs of educating as many business owners and entities within the network about their obligations. Additionally, the Fair Work Ombudsman itself reports that it has also managed to recover more unpaid wages in relation to vulnerable workers than before. It has shifted its focus towards the protection of vulnerable workers.

Our members understand the concerns that have been raised by the 7-Eleven case and that were identified in the 7-Eleven inquiry report. However, it is evident from the report that much of the difficulty faced by the Fair Work Ombudsman in relation to the franchisor was the Fair Work Ombudsman's lack of power in relation to obtaining direct evidence about an accessory's role in or knowledge of the business and the facts of the contravention. It should be noted that this lack of power did not stop the franchisor from assisting the Fair Work Ombudsman voluntarily. The facts remain that the Fair Work Ombudsman does not have the capacity to require or compel a person to answer questions on record in relation to the alleged contraventions of a workplace law. It is our view that the Fair Work Ombudsman should be given further and better powers to obtain information to

allow the ombudsman to obtain direct evidence in relation to an accessory's role in or knowledge of the business and facts comprising of a contravention with the company immunity that generally follows to a witness. We would argue that it is not a deficiency associated with the current legislation.

Despite these views, if the vulnerable workers bill is to pass the National Retail Association has made suggestions in relation to amendments to the bill within its submission to the inquiry. Specifically, our concerns relate to: the section 558A phrase 'responsible franchisor entity', the broad nature of this provision and the inadvertent implications for a number of business models who have little or no control over third-party employment contracts or practices; the section 558B phrase 'knew or could reasonably be expected to have known' and the broad nature of this provision; section 558B(4) on court considerations as to 'whether a person took reasonable steps' and how 'reasonable steps' should be interpreted; and section 558B(6), which in its current form in the bill has the effect of proposing a primary liability on a responsible franchisor or holding a company by a contravention by a franchisee or subsidiary entity irrespective of whether an order has been sought or made against the franchisee subsidiary.

In addition to these concerns, we have made a number of recommendations about the explanatory memorandum. Our concerns about the explanatory memorandum really are surrounding the fact that it is likely this document will be read into the current form of the legislation. Currently, the explanatory memorandum states that the franchisor or holding company 'does not need to have actual knowledge' that the actual franchisee or subsidiary has contravened the Fair Work Act in order to be implicated. Further:

> It is enough that the responsible franchisor entity could reasonably be expected to have known the contravention would occur, or that a contravention of the same or a similar character was likely to occur.

In our view, this is far too onerous, especially in complex franchising or holding company networks.

We submit that the reasonable steps as explained in the explanatory memorandum are also far too onerous for franchisors and holding companies both in terms of cost and business confidence and are likely to erode the complex business relationship between franchisees and franchisors. The concern is that by placing additional burdens on the franchisor and holding company, the franchisor and holding company will be forced to pass these costs onto the franchisees, which will inevitably place further pressure on the financial viability of franchisees, creating the potential for even more pressure to reduce labour costs or numbers of people they employ. There has been no mention of government support or a period of implementation or assistance which will be provided to the franchisors or holding companies in order for this legislation to be implemented.

The last thing our industry needs is a disincentive for individuals to enter into a franchise arrangement, as it would reduce the opportunity for small business to gain access to this operating model and, in turn, to employ their workforce. The bill creates additional red tape and complexity around a legal relationship that once fostered prosperity rather than regulation. It is our view that the bill is effectively seeking to hold franchisors and holding companies as guarantors over the employment and payroll practice of separate legal entities and, in the case of franchisees and holding companies, unrelated third parties. This is business-to-business regulation and is not the role of the franchisor or the holding company. There is no typical model in relation to a franchising system or holding company system, and unless significant changes are made the drafting of the legislation it is likely that it will inadvertently capture businesses who do not have the legal right or ability to take reasonable steps as characterised by this bill.

Senator MARSHALL: I am just trying to frame my question around that. I think that clearly the intention of the bill is effectively to hold the franchisor as guarantor for wages and conditions for the franchisees.

Ms Lamb: The difficulty is that in many of the situations our members find themselves in, some of them do not have the legal right to intervene in relation to those employment matters. Unless we see the definition of the control of affairs part of this legislation changed, it means that people like banner groups, which you have already heard about, are going to be held liable for things that they have never had anything to do with in the business.

If you do all the purchasing for a business or do all the marketing for a business, you have control over some affairs but not over the employment. What it will mean for a number of these models is that effectively they will have to create—

Senator MARSHALL: Change their model?

Ms Lamb: Well, they will have to create an entirely new workforce to ensure that they can comply with what looks like the reasonable steps are going to be.

Senator MARSHALL: Well, not really. All you have to do is ensure that the franchisee is in fact complying with their obligations under the law. If you can ensure that that is the case then there will never be any liability applied. It ought not be a big and onerous step to actually do that.

Ms Lamb: But the legislation does not prescribe what is meant by how you would get a franchisee to comply. If you are simply talking about giving them information—educating them and ensuring that they are aware of what award they are meant to be paying under and making sure—

Senator MARSHALL: And making sure that they do it.

Ms Lamb: that their payment practices are correct, that is one thing.

Senator MARSHALL: Yes.

Ms Lamb: But in order to check up on them to make sure they are implementing their regular increases to minimum wages, to make sure they are issuing pay slips, to ensure they are accruing annual leave correctly or that they understand how to accrue the correct long service leave, that is a whole other story—if you have a framework for a number of businesses where you then have to seek to push yourself in to gain access to their records.

Senator MARSHALL: So who should ensure that they are doing all those things right?

Ms Lamb: The business owners themselves should understand what their obligations are. I think that the Fair Work Ombudsman does a very good job in the sense of educating. They certainly have umpteen number of templates on their website and they have the awards available. And if you are a small-business owner and you are part of an association then you have access to support around those things. It is that person's obligation. They decided to go into a business.

Now, if you want a third party to come in and oversee what is actually happening on the ground there, these sorts of people do not have natural access to these records. They do not all issue the payroll systems. They certainly do not all have frequent contact with employees. Many of our members have done some of the things that are suggested in here, such as setting up employee hotlines where employees can make contact, so that if it is flagged that there is an issue then they will intervene. But making this a prescriptive obligation will mean that they will have to change their business model, as you said. They will have to change their documentation around what they can and cannot do with their franchisors.

This means, in practice, that they will have to renegotiate their contracts, and there would have to be consideration offered. We are talking about really complicated networks. It is not as simple as just saying, 'We're going to put in place a regulatory bill,' and then forcing people to enter into a business where the owner of that business had entered into it so that they could run it themselves. This is effectively parenting—they are going to have to intervene. That is a costly exercise and also it means that they will not have control.

Senator MARSHALL: But shouldn't the franchisor take some responsibility for the actions of the franchisee if they are not employing people correctly? Why shouldn't they have some obligation there?

Ms Lamb: The franchisor offers a model in which people are in business and are supported by another business during the course of that. Many franchisors offer support in the nature of industrial relations advice, they provide them with training and they go through many things, including in some instances auditing. However, to say that they need to do that or to go as far as to check to make sure that each franchisee is doing the correct thing is ludicrous, because ultimately—

Senator MARSHALL: Well—

Ms Lamb: They do not have the resourcing to do that. Effectively, you are saying to them, 'You need to go and check every single business in your network periodically and make sure they are doing the right thing.' These laws change all the time—they change frequently. At what point do we say it is the small business or the franchisee's obligation to take responsibility for that? Of course they will still be joined, but then to have another business that has effectively no sight, no ability to see—

Senator MARSHALL: Except the same name.

Ms Lamb: It is very onerous.

Senator MARSHALL: I disagree with you but—

Ms Lamb: If you look at any of the brand groups—for instance, if we talk about liquor and we look at banner groups, just because they have the same name does not mean that they have any connection with any of the employees or how payroll or employment practices are run within that store. They do not have the ability to control—it is not in their documentation; it is not in their relationship; it is not in their practices—and you are now saying, under this bill, that they will have to effectively change their entire practice model in order to force themselves into a business which is always run independently and simply under a banner.

Senator MARSHALL: That is a matter for them but, if someone underpays, the law, if this bill is passed, will be the law. If they choose not to take any responsibility for that, I guess they will suffer the consequences envisaged by the act.

Ms Lamb: If it is the case that this law is passed, it needs to be more prescriptive about what 'reasonable steps' is going to mean. It is also going to need to be more prescriptive about what is meant by 'ought to have reasonably known', because, in the case of a franchise network, if you know that someone has contravened and you have seen that they have corrected that contravention, are you then meant to 'reasonably ought to have known' that they are likely to do it again? It is crystal ball gazing. Are you then meant to focus on that particular franchisee because they got it wrong once and continually, repeatedly, check on that individual? Do they have a higher risk associated with that person?

Senator CAMERON: Yes. It is corporate responsibility.

Senator MARSHALL: Yes. I bet you they do for the things they are responsible for now. I bet you they do. Isn't that what it is all about?

Ms Lamb: The issue is, right now, that, under 550, they already can be joined as a third party. We have seen it done. They can already be held liable if they have got a franchisee that has done the wrong thing. Under this model, they are going to have to proactively almost guess what might happen in order to prevent any of these things happening within an entire network. So it is going to be a positive obligation, effectively, for them to create an entire system which will prevent this from happening, in order to manage their risk. The cost to business in an industry that is absolutely struggling—it means the cost has to go somewhere. It means it will be forced onto the small business. And, ultimately, because the small business is paying for it, are we likely to see more contravention? I just do not accept that this bill, in its current form, assists vulnerable workers.

Senator MARSHALL: Let us stop there. Yes, if people are not doing the right thing and we put these provisions in place, of course we will see more contravention—but contravention we did not know about until this process. So it is indeed meant to establish that. Part of the problem that I believe this bill is trying to address is the process where the franchisee and the franchisor hide behind each other about whose responsibility it was to pay people properly.

Ms Lamb: In any of the cases that are prosecuted by the ombudsman, the franchisee, if they are the ones that are actually doing the paying, if they are the ones that actually are in charge of administering, are the ones that are joined, so on what basis are they able to hide behind each other, if it is the paying entity? That is the case. Even if they are a franchise, the ombudsman already has the right to join the franchisor. But what about the other groups that we are talking about in relation to these systems? Under the current system, they are not able to join groups that fall outside of the definition. If they have got nothing to do with the employment matters, they cannot be captured—and they should not be captured, because they have nothing to do with how the employment practices are maintained. But, under this situation, groups far broader than just your franchisor, and your traditional franchisor that you are thinking about, will be actually be captured under this. And they may have absolutely no ability to intervene to protect themselves.

Senator MARSHALL: What groups? I do not understand. Outside the franchisor-franchisee—

CHAIR: Could you give an example, Ms Lamb?

Ms Lamb: A good example of that would be if you have a look at lotteries. If you have a look at the Tattersalls Group, their control over any of the franchisees within their network actually is only in relation to the lotteries element of their business. These businesses are also other franchises, including WHSmith, Nextra and a number of other newsagencies that you would typically find lottery tickets sold in. On that basis, if Tattersalls have knowledge of a particular business that is only making a certain amount of money and they are only selling lotteries, and they know that that business does not have cards and other things that they have for sale and they know that they have employees, should they have known that that person is not paying their employees correctly, even though they have absolutely no vision of what is occurring within their employment relations?

Senator MARSHALL: That is an interesting example, I must say. I will have to think about that.

Senator CAMERON: The proposition that you seem to be putting is that these franchisors are victims.

Ms Lamb: I would not go that far.

Senator CAMERON: You would not go that far?

Ms Lamb: No.

