



**Australian Government**  
**Productivity Commission**

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**PRODUCTIVITY COMMISSION**

**INQUIRY INTO WORKPLACE RELATIONS FRAMEWORK**

**MR P HARRIS, Presiding Commissioner**

**TRANSCRIPT OF PROCEEDINGS**

**AT PRODUCTIVITY COMMISSION, MELBOURNE  
ON WEDNESDAY, 23 SEPTEMBER 2015**

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**MR HARRIS:** Good morning, and welcome to the eighth and final public hearing for the Productivity Commission’s Inquiry into Workplace Relations following the release of our draft report in August of 2015. I’m Peter Harris and I’m the Presiding Commissioner on this inquiry. My fellow  
5 commissioner on the inquiry is Patricia Scott, but Patricia is not well and won’t be able to be here today.

The purpose of this round of hearings is to facilitate public scrutiny of the Commission’s work and to get commentary back on the report. We’ll  
10 work towards a final report to the government at the end of November 2015. The government will then have 25 Parliamentary sitting days, up to that period anyway, before they have to release the report which means it may not be released until early next year. We like to conduct all hearings in a reasonably informal manner, but I remind participants there is a full transcript  
15 being taken. For these reasons, comments from the floor cannot be taken, but at the end of the proceedings for the day, if anybody is persisting that long from 8.30 this morning, I’ll provide an opportunity for persons wishing to do so to make a brief presentation.

Participants are not required to take an oath, but should be truthful in  
20 their remarks. Participants are welcome to comment on issues raised in other submissions, but should be aware not to defame anybody in so doing. The transcript will be made available to participants and will be available on the Commission’s website following these hearings today. Submissions are also  
25 available on the websites. We do not permit video recording or photographs to be taken during proceedings, but social media such as Facebook or Twitter may be updated throughout the day. We do ask all members of the audience to ensure their mobile devices are switched to silent.

To comply with the requirements of the Commonwealth Occupational  
30 Health & Safety Act, in the unlikely event of an emergency requiring evacuation, follow the green exit signs and there are floor wardens to tell you where to go, and the assembly point for the Commission is at Enterprise Park at the end of William Street, down by the Yarra.

35 Let’s open, and if I understand rightly, is it Catherine, are you leading off? Can you guys identify yourselves, please, for the purpose of the record?

**MS HEMINGWAY:** I’m Catherine Hemingway.

**MS BOI:** I’m Neng Boi.

**MR NALTHORPE:** I’m Denis Nalthorpe.

**MR HARRIS:** It should be that you won’t have to lean towards the  
45 microphones. They’re usually pretty good at picking it up, but for the people in the audience, you’re not getting any amplified sound, so you’ll just have to lean forward a little bit if you can’t hear anybody.

Catherine, do you have anything to open up with, as a statement?

5 **MS HEMINGWAY:** Yes, I do. Thank you very much for this opportunity. For many newly-arrived workers, sustainable employment forms are part of a successful settlement. Not only does work provide financial security, it also provides essential social connections, self-esteem and independence. However, as the Commission has recognised, migrants are more vulnerable to exploitation due to limited understanding of laws and services, language and cultural barriers, and a lack of support network. The Western Community  
10 Legal Centre Employment Law project seeks to improve employment outcomes in newly-arrived and refugee communities.

15 Based on a period of research and community consultation, the project established a pilot employment law service and community education program. In the past 16 months, our legal services assisted over 125 workers from more than 26 countries. Most commonly, we have assisted with underpayments and sham contracting issues, recovering over \$55,000 in unpaid wages. We've also assisted with unfair terminations resulting in over \$30,000 in compensation and outcomes focused on finding new employment.  
20 We've also assisted clients with advice on discrimination, bullying, workplace injury and misconduct allegations. Many of our clients do not understand Australian laws and processes, do not speak English, and would not have enforced their rights without our help.

25 Our community education program has delivered face-to-face information sessions to over 500 community members, community workers and community leaders through our train-the-trainer program. We have made two submissions to this inquiry. I have copies of the submissions and our project's preliminary report here, if that would assist the Commission?  
30

**MR HARRIS:** No, just keep going with this. I've got your written statement.

35 **MS HEMINGWAY:** Sure, great. I would like to make three points to open this morning. Firstly, the Commission's focus on migrant workers is welcome and necessary; secondly, law reforms should be informed by the needs of newly-arrived and refugee workers; and finally, newly-arrived and refugee workers require targeted assistance and support to enforce their rights. After I speak, my colleague, Neng Boi, will also present briefly about her  
40 experiences as a community development worker and community leader from Myanmar.

45 Focus on migrant workers is welcome and necessary. We welcome the Commission's focus on migrant workers in chapter 21 of the draft report. For our workplace relations system to function effectively, it's essential that it operates to protect the rights of those who are most vulnerable, including migrant workers. As the Commission is no doubt aware, there are a wide variety of different categories of migrant workers in Australia. Some are permanent residents or citizens with unrestricted work rights, for example, our

refugee clients. Others have restrictions on their work, for example, on the length of time they can stay in Australia or the number of hours they can work.

5           Our largest group of clients at our service are refugees, but we have also  
assisted international students, asylum seekers and people on temporary work  
visas, including working holiday and 457 visa holders. Although each of  
these categories of workers face unique challenges and are provided with  
10 different levels of support upon arrival to Australia, we have observed a  
general pattern of exploitation and low rights awareness among all types of  
migrant workers. For example, our client, Johnno, whose name has been  
changed, lived in a room in his workplace. His boss didn't want to pay him  
the minimum wage, so after he was paid by electronic transfer every fortnight,  
15 Johnno had to pay hundreds of dollars of cash back to his boss. He also had  
to pay rent.

          He worked hours of unpaid overtime during the week, on weekends and  
holidays. He didn't realise the requirement to do unpaid work was illegal, he  
trusted his boss. When he learned about the law and said he would no longer  
20 pay money back or work extra hours without pay, he was dismissed. Because  
his employment was terminated, Johnno's visa was cancelled and he was  
deported. He lost his dream to set up a life in Australia and was punished for  
speaking out about his rights. Migrant workers are also more likely to be  
engaged in low-income, precarious forms of employment and are more likely  
25 to experience discrimination.

          Our clients are predominantly working in the food processing,  
hospitality, cleaning, warehousing, distribution and child and aged care  
industries. Generally, our clients are desperate to find and keep work. For  
30 these reasons, it is essential that the Commission considers the particular  
experiences of newly-arrived and refugee workers and how our laws can work  
better to protect the most vulnerable. This includes the content of the law and  
also the accessibility of institutions promoting compliance.

35           The story of Marko illustrates some of these needs. Marko came to  
Australia as a refugee. He doesn't speak English, worked in a food processing  
factory for over three years. One day he was accused of misconduct by his  
employer. He had to attend an interview without an interpreter and was asked  
40 to respond to allegations in writing. Marko was stood down without pay. His  
salary not only supported him but his children and family back home. We  
assisted Marko to write a letter requesting a face-to-face meeting with an  
interpreter. He was given that meeting and could explain his situation. Marko  
kept his job.

45           Our submissions provide further detail, but in particular, we draw the  
Commission's attention to a few aspects of the draft report. In particular,  
chapters 5 and 6 on unfair dismissal and general protections. We note that  
migrant workers generally face extreme difficulty in gaining employment.  
Therefore, these laws are extremely important in assisting clients to stay in

work. Given the numerous barriers that our clients face in accessing roles in the first place, it's essential that when people do engage, they are not disadvantaged. We submit that consideration of unfair dismissal applications on the papers will result in injustice for newly-arrived and refugee workers who often have low literacy levels.

We also note that procedural errors should remain a central consideration of unfair dismissal. It is essential that workers are given procedural fairness and an opportunity to respond or improve. This is particularly true for newly-arrived workers who are operating in a new legal and cultural system. We submit that reinstatement must remain the primary remedy, and that indeed, the available remedies should be expanded. The Fair Work Commission should be directed to consider the impact of an employer's behaviour on an employee, including her/his humiliation, and also the gravity of breach of an employer. Penalties should be able to be awarded as well.

We submit that lodgement fees should not be increased as this would decrease access to justice, and time limits should take account of the particular characteristics of newly-arrived and refugee communities who are unable to lodge applications without assistance, and noting that those agencies that are available to assist are under-resourced and often take some time to offer an appointment due to limited resources. Finally, we submit in respect of general protections that a cap on compensation would trivialise discriminatory and unlawful behaviour and that this would undermine the role of general protections. In respect of chapter 20 of the draft report, we note that we have seen extensive examples of sham contracting among newly-arrived and refugee workers.

We have also seen exploitation in labour hire and franchise arrangements, particularly in the cleaning, distribution and construction industries. Without a definition of "employee", it's difficult for our clients to know whether to pursue a claim as a contractor in VCAT or an employee in the Federal Circuit when they're not paid. Many of our clients are underpaid and exploited and find themselves at the bottom of long and complex supply chains. When their immediate boss disappears or goes insolvent, they are left without recourse. Principles, host agencies and franchisors must take more responsibility for ensuring that rights are protected. We submit that the Fair Work Act should be amended to include a concept of joint employment.

These submissions all assume that our clients will manage to access the legal system in the first place. Unfortunately, without targeted assistance and support, many of our clients will not ever enforce their rights. For example, our client, Parvil, is a refugee. He did not speak much English and he couldn't write in his own language. He got his first job as a cleaner. He often worked 12 or 14-hour shifts, but he was only paid for five hours' work each shift. He was also paid below the minimum pay rate. Parvil came to us because he had not been paid for his last two weeks. He didn't understand that he hadn't been paid the right hourly rate or that he should have been paid for all the hours that he worked.

5 A community worker had tried to assist Parvil to complain to the Fair Work Ombudsman, but because they didn't know what to complain about, the complaint was closed. We helped Parvil make a new complaint to the Fair Work Ombudsman and negotiated with his employer to receive back payment. We later learned that Parvil had assisted two of his friends to negotiate back pay and legal pay rates going forward. As the Commission has recognised, migrant workers face significant barriers to accessing mainstream services. Therefore, we welcome the recommendation, or the draft recommendation, for additional resources for the Fair Work Ombudsman to order and investigate migrant workplaces and we see this as an essential and welcome recommendation.

15 However, more is needed to support efficient audit and investigation work by the Fair Work Ombudsman. Firstly, targeted education is essential to build trust and raise awareness of laws and services. Providing a flyer in English is simply not enough. Many of our clients have literacy barriers and, as our submissions have detailed, the importance of relationships and building trust is a key part of making services accessible. We suggest that face-to-face information is essential and could be delivered via various mediums, including English as additional language classes, community meetings and via a train-the-trainer program which we have piloted and can speak more about if the Commission would like us to.

25 We also note that in addition to targeted education, more targeted assistance is needed from services to enable workers to make a complaint and resolve them. As Parvil's example demonstrates, when clients try to engage with the system, sometimes they are unable to have their voices heard. We submit that government agencies, including the Fair Work Ombudsman and the Fair Work Commission as well should develop their cultural responsiveness frameworks, including checklists and assistance to clients so that they can articulate their complaint and effective support and dedicated staff so that they have support through the process. For many of our clients, filling out a form is not something that they're able to do alone.

35 As we suggested in our first submission, the Fair Work Ombudsman should also have increased enforcement powers. They should be able to compel parties to attend a mediation and be able to make binding recommendations in respect to very small claims. Finally, we submit that in order to increase the efficiency of Fair Work Ombudsman audit powers, there should be greater resources for community organisations who efficiently and effectively link vulnerable workers to key services and provide assistance where Fair Work Ombudsman has no jurisdiction. As the Commission is aware, the Fair Work Ombudsman is not able to assist with all issues, most importantly, regarding dismissals, but also things like contractual interpretation.

Therefore, community-based employment advice services like ours and others including Job Watch and the Employment Law Centre in Western

Australia are the only available services to provide assistance to clients who would be otherwise unable to access the system. We also play a really important role in filtering disputes; we advise on merit and if a client doesn't have merit, we don't suggest they take the matter further, and we also promote the efficient passage of disputes through the multifarious pathways that exist through all the different jurisdictions.

So while the workplace relations framework is available to all employees, not all employees will have the same degree of need or reliance on the system. Neither will all employees have the same degree of access. Articulate employees familiar with the Australian legal framework and confident in their own rights and skills may negotiate the system with relative ease. However, vulnerable employees who are most at risk of exploitation often face significant barriers to rights enforcement. It is these vulnerable workers, often in low-paid and insecure work who have the greatest need for protection from a robust workplace relations system.

Throughout our project, we have witnessed extreme disadvantage and exploitation. We have observed systemic injustices and gained experience in assisting clients to navigate a complex and multi-jurisdictional workplace relations system. It is essential that our workplace relations system provides justice for migrant workers. When the most vulnerable are protected, that will promote wellbeing of all Australians. By assisting just one vulnerable worker, the flow-on effects can be immense. As one client commented after we helped him get his money back, he said, "So I must say, thank you again. Because of you, I will be powerful to help other people."

Thank you for allowing us time to present this morning. If the Commission would like further information about migrant workers, we would be happy to assist in organising further consultations with other community leaders or community agencies who work closely with newly-arrived communities. I'd like to introduce you to my colleague, Neng Boi.

**MS BOI:** Thank you so much for giving me this opportunity to present my community. I would like to speak about my community in Myanmar and their experience coming to Australia. Most of the people in Myanmar don't know about employment laws. 70 per cent of the people are farmers. To get a different job, you must be related to the government authority or able to bribe the HR with offers of money. People get paid based on monthly wages no matter how many hours they work, no matter how many days per week they work. They don't get paid extra. That means not getting paid for overtime and penalties.

There is no compensation if injured. You are fired if you make complaint or speak out the truth. In Australia, most of the people from Myanmar community are farmers, not literate or educated. They get a job which doesn't require any qualification, only require hard working such as meat factory and cleaning. They sign the paper with the understanding what are in terms and policy. Because of not understanding employment law or



5 their rights at work, they don't get paid properly. If they are injured at work, they don't know they have the rights to get compensation. If you have a problem at work, people go for information to community leaders. They don't contact government agency for help with problems because they are scared, they have language barriers and they think that they will lose their jobs.

10 They think that they cannot get a job in the future because of making complaint against the boss. I think the train-the-trainer program is the best way to help Myan community understand the law because whenever the community have a problem, they come to the leaders. If the community leader has knowledge about the law and substance, they can guide the community members where to get help and advice. Also, the Western Community Legal Centre to look at website or fill out a complaint form is very complicated. Myan community don't have the capacity to do this alone. They need help. Here, the service is face-to-face and one-on-one. This is important because the centre has been working with the community.

20 Now they have confidence to come here. This is the first step for the community to get help. Thank you.

25 **MR HARRIS:** Thanks very much. Does your colleague wish to say - okay. So you've raised a number of issues and I note for the record we had investigated these issues before they became a matter of public notoriety, as they have become in recent times, but it's pretty clear that there is some kind of problem here in relation to exploitation of migrant workers. It undoubtedly deserves further attention and will get it in the final report. You've put forward a number of proposals, and some of them, I'm not clear about why they create the impediment that is implied, that you've suggested.

30 So in relation to unfair dismissal and consideration on the papers, you state that, generally speaking, your concern about this, because you think assistance is required, but I can't see the connection between consideration by the FWC on the papers and the prevention, any action that that would require that would stop someone getting advice. So the 21-day period for lodgement is still there, you're still able to get advice, it's just what you put in would be then considered on the papers. So where's the failure to get advice in changing the nature of the current legal position?

40 **MS HEMINGWAY:** So, I guess assuming that clients are able to get advice within the 21-day time period, which isn't always possible, especially with our service, we have wait lists of over six weeks, but in terms particularly of just being able to see, assuming that - - -

45 **MR HARRIS:** Well, you see the linkage I'm trying to make.

**MS HEMINGWAY:** Yes.

**MR HARRIS:** I'm trying to make this linkage where you've suggested that

on the papers will prevent people getting legal advice. I can't see why it would.

5 **MS HEMINGWAY:** No, no, I guess that's not the submission I'm making there. The submission I'm making is that on the papers would result in  
10 injustice because our clients are unable to articulate themselves at all sometimes, or in a very limited way in writing. So if people hadn't been to see us or we were unable to assist them to draft their application, I've seen attempted draft applications by our clients and some of them have literacy  
15 levels well below primary school. Even clients that are able to articulate themselves quite well in spoken English, at the time they come to submit an application that they've tried to write themselves, it's extremely limited, it's difficult to understand, it doesn't properly articulate their complaint and it doesn't do justice to what's really happened to them. They're much better able to explain that in an oral form with an interpreter present.

20 **MR HARRIS:** But an on the papers consideration wouldn't stop the Fair Work Commission noting that this was a deeply inarticulate application and asking for further information; it wouldn't stop that, would it?

**MS HEMINGWAY:** Well, it would depend. I mean, what would be the point of the Commission assessing something on the papers if they were to hear every complaint that wasn't well-articulated?

25 **MR HARRIS:** Well, that's actually the point. We're trying to provide some judgment to the people doing judgment here, rather than an obligatory process of continuously considering everything that's put in front of them.

30 **MS HEMINGWAY:** Yes, and so I guess what I'm saying is that for our client group, if their case was to be judged on the papers, that would be unfair because they're not able to set out their case clearly in writing.

35 **MR NALTHORPE:** Can I make a comment on that. It seems to me there are two possibilities; someone who doesn't get assistance, and in the case of either newly-arrived or even illiterate Anglo-Saxon-type based workers, there are two possibilities. One is they could put in a fairly inarticulate claim, they meet someone face-to-face and they get an opportunity to explain it. Now, that may or may not happen under the current system, but if it's dealt with on  
40 the papers and there is an inarticulate application, our concern is that instead of noting that it's from someone who is inarticulate or unable to express themselves in writing, it will be dismissed pretty much summarily.

45 Perhaps I can give an example. A good example of this would be I've noticed in our work with the Sudanese community that they often understand the words quite well, what they don't understand is the concepts. And so you think they understand, but they actually haven't got the faintest idea what you're talking about. So I think what you say may be correct, if you make the assumption that the reader will say, "I need to get more information" or "I need to assist this complainant to better articulate their problem."

**MR HARRIS:** Okay. So let me stick with something, and I've got a place to recommend you might have a look at, too. The other day in Sydney we got quite interesting testimony from the Marrickville Legal Centre and another group who is a similar relationship, whose name I can't quite remember, but they had posed that this recommendation for consideration on the papers could be significantly improved if there was an electronic lodgement system that enabled people to indicate some limitations they might actually have. So for example - I'm not proposing this, I'm putting something conceptually in front of you to see what your reaction is - if there was, in the electronic lodgement form something that said, "Have you been unfairly dismissed?" "Yes." And then it says, "Are you a migrant, what category of migrant do you have", that kind of thing, it would enable the Commission to have some information in front of them which says this person is possibly going to be not able to understand all that they put in front of them and pursue the arrangement.

You see, we're trying to modernise the law for the purposes of the entire country and we certainly don't want to impose additional regulatory standards which are going to probably choke up the system for 90 per cent of the people, but for 10 per cent of people become particularly important, so we're trying to find a way of - and that seemed to be a very interesting concept that they put forward, that if you could have a mechanism - they didn't actually talk about migrant workers, but I think they have been dealing with the same kinds of community issues, you could then have that understanding in front of the Commission and could then make a judgment as to say, "Yes, yes, I need to call for more information in this particular case", or something.

There's no guarantee, of course, that people will go and get advice, we know that, but it's a mechanism that might trigger the Commission to inquire further rather than rely on the person knowing their full circumstances. Do you have any reaction to that?

**MS HEMINGWAY:** Well, I think that would certainly be a necessary part of introducing an ability to decide on the papers, a direction to consider the needs of vulnerable client groups, including people who speak English as an additional language. But I guess it would be essential, then, that people who are making that determination were aware of the barriers that many newly-arrived people face because they might not understand - they might dismiss a complaint without having a full understanding of why that particular matter presents as quite weak when there's actually quite a strong case line behind that.

**MR NALTHORPE:** But I think - I take the point you're making. If the form asks, "Is English a second language" - - -

**MR HARRIS:** Or words to that effect, for example.

**MR NALTHORPE:** Words to that effect, then I think, yes, then it would put

on notice, and I suppose the other thing is if something is dismissed on the papers, where there is a notification that English is a second language or something to that effect, then at least it's possible to go back later and say, "Yes, but hang on, you never really understood the problem because this person wasn't capable of articulating in the right words where their rights had been abused."

**MR HARRIS:** Yes, because I do notice in your presentation you were saying you have had circumstances where you've gone back on a second occasion, having given people advice and saying, "Look, I think there's been" - well, I think that was with the FWO, though, rather than with the FWC, but you do get people coming around with their circumstances after they've made one go into the system and failed.

**MS HEMINGWAY:** Especially when people don't have a strong understanding of the law, they don't know what to complain about. They might have a general sense that something hasn't been right, so for example, in that client situation, he hadn't been paid for the last few weeks of work and he felt that that was really wrong, but he had no understanding that being paid for five hours' work each shift when he was working 14 wasn't correct because he just didn't understand Australian employment laws, and I guess similar would apply for - if you're trying to make a general protections application, I mean, that's an incredibly complex area of law and to know what to put in that application when English isn't your first language and there's no concept of discrimination law in the country that you've come from, these clients are going to need help, so any mechanism that can be introduced as part of any changes to this area would be welcomed by us.

**MR HARRIS:** Yes. Because that is another option, speaking hypothetically, rather than altering the whole of the unfair dismissal provisions, you might actually consider whether general protections has a specific right in relation to migrant workers.

**MS HEMINGWAY:** In what sense?

**MR HARRIS:** Well, you have two courses when you claim unfair dismissal, correct? You can go down the standard unfair dismissal processes or you can say there was another circumstance that actually drove my dismissal and I prefer to use the general protections, we know that. We know that occurs today. If migrant workers had a specific provision in the law, you probably wouldn't put it, would you, into unfair dismissal, you might put it into general protections. That's what I'm suggesting.

**MS HEMINGWAY:** I think it would depend on the circumstances. We have a lot of clients who might be dismissed for - as a result of procedural unfairness, where there's been some sort of misunderstanding and you wouldn't peg it - it's not directly connected to their migrant status or their background, but I guess the process has come about because of their lack of cultural understanding. In those sorts of circumstances, we've opted for an

unfair dismissal claim because that's been more appropriate in those circumstances.

5 **MR NALTHORPE:** But, again, I think the point you are making, that if  
there's a recognition, and I think - I take your point there's been recent  
publicity, but if there's a recognition that newly-arrived workers are being  
subject to particular discrimination or particular forms of exploitation - and I  
might add, I think there are some other groups. We recently started doing  
10 some work with 15 to 18-year olds in schools and have been pretty surprised  
to find that the most common legal problem they raised, which they don't  
want to pursue, not surprisingly, is problems with their employer on weekend  
or after school jobs.

15 Now, it's no great surprise that a 16-year old doesn't want to take on an  
employer, but I think if there is, in the legislation, an acknowledgement that  
there are certain groups that are subject to quite significant exploitation, I  
think that would be beneficial and I think when you look at the sort of public  
exposure of the cases that have come up, it is obvious that there are certain  
20 groups that can be, you know, greatly exploited because of their circumstance.  
So I actually think there is significant merit in that proposition.

**MR HARRIS:** Yes, and you'd be conscious, I assume, that what I said  
earlier is important, we wouldn't want to amend the entirety of the unfair  
dismissal law affecting the vast bulk of cases to which these circumstances  
25 aren't relevant solely because of this, but you might consider a specific  
provision which relates to the position of people in those circumstances, and  
I'm just asking, because I'm not a lawyer, whether, given some of you I'm  
sure are lawyers, it more logically belongs in general protections because the  
other thing, and it goes to a comment you just made, is we know the general  
30 protections rights are - well, ill-defined and probably in need of some clarity  
and it just seemed that this might be an area where you looked for clarity.

**MR NALTHORPE:** Could I just make one comment on that, which isn't  
particularly based on employment law, it seems to me the one issue that is  
35 arising in these recent cases, and is clear in Catherine's work, is that if an  
employer has 99 people that represent the broad community and one  
newly-arrived worker and there is a dispute, that's one thing. If an employer  
has a history of having 99 newly-arrived workers and one ordinary person  
who supervises them, it does seem to me that there may be a good proposition  
40 for viewing that employer in a different light. Clearly, some of the more  
recent high-profile cases are about employers who are clearly targeting  
vulnerable communities as an easily-exploited workforce.

**MR HARRIS:** Right. So let's go to that, although it won't be specific to the  
45 case I think we all have in mind, given recent publicity, but it might be more  
relevant to the general propositions about better workplace relations  
regulation for the future which is what our inquiry is mostly about. Sham  
contracting and labour fire firms and the like have been called into question  
for some kinds of exploitative behaviour. I'm certain it's not relevant to all

such firms, but that seems to be an area where you've made propositions for change in the law and we'd made propositions for change in the law.

5 So if I take it that you already supported, generally speaking, although I need to get clarity from you on this, if I could, that our suggestion of changing the definition of awareness, if you like, in relation to labour hire arrangements and status employees from a recklessness test to a reasonable person test, you would support that, or you want to go further than that?

10 **MS HEMINGWAY:** Look, I think that we do definitely support that change, but I guess we would say that more needs to be done.

**MR HARRIS:** On the definition alone, because I'm going to go to more, just first the definition, though?

15 **MS HEMINGWAY:** No, I wouldn't have more to say either way on that at this stage.

20 **MR HARRIS:** Okay. So let's go further, then, into this whole area. It has been suggested to us that licensing of labour hire firms might be of value. Do you have a view on that?

25 **MS HEMINGWAY:** We think that anything that would enable greater scrutiny and obligations on those that are further up supply chains to ensure rights are protected would be useful, yes.

**MR HARRIS:** Okay.

30 **MR NALTHORPE:** Can I just add one comment, though. I think it's well-recognised that licensing can have two propositions. One is to raise money and the other is to change behaviour. I have to say I'm a bit concerned that licensing might have more to do with raising funds than it does with - - -

35 **MR HARRIS:** Yes.

**MR NALTHORPE:** But if the licence fees are directly - are directed to the monitoring and enforcement of behaviour, then I think licensing might have some value.

40 **MR HARRIS:** Yes, and I think in principle we'd certainly agree with you. This is not about revenue raising and should never be. Neither should it be about impeding the development of such firms, which can be of quite significant value in an economy like ours with its diverse labour needs, but behaviours also need to be addressed and it's a mechanism, it's certainly not a  
45 mechanism that we've made up our minds on, but I just wondered if you had a view, but I'll leave that for the moment, then.

You talked as well about the definition of an employee. Now, when you talked about better defining an employee, which is a relevant consideration in

5 this area as well, you also talked about joint responsibility between the principal and the firm supplying the labour. That is, if you like, the head contractor and the subcontractor. You wanted them to take some joint responsibility. Now, in a design sense, a legal design sense, it seems a fairly complicated arrangement to again define. Do you have a view on how we could go about defining an employer/employee relationship where there was joint responsibility?

10 **MS HEMINGWAY:** Look, this is something that I'd be happy to look into further and provide more details on, but my understanding is that from jurisprudence in America, that it's centring on this idea of control - - -

15 **MR HARRIS:** Yes, it just came up in California, I know they've made a decision on that.

**MS HEMINGWAY:** Yes, just recently.

20 **MR HARRIS:** Yes, I've read that, but it didn't seem necessarily relevant. Their law is so different in construct to our law that it's hard to imagine it could conceivably be simply translated from one jurisdiction to another, but - - -

25 **MS HEMINGWAY:** Yes, but I guess that concept is helpful in the sense that, I mean, for example, one of our clients who is working six and seven days a week, 12 to 14-hour days driving a truck, distributing products, he was probably four or five links down the chain and engaged as a contractor when he should have been an employee and was dramatically underpaid. He was wearing a uniform of one of the companies about three rungs up. He was receiving directions from the very highest company where he was meant to be going and taking the goods and how he was meant to be doing it. He was, yes, receiving telephone calls throughout the day and monitoring his performance from not his direct boss, but many rungs up and two steps above him was the company that had his employment records of the hours that he was working.

35 Yet, when he was underpaid and his immediate employer or principal disappeared overseas, he had no recourse and - - -

40 **MR HARRIS:** Yes, we can see the contract arrangement in there as reasonably clear, but the law may not be clear, so it's a question of - what you're really saying is common law is not going to do the job there, for a person who will have to go and get a lot of legal advice and fight a serious court case.

45 **MS HEMINGWAY:** That's right, and I guess in that sort of example, you can see that the companies further up the chain do exercise a significant degree of control over this worker and so perhaps that might be an idea, to integrate in terms of the concept of joint employment.

**MR HARRIS:** All right. Is that example described in detail in your submission, that working relationship differentiation?

**MS HEMINGWAY:** No, perhaps not, so perhaps we could - - -

5

**MR HARRIS:** Maybe you could do that by email for us because that would be quite useful potentially as a guide in that area.

**MS HEMINGWAY:** Sure.

10

**MR HARRIS:** I won't do lodgement fees because we lack time. Reinstatement is a primary, we understand that. You talked about flyers and information. My understanding is that there is information provision via the Fair Work Ombudsman in multiple languages. Your suggestion is that it isn't, or it is insufficient or it's in some other way deficient? Can you tell me a bit about that?

15

**MS HEMINGWAY:** Sure. So when people first come to Australia, perhaps straight from a refugee camp, they don't speak any English, they're learning how to use a public transport system, get their kids in school. Perhaps they don't speak - unable to read and write in their own language. A translator flyer on a website is completely inaccessible. Many clients who have come from refugee backgrounds who have experienced significant trauma and torture, often at the hands of people in government authorities or people in positions of power back home. Providing a piece of paper is not going to make government agencies accessible and it's not going to let people know about their rights.

20

25

We have found through our community education program that face-to-face, targeted assistance designed in collaboration with English as additional language teachers, is a really important way not only to let people know what their rights are, but to build those connections with key services and to build trust.

30

**MR HARRIS:** Right, but - - -

35

**MR NALTHORPE:** Just before, could I just say two things to that. Our experience is also that, firstly, government and agencies that translate often are two waves of migration behind, so you'll easily find Vietnamese, you may not find the Burmese languages, and the second thing that is now widely recognised, one of our projects was adopted nationally by the national Legal Aid, is that we, when we work with agencies that work with newly-arrived, they tell us "More pictures, less words." If you go and have a look at the materials that are available, they are inevitably dense context and the argument is, you actually probably need a tertiary qualification in the country you came from to be able to understand them.