Senator CAMERON: Well, that is how it sounds to me, that these poor franchisors are going to be the victim of this legislation. They do get benefits—don't they—through the operation of the franchisees?

Ms Lamb: Absolutely, they do get benefits for their own business.

Senator CAMERON: They get financial benefits?

Ms Lamb: Yes.

Senator CAMERON: They get brand-name benefits?

Ms Lamb: They do.

Senator CAMERON: They get benefits in terms of their brand being out on street corners; for some of them all over the country. They receive practical benefits, so it is all benefit but no responsibility under the proposal you are putting.

Ms Lamb: I would not say there is no responsibility. There is a responsibility under the current legislation.

Senator CAMERON: Except if you are an employee who gets ripped off and that franchisee disappears.

Ms Lamb: If the franchisor has knowledge. In fact, under the current legislation, if they have knowledge and it can be proven that they have knowledge then they can be joined. In fact, that is what the ombudsman has been seeking to do. If there is a body that no longer exists then they do seek to join the director. If it can be proven that there is an act or omission directly or indirectly where a party knew about a contravention, then they can be joined and the franchisor absolutely is not off the hook.

Senator CAMERON: In the example you gave, could there not be joint responsibility from all the franchisees who operate under that one franchisee operation?

Ms Lamb: In the example I gave, under the vulnerable workers bill as it currently stands they could be joined. Under the current legislation, if they could prove that there was knowledge at each of the levels then, yes, they could be joined. Really, all you are now saying is that under the example I gave every single party within that network has got to effectively create a way in which they are educating consistently and potentially looking into the workplace relation practices of one small business, which means that—

Senator CAMERON: Why not?

Ms Lamb: It means that you are going to be eroding the relationship between the franchisee, whoever their franchisor is, and then whoever the other franchisor involved is. Because the pressure effectively would push down and you would think that the cost of that will also push down. In that case, it could mean that the franchisee could end up paying double the cost if both the other guys are forced to protect themselves against this risk.

Senator CAMERON: Isn't that a cost that is reasonable if workers do not end up being egregiously exploited?

Ms Lamb: What is reasonable is that an employer that goes into business makes sure that they are absolutely aware of what their obligations are and that they do the right thing. Right now, all of those requirements exist and they are able to educate themselves enough to do the right thing, and they can be held accountable if they have not. To say that we need other third parties to be held accountable for something that they may never have had any contact with or any visibility of is extreme.

Senator CAMERON: Your membership is made up of both franchisors and franchisees?

Ms Lamb: Yes, that is correct.

Senator CAMERON: I put a question to Mr Billson. Could you also, on notice, advise how much the membership fees are for franchisors and franchisees, and how you balance the rights of the franchisees against franchisors? What process do you have in place now to deal with a conflict, because I see you have a conflict?

Ms Lamb: Within our association, we have an NRA, or effectively we have a subsidiary that is a law firm as well as an RTO amongst other things. So we come up with this question quite a bit. But the issue is that our franchisors and franchisees never act against each other, and we never advise them against each other under any circumstances and when it comes to issues like this we speak with all of our membership about their views in relation to issues that we are going to make submissions on.

Senator CAMERON: Why are you taking membership fees from franchisees if you do not support them when they are in trouble against a franchisor?

Ms Lamb: We support them in relation to industrial relations matters. We provide them with other support. Our practice does not allow for us to take action on their behalf that is of a commercial nature that may be against their franchise. But what we do is provide them with all assistance in relation to any type of workplace matters, so that they do not have to call their franchisor and breach themselves or anything like that.

Senator CAMERON: I just think you have the same conflict as Mr Billson's organisation. I think it must make for some quite interesting discussions behind the scenes. The government has indicated that a franchisor or holding company that is required to rectify underpayments will also be given a statutory right to recover any amounts paid from the franchisee or subsidiary, ensuring that the direct employer continues to be liable for the breach or can use contractual arrangements to recover in the case of a settlement. Are you aware of that?

Ms Lamb: I am aware of that.

Senator CAMERON: What is the problem with that?

Ms Lamb: The issue with that is that most of the time, if you are dealing with a franchisee, the way in which they fund their business can be either against the house or it could be that it is all of their life savings. It could mean all of their assets are tied up into it. If it is the case that a franchisee does do the wrong thing and they have significant underpayments, the chances of a franchisor being able to recover those moneys from a mum and dad in that situation are difficult. In many cases it could lead to bankruptcy and could lead to a number of things, but I would say that it is not—

Senator CAMERON: But so what? If the franchisee has been ripping off workers and they end up bankrupt because they have been engaged in some egregious, unprincipled, unacceptable conduct, why would you protect them?

Ms Lamb: I do not think it is about protecting them at all. It is about not putting an enterprise into a difficult situation when it was not their doing. Just because they are joined, it does not mean they are going to be liable. In addition to that, why should they be left paying the bill of somebody who did the wrong thing, and not be able to recover it?

Senator CAMERON: The reason for that is that workers who are at the bottom of the chain, the most vulnerable, end up carrying the costs. Someone has to pay, because someone has entered an arrangement under a franchisor and franchisee relationship, to simply wipe their hands of any responsibility for their brand-name. That is why.

Ms Lamb: I still do not think it is a sufficient way to say they will be able to recover their funds. It just gives them a means to try.

Senator CAMERON: I am not saying they will recover, but it is there, so it is an opportunity to recover. If they do not do it, who ends up carrying the can? It is the employee.

Ms Lamb: The employee would have exactly the same ability, in fact.

Senator CAMERON: So the employee has the same ability as 7-Eleven, Caltex or Dominos to take legal action against a franchisee?

Ms Lamb: They could certainly go and attempt to recover the moneys directly from the franchisee.

Senator CAMERON: You have got to be kidding me.

Ms Lamb: They can.

Senator CAMERON: Are you seriously putting that as a proposition?

Ms Lamb: It is exactly the same proposition. They have the ability to do it. You have just said that the businesses have the same ability. But the only difference is that you are saying the business can afford it, but not in all situations. As we have heard, 75 per cent are quite small, so not all businesses can sustain having to correct underpayments.

Senator CAMERON: If there is a business model in this country that protects franchisors at the expense of employees, something has to give and it has to be the model, because the model is wrong, surely.

Ms Lamb: I would say to you that under the current drafting, the control should be around workplace relations. If they have direct control over workplace relations, absolutely they should be liable. But if they have no direct knowledge of what is happening and have no ability to engage around those issues then they should be held liable or accountable.

Senator CAMERON: But they get the benefits that you outlined earlier in terms of their branding and in terms of profits, so it is all care but no responsibility.

Ms Lamb: It is not all care and no responsibility.

Senator CAMERON: It is.

Ms Lamb: Not it is not. That is not true. But if they do not have the visibility and they have no ability to control it, how can you hold them liable for it?

Senator CAMERON: Because they have taken a conscious decision to set up a model that parts them from the employee operating under their banner and the franchisor. It is a model that they have concocted, and it is called franchising.

Ms Lamb: But the model itself also bears the same risk, and under the current drafting they are still able to be held accountable. So they are still bearing the risk; all you are doing here is saying not only do you bear the risk, but now you have to pre-emptively ensure that this does not occur, despite the fact that you do not have any control.

Senator CAMERON: Do you support the part of the bill that prohibits employers from asking for cashback from employees?

Ms Lamb: Sorry, could you say that again?

Senator CAMERON: The minister indicates that the bill prohibits employers asking for cashback from their employees.

Ms Lamb: If this is in relation to the instances that occurred in 7-Eleven, yes, we are in support of the fact that employers cannot ask for employees to give a cashback. But I also would say that under the Fair Work Act there are also the unauthorised deduction provisions, which allow this not to occur as well.

Senator CAMERON: Is 7-Eleven a member of yours?

Ms Lamb: No, they are not.

Senator CAMERON: That is a good thing.

Ms Lamb: It was a good thing.

CHAIR: Senator Cameron, have we—

Senator CAMERON: Okay, I will leave it at that.

CHAIR: You are all happy?

Senator CAMERON: I am not happy, no.

CHAIR: No. As soon as it was out of my mouth, I realised I was overreaching. But you are content to let this witness go at this time?

Senator CAMERON: Yes.

CHAIR: Thank you very much your evidence, Ms Lamb.

PERKAL, Ms Tarni, Senior Solicitor Employment Project, WEstjustice

[14:51]

Evidence was taken via videoconference—

CHAIR: I now welcome Ms Perkal from WEstjustice. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. Could you make a short opening statement, and at the conclusion of your remarks will go to questions from senators.

Ms Perkal: Thank you for the opportunity to provide evidence today. As you might be aware, WEstjustice is a community legal centre that provides free legal assistance and financial counselling in Melbourne's western suburbs, including an employment law project which assists vulnerable migrant and refugee workers. The achievements of this project are outlined in our submission. One de-identified example is our client Hamid. He worked as a truck driver and delivery worker. He worked six or seven days a week, usually 12 to 14 hours a day. Hamid was employed as an independent contractor by Sami. Sami was a contractor for another large distribution company, which, in turn, was engaged by a large supermarket. Hamid worked under an ABN, but he had no control of work hours, where to go or how to do the work. He wore a uniform with the supermarket's logo. Hamid was not paid for his last two weeks of work, so he came to see WEstjustice. We explained that Hamid had been underpaid by thousands of dollars as an employee. We assisted Hamid to make a complaint to the Fair Work Ombudsman, who investigated the matter and issued infringements and a notice of caution. However, Sami had disappeared overseas and so no further action was taken.

Unfortunately, Hamid's case is not unique; newly arrived migrant and refugee workers face widespread exploitation at work. The extent of this issue has been well documented, including in the WEstjustice *Not just work* report, which sets out 10 steps to stop migrant worker exploitation, many of which recommend specific changes to the Fair Work Act. Exploitation not only harms vulnerable workers but undermines the workplace relations framework. Businesses that do the right thing are undercut by those breaking the law. In this context, WEstjustice welcomes the vulnerable workers bill. However, we suggest some further amendments and additions that will increase the bill's effectiveness.

In summary, our recommendations to help ensure vulnerable workers are effectively protected are: firstly, creating a reverse onus in wage claims where an employer has not kept or provided records, as required by law; secondly, to extend the liability to supply chain heads and labour hire hosts as well as franchise or entity-holding companies who benefit from the exploitation of workers; and, thirdly, to strengthen the Fair Work Ombudsman's enforcement powers to more efficiently and effectively resolve wage claims without the need to go to court. I would like to talk about each of these briefly.

Firstly, to assist in stopping wage theft, we propose creating a reverse onus of proof in wage claims where employers fail to keep or provide employee records. Underpayment or non-payment of wages and/or entitlements is the single most common employment related problem that presents at our employment law service. In our experience employers regularly failed to keep any records at all or to provide pay slips. On many occasions employers have ignored our requests for employee records or stated that no records were kept. Without any employment records it is extremely difficult for employees to prove what hours they worked and what they were paid. The evidentiary burden rests with workers to precisely establish these matters. This means that in the absence of legislative reform there remain significant employer incentives to neglect record-keeping duties. Imposing a reverse onus of proof on employers who are respondents to wage claims for unpaid wages is not an additional regulatory burden on employers, as they were already required to keep and provide employee records by law. Those that are doing the right thing will be able to easily discharge this burden of proof. Employers who have not kept records could still discharge the onus in other way, for example, via CCTV footage or rosters. In nearly all cases an employer will be in a better position to provide this evidence than our clients.

Increased penalties alone are not sufficient to deter businesses from wage theft. The Fair Work Ombudsman, even with additional powers and resources, cannot investigate and impose penalties on every small employer that is breaking the law by not keeping or producing records. However, if employers that are not doing the right thing are made aware that they will be required to prove an underpayment claim, as alleged by the applicant, is incorrect and that there are organisations like ours available to enforce this law then we believe this will help to create a culture of compliance and to stop rewarding employers that do not keep or provide records.

Secondly, to help ensure that all persons that benefit from the exploitations of vulnerable workers are held accountable, we recommend making supply chains and labour hire hosts, as well as franchisor entities and holding companies, responsible for breaches of workplace rights. The law should not reward those who turned a

blind eye to exploitation. For our clients who have been underpaid, not paid or otherwise denied entitlements under the Fair Work Act it does not matter whether the structure they were working in was a franchise, supply chain or labour hire arrangement. They just need a way to ensure that those who are directly or indirectly benefiting from the exploitation and are in a position to take reasonable steps to stop it are able to be held legally accountable.

In our submission we have set out two options to achieve this. One involves amending section 550 to extend accessorial liability. Currently this section attributes liability only in limited circumstances, including where there is aiding, abetting, counselling or procurement, or the accessory is knowingly concerned. The requirement of actual knowledge is an extremely high bar to establish accessorial liability of the host employer or those at the apex of the supply chain or franchise, one that is almost impossible for our clients to meet. Although the Fair Work Ombudsman has recently used section 550 with some success, Dr Tess Hardy notes that there have been only a handful of cases where section 550 has been used to argue that a separate corporation is involved in the breach. If we are going to use section 550 as an effective accountability mechanism, we would need to amend the wording of the section, and we have made some drafting suggestions to this effect in our submission. A second option is to keep the additional provisions in division 4A of the vulnerable workers bill, but to add to these provisions to define and extend liability to indirectly responsible entities. We also suggest drafting to this effect in our submission. I also note that if division 4A remains in the vulnerable workers bill, our submission makes several recommendations for changes and clarifications to the proposed text, in particular, expanding the definition of franchise or entity and clarifying liability.

Thirdly, to help ensure wage claims are resolved efficiently and effectively without the need to go to court, we propose to expand the Fair Work Ombudsman's powers to issue assessment notices. Currently there are limited incentives for employers to resolve claims prior to court. This is especially the case for smaller companies where fear of reputational damage is less significant. It is also the case for unscrupulous employers and newly arrived workers. These employers know that their workers lack the capacity to enforce their rights in court without help and are unlikely to access assistance to take action. At present employers cannot being compelled to attend Fair Work Ombudsman mediation. In the experience of WEstjustice it is unfortunately common for employers to refuse to attend mediation with employees in cases of non-payment of wages. For many clients this has meant that the Fair Work Ombudsman has closed the file, as it cannot compel attendance. That is why we propose making clear cost consequences where a party has unreasonably refused to engage in a matter before the Fair Work Ombudsman. Where an employee refuses to participate in mediation, we propose that the Fair Work Ombudsman can issue a notice of assessment that sets out the Fair Work Ombudsman's findings as to the employee's entitlements. An applicant may then rely on the assessment notice in the court proceedings. Where an applicant has an assessment notice, the applicant is taken to be entitled to the amount specified in the assessment notice unless the employer proves otherwise.

In addition, while we in the main agree with the proposals to strengthen the Fair Work Ombudsman's evidence-gathering powers as set out in the vulnerable workers bill, we wish to emphasise the need to protect vulnerable workers, particularly those on temporary working visas. To this end we make several recommendations in our submission and in our *Not just work* report, and we also support the recommendations 5, 6 and 7 contained in the submission by Dr Tessa Hardy and Dr Joo-Chong Tham from Melbourne university law school. More generally, their submission has cogent arguments and complimentary recommendations to the WEstjustice submission.

Thank you for your attention. I will be pleased to expand upon our recommendations further, as useful.

CHAIR: Thank you very much. We will go to questions.

Senator MARSHALL: I would like to cover lots of areas, but we might only have time for two. Your recommendation to expressly prohibit employers from requiring prospective employees to make unreasonable payments for employment, I am interested in what your definition of unreasonable would be there and how widespread this is.

Ms Perkal: I can only speak to the clients that we have seen coming through our service. We have, even in the last few months, seen several examples of this. We have seen an increase in cases where a client is asked to make a payment in order to secure employment which often just never eventuates. The payment is usually an initial up-front fee and/or spending money on, say, vehicles or equipment. A really good example—which is in our submission—is where a client was asked to pay $10,500 for 10-days training to become a cleaner. The training mostly just involved shadowing other cleaners. He was told that after the training was completed he would be given work with a weekly income of $2,600. After the training he was informed there was not enough work. His boss did refund him $7,500 but his boss kept $3,000—the prospective employer kept the $3,000—telling him that it had been deducted for the training costs. So that is the kind of thing we are considering may be unreasonable.

Senator MARSHALL: Maybe. Is it legal now, under the Fair Work Act, that an employer can charge an employee for a job?

Ms Perkal: In our mind it is unclear whether we would be able to currently prosecute that under section 325 to 327 of the Fair Work Act. We think it would be good to clarify that because it talks about employment and, in this case, it is sometimes unclear: when the contract or employment actually begins; whether they are actually employees and, if so, whether that section 325 to 327 currently applies.

Senator MARSHALL: I did read that case study, but are you aware in this case whether the person was told they were a trainee? Were they classified in any way?

Ms Perkal: No, they were told they were going to be an independent contractor, as far as I am aware. Whether or not that is correct is a secondary issue, but I think that was the general intention. We have seen particular instances of exploitation in the cases of traineeships and apprenticeships as a separate issue, but this one was not one of them, as far as I am aware.

Senator MARSHALL: Would it be fair to summarise your submission as that this bill is a start to protecting some vulnerable workers but actually does not start addressing some of the other major issues of exploitation?

Ms Perkal: That would be absolutely fair to say.

Senator MARSHALL: One of your recommendations is:

In addition to protecting workers in franchises and subsidiary companies, make supply chains and labour hire hosts responsible for the protection of workers' rights.

That is, in fact, very similar to the provisions in this bill. It expands it away from just franchisees to labour hire arrangements. How do you see that working?

Ms Perkal: I think that is a really good point. It is very similar; it is just a slight expansion. There are some issues around drafting and making sure you do not capture everyone in the world, which obviously we do not want, and I think we have some ways of doing that. As I suggested, that could be under some changes to section 550 or it could be an additional subsection within proposed division 4A which extends this to indirectly responsible entities in a kind of vicarious liability model. We have got some definitions around that set out in our drafting instructions. Subject to the views of the drafter, there are various ways in which this could be done.

Senator MARSHALL: If you were a company that employed cleaners, which I suppose is the most common example, as labour hire, the host employer would have some responsibility for ensuring that the cleaner who had organised the labour hire people was paying them the legal entitlements.

Ms Perkal: That is right. There will always be the option to use some version, which we support, of a reasonable standard of diligence, and that is set out in the reasonable steps defence in the current version of the bill. If they do not have any control at all but they are able to prove they have come up to a reasonable standard of diligence then you will not be able to recover from them. I think that is very fair and very flexible. We would potentially go even further to incentivise proactive compliance, particularly around auditing, and put some weighting on those factors. But we do think those factors are quite fair and balanced overall, taking into account everyone's perspectives and giving those franchisor entities, labour hire hosts and supply chain heads a real opportunity to show that they did not have enough influence or control to make the required changes or that they met a reasonable standard of care.

Senator MARSHALL: Can I just take you to your experience with the Fair Work Ombudsman. I thought you said—and you can expand on this—that if the employer simply refused to engage in mediation the Fair Work Ombudsman closed the case and there was no further action taken. Is that actually your experience?

Ms Perkal: In many instances yes, because the Fair Work Ombudsman cannot necessarily take these cases further for every small employer that comes through the door; they just do not have the resourcing. In some of the smaller claim matters these cases will just be shut, in our experience, after an employer does not turn up to mediation, requiring the worker in that situation to try to take it to court on their own.

Senator MARSHALL: Okay. I thought there was a zero tolerance policy with the Fair Work Ombudsman but it does not sound like it.

Ms Perkal: There is. We have a very good working relationship with the Fair Work Ombudsman and we realise they need to triage their matters in terms of what they are able to take on as litigation internally, and that is obviously resource dependent.

Senator MARSHALL: Is there some definition about what would be a small or minor matter?

Ms Perkal: We do not know the exact guidelines that they have for taking on matters, but they do have a litigation policy up on their website which includes a whole number of factors. I think it is not insignificant. I

would need to take on notice the exact amount. I could get back to you with those details as far as possible but I think the Fair Work Ombudsman is probably best placed to expand upon that.

Senator MARSHALL: They are on next, so we will talk to them about some of those issues. But a small amount to someone like me may be an enormous amount to someone in that situation on the lowest wage, so it is all very subjective, isn't it?

Ms Perkal: That is absolutely correct, but that is why we are suggesting some of these more proactive compliance measures. We are really hoping that having a reverse onus of proof for wage claims where employers have not kept records and also extending liability to labour hire hosts and supply chain heads as well as franchisors will encourage them to rethink their business models and ensure that proactive steps are taken to comply. We understand that they are taking on some component of compliance and risk there, but they already have some obligations and we think that there are very fair and reasonable steps looked at in their defence and they are much better placed to take on those responsibilities than workers, who often have not been paid at all or been underpaid or exploited in very unfair ways.

Senator CAMERON: I want to go to the issue of the reverse onus of proof. Are you seeing an increase in the number of clients who come to you where the employer has not been keeping proper wage records?

Ms Perkal: I am not sure that it would be fair to say an increase. Since our service began it has always been a big issue for us. Our service was set up in 2014. So it has only been in the last few years that we have been operating the employment law part of our service.

Senator CAMERON: So it has been a general problem?

Ms Perkal: That is correct.

Senator CAMERON: You are aware of the position at the moment with Centrelink requiring welfare recipients, social security recipients, to prove—

Ms Perkal: Yes.

Senator CAMERON: That is a reverse onus that Centrelink put on welfare recipients. That is an unfair reverse onus. Could this be seen as an unfair reverse onus? What is the difference?

Ms Perkal: The difference is that they are putting this reverse onus, which is unfair currently because it is on employees, back on to employers, who have control and access to the records and are already required under law to keep those records. So I do not think it is any additional burden on them. If they are already complying with workplace laws, they will be able to easily discharge the burden of the reverse onus without a problem. Also, they have control of all the evidence in relation to hours that are worked, even outside keeping employee records in terms of things like security passes, CCTV footage, digital logons and logoffs, rosters and all sorts of things. The employer really has control over all that evidence. So, even if they have not been complying with the law as they should be, they would be the ones who would be able to discharge the burden rather than putting on an employee who has very limited access. I understand your point in relation to Centrelink. It actually has an interesting intersection with this in that, if people are not able to access records because they have not been kept, they are going to find it extremely difficult to discharge that burden of proof with Centrelink.

CHAIR: Just on that point, my understanding is that, if an employer is found not to have records, that is a breach and they are actually required to go and rectify that situation. Are you saying that that is not the case? I am a little confused.

Ms Perkal: Sometimes it is very hard to pursue employers in this situation. It is difficult unless there are other claims involved. In our experience, the ombudsman does not always step in to provide a penalty for not keeping a record. We have one case worker, and that is it, to help all the clients who come through our service. Unless they have the capacity to take the matter to court and try to force it, or unless the Fair work Ombudsman is able to pick up the matter, it will be very difficult to try to get any kind of information from that employer.