40

45

**MR HARRIS:** Okay. So if I can again turn to practicalities here, I think you've told us what doesn't work, although your recent comment is about



5 pictures and so that might work, but it's, again, not terribly easy for us to put  
10 into a form of recommendation here, but if I can persist for a second. You're  
15 really saying if it's face-to-face, you need to identify the groups of employers  
20 first before you can have face-to-face. Now, someone's going to have to do  
25 that. You could do it through the communities and at some point this inquiry  
30 draws boundaries and says, well, telling the Immigration Department or State  
35 government authorities how to deal with migrant communities is probably  
40 right out on the edge of our levels of consideration, but sticking within  
45 something that might be closer to where we might consider it, again, if you  
50 could identify the employers that had a substantial proportion of their  
55 workforce as being workers on visas of different kinds or recently-arrived  
60 visas or other arrangements, would that help a face-to-face consideration?

15 In other words, would it help organisations that would have to go out  
20 and do this? The FWO is one example, but I was thinking more of other  
25 community advice kind of organisations as well. Perhaps not your own  
30 because you're more legal advice, but community advice kind of  
35 organisations. This came up when we were in Bendigo a couple of weeks ago  
40 with the same sorts of things, but without being - at that stage, I don't think  
45 we had enough background to be able to work out where you might go with  
50 this, but identifying the sets of employers, I think you used the example  
55 yourself of someone who - maybe there's only one person on a visa, it's  
60 probably not set of employers that you're bothered about, it's someone who  
65 has 99 per cent of their employees who are on a visa of different kinds.

25 Would you see any value in some mechanism, if we could put our  
30 minds to that, to doing identification of employers?

30 **MS HEMINGWAY:** Yes. Look, I think there's a number of ways to  
35 approach it, and coming at it from an employer perspective is certainly one  
40 way of targeting - I guess targeting the education push to the right  
45 communities. The way that we've gone about has been going directly through  
50 the communities, so we've talked at English as additional language classes  
55 and a possibility could be to introduce part of the curriculum focusing on  
60 workplace rights and making that a compulsory component of those  
65 certificates.

**MR HARRIS:** Yes.

40 **MS HEMINGWAY:** We've also gone to community meetings where - I  
45 mean, there you're going to hit 100 per cent of people who are going to be at  
50 the information sessions will be members of newly-arrived and refugee  
55 communities, and also by upskilling community leaders, which is often their  
60 first port of call for community members, so that they're aware of what their  
65 legal rights are and also aware of the services. Not to give advice themselves,  
70 but to act as a really important bridge between vulnerable workers and the  
75 services that exist to assist them.

**MR HARRIS:** Okay. I think I'll leave that there because we're just at the

end of time, you see, so - - -

**MR NALTHORPE:** Can I just also add - - -

5 **MR HARRIS:** Yes, keep going.

10 **MR NALTHORPE:** - - - very simply, I think there is now an accepted best practice in producing materials for newly-arrived communities, and so long as there's a reference to making sure that they're not simply interpreted documents, but they're actually best practice there. You know, there's a wide use by ASIC, ACCC and others of pictorial stories, so it is simply a matter of producing materials in a way that has been tried and tested, and so simply a reference to best practice is probably all that's needed.

15 **MR HARRIS:** Well, here's a thought. Even if we can't put it in as a recommendation in this report, again, a picture tells a thousand words. If you could maybe give us a copy of something that you think is relevant in a picture, we can quote you, so your endorsement of the same, this is a good way of communication, so since you mentioned that, and we could probably  
20 try and put this into the report itself. It's always an interesting device for us to do that. We could actually stick it in a chapter and say here's a better way of communicating. So if you've got a good example that you're prepared to put your organisation's recommendation and name to, we could quote you and say, "Here's an example."

25  
30 My final question to you is about our actual recommendation in the draft, and as you know, this issue has become far more up in lights in the public, but we were investigating it before that happened and we were trying to obviously frame a recommendation with what I might call limited public attention to the issue. We put a proposition that the Migration Act - and I emphasise this - should be amended so that employers can be fined at least the value of any unpaid wages and conditions for migrants working in breach of the Migration Act. Now, we put that forward because that's a disincentive to profit for an employer. I'd note it might actually be helped by identifying in  
35 advance the sorts of employers you're looking at, but nevertheless, we might actually find the circumstances come forward in a way that Four Corners has brought things forward and that sort of thing, but I don't think that will be sufficient on its own.

40 Now, we got some adverse comments about that, I think from people who either misunderstood it or can't quite conceive of the benefit in it. The idea was it was incentive to an employer not to exploit because you won't profit because if you are found to have done so, even if the employees have had their visas cancelled and left the country and that kind of thing, you will  
45 not profit because a fine will be levied equivalent to the profits that you earned, and you could go further with such a device. But the negative comments seemed to be, "I don't want the government to get the money", which seemed quite a peculiar arrangement because our difficulty here is, where visas are cancelled and people have left, the employer is left with the

benefit and you did see in the Four Corners' examples at least one firm that seemed to be going down that path by phoenix-ing and similar exploitative actions.

5           So can I get your reaction to the concept of having a fine? It need not exclude the idea that unpaid wages would be restored to someone if they could be found and paid, but if they can't be found and paid, surely the concept of having a fine would still be of value in terms of a disincentive effect to undertake the behaviour in the first place?

10           **MS HEMINGWAY:** Yes, it would be, but I guess we would say that a central part of that would be that whenever possible, the worker would receive the wages that were entitled to them, they're entitled - - -

15           **MR HARRIS:** So the one would never substitute for the other, but the one would be a fall-back for the other.

**MS HEMINGWAY:** Yes.

20           **MR NALTHORPE:** Can I make a couple of comments on that?

**MR HARRIS:** Yes.

25           **MR NALTHORPE:** I'm not an employment lawyer. I first support the recommendation because of the sort of case that Catherine mentioned. I must say, just generally, it just struck me as horrific, which is an employer clearly abuses or exploits a worker, the worker leaves and the first thing the employer does is say, "I'm going to report you to Immigration and have you deported." Frankly, that is one of the most extraordinary things I've ever heard. The answer to the criticism is something that is a well-known legal principle, it's 30 one of the few French phrases in the English language, it's called cypres, c-y-p-r-e-s, which is the nearest best thing, and there are lots of examples in Australia where when penalties can't be returned to the individuals, they are in fact directed - it doesn't need to be government - ASIC, ACCC.

35           In the last 12 months in Victoria, the Fire Services Levy monitor directed that if the moneys that were unlawfully charged to consumers could not be returned to consumers, then they should be directed to community organisations for use in that sort of area. So there are clear alternatives - - -

40           **MR HARRIS:** Yes.

**MR NALTHORPE:** - - - but I suppose the fundamental proposition I'd make is, absolutely it should not be possible to profit by exploitation.

45           **MR HARRIS:** So, thank you for that, and we will look further into those examples you've given - - -

**MS HEMINGWAY:** I just say one further thing on that, that a key part of

being able to run those cases, and we've faced real challenges with this, is that if people are deported prior to their cases being heard or being able to bring a case, it obviously creates real problems of evidence and for a very small community organisation to be able to communicate with clients, so I guess  
5 linked to that would be our suggestion that these clients be able to stay in Australia for at least as long as their case is being heard so that they are able to give that evidence.

**MR HARRIS:** Okay. Thank you very much for your time and testimony and effort today and for any further examples which I hope you might be able to  
10 put forward to us.

**MS HEMINGWAY:** It would be our pleasure. Thank you very much.

**MR HARRIS:** Okay. So now we need to swap over and bring Australian Mines and Metals Association in. I'm running a little late, but we'll try and catch up or we'll have no morning tea. Once you settle, if you guys could identify yourselves for the record, that would be great.  
15

**MR BARKLAMB:** We might make a rapid start, Chairman, thank you. My name is Scott Barklamb, I'm Executive Director - Policy and Public Affairs with AMMA.  
20

**MR MENALDA:** Tristan Menalda, Senior District Policy Advisor at AMMA.  
25

**MR MAMMONE:** Daniel Mammone, Director of Government Relations.

**MR BRADFORD:** Tony Bradford, Principal Consultant, Victoria.  
30

**MR HARRIS:** Okay. Please proceed.

**MR BARKLAMB:** We thank the Commission for the opportunity to appear today and wish to pass on our appreciation, both to you and to the Secretariat for the support and information we've received throughout this review process. I want to focus today firmly on outcomes. AMMA wants to help ensure the government receives a final report in November that delivers on the terms of reference, contains recommendations that will improve the capacity of our economy and labour markets to navigate current and future challenges, and that charts a course to assist and that will do better for employers, employees and the wider community and our economy. On this basis, we wish to make a few introductory points.  
35  
40

First up, I should make the point, AMMA supports the majority of the recommendations in the draft report. I want to say upfront there's much the PC gets right and many recommendations we strongly support. However, there are also fundamental inadequacies in what has and has not been addressed and the approach taken in the draft report on particular issues. It doesn't go far enough. In many key areas, the draft recommendations don't  
45

5 go far enough and don't tackle what's been identified as core problems by those using the system. There is also often no solution or way forward on issues the PC acknowledges in the text. Much of the introduction to the draft report, and indeed, to particular issues, we would agree with but it doesn't seem to follow through into sufficient remedial recommendations in a number of areas. It also fails to tackle the range of issues AMMA and others raised in their submissions.

10 The biggest risk or danger in this is of missed opportunity and not doing all we can by employees, job-seekers and employers and the community because this review really matters. The Australian economy and labour market are under real challenge and pressure and have weaknesses. There's a genuine danger that we'll see further job losses and widespread impacts on living standards for individuals, families and the community. Of course, workplace relations alone is not going to fix any economy, investment of confidence and no one is telling you it is, but it has a role to play in equipping Australia to ride out trouble and be more competitive and continue to grow in a globalised world.

20 This review is ultimately too important and too timely an opportunity for genuine reform to allow it to be missed or under-done in any way. That's why my organisation, AMMA, has gone to so much effort to put submissions before you; a 481-page initial submission, backed by 133 pages of economic evidence and most recently 249 pages responding to the draft report. Now, the quality of what anyone puts to you is not judged by its weight or number of pages. I want to make the point we've substantially and comprehensively engaged with what we think the Commission was asked to grapple with. This review must grapple with our future challenges. The PC observes in its report, and I quote, "The past is assumed innocent unless found guilty in many old but outdated features of the workplace relations system."

35 This criticism from the PC could be a criticism of the PC and the approach in the draft report, except it's the status quo which has been presumed innocent in too many places leading to a failure to fully and critically evaluate the existing workplace relations system at key points and engage with options for genuine change. The focus shouldn't be on how far we've come or how much our system has changed. It shouldn't be that we've gone from 4,000 awards to 122, it should be on whether we have the system we need for the future, whether it's competitive and doing the best by the community, employers and employees.

45 We'd make the observation the report perhaps doesn't seem to have linked future trends as we expected to how our workplace relations system needs to change. An analysis needs to be critical, not descriptive. The PC draft on occasion merely recites the status quo or its evolution, but fails to then go the next step to critically evaluate the performance of the current system and how it could be improved in the future. And our system needs to be critiqued at the fundamental level to ensure it can be as effective as possible in supporting employment growth and opportunities and it's fit for

purpose in the globally competitive and changing environment we face.

5 The recommendations need to do more than make minor changes to the existing Fair Work system and they need to do more than - and I don't use this word at all pejoratively, I'm using it because I'm moving quickly - tinker. We need smarter, more effective and targeted regulation and this isn't necessarily deregulation, it's about the right regulation, about smart regulation that's intelligent and effective.

10 We say the PC's terms of reference demand that it go further than we've seen in the draft report. As acknowledged at page 9, and I quote again, "The terms of reference require the PC to cover all these aspects of workplace relations, all those aspects of workplace relations that impinge upon the ability of the system as a whole to adapt to longer-term structural shifts and changes in the global economy." We could not have put it better, but we question on occasion whether the draft report actually delivers on this and engages fundamentally enough with the system.

20 The repair or replace dichotomy and the dichotomy - sorry, the repair and replace approach, the observations on that, we say are a little bit of a straw man and the dysfunction characterisation is an artificially high bar. We concede that's not actually particularly useful to you in realising your final report. Very few parties put to you that whole swathes of the system should be abolished. We, for example, engage with how the system can be improved, 25 so the repair or replace doesn't take us perhaps far enough. The question is whether the PC has recommended a sufficient level of repair and the right repairs for the future.

30 Institutions are means not ends. They're very important and my organisation says a great deal about them, but even more important is getting their powers and responsibilities right and this means changing the legislation in many areas for the better. A couple of final points. We expected from the terms of reference to see substantial international comparisons to our fellow OECD economies, understanding how they regulate work differently from 35 Australia and critically evaluating what we might take from this international experience to improve our system for the future. We don't see that in the draft report, that sort of critical evaluation.

40 New Zealand made substantial changes, the UK made substantial changes, Canada, the US do labour relations very differently from us. What is good or real in those systems? What might we learn, particularly in the industry we represent. We're competing with those developed nations and the structure of work is part of that competitive equation. We also ask the Commission, we request you look again at the economic evidence. We 45 commissioned first rate economic evidence or modelling to assist the PC from KPMG, and it's the KPMG report that was appended to our initial submission. We did this because we knew you would confront a deficiency of economic evidence for workplace reform. We've heard it before. The terms of reference predicted gaps in the evidence and we sought to plug a critical gap

for you in advance.

5 We were disappointed to see that our KPMG research was not even  
acknowledged as a source, on page 83 of the draft report, nor does it appear in  
the bibliography, and we took the initiative to try and provide properly  
modelled CGE-style modelling evidence to you to test propositions. So we do  
no more than ask that that be looked at again afresh, the KPMG research that  
we've given you, because it estimates substantial economic benefits from  
workplace reform, collectively supporting resource-sector productivity growth  
10 of up to 5 per cent, an investment growth of up to 8 per cent, and this could  
grow our national GDP by 2 per cent and employment by 0.3 per cent, adding  
30.9 billion to our GDP, up to 30.9 billion, and creating up to 36,000  
additional jobs.

15 Above all, chair, resource employers urge the PC not to allow this  
review to be writ small and not to miss the opportunities and obligations to  
better support jobs, growth and fairness for all users of the system, existing  
and future. I want to complete our opening by reiterating the reform priorities  
we say should be prioritised in what you recommend to government. Firstly,  
20 improving the capacity to access reliable, timely, Greenfields agreements, and  
we do note very positive recommendations we strongly support in that regard  
and have a couple of points where we suggest you go further.

25 Ensuring allowable matters, the content of enterprise agreements, and  
incidentally, what you can take a protected strike on, pertain to the  
relationship between employers and employees and not to extraneous issues,  
and again, there's one very positive recommendation in that regard that we  
say could go further. Ensuring employers and employees can rapidly and  
efficiently enter into agreements, ensuring agreement-making options are  
30 broadened and encompass individual and collective union and non-union  
options, and ensuring any additional mechanisms, such as IFAs, are as  
effective and accessible as possible. Ensuring protected industrial action  
during bargaining can only be taken as a last resort, and greater access to  
cooling off.

35 Ensuring the location and frequency of union right of entry visits is  
reasonable and takes due account of operational needs, and indeed,  
experiences with the right of entry system, which my colleague Mr Bradford  
might assist us on later. Finally, ensure greater rigor is introduced into any  
40 adverse action general protections jurisdictions. As you observed earlier, to  
the earlier party that was sitting in the seats we're sitting in now, it's in  
ill-defined clarity, and that has a real impact on employers and employees,  
and these are important protections, they need to be right, they're not in any  
way things employers dispute, but the system needs to work differently.