Senator CAMERON: We have heard evidence today from the Franchise Council of Australia and the National Retailers Association. They are very protective of the franchisor-franchisee model. I am not surprised franchisors want to protect that, because that removes them from direct obligations towards an employee at the bottom. You have raised this issue in your submission. How can you have this bill, if it becomes legislation, operating effectively if a franchisor just determines not to make themselves aware of anything that is happening at the employee level—never mind the franchisee level, but the employee level?

Ms Perkal: Yes, that is a potential concern. It is why we say it is a start. I might have to take that question on notice to see if we can come up with a full answer for you, outside of what we have already provided in our submissions.

Senator CAMERON: On the surface, it would seem to me that, under the current franchisee-franchisor system, all they have to do is provide the name. We are told that some of them provide some workplace relations advice and some of them may only supply goods; but, apart from that, they have no engagement. So it would be very difficult to make this bill operate in that type of relationship, wouldn't it?

Ms Perkal: I think it would. There are various ways of mandating. I mean, there are so many different paths it could go down. We are not experts in legal structures or the franchise model, so I wouldn't want to talk out of turn. However, we would definitely be supporting measures which would encourage proactive compliance, particularly around independent auditing. That is why we would recommend some kind of weighting in terms of the reasonable steps and factors. There are other things you could try in order to have something a bit stronger or some kind of mandating of various aspects to encourage proactive compliance; but, again, as legal structures and governance is not our main area of expertise, I would have to look into what other ways we could encourage that, outside of these provisions. Yes, definitely, that is our concern. We do very much support having flexibility, and we understand that the franchise model has a lot of variation. Where a franchisor entity has taken all reasonable steps, we understand that in those circumstances it might be unfair to hold them liable for certain workplace law breaches. Having said that, we think it is disingenuous where the franchisor entity may be in essence influencing workers' workplace rights due to the way that they have structured the model. If they have control over a whole lot of other issues, except they have decided not to inform themselves about the actual payments, then that is where we really want to see them held liable.

Senator CAMERON: I am not sure if you have a copy of the bill with you.

Ms Perkal: I do, yes.

Senator CAMERON: On 558B(3), Mr Billson, on behalf of the Franchise Council of Australia, is proposing that if there is a breach but at the time of the breach a company is complying with a compliance program that meets the relevant Australian standards or if it has been approved for use by the Fair Work Ombudsman then that should basically be all they have to do; they should not have any further obligation. What is your view on that?

Ms Perkal: I am sorry. I might have to take that on notice, because I am not actually sure of what the relevant compliance standards are, who sets those or how they would be enforced in this particular scenario.

Senator CAMERON: That would be handy. It is on page 7 of the Franchise Council of Australia's submission. I am concerned, given that I have been critical of the light-touch approach by the Fair Work Ombudsman, that this light-touch approach means that they get a 'get out of jail free' card.

Ms Perkal: Yes, that is definitely a concern. We are definitely very concerned that these franchisors will be encouraged not to know what is going on in their franchisees but still run the same business model with non-financially viable contracts unless workplace laws are being breached. The alternative is that there are some very minimal compliance standards which require them to tell their franchisees that we have workplace laws and that they need to comply and maybe direct them to the Fair Work Ombudsman's website, and that will meet the standards. We obviously encourage a much higher standard to encourage proactive compliance than that, and it is a concern for us. But in terms of whether those standards are sufficiently strong, and who sets them and how that would be enforced, I am sorry but I do not know enough to answer that right now.

Senator CAMERON: Could you then have a look at 558A? On 558A(2)(b), the Franchise Council's proposal is: you change 'significant' to 'substantial'; you take out the words 'of influence'; and you take out 'affairs' and you add 'workplace terms and conditions'. So they want to narrow it from the franchise entities' 'affairs' to 'workplace terms and conditions', and they want to change 'significant' to 'substantial'. From your point of view as a lawyer, what is the difference between 'significant' and 'substantial'? You can take it on notice if you need to.

Ms Perkal: I would be happy to take that on notice. What I would say in this particular instance is that we obviously do not support that proposition. We actually think that the definition is already too limited. We actually think that you could entirely take out the fact that they have to have any significant degree of influence or control from the definition. I think that it should capture all franchisee entities and responsible franchisor entities, and then there is plenty of opportunity for franchisor entities to show that they do not have any influence or control in the reasonable steps defence. But in terms of these provisions applying to them, I do not see why it should not apply to them even if they do not have any degree of influence or control from a starting point from a legal perspective. There are some recommendations in recommendations 3 contained in the submission by Dr Tess Hardy and Dr Joo-Cheong Tham from Melbourne university law school which talk about making the definition a bit more compatible with the current franchisor code, which might also be another way to consider this.

Senator CAMERON: I know that you are out there busily protecting exploited workers, but could I ask you to, on notice, have a look at the specific recommendations from the Franchise Council of Australia on page 7 of

their submission and give me a view as to the implications of those submissions on the bill as it stands? They are portraying this as a minor change. My view is that this, basically, guts what is there already in the bill. I would be interested in your view on that.

Ms Perkal: We would be more than happy to do that.

Senator CAMERON: Thank you.

CHAIR: Thank you very much for your evidence today.

Ms Perkal: Thank you.

ANDERSON, Ms Jody, Branch Manager, Workplace Relations Policy Group, Department of Employment

CAMPBELL, Mr Michael, Deputy Fair Work Ombudsman, Fair Work Ombudsman

CARRUTHERS, Ms Ailsa, Acting General Manager, Fair Work Commission

FURLONG, Mr Murray, Director, Tribunal Services Branch, Fair Work Commission

HOFFMEISTER, Ms Kelly, Acting Chief Counsel, Workplace Relations Legal Group, Department of Employment

JAMES, Ms Natalie, Fair Work Ombudsman, Fair Work Ombudsman

MOREHEAD, Dr Alison, Group Manager, Workplace Relations Policy Group, Department of Employment

VOLZKE, Ms Rachel, Senior Executive Lawyer, Workplace Relations Legal Group, Department of Employment

[15:25]

CHAIR: I now welcome representatives from the Department of Employment, the Fair Work Ombudsman and the Fair Work Commission. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of them to superior officers or to the minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. I will now ask you to provide us with a short opening statement, and we will then head to questions.

Dr Morehead: Thank you for the opportunity to attend the hearing today regarding the three bills. I will make some brief comments about each bill. The Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 makes three changes to the Fair Work Act. First, it removes the requirement for continued four-yearly reviews of modern awards while ensuring the current four-yearly review continues under the existing framework until finalised. Repeal of this measure is broadly supported by both unions and employer groups. This reflects, in part, recommendation 8.1 of the Productivity Commission inquiry into the workplace relations framework.

Second, the bill allows the Fair Work Commission to overlook minor procedural or technical errors made during enterprise bargaining which were not likely to have disadvantaged employees when improving an enterprise agreement. The bill does not change existing safeguards in the Fair Work Act that are designed to protect workers or equate these safeguards to mere technicalities. Instead, the bill ensures that minor errors made in meeting the requirements of these safeguards do not necessarily result in an entire enterprise bargaining process being invalidated. It gives the Fair Work Commission the capacity to properly evaluate those minor errors, and it must be satisfied that employees were not likely to have been disadvantaged by those errors when approving an enterprise agreement. This responds to recommendation 20.1 of the Productivity Commission inquiry into the workplace relations framework.

Third, the bill enables the parliament to quickly establish a commission to investigate and report on alleged misbehaviour or incapacity of a Fair Work Commission member and clarifies that the complaint-handling powers of the Minister for Employment and the Fair Work Commission president apply to all Fair Work Commission members regardless of when they were appointed.

The next bill, the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, is the third and final element of the government's election commitment to protecting vulnerable workers. The other two components included establishing the Migrant Workers' Taskforce and allocating $20.1 million in additional funding to the Fair Work Ombudsman over four years.

This bill makes a number of changes to the Fair Work Act to improve compliance with workplace laws, including the introduction of new provisions to hold franchisors and holding companies responsible for payment related contraventions of the Fair Work Act where they knew, or ought reasonably to have known, of the contraventions and failed to take reasonable steps to prevent them. The bill will also grant the Fair Work Ombudsman new evidence-gathering powers which will enable it to compel a person to provide information or documents or attend an interview. These powers will be particularly important in cases where no relevant documents appear to be available and an investigation has stalled. They will also help to progress investigations

where people refuse to cooperate with Fair Work inspectors. These new powers are similar to those already held by the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission and are accompanied by protections for those who may provide evidence, including reimbursement of costs associated with providing evidence, protections against use of the evidence in court, and the right to a lawyer. These protections ensure the powers are used appropriately and consistently.

The third bill, the Fair Work Amendment (Corrupting Benefits) Bill 2017, implements a further three recommendations of the Royal Commission into Trade Union Governance and Corruption. Firstly, this bill will amend the Fair Work Act to include a new federal corrupting benefits offence. The bill will make it a criminal offence to give or offer a registered organisation or a person associated with a registered organisation a corrupting benefit. It will also be an offence to solicit or receive a corrupting benefit.

Secondly, this bill will make it a criminal offence for an employer to provide a cash or in-kind payment to a union where its employees are entitled to be represented by the union. There are exceptions for legitimate payments, such as genuine deductions of membership fees, a genuine gift that is tax deductible, the provision of goods and services at market value, or payments made in accordance with a law or court order. The bill does not prevent unions from approaching an employer to recoup unpaid wages or entitlements from an employee of the employer, as these are legitimate payments made in accordance with a law of the Commonwealth or a state or territory. Payments would also be legitimate where they are made for the sole or dominant purpose of benefiting the employers' employees—for example, if an employer supplies sandwiches to employees at a bargaining meeting. The bill also provides for the regulations to prescribe other kinds of non-corrupting, legitimate payments.

Finally, the bill will require that bargaining representatives for a proposed enterprise agreement must disclose financial benefits that the representative, or someone reasonably connected with the representative, stands to gain from a term of the proposed agreement. The requirement will apply to employers, employer organisations and unions.

I hope we will be able to assist the committee today with any queries it might have about those three bills.

CHAIR: Thanks.

Ms James: I am here today to speak with you about the plight of vulnerable workers and, in particular, the Fair Work Amendment (Protecting Vulnerable Workers) Bill. The issue of vulnerable workers is one that we have spent quite some time covering before various versions of this committee at Senate estimates and before the references committee. Your 2015 inquiry into Australia's temporary work visa programs and the impact of these programs on the labour market shone a light on the exploitation of vulnerable workers, and you will remember that that inquiry heard many shocking stories of worker exploitation—the sort of stories with which, sadly, the Fair Work Ombudsman was very familiar. We appeared four times before that inquiry, and I spoke about our work focusing on migrant workers, who represent a small but very vulnerable cohort in our labour market. I also spoke about the need to consider the broader settings in which this conduct was occurring: the current workplace relations framework, its penalties and our regulatory powers, as well as other regulatory frameworks, such as corporations, immigration and tax law.

The bill contains a number of measures that would adjust those settings in the Fair Work Act. These measures draw on the references committee's report on Australia's temporary work visa programs, as well as our own work in this area—in particular, our inquiry into worker exploitation throughout the 7-Eleven network. The Fair Work Ombudsman supports these measures. I consider that they would significantly enhance our capacity to take effective action in the most serious and deliberate cases of worker exploitation.

These measures would help us achieve better outcomes for the vulnerable workers who feature in those stories that we have heard again and again over the last two years—stories of migrant workers being paid $14, $12 and sometimes under $10 an hour, well below the federal minimum wage of $17.70 an hour; stories that, frankly, in spite of their regularity still shock me on occasion because of the calculated and malevolent motivations behind the appalling treatment that some migrant workers face in our country; stories about vulnerable workers being forced to withdraw cash from the ATM and hand it over to the boss under threat of their visa being cancelled or their job being lost; stories of young people being forced to accept payment in pizza and soft drink rather than wages. These cases reflect badly on our country and on the majority of employers, who are trying to do the right thing. These are employers who do the right thing despite the pressure of undercutting that comes from some operators who are paying black market wages with little thought to the damage they cause to their victims or our national reputation.

The Fair Work Ombudsman has had many successes in taking action to address this sort of conduct, pursuing unscrupulous operators to the full extent of the current law, pushing the boundaries of that law, sometimes in the face of criticism, and often securing close to maximum penalties from the courts that are available under the current settings. However, the stories continue to emerge, and for every one we take to court there are others we cannot take action against and still others we do not even know about because people are too scared to come to us. My inspectors doggedly pursue operators that engage in a range of tactics calculated to evade our action: they liquidate their company and set up a new business; they do not bother keeping records or, worse, they falsify them, making it very difficult for us to verify what hours have been worked and what is owed; they engage in insidious cashback schemes; they target vulnerable workers, who are less aware of their rights and less likely to report problems, and then they threaten these workers with their visa or their job.

Despite our enforcement outcomes, we have been limited in our capacity to disrupt the most deliberate and systemic conduct or to reverse the apparent culture of noncompliance in some high-risk industries and sectors. While the system is fit for purpose to address accidental or negligent noncompliance, it has proven not to be fit for purpose when it comes to addressing the deliberate and systemic unlawfulness that some unscrupulous business operators are adopting as part of their business model—operators that set up their model on the basis that a successful investigation or a court imposed penalty is simply a calculated risk or the cost of doing business. They consider the likelihood of being caught or the quantum of the penalties to be so low that it is worth their while to exploit their workforce. Our submission contains a number of examples where the court imposed penalty has clearly been far less than the likely value of the underpayments of the workers. This is not all or even most employers, but it is a pernicious and persistent minority—a minority that is distorting our labour market and tarnishing our reputation as a fair and decent place to work.

To put it simply, exploitation cannot truly and finally be stamped out if the settings remain the same. If something does not change, the script will not change and we will continue to see these stories on the front page of our newspapers, in spite of our best efforts and the efforts of many stakeholders that we work with. No one single measure will fix this issue overnight, but the package of measures contained in this bill will go a long way to giving the Fair Work Ombudsman the tools we need to combat the most serious worker exploitation that we encounter. It will ensure my inspectors are taken seriously, that they are not ignored, and if they are there will be consequences that make these operators think twice before continuing to systematically and deliberately underpay vulnerable workers.

Thank you for the opportunity to be here today and to ask questions about our written submission. I am happy to answer your questions. There are some issues that have arisen over the course of the day which, if they do not arise in your questioning, I would like to address, including accessorial liability and its application in the franchising context, our evidence-gathering powers, and the dynamics within franchising that can incentivise both sides of the equation to vacate the field when it comes to taking responsibility for compliance with workplace laws.

CHAIR: Thank you, Ms James, you have hit a few nails on the head there. The Fair Work Commission?

Ms Carruthers: No, we do not have an opening statement, thank you.

Senator CAMERON: Welcome, everyone. I am not sure whether to go to Dr Morehead or Ms James, but obviously you can—

Ms James: We sat next to one another so we can confer, if that assists you, Senator.

Senator CAMERON: That is good. Regarding the assessorial liability issue, the ACTU, in its submission in relation to the extra powers that would be provided under the bill, raised concern that the self-incrimination part would mean that you would not be able to properly follow through on breaches. I am paraphrasing; maybe you could go back and have a look—

Ms James: I think I understand.

Senator CAMERON: at what they said—I do not have their *Hansard* here—but, in the broad, I think that was the point they made. Has either the department or you got a view on that?

Ms James: I am happy to talk about how we would see those provisions operating within the broader context of how we go about our work. For a start, we would not be reaching for those examination powers if we could get the information in some other way. We do not do that now. We have current powers to issue notices to produce, and we do not issue notices to produce if people are prepared to give this information voluntarily. Sometimes they say they will give it to us and then they do not—they are not forthcoming. That is when we might issue those notices. With the examination powers, we would see them as a power of last resort because, in particular, there is this issue about wanting to ensure that we are able to use the evidence against the appropriate target, so to speak.

The way the immunity provisions work is, if we ask you to attend an examination, the information you give us effectively cannot be used against you unless you lie to us, in which case we can use it against you in an action around the lying. So we would need to consider very carefully who might be the subject of an examination, and what we would really be looking to is witnesses—people who can help us build a case against a primary target—not the primary targets themselves. There would be almost no utility, I think, in bringing in a person who was our primary target, because then we would not be able to use that information against them. We would also see it as something that we would reach for once we had done quite a bit of work in an investigation and we were very much convinced there was a very serious breach of the law going on and an inability to get the evidence we needed through other means.

Senator CAMERON: I moved amendments to the ABCC bill in terms of their coercive powers which reinstated the role of an AAT presidential member. What differences are there in terms of the ABCC checks and balances and what you have, because I do not see any role for the AAT here?

Ms James: I understand. These provisions have very much a longstanding basis. There are a range of provisions across the statute books that deal with these sorts of evidence-gathering powers, and this model is very similar to the ones the ACCC has had for many, many decades.

Senator CAMERON: But that is in criminal investigations.

Ms James: Criminal and civil. The ACCC has a jurisdiction that covers both, and they do use it for civil. But the department is probably best placed to talk about the relativities between those different models, I think.

Ms Hoffmeister: I think the key difference between the powers is actually the sanctions that apply. There are civil sanctions for noncompliance with these provisions and criminal sanctions in the building legislation.

Senator CAMERON: Are you seeing there is no need for AAT oversight in relation to the coercive powers because it is civil sanctions? Is that the submission from the department?

Ms Hoffmeister: No. Your question was actually what the differences were. I have identified the differences.

Senator CAMERON: Tell me the differences.

Ms Hoffmeister: The key difference is the sanctions.

Senator CAMERON: But there are oversight provisions as well, aren't there?

Ms Hoffmeister: There are a range of oversights already built into these provisions as well.

Senator CAMERON: But are there differences in these oversights and those in the ABCC? That is what I am asking.

Ms Hoffmeister: You are correct that there is no AAT oversight. That is a difference: that there is no AAT oversight in the bill.

Senator CAMERON: There are also other differences, aren't there? Do you want to take that on notice?

Ms Hoffmeister: In terms of?

Senator CAMERON: I am simply saying to you that I would like a clear delineation of the differences between the coercive powers—the checks and balances—in the ABCC Act and what is being proposed here. And it is more than the AAT, I can tell you that now. I would like the department to provide the committee with a detailed, cross-referenced analysis of the differences. Is that clear?

Ms Hoffmeister: Yes.

Senator CAMERON: Thanks. Ms James, you have been provided an extra $20 million; is that correct?

Ms James: Yes. It is $5 million each year over four years.

Senator CAMERON: In the minister's speech introducing the bill, I got the impression that was to help you deal with the extra responsibilities you would have under this bill. Is that correct?

Ms James: The funding is related to these measures and the election policy. I do not know if I have that information to hand, but what we have done with that funding is engage more frontline compliance officers and more legal officers. We have also invested quite a bit around engagement with the migrant community. So that is what we have done with the funding so far.

Senator CAMERON: What experience does your organisation have with interrogative powers? This is a special area and needs to be handled carefully. What skills does your organisation have in this area?

Mr Campbell: We have a lot of experience with compulsory evidence gathering powers. While we have not had the ability to require someone to attend an examination, we have had the power to compel the production of documents since the agency was effectively established in 2006. I am pretty sure the Commonwealth Ombudsman

did an own-motion inquiry into our use of compulsory evidence gathering powers maybe three or four years ago, which indicated that we are pretty good at it. I would suppose that I would offer, in terms of any powers that this bill might ultimately see this agency have, that we would take the same approach that we do with all of our other compulsory evidence gathering powers: we would put processes and policies in place around how they are to used, when they are to be used and who they are to be used on. Personally, I have had roles before where I have had responsibility for the exercise of compulsory examination powers, and other officers within the organisation would too, so it would be a very welcome addition to our suite of enforcement powers.

Senator CAMERON: Have you given some consideration to how this would be exercised and to what the process would be, if you were bringing someone in for a compulsory examination, once you get them there?

Mr Campbell: Let me know if I step into a hypothetical at any point here, but I suppose what I would say—

Senator CAMERON: I am asking what you will do, not for a hypothetical.

Mr Campbell: I know, but because we do not have the powers yet I am a bit nervous about talking about something the bill will—

Senator CAMERON: Okay.

Mr Campbell: What we would do is, as Ms James has already pointed out, use this as a power of last resort. We would not reach to use this at the commencement of an investigation. This is something that is going to assist us in the most difficult and complex cases, where witnesses are unwilling to work with us for fear of retribution or some other feature, where you can see within a company that there is an attitude to noncompliance which is getting to a point where managers are refusing to talk to us because there is some pressure being put on them by the directors of a company or where the directors of a company are choosing not to involve themselves in our investigations. This is to crack the hardest of nuts, and we have seen plenty of those cases over the last 12 months.

Senator CAMERON: Part of the process in the ABCC is the involvement of a tribunal member of the AAT and the ombudsman to review the manner of the interrogations. Would that be a problem for you guys?

Mr Campbell: I could not comment on that. The bill as it is currently drafted proposes the power, which seems sensible and useful to us.

Senator CAMERON: Dr Morehead, what consultations have taken place in relation to the corrupting benefits bill with people who are going to be affected?

Dr Morehead: What the corrupting benefits bill does is respond to three recommendations from the royal commission, as you know. So in terms of consultation, what the bill does is—

Senator CAMERON: I know what the bill does. I am asking what consultations you had.

Dr Morehead: We have consulted at various stages throughout the trade union royal commission process, so with the three recommendations—

Senator CAMERON: Let me be clear. I am asking about what consultations have taken place in relation to the development of the bill with parties that are going to be affected.

Dr Morehead: I will answer that exactly. The consultations that have taken place in the development for this bill started back in around 13 March 2014. It has been going on for close to 3 years in terms of airing the policy problem and possible policy solutions to the policy problem. As you would be aware, the trade union royal commission was asked to see if there was a problem. It was asked to see if there is a problem with bribes and corruption that involve unions. That was basically its remit as you know, or part of its remit. That is where we had the evidence-gathering stage for the government. They waited to see whether or not this was correct and if there was any evidence to that effect. As you know, then there was a series of papers and an interim report that was put out by the trade union royal commission. But essentially it was looking at two things. The trade union royal commission looked firstly at—

Senator CAMERON: I am not really interested in the trade union royal commission.

Dr Morehead: This is part of the consultation.

Senator CAMERON: The consultation I am asking about is specifically in relation to this bill.

Dr Morehead: Yes. This is specifically in relation to this bill.

Senator CAMERON: For this specific bill, when did you start talking to employers and unions?

Dr Morehead: It started from March 2014, and that is what I am just explaining specifically about the bill, because the bill enacts three recommendations. I can read those out, and then you will see how specific it is to the bill.

Senator CAMERON: You do not need to. I have read that. What we are being told is that there was good consultation in relation to two of the bills before us, but no consultation in relation to this one. I am not asking you for any advice you have given the minister, but when were you advised of this bill and when did you start drafting it? When did you get advice from the minister to draft this bill?