45 There's a great deal more detail in our original and reply submissions,  
but we want to provide the ideas and recommendations to make properly  
comprehensive changes for the future, and we think that's what the terms of  
reference asked for. I'll conclude my introduction there, but there is one thing

5 I wanted to say as we went along, just at this point. As an inquisitorial process, we'd be very willing and interested after today to assist your consideration of both our key priorities in part A of our reply submission, but also the other matters in parts B and C, such as transmission of business, dismissal, institutions and the safety net. We don't say they're front of mind for our members, but they're important considerations, we've bothered to address them and provide a proper response to what's been included in the draft report, and we thank you for that basis for doing so.

10 So with that, chair, that concludes our introduction.

**MR HARRIS:** Thanks for that. Do your colleagues want to speak, or shall we go to questions?

15 **MR BARKLAMB:** I think we'll go to questions.

20 **MR HARRIS:** I just make a couple of comments. You mentioned KPMG's modelling. So you'll see in fact we didn't do any CGE modelling for the purpose of this, so that is the explanation for why we're not taking this option up until we're convinced that we've got a sufficiency of recommendations, that if we do do modelling, we can model-value ourselves. So at that point, KMPG's may become quite relevant, if we choose to do it. But as you'll know, there has been a history of CGE modelling being exploited, shall I say, for particular purposes based around assumptions. If we do go down that modelling path, we'll go down it where we have recommendations that we think we can confidently say this is a rational assumption based around these recommendations, and as a consequence, we have decent inputs into the modelling, otherwise, you know, standard modelling problem; garbage in, garbage out.

30 So I think people did go through KPMG's, but we weren't using it for the draft report, we're deliberately not coming up with the big number because we wanted to focus on the specific recommendations. That's not to dismiss the value in the big number, you've just got to be pretty confident you can do it, and as you can see, some people have failed to observe this, but I don't think AMMA has. The way we've structured this report is deliberately designed to in fact, if you like, lead evidence, and in some cases, not come to conclusions or recommendations. So there are, as you have observed yourself, some areas where you could pretty clear see maybe there's a scope for a recommendation here.

40 We are looking for better evidence in those cases to only put forward so far the things on which we think we can confidently make a case, and I think you understand the context in which we're working deserves that kind of behaviour. To go the alternative path, and speculate on large shifts in change and put that into a CGE model would be - well, it's really easy for someone to come up with their own competitive CGE model in reverse and then we've just got an argument between two numbers. We don't want an argument between two numbers, we want an argument over the quality of the



recommendations. So that's the structure that we've deliberately chosen to take forward and I think we've had some interchange with your organisation, amongst others, on just this. So today's effort is to try and get some specificity for the confidence in those recommendations.

5

So let's go, specifically if I could, I think on Greenfields we're roughly in agreement but you want to go slightly further. Can you tell me slightly further, but this won't be our primary question, I'll just get Greenfields out of the way, I think, at that stage. While you're looking it up, we created what we call a competitive suite of options which actually incentivises, and we're very big on incentives in design here because we think it's the most important part of the solutions that we can offer. It tries to say to the parties, unless you stick with a big project, because in your case, big projects are probably most relevant but we know that Greenfields actually goes to small projects as well, tries to get the parties to, within a three-month period, decide that they can actually solve this, or then put in the hands of the project proponent a suite of options.

So there's an incentive to come to terms quite quickly, therefore not delay the process, and then you have a choice of where to go. So we thought that's probably getting the balance about right. Can you tell me where you want to go further?

**MR BARKLAMB:** Absolutely. We strongly support what you have recommended and that suite of options, the three options there. There's just a few areas where we had additional parts to a suite of Greenfields options. One is the option for a project proponent agreement which would allow essentially the principal or main operator on a site to spearhead the Greenfields effort, which may well be with a trade union, and it would provide a shorter, simpler process for Greenfields agreements in similar terms for subcontractors and later participants on the site, all of whom are able to use Greenfields agreements, to enter into those arrangements quickly and simply. I hesitate to use this term, but I will for simplicity; it's a flow-on effectively, in like terms on the one site. It's the process for that.

35

**MR HARRIS:** So it works on the basis that we can't at this point identify all the parties that would have to be bound to this, but we want to be able to say the agreement will operate and they will get the benefit of this head agreement, if you like?

40

**MR BARKLAMB:** Yes, and it's an intricate process and my colleague Mr Bradford, might be able to get this better than I do, but like any construction project, there's a formative stage, earthworks, et cetera, then there's a level of construction, then there's a level of fit-out, passing on and making the operation operational to extract resources. Each of those contracts enters subsequently and often with far fewer employees.

45

**MR HARRIS:** Yes. I'm an infrastructure guy, so I know this pretty clearly.

**MR BARKLAMB:** Yes. Also a form of continuity of supply or rollover agreement to allow, where the agreements are already in place and operating, to complete parts of the phases of the project, is another option. Also, there's a slight issue in the Greenfields for very big projects that take a long time, of delayed commencement. So you have, for example, a major effort to secure an agreement with a union, and let's just presume at the moment that we successfully do that, and one thing I should communicate to you is we're certainly very willing to attempt that path and that's why we like the three options you've got because they provide a choice where that is not working and, frankly, the incentive is there for the union to enter an agreement with the employer which we think is very positive.

We're calling these very high-paying agreements, we're not talking about the safety net-style employment here at all. Often after securing the Greenfields agreement, it's one part of a project, but until you turn the earth, for want of a better phrase, may take some months, and that can have difficulties at the back end. Now, part of your recommendations for a longer agreement will alleviate that, but also the delayed activation may also be of assistance until people actually come on site to start to be employed.

**MR HARRIS:** Correct, but if you negotiated effectively, I would have thought you'd have a provision, and I'm familiar with these, I've done at least one, pretty close to being directly involved, not quite a participant, but being close to it, you would have a provision which said if the contract doesn't actually turn its first sod until a particular date, we will take the benefit of the gap, if you like, and add that to the end of the project term. You normally have a provision in there to allow that to occur. In other words, you won't cite that the project must finish by date X, you'll effectively say if there's a delay in exercising the final contracts, we'll take that delay and we'll add it to the term of the Greenfields agreement.

**MR BARKLAMB:** I might pass onto my colleague, Mr Bradford. I'm not sure you can delay the commencement of an enterprise agreement - - -

**MR BRADFORD:** No, it operates seven days after it's approved by the Fair Work Commission, chairman, regardless of how the project status goes, and often clinching the deal is the critical part and the employer parties are usually keen to get the agreement in the Commission and approved as soon as possible. And then if you're an infrastructure person, Mr Chairman, you'd understand that there's often technical issues which make the best-laid scheduling plans not particularly workable. So extended periods for agreements are one way of dealing with it, but certainly the most difficult part is actually getting the agreement signed by the union parties and dealing with a lot of the extraneous claims, some of which relate to who will be employed, where the unions seek to actually give a list of names to the employer and say, "Well, we'll sign this agreement if you employ these people", some of whom are related to the union officials involved, of course. So, yes, timing is crucial.

**MR BARKLAMB:** I guess the other - - -

5 **MR HARRIS:** That's an interesting proposition, though, the seven-days rule because an example I'm thinking of, it can't have applied quite as explicitly as that, but I'm not going to go into the detail because it's still a controversial project, in my case, anyway. But we will look into that seven-day start-up arrangement because I understand why you want to lock it away, having got it. You don't want a delay of six months while the final tenders are completed and everything else.

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**MR BRADFORD:** People change their minds.

15 **MR HARRIS:** And that allows people to change their minds, or other circumstances suddenly intervene. So that's certainly an interesting aspect and worthy of consideration.

20 **MR BARKLAMB:** May I just add, there's also obviously an investor angle to this. You have investors, obviously to get to the start of the agreement, but also you want to maintain investor confidence, commodity prices can change, et cetera. We're talking about squaring away employment arrangements by agreement with a union through this process as just getting that little bit of flexibility when it can start, perhaps it needs to be explicit, as you say, but that might need to change, the seven-day rule, that - - -

25 **MR HARRIS:** I was thinking of this automaticity. "Today, we've agreed this, it's now got legal status, I can finalise my bid on the strength of these prices." Six months to get to a winning bid, in the one I'm familiar with, that period was taken and just said, "Whatever this period shall be between when we strike the agreement today and I actually start the project, I have my finance in place as well as my contract in place, then I'll add that period to the end." Because the downside is, I think - you are otherwise accommodated by an unlimited term, but we worked out there's not a lot of value in an unlimited term as well, I think, from everybody's perspective. These things are meant to generate confidence, so confidence in the sense that - - -

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**MR BARKLAMB:** We'll have a bit more of a look too, perhaps.

**MR HARRIS:** It's worth picking up. Okay. That's Greenfields.

40 **MR MENALDA:** Chairman, if I can just move on from that, there are in our reply submission, at page 25, some detailed feedback about the second dot point in draft recommendation 15.3, which is about the ability for an agreement to match the life of a Greenfield project, so long as one would be able to satisfy the Fair Work Commission that the longer period was justified.

45 So we've provided some details, and I won't go through that now in the benefit of the time that we've got, but those are to really deal with the test, if that remains as a final recommendation, and some improvements to that to ensure some certainty that we don't want to see this artificially set too high as a bar, that what's it intended to achieve can't actually be achieved with the

test.

**MR HARRIS:** Sure.

5 **MR MENALDA:** So that's what I just wanted to highlight, chairman.

**MR HARRIS:** Okay. So let's go to agreement content. So since you've been following this inquiry, you'll know that we have quite significant differences, I think, in submissions between employers as to the limitations that might be put in place here. Now, when I say differences, I don't mean outright disputes, I just mean differences that are very important to us in doing design work and in the first round of submissions that we've received here, we have a lot of what I might call general descriptiveness of greater flexibility and we have very little specificity. So I made the call very clearly for greater specificity in what variations to agreements people want.

In other words, the general slogan of, "I don't want things that interfere with management prerogative" is insufficient for us to do design work, and certainly insufficient for the government to legislate. It has to be turned into something that is specific, and needs some consideration as well from the point of view of if it's excluded from an agreement, where does it go? In other words, does it disappear entirely? It's left entirely to management's prerogative, and what does that mean for those employers in a position of limited market power? And you represent some employers who have certainly - I'll take them at the face value - said "We're in a position where we are takers." In these circumstances, I'm thinking of the West Australian coastline, all the developments that might actually apply in those circumstances, and we take that at face value and say, "Fine, if this can't be in an agreement, this management prerogative, where do you want to see it pursued?" Are you happy - and we need to get people on the record to say, "Happy to manage this on my own."

**MR BARKLAMB:** Okay. I thank you for the question and you are very much correct. Coming with a generality like "We want prerogative" doesn't assist you. On agreement content, we've had in the past a model that worked, so we all grew up in an era of arbitration and the constitutional definition of industrial dispute limited you to the employer and employee relationship in awards, and thereby the first generations of agreements. Things that were not pertaining to that relationship had to be dealt with elsewhere. Side letters, custom and practice, access to sites, all those sorts of things, we dealt with them.

**MR HARRIS:** And can I link to that, disputation associated with them was also, in that period, random and available. In other words, the agreement prevents disputes - - -

**MR BARKLAMB:** Yes.

**MR HARRIS:** - - - other than in protected action, so that's the nub of my

thinking. The consequence is you exclude from an agreement, you not only  
exclude it from having to be negotiated and providing some constraints on  
management, you also exclude the possibility that legal action - sorry, that  
strike action shouldn't be pursued on such matters because they're covered in  
5 the agreement and only protected action can take place in specific  
circumstances.

**MR BARKLAMB:** Well, okay. The first point I wanted to make is there are  
models that work. We had one prior to the 2009 changes, which is to have a  
10 general empowerment that concerns the relationship between the employer  
and the employee, and then specific possible inclusions and exclusions, and a  
regulation making power for exclusions. I might in a second ask my  
colleague Mr Bradford to reinforce something I want to say, which is that  
often the union claims which are about union business or about contractors  
15 and labour hire, and we very much welcome your recommendation, are what  
can trip over an agreement, where we can come to terms on wages and terms  
and conditions of employment. It's often the extraneous controls on  
contractors, casuals, labour hire, that can trip that up.

20 What we wanted in the Act is a clear direction to the employment  
relationship and detail of what's in and what's out, and a remedial capacity to  
correct claims that shouldn't be there and shouldn't be enforceable, using the  
mechanisms of the State, because it's important to recall that you breach the  
agreement, you commit an offence and it's an offence we would commit.  
25 Now, as to where those issues are dealt with, some need a home or a solution  
and some don't.

**MR HARRIS:** Yes, and I'm happy with that. I'm not disagreeing with it, I  
just want people to be sure what they're buying. When I hear the general  
30 proposition that, "I don't want any constraints on management's ability to  
manage", I mean, my request is that you think through clearly and say, "I'm  
happy" - as I said earlier - "to carry this on my own and the cards will fall  
where they may and market circumstances are not something that I'll be  
bothered by, because on balance I'm happier that it's not required content for  
35 an agreement", or not acceptable content for an agreement.

**MR BARKLAMB:** I'll pass to my colleague Mr Bradford imminently, but I  
can say that is the employers we represent and I'm sure pretty much the wider  
employers, we will very much be willing to accept that we confine agreement-  
40 making to the employment relationship. Now, it may have recitations at the  
front about how we want the relationship to go and result in this, that and the  
other, but in terms of concrete obligations, we don't want to see union right of  
entry in there, we don't want to see restrictors on contractors and labour hire.  
We say they are damaging, and damaging to the settlement of agreements and  
45 damaging in impact. But I'll ask Mr Bradford to just add briefly.

**MR HARRIS:** Sure.

**MR BRADFORD:** Certainly, it's very common to find logs of claims from

unions as opposed to a log of claims from employees, and - has the chairman seen this document?

**MR BARKLAMB:** We've emailed to you - - -

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**MR HARRIS:** I won't have read everything, because I've been in multiple locations around the country and yesterday you might have noticed I had to do another piece of work and - - -

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**MR BARKLAMB:** No, no, that's fine. I might just quickly, just while Mr Bradford finds his place, we have emailed some sample logs of claims in a redacted form that we don't want published on the website, for your information.

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**MR HARRIS:** Sure. Well, the teams will have that.

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**MR BARKLAMB:** Along with some other bargaining style information from unions that they've asserted privilege over that we don't think should go on the website, but I'll put back to Mr Bradford to read from something we have provided.

**MR HARRIS:** Sure. Read it into the record.

25

**MR BRADFORD:** So there's a union log of claims dated Tuesday, 17 February 2015. When I say it's a union log of claims, in the second-last paragraph, it says "The AWU will circulate this log to employees and expect that it will prompt some people to add additional items." So this is not from the employees, this goes out to the employees and it's predominantly - it's entirely the union's position, so they're acting as a party rather than just a representative, and included in that log of claims are restrictions on the use of casuals, like after a period of time, they must convert to permanent.

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Now, I suppose the Act and the modern awards already regulate those categories of employees quite adequately and there are statutory limitations and case law which governs how long casuals can remain in that status as a regular employee. The requirement to impose on the employer a period of time where a person must convert to a casual - and it can be as short as two weeks. In offshore construction, if you do one swing of two weeks and you are required to do a second one, you automatically become permanent under certain agreements which are pushed by the union, and therefore entitled to a redundancy package, which in that particular example was worth \$28,000 after four weeks' work.