Dr Morehead: We started thinking about a bill when we saw the recommendations from the report, specifically—

Senator CAMERON: I have not asked when you were thinking about it. I have asked you when the minister—

Dr Morehead: You know I cannot disclose the advice and that sort of information.

Senator CAMERON: I am not asking you for advice. I am asking when—

Dr Morehead: I cannot disclose those sorts of thigs.

Senator CAMERON: Yes you can. There is absolutely nothing stopping you telling us when the minister advised you that she wanted this bill drafted. Nothing is stopping you.

Dr Morehead: In terms of discussions with the minister about this, they go back a long way, and I will have to take it on notice. If you are asking when the minister first started saying to the department 'Let's think about a bill,' I will take it on notice.

Senator CAMERON: I do not want you to draft my question for me. I am asking: in relation to the bill before us now, when did the minister engage with you to say 'fix this bill'?

Dr Morehead: Engage with us—sure, that is what we will take on notice.

Senator CAMERON: That is in relation to this bill, not the royal commission and not consultations during the royal commission nor the facts of the royal commission that it was. It is in relation to what happened after it. When did you start drafting this bill?

Dr Morehead: Sure. If I may, I might speak to that issue of the working up of the recommendations and the consultation. I think this will help fill out some of the context of what people have expressed today regarding that bill. Basically, in terms of identifying a policy problem and going out and collecting evidence, I know that some people this morning were asking about what would constitute evidence or cases of bribery and corruption. And I know that you probably do not want me to go through the cases of evidence put before the trade union royal commission.

Senator CAMERON: You are probably right. I do not know where you heading with this.

Dr Morehead: I am just trying to explain evidence for policy, because this is a piece of policy.

Senator CAMERON: I am not interested in that. I am asking you other questions.

Dr Morehead: Okay. The other thing that was very important during the process in the three years since it began was really—

Senator CAMERON: No, I am not interested in that either.

Dr Morehead: Okay. The evidence and then also the legislative solutions—

Senator CAMERON: Chair, please. She is just on a little—this is pretty awful.

Dr Morehead: I am trying to respond.

Senator CAMERON: I am asking a question.

CHAIR: Senator Cameron, what is your specific question?

Senator CAMERON: I have asked a question, and now Dr Morehead is off on this little—I do not know where she is going to head. I am not interested.

CHAIR: Let's press reset, Senator Cameron and Dr Morehead.

Senator CAMERON: I am not interested.

CHAIR: Let's just press reset.

Senator CAMERON: When were the last consultations you had with the ACTU in relation to this bill?

CHAIR: Thank you.

Dr Morehead: I have to go backwards in time—I am sorry. We have had several meetings of the National Workplace Relations Consultative Council, the NWRCC, which is the formal way that the minister meets with both unions and employers.

Senator CAMERON: When was that?

Dr Morehead: I do not know how far you want me to go back, but if you wanted—

Senator CAMERON: No, I want you—

CHAIR: I think the answer is arriving at the desk.

Senator CAMERON: When was it last discussed at that level?

Dr Morehead: The meetings where things to do with the trade union royal commission were discussed—

Senator CAMERON: Not things to do with the trade union royal commission—this bill. This is getting a bit ridiculous.

Dr Morehead: There has not been a meeting of the NWRCC this year, for example. There is one that is due in May. In terms of when the NWRCC discussed these issues, there were four meetings. I can give you the dates if you like, but I am going to have to go backwards in time, and I know that that is not what you want.

Senator CAMERON: So this has not been raised recently?

Dr Morehead: It depends on whether you want me to go backwards in time. What time am I allowed to go back?

Senator CAMERON: I would just like an answer.

Senator MARSHALL: You are trying to tell us, really, that this bill has been bouncing around for three years.

Dr Morehead: I have to say this: the bill reflects three recommendations from the trade union royal commission. The bill enacts them, so you have to go to those three recommendations.

Senator MARSHALL: But we are talking about the bill. When did you first have a piece of paper which you started to describe as a bill?

Dr Morehead: That is a new question, and we can take that on notice.

Senator MARSHALL: It is not a new question; it is a question that has been asked.

CHAIR: No, that is a different question that is asked.

Dr Morehead: Yes, it is different from the engagement.

CHAIR: Dr Morehead is answering quite specific questions today.

Senator MARSHALL: About the bill. The question has always been about the bill.

Dr Morehead: Yes. The bill enacts three recommendations, each of which mentions—

Senator MARSHALL: Yes, thanks. You are not going to take us back.

Senator CAMERON: Yes, we know all that.

Dr Morehead: 'Please amend the Fair Work Act.'

Senator CAMERON: We know all that. Chair, this is outrageous.

CHAIR: Dr Morehead has taken it on notice as to when the bill appeared.

Senator CAMERON: Yes. Dr Morehead, when did you issue drafting instructions? When did the minister issue drafting instructions?

Ms Anderson: We would have to take the exact date of that on notice.

Senator CAMERON: Well, if you do not know the exact date, was it this year, last year or the year before?

Ms Anderson: It was 2017.

Senator CAMERON: So it is not that long ago?

Ms Anderson: No, but I would have to take the exact dates on notice. I do not have the exact dates with me.

Senator CAMERON: Once the instructions for drafting were issued, have there been any discussions with the parties following the bill being drafted? Dr Morehead could have told us this quite easily.

Ms Anderson: Obviously the timing and implementation of any legislation is a matter for government. Based on the timing that the government indicated it would like to progress the bill on, obviously that timing has meant there have been limited opportunities for consultation.

Senator CAMERON: Limited opportunities or not, has there been any consultation?

Ms Anderson: There has been, in terms of consultation we would normally do in developing bills: with the Office of Parliamentary Counsel, for example, with the Attorney-General's Department, with the Fair Work Commission, with the AFP and with a number of other agencies.

Senator CAMERON: What about the parties who would be affected: employers and unions?

Ms Anderson: As Dr Morehead was alluding to, the—

Senator CAMERON: Do not go into what Dr Morehead was saying. I like you much better, because you are much more concise. I wish you had given us some advice.

CHAIR: This is not a likability contest; it is a Senate hearing, Senator Cameron.

Senator CAMERON: We have now come to a position where you have conceded, in spite of all that stuff we got earlier, that the bill was drafted in 2017 and there has been no consultation, I put it to you. Is it correct that there has been no consultation with employers, unions or the ACTU on that bill since it has been drafted? Is that correct?

Ms Anderson: Timing has meant that consultation has been restricted.

Senator CAMERON: What do you mean by 'restricted'?

Dr Morehead: Restricted to previous to the bill being developed.

Ms Anderson: What the department and the OPC have referred to in developing the bill has been the various evidence, submissions and materials that were made to the royal commission itself, which included employer associations—

Senator CAMERON: There was a consultation process on the two other bills we are dealing with. Is that correct?

Ms Anderson: That is correct.

Senator CAMERON: Why was there no consultation on this one?

Ms Anderson: It is a matter for government. I would have to refer that question to government.

Senator CAMERON: Is it usual to have absolutely no consultation? There are three bills coming as a package. With two bills there was consultation, and with one bill there was none. What is the issue there?

Ms Anderson: In terms of what is usual, again, it varies from time to time over the years how governments have chosen to progress implementation.

Dr Morehead: There was not a royal commission into the other two bills.

Ms Anderson: As Dr Morehead just said, there was quite a lengthy royal commission where significant evidence was provided. There was a discussion paper back in May 2015—

Senator CAMERON: I don't care about that stupid royal commission. That royal commission was biased and political.

CHAIR: In your opinion, Senator Cameron.

Senator CAMERON: So I don't really care about the royal commission. Finally, we have got to a position. This was drafted earlier this year, I would assume. You are going to get me the exact dates.

Ms Anderson: That is right, Senator.

Senator CAMERON: And there has been no consultation with the parties since then?

Ms Anderson: We are obviously interested to hear what the parties have to say through this process in terms of the evidence they put. We are thoroughly examining the various submissions that are being put forward to this committee.

Senator CAMERON: That is not normally what happens. There is usually a formal process of consultation, isn't there?

Ms Anderson: There is no legal requirement as such—

Senator CAMERON: That is not what I am asking you. I am saying there is a formal process, isn't there?

Dr Morehead: NWRCC, which I have tried to go through the dates, Senator.

Senator CAMERON: There is a process.

Senator MARSHALL: You said it was not part of those things that were drafted.

Dr Morehead: Not this year.

Senator CAMERON: That's right.

Senator MARSHALL: So we are not talking about consultation on a bill that did not exist. That is not what we are talking about. I thought we had made that clear several times. We are asking about consultation since the bill that is in front of us—the one that we are considering today—was drafted, on paper, in writing. That is the one.

Ms Anderson: I do not know what else we could add to what we have already outlined in that—

Senator MARSHALL: There was no consultation.

Ms Anderson: The government had its clear instructions on when it wished to introduce the bill. Timing is a matter for government, and we are very open to listening to the submissions to this committee and continuing to work with stakeholders on the bill.

Senator MARSHALL: Sure. But there has been no formal consultation with any of the stakeholders?

Dr Morehead: Could I just be clear that there has been consultation on the words in the bill, in the drafting, and I know that is what you are asking about. I know you are asking about the words on paper that we have drafted, with the help of the Office of Parliamentary Counsel, and that were introduced on 22 March.

Senator CAMERON: It is the bill. Is that what you are talking about?

Dr Morehead: When you talk about consultation—

Senator CAMERON: Just let me be clear: I want you to understand what Dr Morehead said. She said consultation about words on a piece of paper. Are you talking about the bill?

Dr Morehead: The bill is a policy, Senator. It is a policy. It is a law to enact a policy. The bill is the end result of policy development. What I was explaining was that, when you talk about consultation and say that certain groups were never consulted, they were consulted during the policy development process. That was what I was trying to point out. What you have moved to is the exact wording on the bill that we actually had drafted and put into parliament on 22 March. I understand that is what you are asking about, but I was trying to provide a picture that in this case, different to the other two bills, there was a very long three-year period of policy development and in fact draft legislation presented during the commission—draft legislation done by Justice Heydon. That was all part of the policy development process where there were formal invitations for a range of parties to present submissions in a public process.

Senator CAMERON: That is the same guy that was doing the Liberal Party fundraisers. That is the same guy, Heydon? Yes.

Dr Morehead: What I was trying to say is that is the consultation during the policy development process. I know that you wanted to ask about the bill but I was trying to say how it was different to the other two bills.

CHAIR: Thank you, Dr Morehead.

Senator CAMERON: In terms of the issues that can be negotiated, or changes to the issues that can be negotiated under this corrupting benefits bill, if a union negotiates with an employer to have workers attend a union health and safety training course and if there was a payment for that, is that allowable under this bill?

Ms Anderson: Just to clarify the question; you are talking about whether an agreement can negotiate such an arrangement?

Senator CAMERON: Either an agreement or a verbal agreement—it does not have to be in the agreement.

Ms Volzke: Obviously, I would predicate what I am saying: it would be dependent on the circumstances. But using your example as to whether or not a clause included in an enterprise agreement required such a payment, that would in fact be a legitimate payment because it would be authorised by or under a law of the Commonwealth. That is triggering 536F(3)(e).

Senator CAMERON: And what if it was not in an agreement?

Ms Volzke: If it was not in an agreement, then I would say that it is the employees who are the sole dominant beneficiaries of the provision of that training, and thus it would also be excepted under subsection (3)(b).

Senator MARSHALL: Can you tell us what is the basis for asserting that secret commission provisions apply to corporations but not to registered organisations? That would be in relation to the existing offences in the Corporations Act.