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**MR HARRIS:** Now, but you will be conscious that we've already, as it were, dealt with that one, we think, in the recommendation anyway. We said no terms to restrict such behaviour in agreements. It doesn't stop them being obviously in black letter law, but we're not trying to change the black letter law. I'm not requiring you to give examples into the record of this point, but I guess my proposition here today is that we need to be clear, and it has to be

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5 some public clarity because numbers of employers have said to us they do or don't want different things in this agreement making. Now, we're conscious of course, it's going to be our job to sieve between them, we're never going to get comprehensive agreement between employers, but I'd like it to be in the public debate because if it isn't in the public debate, it's very difficult for us to say one set of employers told us this, another set of employers told us that in phone calls, because of course that's not a public discussion.

10 **MR MENALDA:** Chairman, we provided in our primary submission - and I appreciate that you've got so many submissions that you'll - - -

**MR HARRIS:** No, no, we've been through the primaries.

15 **MR MENALDA:** Yes. We actually listed in there what are the terms that we would like to see on the list of prohibited terms.

**MR HARRIS:** Correct.

20 **MR MENALDA:** In our reply submission, we amplified that by reference to your public infrastructure inquiry report of May 2014, and the recommendations there that in that case, in that instance, the inquiry that you were looking at, there was some practicality and benefit in looking at what was then the Victorian Code of Practice for the - - -

25 **MR HARRIS:** Yes.

30 **MR MENALDA:** So we have provided a bit of detail in terms of we just haven't said we don't want anything fettering the rights of management. So we've actually detailed in two submissions now. Also in our KPMG report, the staff KPMG and their case study work looked at some of those clauses that are inimical to productivity, to some of the clauses that are pushed in bargaining, and my colleague, Mr Bradford, was I think going to mention some of the other clauses apart from the casual rights that are pushed by unions, such as nominated labour and other things, that are part of the legitimate bargaining tactics of unions and how that can actually influence the dynamic.

**MR HARRIS:** Sure.

40 **MR MENALDA:** So when something is off the table and that all parties say, "Well, we can't bargain over this term", that actually clarifies, it focuses the minds of the bargaining parties to what actually is at the heart of the relationship, and that's why we say that a lot of these provisions that are in logs of claims - that's why we've provided you two redacted forms of log of claims - to give you an example of the breadth of and the depth and the type of issues that are there and with the threats of taking protected industrial action - - -

**MR HARRIS:** But you understand our position on redacted, don't you? You

do understand that? I earlier made the comment, we need a public exchange between employers on this general question of exclusions from agreements to see that there is some form of consensus or no consensus. That's what I'm actually suggesting needs to happen, and so perhaps I can invert it. We've  
5 asked the Business Council of Australia to do the same thing. I hope you will look at their submission, which I doubt will be redacted, and I wouldn't mind knowing, do you agree or disagree with their list of matters that should no longer be relevant in agreement-making.

10 **MR MENALDA:** I'm not sure we're clear on that, with respect. The log of claims that we've provided, the only thing that's redacted is the name of the employer.

15 **MR HARRIS:** No, no - - -

**MR MENALDA:** Not the content of the log of claims. So we will look at the BCA submission, but I just want to clarify that - - -

20 **MR HARRIS:** But I don't think, if I understand rightly, that's in your public submission. I haven't read your second public submission, so I don't know, but is that log in your second public submission?

**MR BARKLAMB:** No. It's subsequent, Commissioner.

25 **MR HARRIS:** I'm talking about public exchanges, awareness from you and them of what each of them are proposing and I'm not limiting this to the BCA, I might say, so AIG and ACCI and some individual large employers. Now, you're otherwise asking us to come up with a set of proposals for exclusions from agreement-making. Should we do that, we're already in a  
30 position of then having to explain to unions, and explain it in a publicly-displayed report with lots of analysis and all that kind of stuff, but we're also interested in knowing, have you guys got a consistency of judgment? And if you don't, that's fine, you don't have to have a monolithic view, but we equally want you to know that you don't, before we come out with our final  
35 report, if you see what I mean?

Because we could all do better if we actually did have some form of consensus here.

40 **MR BARKLAMB:** We clearly hear what you are saying, chairman, and we will take that away - - -

**MR HARRIS:** It's just worth thinking about.

45 **MR BARKLAMB:** - - - and give you that in due course.

**MR HARRIS:** And even if we had to reopen public submissions for a third very simple set of comments, that might be of great value to us in trying to frame a report. So my purpose in making these sets of exchanges with you is



so that you understand we're not limiting our exclusion kind of discussion to what was in the draft report. We are open to improving what we've got in there, but we have to improve it on the basis, re my earlier comments on CGE modelling, for example, where we can be confident that what we've got is something that is of clear value and that we can discern the value and that we can perhaps suggest even if perhaps not CGE on cost benefits basis, here's some numbers.

Look, we're just going to go over time, I don't know what your time constraint it, but I don't need 20 minutes for a cup of tea and there's no one else up here to worry about, so we're just going to keep going. We have our next caller coming in at 10.20, so we've got a call-in process, we'll probably have to take five minutes to make sure we get the phone right, but we'll go through until 10.15, if that's all right with you. So anyway, that's the kind of thing I'm hoping to try and get something on. Repair for the future. Okay. So this is an interesting, very interesting area, the future. It would be fair to say that our report is very conscious of the terms of reference and the requirement to address the future, but carries the constraint that, as I said, we like evidence and we want to have a firm foundation for assessing the future.

This has proven to be somewhat difficult because there are of course very diverse views on the future. I think we can all agree on that, it's a statement of common sense. So we're interested in propositions that can actually anticipate changes in the nature of workplace relations or workplace needs. So we'll narrow the future down to changes where we could be confident that these will be necessary to deal with future workplace needs. As I said, I haven't gone through your second submission, so I don't the degree to which you've gone to this, but propositions for the future, we will endeavour to make that linkage and we'll certainly do it in the final report.

We will be probably more adventurous about the future in our final report, but we'll only be adventurous where we've got, we think, a sufficient evidentiary basis to say this is a coming trend. And so you'll know, for example, people have said to us in public comment, you haven't looked at the gig-economy, the great digitisation. Not a matter for AMMA, I don't think, but it's been said.

**MR BARKLAMB:** We've got robotic mining and all sorts of things there.

**MR HARRIS:** Of course you have, but not quite the gig-economy, if you know what I mean. This is about people doing tasks rather than jobs, you know, Airtasker, Uber - we've said, well, tell us the public policy problem and that's the proposition where we're at. So, yes, we're interested in the future, we're interested in the future, though, about the public policy problem that might come from this growing trend in workplace relations, and so you'll see, for example, we've had a go at things like internships and things like that. Not a go in terms of saying we want to make changes, but tell us, we hear that it is a big trend, we hear that it's in need of a shift. We can guess at a potential public interest issue there, but we need better evidence.

So we're definitely going with the future in your case as well, it's just that that linkage to you can discern this trend now, and so I'm inviting you to put on record trends that you can concern.

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**MR BARKLAMB:** Absolutely, and I welcome your indication of your approach because a lot of the future is this - I say this as a resentful member of Generation X, this fetishism for Generation Y and everything's changing, all these trendy articles, that's not that useful to you.

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**MR HARRIS:** No.

**MR BARKLAMB:** I don't think, despite the taxi drivers going on strike, Uber is actually that useful to you at all either, but what can you confidently predict.

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**MR HARRIS:** That's right.

**MR BARKLAMB:** Our industry is at the forefront of globalisation and its impact on our continent, fairly removed from the rest of the world. We're right at the sharp end of commodity prices, market changes, changes of demand in China, new competitors in the BRIC countries and other parts of the developing world, so you can predict greater competitive pressures on Australia. We can easily predict from recent developments freer trade and greater global competition. I'm sorry to say for my union colleagues, their union membership isn't going to tick upwards. They've lost the hearts and minds of emerging generations and I think somewhere in the report you put the age profile of unionisation - - -

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**MR HARRIS:** And we think that's quite important because the system in part still says it's going to depend on unions investigating workplace safety, for example, and thinking, with limited coverage, you know, how can you rely just on that? That's not to exclude unions from such a thing, it's just saying the systems going to be - need to change.

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**MR BARKLAMB:** Can you put so much of the system on their shoulders and assume a central position for them, when you have whole generations of people, particularly in the private sector where the numbers are much worse than the aggregates, doing different things? So that's a trend you can reliably predict. Needs are more diverse. Now, the greatest change in our labour market is female employment and parental employment, or maternal employment and the parenting obligation on fathers, the change in society, the change in families. Needs are going to become more diverse, employers are going to be asked to accommodate more diverse needs and accommodations. In turn, we face far different and less-predictable demand pressures. We have flexibilities that we require in work, so flexibility from both sides, those demands can only intensify, they're not going to go down.

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A greater individualisation, the collective of we are all a profile of

people. We're all fitters, all fitters should get the same. Well, that kind of thinking has really changed. It's about me, and what I need and the employer is not going to say, I'm in the hard rock mining industry, we all do the same. They're looking for competitive pressures, they're looking for rosters that suit them, things that are appropriate to their logistical demands, supply chains, logistical chains to get products to market, rosters, et cetera. So I think you've got observable trends and competitive trends in particular which you can pay considerable regard to, and there are some other - there are economic and distributional trends which are interesting, but not all of those sit - and I don't want to get too far into the low-paid, that was a previous stage in my career and Mr Menalda's career, we spent a lot of time with that, but you have some income and distributional trends and the critique there is how much of that is amenable to the workplace relations system, how much with the tax system and the transfer system, et cetera.

So we think the way you articulated it before is entirely right. You've got to sort the wheat from the chaff a bit, you're not going to change every futurist, trendy thing, but there are some very observable concrete trends you can extrapolate for.

**MR HARRIS:** Okay. Let's stick with individual, because I think in your - and no one's binding you here, sorry, so I hope that's clear. I'm not trying to bind you and say we're going to quote AMMA saying you have seen the future, but you did mention individual arrangements are increasingly important and you have mentioned it also in your presentation. I think you will again note from our report that we'd been quite careful in relation to IFAs. Employers seem not to have taken a lot of advantage of them and there is a belief, I think, with different foundations, but from both, if you like, representatives of parties that are relevant to this, from the union side and from the employers' side which says, look, IFAs aren't a tremendously useful tool. For different reasons they say that, but there might be some common ground.

We note that they are quite small, relatively speaking. Are IFAs really a foundationally useful tool for you at all in the sector that you represent? It appears that you are much more experienced in using common law agreements to pursue individual arrangements, to us, and if you are, I know you've got comments because you foreshadowed that you do have comments on IFAs, is it first order or second order? And if you say that's unfair, fine. Just tell me, "That's an unfair characterisation and I can't tell you whether they're first order or second order", but I'm interested in this because we're going to put greatest emphasis on things where participants can tell us, "This is crucial. This is nice to improve, this is crucial."

**MR BARKLAMB:** A scope for a form of individual agreement making is one of our six priorities. And we've structured our second submission into part A, priorities; part B, other key issues, and then part C is they're important issues, but they're not important issues massively for us, but we've gone through institutions, minimum wage, penalty rates, et cetera, to some extent.

We had experience, our primary experience, yes, is with what you might call a common law arrangement, but equally, it was with the options for individual bargaining which were provided under the WA system through the 1990s and through the Federal system very, very successfully from 1996 to prior to the Work Choices changes.

**MR HARRIS:** Yes.

**MR BARKLAMB:** I haven't got these figures to hand, but I remember calculating them at one stage, over a million of - and I stress this - first generation AWAs were entered into quite successfully. I'm not saying a million people that worked under at any one time, but they were entered into and left and recast. We need a form of statutory individual agreement making which is that person's employment agreement and that worked successfully and wrought a cultural and competitive and attitudinal and workplace relations change in our industry which was of remarkable value and lasting value, even though the options have been removed, of lasting value culturally into how well workplaces operate, the cultures and satisfaction of employers and employees. I'm not saying it obviously caused the mining boom, but it equipped us to be flexible, competitive, positive workplaces when that demand came principally from China during that period.

So I'll get to IFAs in a second, but our principal submission is you need options for collective and individual union and non-union bargaining. Again, that's not - a bit like we had that conversation on content - that's not conjecture. We had a system that worked. Forget the Fair Work, forget the Work Choices, prior to that we had a system that worked and we say you can look to experience between 1996 and 2004/5 to what worked quite well. Now, as to the IFAs, a little bit like the cardboard Spitfires in WWII. They were there to appear to be something, but really they weren't. Now, I'll be very frank. They are to give the appearance of individual bargaining. They were the answer to AWAs in the policies in the 2007 election. They've proved an illusion in reality because they're too easy to leave, too unreliable and they don't really provide certainty for either party and the transaction costs are high.

One thing I do want to stress to you, and my colleagues can kick me under the table and I'll retract it if I get this wrong, we have no problem with registering an individual agreement, actually having it registered and approved, and we had that. That's how an AWA worked. It was registered and approved. The IFA - this idea, and I think your enterprise contracts, with respect, perhaps suffer from this as well, but you can just do it and then later bear the consequences of enforcement. We're willing to go through another hoop, which is to actually register it and have it approved by whoever.

**MR HARRIS:** Yes. Our enterprise contracts are designed like that because they're really designed for the small/medium enterprises that have had no experience and are afraid of delving into it. So we always thought in the design, if it's going to be appealing, it's going to be appealing to that kind of

group rather than to your kind of group.

5 **MR BARKLAMB:** Well, in that case, we'd go back to our principal submission, is that should be one amongst the suite of options with the other ones we recommend.

10 **MR HARRIS:** Because as we've been at pains to say, we don't think an enterprise contract is an individual agreement. Now, some people want to characterise it as a backdoor version of an individual agreement, but on its face, and as you've just suggested, it actually isn't the same as an individual agreement ever was. It's actually designed quite differently, but I understand your proposition is you need - as far as AMMA is concerned, you need a mechanism that gives you a reliable, statutory form of individual agreement.

15 **MR BARKLAMB:** Yes.

20 **MR BRADFORD:** Chairman, just a comment about unions, actually, as employers support individual employment contracts. All of the officials from the unions that would appear before you here would be employed on individual employment contracts. I was formerly an official of the Australian Workers Union and I was employed under an individual contract of employment. There's a number of unions who have collective agreements for their administrative employees, but other unions simply employ all of their people on common law contracts.

25 **MR HARRIS:** Yes. All right. That's been very useful, because it does go to future trends which is what we're trying to get. We're trying to get future trends out in clarity, in terms of linkage to change. I might say, since we've only got a couple of minutes left - - -

30 **MR BARKLAMB:** Could we take you to one more briefly?

35 **MR HARRIS:** I was going to say, take me to something that I'm not going to be asked a question on and I really want to talk about.

**MR BARKLAMB:** Union entry to workplaces - - -

40 **MR HARRIS:** Union entry to workplaces, that was the one I had next anyway, so - - -

45 **MR BARKLAMB:** Yes. That's a very significant issue for us. Look, essentially our message is the status quo isn't working. It is generating disputes, vexatious and repeated entries. It's being gamed, to cut to the chase, at this stage. We do make remedial recommendations in here. Again, they're not in thin air. We had a system that worked and we indeed had a commitment from a former Prime Minister, she wasn't going to touch it, which was reneged upon in practice in the 2009 amendments. So what we want to see in right of entry is a reversal of the most recent changes to allow union officials to choose to come to lunch rooms and an obligation for our

members to fly them and accommodate them remotely. That was extraneous and hasn't proved necessary.

5 My colleague Mr Bradford actually has some photographs to show you of the impracticalities of the lunch room scenario, which is very real. I mean, what we will show you there is that - - -

**MR HARRIS:** Thanks. I've been out here.

10 **MR BARKLAMB:** These sites, and if you have been out, that's great, because that's half the explanatory task for us, is that these are big, varied sites with serious dangers of massive machinery and scattered lunch rooms where people work, and it's impractical to be asked to accommodate a union official's choices or whims as to where they want to meet with employees.  
15 We have no difficulty with unions meeting with employees for discussion purposes on a pretty reasonable give and take basis, and we think that existed in the past.