Ms Volzke: I can respond to that. There is a patchwork of legislation at both the federal and state level. At the Commonwealth level, it is limited to Commonwealth public officials as well as foreign officials, so there is limited scope there. But then we have the state and territory provisions, which are not uniform but provide legislation in each jurisdiction that has potential application. In most cases I can say I have not done an exhaustive or comprehensive analysis, but there are specific provisions—the Victorian legislation comes to mind—where

they specifically deem application of those secret commission offences to corporations, and that, obviously, is not the case for registered organisations. That is not to say that they cannot apply, but there is, as Commissioner Heydon identified, some difficulty in applying them to registered organisations.

Senator MARSHALL: Maybe on notice you could take us through the provisions to explain how the actions of corporations and directors or agents of corporations would be captured when dealing with other corporations but not when dealing with registered organisations?

Ms Volzke: One more layer to that is that the Corporations Act at the Commonwealth level has specific criminal offences that apply to corporations in relation to their exercise of duties, and criminal liability attaches—

Senator MARSHALL: I have some questions on that too.

Ms Volzke: For example, it is a criminal offence for a director, officer or employee to act dishonestly and not in the interests of the corporation, or to use their position to improperly gain an advantage; section 184.

Senator MARSHALL: I have some questions on that as well. So you will take that question on notice?

Ms Volzke: Of course.

Senator MARSHALL: Can you give us an example of a secret commission that would be an offence at state law? Some of these questions that I have are as a result of answers that you provided to the shadow minister in a briefing, so I just have some follow-up—

Ms Volzke: I understand. I would say that, as was identified by Commissioner Heydon, someone could potentially be liable at both the federal level, under these provisions which are now proposed, and at the state or territory level, for whatever jurisdiction they were in. But there is a provision in the Crimes Act—I think it is 4C, but I cannot remember off the top of my head—that ensures that, essentially, a person cannot be tried twice. It is always going to depend on the circumstances as to whether or not a particular offence in any jurisdiction will apply. What we are doing in this bill is giving effect to provide uniform coverage, at the federal level, of a consistent approach to criminalising this behaviour that will apply equally.

Senator MARSHALL: You might want to take that on notice and see what else you can add.

Ms Volzke: Thank you.

Senator MARSHALL: If the inconsistency between existing state and territory secret-commission legislation is a justification for introducing these new corrupting-benefits offences, why doesn't this bill also contain secret-commission offences which would apply to transactions between companies?

Ms Volzke: As I said, we have already got a level of regulation in the Corporations Act, and, indeed, if there were payments passing between a company and a company or a company and a registered organisation, the aiding-and-abetting provisions that also apply in the Corporations Act would apply at that level.

Senator MARSHALL: But the offences will be different, won't they?

Ms Volzke: Yes. That is right.

Senator MARSHALL: And the penalties will be different too?

Ms Volzke: The maximum penalties may well be different in some circumstances, but again they are only maximum, and it would be a matter for a court to determine what the appropriate penalty would be in any particular case.

Ms Anderson: Just to add to Ms Volzke's evidence: obviously this bill is dealing specifically with what the trade union royal commission recommended, so it does not intend to go further than what the remit of the trade union royal commission recommended.

Senator MARSHALL: In each state, how many prosecutions have there been of corporations for secret commissions?

Ms Volzke: I would have to take that question on notice.

Senator MARSHALL: That is fine, thanks. I think you were asked: 'What is an example of where the Commonwealth and state bribery and corruption laws do not work or apply to address the situations covered by the new offences in section 536D?' You provided an answer to that, and I have just got a follow-up question. Accepting for the purposes of this question that the shortcomings of the secret-commissions provisions identified by the department as justification for the new corrupting-benefits offences are as described, don't they apply with just as much force to transactions between companies? That is, isn't there a similar need for Commonwealth offences which apply to corporations?

Ms Volzke: That particular offence provision picks up both sides of the transaction, so you have got 536D(1), which is about the person who gives the corrupting benefit, and then you have the corollary, in subsection (2), which is criminalising behaviour for the person who receives or solicits that corrupting benefit. So there is, by virtue of that, a picking-up of corporations. Then, as I said previously, there is the Corporations Act, which picks up corrupting benefits between companies, as well as the state and territory criminal law that might apply in the particular circumstance.

Senator MARSHALL: I think you asserted that state offences would not necessarily capture a transfer between an employer and a union official. Can you provide an example of where a prosecution has failed on this basis?

Ms Anderson: Perhaps I could refer you to our submission, where we provide a number of examples from the royal commission. On page 4—

Senator MARSHALL: No, no. That was not my question. My question was about where a prosecution has failed on that basis. The royal commission was its own thing. There were no prosecutions involved there. You can take my position as being the same as Senator Cameron's. I am not really interested in the royal commission. I am interested in the factual basis of this bill.

Ms Anderson: These provisions were drafted—

Senator MARSHALL: Let me ask the question again. You have asserted to the shadow minister that the state offences would not necessarily capture a transfer between an employer and a union official. Can you provide an example of where a prosecution has failed on this basis? If you cannot, that is all right.

Ms Volzke: I could not give you a case name, but I think it goes back to the concept that the agency which is at the centre of a lot of the secret commission offences does not necessarily lend itself to applying to registered organisations. But I cannot give you a specific case example.

Senator MARSHALL: Maybe you could take it on notice, and I will ask you what evidence there is that this is because of a flaw in the law as opposed to a lack of police investigation and/or prosecution. Is it correct that for offences which use the term 'dishonesty'—such as the existing bribery offences in the Commonwealth Criminal Code—whether or not the relevant action was dishonest is a matter for the trier of fact to determine?

Ms Volzke: Yes, that is indeed correct. I would also add that it is at the criminal standard—beyond a reasonable doubt.

Senator MARSHALL: The department has advised that 'dishonesty' and 'corruptly' have not been used because of a lack of judicial authority as to the meaning of the terms. By that, do you mean that there is no—or no clear—authority for the way in which the judge is to direct a jury as to the meaning of 'dishonesty' or 'corruptly'? With some of these, if you want to take them on notice to give a considered response, I am happy with that.

Ms Anderson: I think we will have to take those on notice and provide a considered response to them. That would be appreciated, thank you.

Senator MARSHALL: Given that the new offences use the term 'improper', and whether or not the relevant action was improper is a matter for the trier of fact, what is the judicial authority as to the meaning of the term?

Ms Volzke: Again, that language is utilised in the Criminal Code. It is going to depend on the particular facts and circumstances in any case. So it is hard to address that in a vacuum, but it would go to where someone is discharging their obligations or duties in a way that is not proper.

Senator MARSHALL: I think Professor Stewart has also raised some of these definitions as matters of concern, and we would also be happy if, on notice, you were to directly and in writing respond to the issues he has raised in his submission.

Ms Volzke: Absolutely. The other point that I would add—

CHAIR: Such as 'improper'?

Ms Volzke: as well is that there are certainly many examples on the statute books of terms that are not defined, and, certainly, as case law develops we get a clearer picture of exactly what the scope of that encompasses.

Senator MARSHALL: Yes, but in this bill were actually proscribing different behaviour of certain kinds, and to say, 'We're not sure what the words mean yet; they will develop in time after people are prosecuted,' is not really satisfactory as far as the parliament goes, I would have thought.

Ms Volzke: I am happy to take it on notice.

Senator MARSHALL: Can you confirm that section 536(1)(b) refers to the intention of the provider of influencing a registered organisation's officer to act improperly?

Ms Volzke: Yes, it is the intention of the provider; that is exactly right.

Senator MARSHALL: Can you also confirm that section 563D(2)(b) refers to two possible intentions—the first one being the intention that the receipt or expectation of the receipt of a benefit will tend to influence a registered organisation's officer to act improperly; the second being the intention of the receiver that the provider believes that the receipt or the expectation of the receipt of the benefit will tend to influence a registered organisation's officer to act improperly.

Ms Volzke: I would probably have to take that on notice to give a fulsome answer. But I would say that subsection (2)(b) addresses the intention of the person who is soliciting or receiving the benefit.

Senator MARSHALL: Right. Take it on notice. That is fine. I understand that there is no requirement that it is not necessary that any person actually be influenced, as set out in section 536D(3)(d), or that the receiver actually know the state of mind of the provider. That follows from section 536D(3)(c), which says that the provider does not have to actually believe anything.

Ms Volzke: What I would say in response to that is that sort of provision is not unusual. For example, in the general protections, again—also within our act—it is all about the intention of the person. Whether or not it actually has the desired effect is not relevant.

Senator MARSHALL: Chair, do you want to do your questions, and then we will see how much time we have left. And there may be a couple that are getting quite technical. I might just put them directly on notice. There are some I want to ask.

CHAIR: Sure. I will not have more than 10 minutes. Ms James, you raised some issues that you wanted to ensure—and had been raised throughout the day. I think it would assist all senators and, indeed, the committee more broadly if you could address the issues that have been raised by some of the evidence this morning.

Ms James: I will cover a couple of issues, and then, perhaps, you can put questions to me. I did want to talk briefly about the evidence gathering powers. In particular, the ACTU submitted that—

CHAIR: Very concerned.

Ms James: we had never asked for them. To my mind, it is not sensible for a regulator to run around telling everyone how powerless you are. So I have been cautious and careful. We do not take a megaphone to shout out challenges and limitations of enforcing the law because that undermines your capacity to deter people from breaching the law. But, over the course of 2015 before this committee and before Senate estimates, I did talk about the limitations of our powers. I did talk about the challenges we had in the Bayada case and in 7-Eleven. In fact—and I would like to table this, actually—we went to some lengths in our 7-Eleven report to talk about the limitations of section 550 in combination with a lack of cooperation. So there are challenges in trying to prove that someone has been involved in a contravention when nobody has written it down—and, let me tell you, it is only the dumbest of people who write down incriminating things; so our notice to produce powers are not helpful—and when we are faced with a lack of cooperation from all parties involved. I can, in particular, point out evidence I gave before the inquiry into temporary visa holders on 18 May at pages 35 to 36. I can mention the estimates hearing on 22 October at pages 176 to 177 of the *Hansard*. And with the 7-Eleven report, there are three examples where I talked to the committee, to the parliament and also to the public via that report about the limitations around our current powers. Obviously, we have also engaged with government about this over some time. It was, particularly, something that we took up in the context of the 7-Eleven matter.

I should also say that I have heard a number of people say this morning what a great outcome it is in relation to 7-Eleven. Well, it is—over $80 million paid to over 2,000 workers so far. But, may I remind you, it is voluntary. May I remind you that it is not the law that brought them to that. The Franchising Council in their submission suggested that perhaps we did not pursue section 550 action because 7-Eleven cooperated. Let me tell you—and I think I have said this before in front of this committee—if we had had the evidence, given the scope of what we found and the length of time over which we were telling them there were problems, we would have taken them to court and seen penalties imposed upon them. We have been able to secure outcomes for workers so far because 7-Eleven, after a change of leadership and after immense pressure from the media, stepped up and took responsibility in a milestone compliance partnership with us, but that compliance partnership is made under the general law. It is not made under the Fair Work Act.

Senator CAMERON: If these changes are made then what would stop you from taking action against 7-Eleven? 7-Eleven have not complied with the law. 7-Eleven continue to deal with this in a manner that is unacceptable. That is why I keep saying that you gave them the feather—

Ms James: The feather duster.

Senator CAMERON: It is really not good enough. Why don't you pursue them now?

Ms James: The evidence was not there. If the bill were to pass, I do not think it would operate in a way by which we could retrospectively investigate those matters.

Senator CAMERON: Why not?

Ms James: I do not think it operates that way.

Senator CAMERON: Is that correct?

Ms James: Ms Hoffmeister might be able to tell you about the commencement.

Senator CAMERON: If someone has breached the law—not just 7-Eleven—12 months ago or two years ago, are you saying this bill does not apply?

Ms James: I am saying I am not sure that the new evidence-gathering powers would operate to enable me to investigate past breaches of the law.

Senator CAMERON: Really? Is that correct?

Ms Hoffmeister: The powers are available in relation to an investigation of a contravention of the Fair Work Act.

Senator CAMERON: So that can go back?

Ms James: That may be an option open to us.

Senator CAMERON: Let's do it. Let's go after 7-Eleven, put the feather duster away and force this mob to treat people properly. Just do it.

Ms James: We will always look at all the options available to us, should the parliament pass these laws.

Dr Morehead: 'Should we pass the laws'—that is why we have the bill in.

Senator CAMERON: That is good. That is one good thing to come out of this session.

CHAIR: Tick, Senator Cameron.

Senator CAMERON: Excellent.

CHAIR: There is a lot of debate and discussion about the franchises—

Senator CAMERON: Can I just say, it is not just 7-Eleven; can you do Caltex, Domino's, Pizza Hut, United Petroleum and Bakers Delight? Go after the lot of them.

CHAIR: Senator Cameron, we are moving to franchises now.

Senator CAMERON: And go after all those farmers that are ripping workers off as well.

CHAIR: Ms James, I know you have been doing a lot of work in that sector.

Ms James: Indeed we have.

CHAIR: But we will not go there now.

Ms James: We will always look to achieve those outcomes in the greater scheme of things.

CHAIR: The franchises?

Ms James: I want to address the issues of accessorial liability and franchising. The Yogurberry decision is a matter we address at pages 11 to 12 of our submission. Yes, it was a very important precedent. It was the first time we had used accessorial liability in the franchising context. We are always pushing the boundaries of that provision. It is one of the few tools that sometimes enable us to get justice for underpaid workers. Yogurberry was a different sort of case, though. In particular, I should say it is an overseas franchise. It was started in South Korea in 2004, and I understand it opened its first door in Sydney in 2012. The outlet that we took action over had been directly run by head office, and some of the breaches occurred then. Then there was rearrangement, and corporate entities shifted things around, but effectively in this case there were strong connections between the individuals, entities and the head office, not the usual arms-length franchising arrangements that you see.

Yogurberry was a fantastic precedent, and of course we sought to leverage it through our media to encourage the franchising sector to step up and take responsibility for workplace laws throughout the networks. It is our job to deter breaches and emphasise consequences. Yes, we talk up our outcomes and seek to maximise the deterrent impact of our work, but Yogurberry is a very limited precedent.

What you have just been handed from our 7-Eleven report goes through in some detail the limits of section 550 in that context and more generally. I agree with the comments of Professor Stewart this morning about the

distinguishing nature of these provisions. So to simply point at section 550 and the Yogurberry decision and say, 'Our work here is done,' I think is overly optimistic. There are a number of cases where we might have looked to secure outcomes from a franchisor where the evidence based on our current evidence-gathering powers was simply not available to us. It would be different if these new provisions were in place and those evidence-gathering powers were in place and the serious contravention powers or penalties were in place. The combination of that package would make a significant difference.

Mr Billson was referring to comments I made at a franchising conference in November last year. Of course I was very keen to engage with that cohort about the need for them to step up and take moral and ethical responsibility.

CHAIR: Thank you, Ms James. Are we clear around franchising?

Senator CAMERON: I just want on notice then to get a comment from Ms James in relation to the submission from WEstjustice. On page 17 of their submission they say that eight franchisor chief executives were asked to enter into compliance partnerships with the FWO and that basically you were ignored. Have a look at what they are saying there. If you can come back and give us your view on that—

Ms James: We can take that on notice.

CHAIR: Thanks, Ms James. The ACTU has claimed that the corrupting benefits legislation is retrospective. Is that the case?

Ms Volzke: No.

CHAIR: Excellent. There was another claim that every single benefit to unions under an enterprise agreement will have to be disclosed and dealt with. Is that correct?

Ms Anderson: The bill is fairly narrow in terms of what needs to be disclosed under schedule 2 of the agreement. Basically any financial benefit that a registered organisation derives from a provision within that agreement needs to be disclosed to employees. Importantly, the basis for those provisions, and again in terms of what the royal commissioner found, is that the current enterprise bargaining provisions in the Fair Work Act did not necessarily go that extra step. Of course employees are required to see the agreement but the current legislation does not go that extra step. For example, there may be a fund in the agreement and that fund might be operated by either the employer or the union, but an employee might not know that either the employer or the union might gain a benefit from that fund. The intention is basically to ensure disclosure of those financial benefits to employees before they vote on that enterprise agreement.

CHAIR: Senator Cameron asked some questions this morning about payments made around training provided and whether it is for profit or not and how we test market rate. Could you facilitate answering some of those questions please?

Ms Volzke: Sorry, could you repeat the question?

CHAIR: There was a lot of discussion this morning around the provision of training and whether that needed to be disclosed or would be captured.

Ms Volzke: Again, for that particular provision it would really just be an evidential burden for the union in this case to provide and to point to evidence to suggest that it was reasonable market value for whatever service it is and then it would be incumbent upon the prosecution to prove beyond a reasonable doubt that in fact it was not at a market rate.

CHAIR: How do you determine market rate?

Ms Volzke: That is a matter again for the trier of fact as is the usual course, taking into account all of the evidence, facts and circumstances.

Ms Anderson: I will add to that too. There was some confusion, I know, from some evidence this morning too about the view that the bill seeks to place restrictions on content and the like. Under the act, it does not, so suggestions that provisions around training cannot be included in an agreement are not the case. It does not go there in terms of legitimate existing training arrangements that might be in an enterprise agreement. What it would simply do is that, if there were any financial benefit relating to an employer organisation that was providing that benefit, that benefit would have to be disclosed to employees voting on the agreement.

Senator MARSHALL: Why only existing arrangements? You actually said 'to existing arrangements'.

Ms Anderson: In terms of the disclosure requirements, they are based on what is contained in that agreement when it goes to vote, so it will be in relation to any provisions in that enterprise agreement.

Senator MARSHALL: I have listed a whole heap that I can put on notice, but if we get time I will come to them anyway. Is there any reason why proposed section 536F(3)(b) could not be amended to add 'or former employees' at the end in order to make it clear that a union can make requests for wages due to be paid to a former employee?

Ms Volzke: I would say that would be a matter for government, but what I would say about former employees is that the entitlement to unpaid wages or other entitlements would be a right that crystallised by virtue of their employment, so I would think that it would be captured within that exception so that they would be able to seek to recover those amounts. But, in any event, there is also a payment made by, under or in accordance with the law if it was sought in those circumstances given that the Fair Work Act provides for those sorts of—

Senator MARSHALL: You did mention earlier though that it only did apply to employees. Are you saying that is not the intent of the bill?

Ms Volzke: No, I was not saying it necessarily was limited in that particular example that was previously raised. I think it was in relation to employees, and I am just making the point that it potentially could extend to former employees.

Senator MARSHALL: It worries me when you use 'potentially'—it could potentially extend to it. Would it apply to a claim for underpayment of wages for a former employee?

Ms Volzke: In my view, yes.

Senator MARSHALL: As a corrupting benefit?

Ms Volzke: No, it would be an exception. In other words, it would be perfectly legitimate for a union on a former employee's behalf to pursue those unpaid wages.

Senator MARSHALL: That could be fixed either in the bill itself or in the explanatory memorandum, I suspect.

Ms Volzke: Indeed.

Senator MARSHALL: You will take a note of that. Thank you. The only example given in the explanatory memorandum of the type of payment this section is intended to prevent or capture is at paragraph 42, which says:

For example, it is intended to apply in circumstances where the spouse of a national system employer causes to provide a cash or in kind payment to an employee organisation for the purpose of the employee organisation treating the employer's company favourably in an industrial campaign.

Sorry, that was a very long sentence. You might want to just take that on notice, actually.

Ms Volzke: Thank you. Yes.

Senator MARSHALL: When you do, why wasn't this example covered in the new corrupting benefits offence? If it is, why is another offence required?

Ms Volzke: I would say that the two offences are different. Clause 536F captures the payment whereas the other offences that are in clause 536D relate to the intention to provide the corrupting benefit or receive it, so it comes at it from a different angle.

Senator MARSHALL: Do you agree that this offence is intended to capture situations where the request or the payment is made for corrupt, improper or illegitimate purposes? You might want to take this on notice. This follows, doesn't it, from the list of exemptions contained in proposed section 536F(3), which the explanatory memorandum describes at paragraph 47 as exemptions that 'allow national system employers to make necessary or legitimate payments'? It also follows from the use of the term 'a non-corrupting benefit' in proposed section 536F(3)(g), which says 'a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations'.

Ms Volzke: If we could take that question on notice.

Senator MARSHALL: All right. When you answer that I want you to ask yourself this question. I put it to you that you would accept that there are likely to be circumstances other than those set out in proposed section 536F(3) where a request for payment should not give rise to liability under proposed section 536F(1). This is the reason, isn't it, for the inclusion of proposed section 536F(3)(g), which exempts 'a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations'?

Ms Anderson: I think we will take you up on the offer to work through that all that and provide a response.

Senator MARSHALL: Thank you. When you answer that one, therefore it follows, doesn't it, that in order to capture corrupt, improper or illegitimate requests or payments but not to criminalise necessarily legitimate

payments this offence should contain a fault element at proposed section 536F(1)(b) and proposed section 536G(1)(a) in order to be consistent with the corrupting benefits offence?

Ms Volzke: We will take that on notice, but I would say that that offence of strict liability follows the commissioner's recommendation.

Senator MARSHALL: I can probably give you all of these when we finish.

Ms Volzke: Thank you.

Senator MARSHALL: I have some questions that go to the difference between 'will tend to influence' and 'the intention of influencing' and the different penalties that will apply to that, but I will put them on notice. In fact, all the questions are about that issue and exploring it further. I would have loved to have talked to you, Ms James, about all things Fair Work Ombudsman, but you are coming to visit us in our corporate avoidance inquiry, aren't you?

Ms James: I am not sure if I have been invited to that one yet.

Senator MARSHALL: Yes, you will be.

Ms James: Always happy to come to another party.

Senator MARSHALL: I have got some of my staff using your app—

Ms James: Over 7,500 people have now downloaded the Record My Hours app.

Senator MARSHALL: I will give you some feedback. It does not work so well in Parliament House because people are moving around all the time.

Ms James: I am concerned your workers may be doing more hours than their award.

Senator MARSHALL: They are while they have the app on, I can assure you.

Ms James: Chair, might I table one more document?

CHAIR: Sure. Did the Fair Work Commission have a view on the four yearly review legislation, given your recent experience?

Ms Carruthers: I think, as Dr Morehead has already indicated, there is broad support across the community for the bill. Certainly from our perspective it is an enormous workload, as we discussed in our last two appearances before the committee. We were just talking about penalty rates and I think the committee rightly understood how much work that has been. We, in fact, have 16 common issues that are being considered by full benches as part of the four yearly review at the moment, so the workload on penalty rates was big but it is actually even bigger when you look at the whole of the four yearly review process. From our perspective it certainly has resource implications.

CHAIR: Thank you so much for your evidence. Thank you, Hansard, secretariat, and ball boys and girls.

Committee adjourned at 16:45