20 The other thing is combating repeated or strategic entries, and the important thing is, if I have a relationship with you, as union X, it's you that should be entering my worksite. If I have an agreement with you, it's you that should be entering my worksite, not competing union Y. You guys run your competition for the hearts and minds where you need to run it. The worksite, if I have a standing relationship and an agreement with a union, it's  
25 particularly important that that's the union that enters the worksite and not others competing. And incidentally, you've got a massive problem in bargaining, with bargaining representatives as well, where formerly we dealt with and we in fact paid for, 20, 25 years ago, for a single bargaining unit. We paid money to get to a proper negotiating unit; now we find we've got  
30 50 representatives around the table occasionally.

Now, have I missed a point because I know we're obviously moving very quickly, Mr Chairman now, but if I missed a crucial point we want to make about the right of entry from our recommendations - - -

35 **MR HARRIS:** We'll look further. We will, I think, look further at this issue. I think there are number of issues you might have seen, again, in the chapter that we discussed, and then we just stopped at that point, which meant we're looking for further evidence, and give us evidence.

40 **MR BARKLAMB:** Well, this is an odd form of evidence, but these pictorial photos - - -

45 **MR BRADFORD:** It was a dispute, chairman, that was taken to the Fair Work Commission because the union disputed the meeting room, so hence they defaulted to the lunch room which is the second picture, but there are nine crib rooms throughout the site that's four kilometres wide. One of those crib rooms is actually the compound - in the compound where the explosives magazine is kept. There's no photograph of that because when I was there

with a senior manager, I was told not to take a photograph of it because it's a restricted area. The unions were seeking entry to all nine crib rooms across those sites where they're heavily trafficked by large vehicles, some two kilometres away from the administration centre, and they particularly wanted to go to the crib room in the explosives magazine compound, which is completely inappropriate.

That was on the record from the union that was running that dispute.

**MR HARRIS:** Okay. Look, I should stop there, if I can, because I think we're going to get this phone call from Western Australia at 10.20, so need to make sure we go to them. Can I thank you for efforts in making submissions to date and attending today and can I also just ask that general question on management prerogatives, it is worth looking at, I think, others' submissions and if you want to put something else on the public record, as I said, we might actually reopen submissions just for - it would be, I'm talking short, I'm not talking big formal kinds of things. It's just as a commentary, it could be very useful to us to understand better something that comes between the sets of employer organisations.

**MR BARKLAMB:** I think I particularly clearly heard what you wanted there and I think we've got some options. I won't put them here on the microphone, but we'll go away and have a good think about how we can best assist. Can I just thank you for hearing today and engaging with the propositions. It's been exceptionally useful, and like I said, with your staff, et cetera, we're very happy to explore other propositions from our reply submission.

**MR HARRIS:** Right. Thanks very much.

**ADJOURNED**

**[10.19 am]**

**RESUMED**

**[10.33 am]**

**MR HARRIS:** Kerry, it's Peter Harris here. I'm Chairman of the Productivity Commission.

**MS DETURT:** Yes.

**MR HARRIS:** So I've read your presentation and your position that you've been put in, in relation to unfair dismissal. Rather than have you go into all the depth of detail that's in behind that, we'll put the submission up on the website, I think that's what we're normally doing, and it's not a confidential submission, is it?

**MS DETURT:** No.

**MR HARRIS:** No, okay.

5 **MS DETURT:** I don't have a problem with other people reading it. I'm sure that there's plenty of other people in the same situation.

**MR HARRIS:** Okay, so - - -

10 **MS DETURT:** I've lost - - -

**MR HARRIS:** Sorry, go on?

**MS DETURT:** It's all right. I just thought that I lost you, it just dropped out. Yes.

15 **MR HARRIS:** Yes. Well, we're in a room here and I'm talking to the ceiling, so this will be tremendously interesting. There's lucky there's no videoing going on of this. So what you've written that I think is pertinent to improvements to workplace relations law is, I'll read this following from your  
20 submission: "I believe that every subcontract joint venture, labour hire agency or any other class of worker working for a third party should have the same legal workplace protection available to direct employees and the third party companies who constantly bully, harass or unfairly dismiss workers who are not their direct employees should be held accountable for their actions, not  
25 the innocent employer of this class of workers."

**MS DETURT:** Yes. I think in my short submission I wrote about the grader operator, because I could get straight to the point. What actually happened back in April was I was employed by NYFL, which is an aboriginal  
30 corporation which was in joint venture with Brierty. We had quite a few safety issues as far as the machines not getting serviced properly, you know, not getting greased, people getting injured onsite through lack of maintenance on the machines and that. The vans that we were driving home with, you know, the doors not opening. We're travelling through flooded creeks on  
35 gravel roads, there was an accident, you know, it might not be a very pretty picture. So, and these issues had been brought up quite often.

Over a three-day period, I had been asking for my truck to be greased and that. For whatever reason, whether it's a boy/girl issue or just a lazy  
40 nightshift serviceman, I'd been to the supervisor, the superintendent, I'd already had dealings with the workshop previous, so I knew that nothing was going to get done. Somebody gave me a contact phone number for a man in head office of Brierty. I didn't know his position and I didn't know him. When I rang him, he was not very happy that he got a call from an ordinary,  
45 everyday operator and that I should have been able to get it sorted on site. When I told him some of the issues, he was not a happy man, and that "I will have somebody there tomorrow to see you and get it sorted. It's not on, these issues shouldn't be happening."



He then said that he was going to be calling my client project manager. There was actually two parts to that Brierty contract; one was mining and one was construction. When he made that phone call, at the end of that day, I got - after I got my book signed, I was walking back to the van to go home and my superintendent called me back and said, “Look, I’m really sorry to do this. You know I like you, you’ve been a good worker, you’ve done a great job, but they said you have to go. You shouldn’t have made that phone call, you should have let it go.” And I said, “Do I come to work tomorrow?” He said, “No, you’re on the morning plane.” That’s it. It is very, very frustrating that when you get home, there is not a thing that you can do. The union, I went to the CFMEU, I did actually lodge a complaint with the Fair Work Commission, but as the commissioner said, there is nothing that I can do to hold Brierty responsible.

The CFMEU, when I said, you know, can we take it further, they said, no. It’ll cost a lot of money to take it to a higher court and we don’t think that it’s in the interests of enough people. Fair Work Commission couldn’t do anything. The Fair Work Ombudsman couldn’t do anything. The lawyer that I spoke with told me Brierty’s can’t do that, my contract is with NYFL, and if NYFL - you know, and I feel that it’s unfair that I have to take NYFL to court. You know, I don’t understand how a court can legally make NYFL, who had no idea what was going on - Evan, who is the CEO, he did not - I was flown out Wednesday morning. I called him on, I think, the Wednesday afternoon to tell him what went on and to see if I would have received a bad ERNS report from Brierty which meant that I’d probably never get work again, and it was only then that he knew what was going on.

How do I, or how does the court, hold NYFL responsible for unfair dismissal? You know, and if there was compensation to be paid, how did NYFL then become accountable for the actions of a third party? It is just so wrong.

**MR HARRIS:** Yes. I completely understand the circumstance, and it’s quite unusual, but that sentence I read out earlier, I’m just trying to summarise your position in a way that would enable our inquiry to do something about it. We’ve had propositions put to us which effectively says where there’s a labour hire company that’s putting employees onto a site, there should be some joint employment responsibility between the labour hire company and the actual party, if you like, the head contractor on the site for the position of the employees. That seems to be consistent with what you’ve got here, your proposition here, which says every subcontract, joint venture, labour hire agency or any other class of worker working for a third party should have the same legal workplace protection available to direct employees.

Well, that’s a sort of summary sentence. So we’re going to look at this question of joint employment responsibility. It will be quite complicated. I’m not sure, from the advice given to me, whether section 550 is the right place to deliver this, which is the proposition that you put forward. So can you tell me, was that legal advice to you which said section 550 might, if it was

edited, give you some kind of - some right, or is that - how did you come by section 550, I guess is my question?

5 **MS DETURT:** When I was actually at the Fair Work Commission, the commissioner actually said to me, because I'd said, look, I don't want you - I didn't even want to take that to the Fair Work Commission because I think it's unfair to NYFL. I phoned Evan and told him that this is what I'm going to do. I said I just want it recorded and my concerns recorded at the Fair Work Commission, but I won't take it any further. The commissioner actually said  
10 to me, look, I will give you five extra working days to seek further legal advice and she had said to me about section 550. After that, that was when I rang the ombudsman again, Fair Work again, you know, rang around to ask about - or got an employment lawyer, and every one of them told me that, no, I had to take action against my employer.

15  
You just said it just a moment ago that it is unusual circumstances. It's not unusual circumstances. This sort of stuff goes on constantly in the industry. The reason that it appears to be unusual is because nothing ever gets lodged in court because there is nothing that you can do. Most of us - I've  
20 been a FIFO worker for about 11 years. Eight years of that has been on earthwork construction, on a four-and-one roster. It is not unusual. This goes on every week, in positions like that. For about the first five years, I didn't have any issue. The last three years have been a nightmare because of policy, because of who people know, because of who they're related to and who they're sleeping with, and the power of some of these bosses.  
25

This is not the first time that this has happened to me and I know of lots of instances which have happened to other people. The first time it happened to me, I'd had words with a supervisor, earthwork supervisor's wife, because  
30 of a serious safety issue involving the trains on the job, and he had actually been bullying before that, they had a shocking name in the industry, still have - - -

35 **MR HARRIS:** Make sure - Kerry, Kerry - - -

**MS DETURT:** - - - but because of - - -

40 **MR HARRIS:** Kerry, just hang on. Make sure you don't go too far with your identification of individuals here. Because you get recorded, you don't want to get stuck with any defamation kinds of issues, so keep it general, if you know what I mean.

45 **MS DETURT:** Yes, yes. That's right. I'm not going to use any names, but following on from that, then I was asked to go to another job site, a particular superintendent because of my work standard. I went there, I had said to my contract boss that I didn't really want to go because of this superintendent and the bullying that went on. The bullying started within two weeks. I then stood up to this supervisor and - or actually, to my immediate one and said, "I don't want to work with that man." I might as well just go home, save the

stress, I'll park my truck up and go home. Anyway, things got sorted. So my payback for causing trouble to this supervisor was - it was my daughter's wedding and I was flying out on the Friday morning for a wedding on the Saturday. He did not organise a lift for me and was going to leave me stranded two hours out of town to get to the airport.

Lucky I had seen the TD who was going to take me to town and found out from her what was going on. She wasn't taking me, I had to organise my own lift into town the night before. That is very unusual. You do not come across that. So at the end of the day, nothing happened. The day after my daughter's wedding, I got a phone call from my subcontract boss telling me I was not allowed to go back to site because I would be trouble. I don't understand how I'm going to be trouble, when I went to work, I did my job, I'd had enough of the supervisor bullying, so had everybody else on site, but because of who he was friends with, then he was protected. Nothing at all happened to that man. That man is still a terrible bully in the industry and had I taken that to court and that's the thing, it is not unusual that people don't complain because if I'd actually - if there was a legal remedy that I could take them to court, then my subcontract boss probably would have his machines off-hired and he would never have got work with that company again.

So that is why things like this become unusual because it just doesn't get raised; people take it on the chin and they move on to another job because they know that they have to, you know, you might have six months' work here, 12 months' work, whatever, but it is not like any other job where you are consistently working, and as a contractor, a joint venture or a recruitment people, then this type of stuff happens all the time.

**MR HARRIS:** Okay. Kerry, can I thank you for making the submission and putting this information in front of us, and also for taking the time to hang on while we resolved our telecommunication difficulties. It was very good of you to put this forward and it does give us something to, I think, give serious consideration to.

**MS DETURT:** Yes, well, like I said, I just do not understand how, legally, I cannot think of any cases, where an innocent person in any sort of thing, whether it be stealing, fraud, whatever, where an innocent person is made accountable for what somebody else has done, and yet, this law here, this is what we have to do.

**MR HARRIS:** No, I understand.

**MS DETURT:** You know, as far as our employers.

**MR HARRIS:** Yes. You're saying that your direct employer is not the relevant party causing the trouble here.

**MS DETURT:** No, no, and there's been plenty of other cases. Another case where a girl did complain, the same supervisor who was bullying, she put a

5 formal complaint in to the company. Within a month, that whole subcontract  
company had been off-hired and all their machines. You know? We know  
that we cannot speak out against as a - you know, a third party worker, but we  
don't have a choice. We have to go to work and on a whim, these people will  
sack you. And one particular bigger companies has a terrible name, but they  
all know that they can get away with it because there is no legal remedy for us  
to take any action against them.

10 **MR HARRIS:** Anyway, thank you for taking the time and effort today to  
present.

**MS DETURT:** So, just before you go, then, how can I follow what's actually  
happening with this?

15 **MR HARRIS:** So we do a final report for the Federal government in  
November. The government will respond to it - well, they publish the final  
report so it will probably be published - it could be published the day after we  
give it to them in November, but it could equally be published as late as  
sometime early next year, but generally the government will put a response to  
20 that and legislation will change.

**MS DETURT:** Yes. Well, I sincerely hope that it does happen because there  
are many people out there working in the industry that this has happened to.  
They don't speak up because they know if they do, they won't get another job.  
25 It's a big industry, but it's a very small world. So I hope that something does  
change to give people protection.

**MR HARRIS:** Thanks very much.

30 **MS DETURT:** Thank you.

**MR HARRIS:** All right. Next, Karen, I think. Can you guys, when you've  
settled, identify yourselves for the record?

35 **MS BATT:** Certainly. Thank you, Chairman. My name is Karen Batt, I'm  
the Federal Secretary of the Community and Public Sector Union, State  
Government Division, and with me is my Senior Industrial Officer,  
Troy Wright.

40 **MR HARRIS:** And Troy. General comments to open up with?

**MS BATT:** Just generally, I wanted to thank the Commission for the  
opportunity to review the draft recommendations. We felt that was a  
refreshing approach to something that is as vexed as industrial relations  
reform in this country and we felt that it gave us a great opportunity to put  
45 forward some additional ideas and commentary regarding the  
recommendations which we're looking at. One issue we were interested in  
exploring with you, chair, was the no recommendations in relation to the  
public sector, and we thought that we'd like to find out what the thinking was

of the Commission in relation to that, as that was a fairly important part of our submission.

5 **MR HARRIS:** So if you were here earlier, you might have heard me saying  
to the Mines and Metals Association a not dissimilar sort of comment to the  
one I'm probably going to make to you. In a lot of circumstances, for a draft  
report, where we could find some evidence of a potential need for a change,  
but in our judgment insufficient to come to a recommendation. We pretty  
10 much wrote the chapter as we thought the evidence laid out, but we didn't  
proceed to recommendation in the hope that that would encourage parties to  
come forward with increased level of detail, and that's particularly where we  
got submissions which were of a quite strong but quite general nature because  
the nature of the change that we're engaged in here is one where we will have  
to eventually suggest either regulation should be deleted, regulation should be  
15 amended or regulation should be supplemented, but it's about, substantially,  
regulatory change.

20 So we're offering you the opportunity to come forward, having read the  
draft chapter and seen where we think the evidence takes us, to put forward  
propositions for change.

**MS BATT:** Okay. Well, the draft chapter dealt with issues in relation to  
productivity and we agree that you can't apply a one-size-fits-all productivity  
25 definition in the public sector because of the nature of the work of the people  
in it, but we thought that there would be some more recommendations in  
relation to the structure of the - I suppose the restrictions for public sector  
workers to access the whole gamut of the powers of the Fair Work  
Commission, such as issues that are prohibited as a result of the Melbourne  
Corporations principle or the construct of the High Court decision in Re:  
30 AEU, and we felt that with the decision in the UFU matter at the Federal  
Court that dealt with constitutional corporations vis-à-vis referred entities, that  
there might have been some scope to look at standardising the access for  
public sector workers who are in referred components, and that's mainly  
Victoria, I'll be honest, but that does need to have some sort of review or  
35 further recommendation because it means that there is a capacity - a large  
group of the workforce in Victoria who are actually prohibited from accessing  
all the powers of the Fair Work Commission in relation to how their  
employer, the Crown, behaves towards them.

40 The height of that is actually areas such as redundancy and the  
regulation of the categories of employment and I think that that's a fairly  
significant issue for the Victorian Public Service in particular.

45 **MR HARRIS:** So will you be wanting to put forward specifics in relation to  
that? The UFU case, if I remember rightly, came too late for us to take it into  
account because we were in drafting mode - - -

**MS BATT:** Yes, that's right.

5 **MR HARRIS:** - - - well before the thing was published, but the other cases, I think the AEU one, if I remember rightly, we did actually cite - we have cited an education union, the Northern Territory example, in one of our chapters, but are you going to then put forward, or have you, as I was telling the AMMA people, because I've been on the road for six days, I haven't read anybody's submissions in that time, so if you have put forward, I haven't read them, the staff will be reading them at the moment, but are you going to put forward propositions for variation to legislation?

10 **MS BATT:** We already had in the original submission. What we've asked in our response to the report is that there be further consideration given to the original submission.

15 **MR HARRIS:** So just the original submission, okay.

20 **MS BATT:** Which was about dealing with the structure of the Crown and the referred entities, looking at the ramifications associated with the UFU case, given that constitutional corporations are now within the gamut of the Fair Work Act and the powers of the Commission, whereas referred entities are not, so you have public sector workers in the one State having different rights. We've also made some recommendations in the original submission and have reiterated them in the response.

25 **MR HARRIS:** That's the Queensland one, then, you were talking about?

**MS BATT:** No, no, Victoria, and the UFU is a matter that dealt with - - -

30 **MR HARRIS:** No, not the UFU, I know the UFU one. No, the education one. There's an education one, of the Queensland government, I think, having privatised the entity and left it with nowhere to go. That's not the case you're talking about?

35 **MS BATT:** No, Re: AU is a High Court decision from 1995 that opened up the - - -

**MR HARRIS:** Okay, a different one again.

40 **MS BATT:** Yes, and it is actually the main constitutional law case that allowed State public servants to be covered by the Fair Work - well, in that case, the Australian Industrial Relations Commission jurisdiction, and it set the parameters for what the jurisdiction could and couldn't do, and it looks at issues about what can be regulated by the Commonwealth government, if you like, through Fair Work, and what can't be. So it's known as the numbers and types of people that can be regulated, so you can't have redundancy provisions, for example, in any enterprise agreement for a referred entity, so  
45 the Crown in the right of the State of Victoria.

You can't regulate the terms and conditions that affect the categories of employment, so you can't regulate the use of casuals or fixed term contracts

in the Victorian Public Service. All of those matters are precluded because of the High Court decision, but subsequently, in a decision that was made by Fair Work in the Parks arbitration for a workplace determination, they actually went further to identify what had not been referred and what could not go into an enterprise agreement in Victoria. Things that would be standard in the private sector are prohibited because of the operation of the law and the constitution of the country from being in our enterprise agreements.

10 So therefore, we're saying as part of the submission, that we felt that there needed to be some equity applied to all the workers in the country and that State public servants who are referred into the Federal jurisdiction should have the same rights as their private sector counterpart to regulate the behaviour of the Crown as an employer. And it's a fairly important issue for us. The whole construct of bargaining fails to take into account that our employer wears two hats; one is the legislator and one is the employer and you only have to look at how the New South Wales government has behaved as a legislator, to give itself powers as an employer, to restrict the bargaining rights of the Public Service in New South Wales.

20 Because there is no power to protect the public servants employed directly by the Crown, not even the ILO conventions that relate to public sector bargaining, being 151, and the regulation 154 of the ILO have been ratified by the Australian Parliament and we recommended that be one of your recommendations so that the bargaining rights that are contained in the ILO convention 98 can apply to the Public Service. We think that it is demonstrably unfair that a group of workers across the country, in one of the largest tiers of government across the country, have restricted rights if they're referred into the Commonwealth jurisdiction for industrial relations.

30 So that's the emphasis of the original submission. It's also the emphasis of our response and we would really strongly recommend that the Productivity Commission, whether it is even a recommendation to continue some work in this area, because it is complex, but we believe that it's about fairness and equity and transparency in the behaviour of the Crown as an employer, and I think that that does need to be understood from our perspective by everyone involved in this.

40 **MR HARRIS:** Okay. So it's always a fraught area to fiddle with constitutional differences between State and the Commonwealth. These are issues, presumably, that the State itself feels it has no ability to deal with?

**MS BATT:** The State, as in government - - -

45 **MR HARRIS:** The State of Victoria.

**MS BATT:** The State of Victoria, depending on the political colour of the State at any one time, will use whatever powers it's got to restrict the bargaining rights of its employees or to enhance the bargaining rights of its

employees. So the previous Napthine and Baillieu government in the bargaining round with the Public Service were quite strong in trying to prevent the Fair Work Commission being able to exercise any powers that might have, what they said, impugn the sovereignty of the State. Now, the  
5 the new government, as part of their election commitments, undertook to review the referral and make sure that the matters that deal with terms and conditions of employment that had been up until the Parks decision regulated by an enterprise agreement could again be regulated and enforceable, but we're saying it's not a matter to just rely on the political colour of the government,  
10 there should be a standard principle that every worker in the country has the same rights, and that's what we're asking the Productivity Commission to make some recommendations on.

**MR HARRIS:** Right. But I'm trying to work out which level of government  
15 has responsibility for fixing this. If it's a - - -

**MS BATT:** Both.

**MR HARRIS:** - - - constitutional - well, if there's a constitutional issue, it  
20 tends to be that the constitution says the employer, in this case, is the State of Victoria - I'm guessing that this is the case. I'm not familiar with the court case, so - but it doesn't really matter. We can just cut to the chase here because I need to have a proper discussion with you, I need to get a focus on  
25 which level of government is meant to be resolving this. When you say "both", that tends to be constitutionally a very, very difficult way to go about doing business because then - - -

**MS BATT:** That's right.

**MR HARRIS:** - - - you have competing legislative jurisdictions and  
30 ultimately the courts will decide and until they do so, that becomes a matter of possible uncertainty, some people say. Lawyers would probably say it's not uncertain, but we found, in policy terms, it often is. Traditionally, and certainly in terms of the way we've looked at the chapter, we know State  
35 governments have abilities to manage their own workforces that do not otherwise apply on general principles, but I think the logic is those abilities are inherently vested in the State as the Crown in the case of the State of Victoria.

40 Therefore, to fetter their own abilities, they need to pass their own legislation. It would be improbable in a constitutional sense - I'm not a constitutional lawyer, but this is what policy tells me, policy activity in this area tells me, it's improbable the Commonwealth can restrict the State of Victoria from exercising its constitutional responsibilities, as it sees fit.

45  
**MS BATT:** That is true, but there are two elements to the referral process. The State of Victoria can refer and has referred and has continued the referral since 1996 - - -



**MR HARRIS:** Of everything.

5 **MS BATT:** Of everything, with some exceptions. And so it's the exceptions that have been held back that have become the basis of quite a lot of  
disputation between all the public sector unions in Victoria and whatever State  
government is there. The current State government has said that they will  
look to amend their referral, but it has to also - part of the discussion is that  
the Commonwealth has got to accept it.

10 **MR HARRIS:** Yes.

**MS BATT:** So it's part of our concern is that the workforce in the Victorian  
Public Service, and any other public service that may refer into the future is  
predicated on the Commonwealth State's agreeing on what will or will not be  
15 in the interests of that government of the day.

**MR HARRIS:** Okay. And so your proposition is that we recommend to the  
Federal government that should Victoria refer some of their residual powers,  
I'll just call them powers, it's a generic term, powers, that the Commonwealth  
20 should accept it and that Victoria should undertake such a referral in the case  
of public sector employees?

**MS BATT:** Refer - yes. What we're asking is that the application of the  
UFU decision which deals with the powers applicable by Fair Work into  
25 constitutional corporations which are found to be unfettered, that those  
principles apply to public servant employees, and therefore, giving everyone -  
placing everyone on a level playing field, and that therefore, Victoria should  
refer, in accordance with the UFU decision and the Commonwealth should  
accept it, regardless of the political colour of both governments. It's about the  
30 workforces having the same rights as everyone else does. AT the moment,  
public servants are of a lesser standard in relation to regulation of their terms  
and conditions.

**MR HARRIS:** I think we know that from the chapter. We've described a  
35 problem. I just don't think we necessarily conceived of it as being one where  
we'd not only recommend that one level of government give up its control,  
but that the other level of government accept it. But I think that was the basis  
for my earlier misunderstanding. I was thinking of specific circumstances  
40 where there were tests already being applied from Fair Work Australia  
legislation to specific jurisdictions, the case of the Northern Territory - the  
case, that there's an absence in Queensland of a circumstance where an entity  
is deregulated and privatised, but has - well, the government retains the  
function, at least, that the employees in a no-man's land according to a  
proposition that was put to us.

45

I see. So this is actually about attitude as much as law, is it not?

**MS BATT:** I think it's more law.

**MR HARRIS:** We can't change the law to make a government accept a referral.

5 **MS BATT:** No, but you can actually make a recommendation based on parts of the terms - - -

**MR HARRIS:** The principle - - -

10 **MS BATT:** The terms of reference - - -

**MR HARRIS:** We're happy with them - - -

15 **MS BATT:** Terms of reference of the Productivity Commission looked at - one of the questions was in relation to the public sector as a unique entity for the purposes of bargaining.

**MR HARRIS:** Yes.

20 **MS BATT:** It is a unique entity. Its employer has more powers than any other employer.

**MR HARRIS:** As we say.

25 **MS BATT:** As you say, but then, there are no recommendations about making sure that, as an employer, they're the same as every other employer in the country and we're saying that that is what we want to have, as the recommendations, to put everybody on the same level playing field and that we're happy to work with whoever in government or Productivity Commission for further work, to try and tease this out because I think it is  
30 unfair for any State government employee to be told that they've been made redundant, so therefore they can't actually look to see whether it's really an unfair dismissal because there's no jurisdiction for Fair Work, and that's a real, live issue, day in, day out.

35 **MR WRIGHT:** If I may supplement that, you do say in your report, you do recognise that point, but you make an emphasis even in italics that you recognise that governments have potential market power. Our experience is they definitely have market power and they definitely exercise it. So our  
40 other issue in regard to public sector bargaining is in addition to the incomplete referral issue that Ms Batt was referring to, is also these quasi-corporations that are created that move between jurisdictions or get lost between jurisdictions. And what we were seeking in our submission and we've repeated it again in our supplementary submission in our response to the draft, is that there's a bit more certainty about what falls within the Fair  
45 Work system, because currently, we have a lot of experience with these organisations that have been created either through legislation or through corporatisation that don't necessarily fit the box.

What happens is both us as a union and the employer have an extremely

frustrating time to try and work out what set of rules apply to our industrial relation systems. I was recently in the Commission for one when I described - the Commission was struggling to get their head around whether or not they had jurisdiction to intervene or make any decision with regard to the matter and described it as a son of Frankenstein, and that's what this sort of organisations we're dealing with, they're created by State laws, yet they're not carrying State responsibilities and they move around and they shift and it's an extremely frustrating process, both for us, for our members, for the employees and for the employers, that there is a lack of clarity regarding what a constitutional corporation is and what falls within the Fair Work system and what falls out of it and stays in the State system.

We would ask, again, that there be a recommendation in that respect, that there's further clarity provided. We indicated in our initial submission that there's been a real reluctance to take on cases like that to the highest level to get a definitive ruling. The Act, as you know, has been operating for six years now. We still don't have a very good definitive ruling on any matter. I think there's a Queensland Rail case either pending or still being appealed regarding that, but we'd much prefer it was cleared up through legislative reform rather than through case law which can become a rubbery instrument. I think also the other point we also made regarding public sector bargaining - and again, it's in relation to your recognition and your right recognition that the market power the government enjoys as an employer, is our need for arbitration to be strongly reinforced at the end of the process.

We have a lot of enterprise bargaining that goes for a lot longer than it necessarily would, or would in the private sector, because of the capacity of governments to exploit, and it's in their interests to exploit, and delay bargaining for as long as possible. We have always been fans of arbitration and as an end point when you hit those bargaining stalemates, that our experience under the Act as it is now only reinforces a need for a greater guiding hand to intervene at times when we get stuck with that position.

**MR HARRIS:** Yes. I think we had the ambulance workers presenting in Bendigo about the length of their dispute, or their negotiation. So just so my colleagues, when they start working on the propositions we get at hearings, I'm going to ask a question that I would normally have asked of them, so they'll work this out ultimately, but from your perspective, some of this sounds like a proposition where we would be recommending a principle rather than recommending blackletter law as you referred to, Troy. I'm not confident, because I'm not a lawyer, but I'm not confident we could create a default provision in the Fair Work Act that, for example, say - let's say this is a general descriptive thing, where governments maintain control of a function, but otherwise privatise its activities, including its employees, that those employees should receive the protection of the Fair Work Act.

But if I understand it rightly, that's what you're referring to, to circumstances, and I'm going on this Queensland education example that was in - it was either in your submission or the ACTU's submission, but it did

strike me as being quite an unusual circumstance, where the employees apparently ended up nowhere, neither in the Queensland - - -

5 **MR WRIGHT:** We have New South Wales Education one similar to that in our submission, so - - -

10 **MR HARRIS:** Right. It may be common and I may be in fact - because I'm doing this off the top of my head, getting the State wrong, but it did seem an unusual circumstance and at the time I thought you could create a default provision, and then I thought, but will it ever be legally effective, and that's the question. You don't tend to put things into blackletter law if you're not sure that the certainty they pretend to import is actually real, but I heard your description of what you're looking for and it just triggered the same thought in me, where a State government goes down a path of creating a quasi-government entity where the employees are perhaps out in the private sector, but the government retains functional responsibility.

20 If it looks like a Crown corporation, the question is, what are the workplace protections for those individual employees. I'm not certain myself from the original consideration of this whether we could create a default provision in the Fair Work Act. But I just want to be clear, is that what you're sort of moving towards? Is that the general idea, that - - -

25 **MR WRIGHT:** Yes.

**MR HARRIS:** - - - unless consciously determined by the State, in those circumstances, those employees would become guaranteed of being protected under the Fair Work Act.

30 **MR WRIGHT:** The test is there currently in the Act, in section 39N, I think it is, the constitutional corporation, but we just say that test is inadequate.

**MR HARRIS:** Yes. No, I'm thinking of something explicit which is - - -

35 **MR WRIGHT:** Yes, and our submission, our original submission, was about trading financial corporations. If it trades or has a significant interest in trading and financial, that should be the test, rather than this new constitutional corporation.

40 **MR HARRIS:** I guess you understand our wariness for very generic, very sweeping amendments of that kind.

**MR WRIGHT:** Yes.

45 **MR HARRIS:** I'm thinking of something quite explicit in the circumstances where a State undertakes the activity that you've just described, describe it better than that, but there's a default proposition which says the Fair Work Act applies unless the State specifically legislates to say it shall not. I'll call it a privatisation, but a privatisation, I think, generically there's not much doubt

about, but - - -

**MS BATT:** No, it's all the grey areas - - -

5 **MR HARRIS:** A corporatisation transfer of functionality, but retention of control kind of circumstance. These appear to be more common than perhaps - I thought the original example, when it was put forward, I thought it looks pretty ugly, but perhaps it's unique. Your suggestion is it's not unique, it's relatively common.

10 **MR WRIGHT:** Yes. I would point out, though, I think in our experience, both employers and our - and unions and employees would embrace whatever test was put in there, because currently the test is so unclear it makes it very difficult for us. We spent 18 months with an employer, and neither of us  
15 disputed it, neither of us cared - it's not a matter of seeking the protection of the Fair Work Act, we just want to know what rules we play by from the start, with an organisation. We need greater clarity. We spent 18 months of litigation with one organisation, ACRA, trying to determine which jurisdiction we would be playing the game in.

20 That was frustrating for all involved. Before we could even start enterprise bargaining, we weren't sure about what rules we'd be playing and what sport we were playing. So if there was any way of clarifying that issue, it would be of great assistance to our members and great assistance to a  
25 number of employers, and these sorts of employers are only going to increase as States relinquish powers or centralise powers or corporatize some of their activities. We have an increasing number of these bodies that don't fit the current test and we struggle constantly with where to place them, and so do they.

30 **MR HARRIS:** Yes. No, I see the generic problem; the specific problem and how to deal with it might be less clear to me, certainly mentally right now, but we should look at this. Can you perhaps - you may have done this, I haven't  
35 read the second round submissions in the last six days because I've been on the road, but if you can give me specific examples of the sorts of what I might call quasi-corporations kinds of things? It doesn't have to be a comprehensive list, it's just we're fairly confident that these handful of entities in Victoria's case are possibly in the circumstances that we've described. That would be useful.

40 **MR WRIGHT:** Certainly. Be pleased to.

**MR HARRIS:** I guess you've got comments as well on most of the  
45 recommendations that we've made. Are there specific ones - we'll move away from public sector employment now to generic, so are there specific ones that you'd like to pull out for the benefit of us here today? But before we move onto those, if there are specifically public sector employment issues that you also want to - let's start with them because they're your core responsibility and I would guess - or I won't guess about why you're

addressing the suite of recommendations more broadly, but have we dealt with public sector issues?

5 **MS BATT:** We've dealt with the broad public sector component from our perspective.

**MR HARRIS:** Okay. So let's switch to the wider set.

10 **MR WRIGHT:** Yes, and we're conscious this is the last day of hearing, so we're conscious you've probably heard submissions on a lot of these points, so we probably thought it a useful target just a couple that might be a little bit unusual. We have a strong view on the representation rights notice proposal that you have at recommendation - I forget where that is.

15 **MR HARRIS:** I know it.

20 **MR WRIGHT:** Yes, the staple issue. We have a strong view on that because we have been involved in a number of these matters. We have been involved in matters where an employer has mucked up the representation rights notice with something almost as trivial as a staple, and we've had to start again, but we've also been involved in matters where employers have deliberately changed that notice in a significant and detrimental way and we haven't spotted it at the time and it's been thrown out for that reason as well. Our view is this: we think the current test is completely appropriate because, 25 currently, we have examples of employers that are unable to abide by what is an absolute test, a mandatory, do this form, don't touch it and release it, and we're concerned that if we move to the - as your first draft recommendation makes, a system where there's a bit of flexibility and discretion in the employer. 30

We think that will open up to a hell of a lot of litigation about that point and a lot of tests and further confusion about what constitutes a representation rights notice that's been fairly issued.

35 **MR HARRIS:** We were thinking of discretion, just maybe it's a marginal correction, but it's important to us, we were thinking of discretion for the Commission, and when you said discretion for the employer.

40 **MR WRIGHT:** Okay.

**MR HARRIS:** We weren't thinking of employers getting any greater ability to act inconsistently with the law, it's more the outcome that was most important here.

45 **MR WRIGHT:** Okay.

**MS BATT:** Well, on that basis, we've read it as a discretion for the employer. So if it's a discretion for Fair Work to say - - -

5 **MR HARRIS:** It's consistent with this theme of looking through form and arriving at substance, so if the - let's say if the error is one which, in the Commission's judgment, does not and would not have disadvantaged the party that could potentially have been disadvantaged, then we just move to the conclusion of the agreement.

**MR WRIGHT:** Okay. Well, sorry, we - - -

10 **MR HARRIS:** No, no, no, it's potentially a drafting issue for us, or it's - but we've got to fix it. You know, we don't want any uncertainties here, because I don't think we were trying to say open slather, we were trying to say - but as you might know, there was a case also drawn to our attention where apparently the Fair Work Commission had not updated its form, somebody started their process with the old form, submitted it, and then was told, "No, start again" because even they took it down of the Fair Work Commission's website, so I don't know, that could be a pocketful, who knows, but what we want to do is not have the credibility of the system held up to ridicule through those kinds of examples. That's what we're trying to get to.

20 **MS BATT:** Yes, agree.

**MR WRIGHT:** Yes. We strongly agree with that, in that case.

25 **MR HARRIS:** But if somebody has - and I can't imagine the Machiavellian intention, but nevertheless, I'll take you at face value, if somebody with Machiavellian intent had actually corrupted the notice arrangements, then clearly the Commission would be able to observe that. Presumably one of the parties would say this is a - been done badly and the Commission would be able to say, "Done badly and not an accident and moreover, could have affected the outcome, so you must start again."

30 **MR WRIGHT:** Okay. If that test was retained, we'd be in support, and as I indicated, we did have a case of not a staple, but an email address, for the purposes of reply, was included on the representation rights notice and Peabody, the case that you cited in your report, the staple case, was ruled to be completely binding and they couldn't do a thing about it and threw that agreement out. So those are the example, we agree, that are counterproductive to - - -

40 **MR HARRIS:** They go to the credibility of the system. See, that's the thing. It's quite important in how we go about doing this, that we will have a regulatory system, notwithstanding some people's views that we won't, we will have a regulatory system, but it's got to have the ability to protect itself from ridicule.

45 **MR WRIGHT:** Yes.

**MR HARRIS:** Okay. Other ones?

**MR WRIGHT:** The other point that we probably - and it's one that we strongly support is your proposal or recommendation about a 5 per cent threshold for enterprise bargaining. We've been involved in enterprise bargaining in agencies as small as a thousand and agencies as large as the current Victorian Public Service bargaining, where the right to appear on oneself's behalf, or with a very, very, very small group of colleagues, is completely counterproductive to the process. You can elaborate further on the Victorian one.

**MS BATT:** In the last round of bargaining, 2011 to 2012, the notification went out to, I think, 30,000 people. Now, we had 20 independent bargaining reps attend the public service bargaining. We were lucky it was only 20. We could have actually had to book Etihad Stadium if everyone chose to be at the bargaining table, and what we found that it actually hindered bargaining because it was really about an individual's dispute. "I want to be reclassified, I've had trouble with leave provisions", rather than bargaining around the structural and systemic issues as what a public service bargaining process is. So the 5 per cent rule we would support because we believe it actually streamlines the process, making sure that an individual can still be there, so long as 5 per cent of the people to be covered by the agreement support it, and so we would recommend that.

The details of the public sector bargaining problems that we had with bargaining reps attending the bargaining and then being required to be notified when it moved into post-industrial action mediation for the 21 days prior to an arbitration for the workplace determination, they had to be notified at every step. Most of them didn't come. The paperwork had to be served on them. It was an excessive amount of red tape that was not necessary because at the end of the day it was us concluding the bargaining. So we would support that recommendation.

**MR HARRIS:** Okay. That's been very useful. We did, as we were quite upfront about, take a stab in the dark at 5 per cent so we were certainly open to other people giving us better advice on that, but most people seemed to think it's about the right order of magnitude and it would certainly simplify the bargaining process which that's the other thing about the credibility of the system. The changes we make have got to actually help the system in enterprise bargaining by not letting this appearance of a Melbourne Cup field of bargaining negotiators be applied to it, even though some, I think, would say, "It doesn't happen in our industry", the question is, when it does happen, it again affects the credibility of the system and certainly must create some delay effects.

**MS BATT:** It does.

**MR WRIGHT:** Incredibly. Things like notices, if things proceed to industrial action or dispute stage, just the process of making sure everyone is aware.



**MR HARRIS:** Well, I can think of meetings. I mean, if you've got to get 20 negotiators to a meeting, you can't really not have a meeting without all 20 of them and the idea that people can coordinate across 20 people being available on a particular date, and otherwise if you exclude them, then you've damaged your bargaining process by excluding them.

**MS BATT:** That's right, and when you go into private mediation, the question is, is it private between you and the government because it's your industrial action that has taken you down that particular path, where they haven't participated in industrial action because they're not union members, so they can't participate, but they're bargaining reps for the purposes of the negotiation. So it became quite complex and quite difficult to deal with towards the end when we were in the private arbitration process.

**MR HARRIS:** Another interesting little example, we could probably use that one. I hadn't conceived of that, but I see it, I see it immediately you described it. Curious. All right. Other issues that you might want to pick out? I mean, I'm not dismissing the general comments you've made here and we've got them summarised, but those couple, are the primary ones you thought were best to give us additional comment on?

**MS BATT:** There's one other we wanted to draw your attention to which is the recommendation regarding the appointments to Fair Work. We don't support that. We believe that the appointment process as currently exists is fair, that it does allow there to be independence of the person on the bench and the thought of having them with rolling contracts of five-year terms I think would actually undermine the integrity of the Commission and the trust that many of us who work with that Commission have in the ability of the commissioners, the deputy presidents, the president, to be able to make a judgment based on the evidence before them, rather than on an eye to their contract being renewed, and we are very strongly supportive of the Commission in its current construct.

Similarly, we don't support the creation of the - what was the separate, the new division? The recommendation, the minimum standards division, and what we've done is we've provided evidence - we think evidence - in relation to the problems that the Australian Fair Pay Commission had, which was a division, and the fact that it fell over with the way it started. It became less transparent in the way it was dealing with evidence, it stopped being judicial, it took public hearings and it just started to get a level of ridicule towards it from a whole range of the stakeholders in the industry. It was not seen to be impartial in the way it dealt with the minimum wage application.

So we would say it's worth looking at the history of the Australian Fair Pay Commission, how that actually worked with the construct of the Fair Work Commission, because I think that there's a salutary lesson in that recommendation not going ahead based on the examples of the AFPC.

**MR HARRIS:** There might have been some factors relating to the Australian

Fair Pay Commission which were relating to its own legislative construct, would there not?

5 **MS BATT:** No - well, there might have been, but our view really is that  
you've got Fair Work or Industrial Relations Commission, Conciliation and  
Arbitration Commission, whatever it's called today, it has the powers that  
were envisaged to be implied by it. It doesn't need a separate process for  
research, it has its research arm. The parties making submissions in relation  
10 to minimum wage applications now, or the review of modern awards or to  
arbitrations in various issues, they do do their own research and the parties  
present their own reason, and I don't - - -

15 **MR HARRIS:** But that's our problem. Our problem inherent in the draft  
report is the parties do their research, the Fair Work Commission  
Commissioners say, "I'm here to decide on the papers in front of me from  
each of the parties." Parties that probably are relevant to general decisions are  
not submitters, natural submitters, and the research functionality of the  
Commission seems to be - well, it's certainly not what you call a first order  
20 organisation that's dealing with economic and social issues would put  
forward. It's certainly not the parallel which we've used in my public  
examples of equivalent to the Reserve Bank's research department, which has  
a similarly powerful function in setting prices across the economy, admittedly  
via indirect means, but the Fair Work Commission is a very substantial  
economic and social institution, and yet, does not conduct its own independent  
25 research.

It conducts research on topics which are of interest in the workplace  
relations field, but that's quite different from an independent research that  
might address a coming social trend of the kind that we've had put to us in the  
30 course of this inquiry. When we finish in this inquiry, there is no party left  
who undertakes this kind of activity on an ongoing basis, and that's the driver  
for us. It's not do they have a research arm, it's what does it do and what's it  
authorised to do.

35 **MR WRIGHT:** Our point in our response to the issue was also that  
section 590 of the Act empowers the Fair Work Commission to inform itself  
in any way it sees fit, so it's currently got the power. It doesn't need to have  
an - to decide its - - -

40 **MR HARRIS:** Yes, but as we all know, legislation is one thing and culture  
and approach is an entirely different one, so I don't think we're going to  
propose here that we vary legislation to direct it to do something. This is  
actually about the Commission reforming itself which comes to therefore the  
membership, and that was the purpose behind our recommendations.

45 **MS BATT:** Yes. I would strongly urge you not to go down that path, as a  
final recommendation. We have had many commissioners, deputy presidents,  
sitting on our panels over the years that have come from the employer side  
and have been very, very good, and we've had people who are from the union

side and have been very, very good. The test is the ability of the person who is appointed to the bench to acknowledge their past, but not take in the baggage when they're appointed, and to do that, they have to have some guarantee that their appointment is for the statutory period of up to the age of 65, and I don't believe that it is going to improve the efficiency or the productivity of the Commission or the good decisions of the Commission to have five-year terms for the people who are going to sit on the bench.

**MR HARRIS:** Okay. Well, let's stick with that for a moment. You are saying that to leave their baggage behind, they need independence. I think we're saying increasingly you should appoint people without baggage.

**MS BATT:** I think that the industrial relations system, all the people in it have a knowledge that should not be disregarded as being valuable on the bench, regardless of whether you're a lawyer, whether you're a solicitor, an economist or a trade union official. I believe that our knowledge of how this system works should be part of what is applied to the bench and the consideration of our knowledge for the decision-making that goes within industrial relations.

**MR HARRIS:** Don't you need a mix?

**MS BATT:** But we do have a mix. There is a mix now.

**MR HARRIS:** Okay. Well, I would say our examination suggests that you don't have a cultural mix of kinds of skills that we would see necessary for the future of the Fair Work Commission. We have one that looks backwards. Taking the tribunal division that we've proposed into account, there's been a monumental shift in the last 20 years of its activities from settling disputes, and therefore needing increasing knowledge or great depth of knowledge about the waterfront, for example, for waterfront disputes, into disputes that are now substantially based around individuals and not settling via arbitration to the waterfront dispute.

The nature of appointees does not appear to have changed to take any cognisance of that, so when the functions change, we're saying the skills needs to change and now we're looking out into the future and saying, you're going to need increasingly more activity relating to an understanding and an appreciation of, for example, research into growing social trends and community attitudes is a factor inside the Fair Work Commission's responsibilities. You're going to need greater research in that area. Currently, you are relying on the union movement on the one hand and the employers on the other hand for this, and as we all know, as we say in the report, regardless of whatever their intent is, it's going to be the label alone that will indicate that this is obviously self-serving from the employers or self-serving from the unions and you're all left deciding on the basis of those two competing pieces of research.

**MS BATT:** But I think that's the nature of any law courts, regardless. I

mean, you always have people who are competing for the decision of the judge to make a decision in their favour, so they provide the evidence. You need a judge that understands the industry, the industrial relations processes, not simply being an academic in politics or an academic in economics.

5

**MR HARRIS:** Well - - -

**MS BATT:** And that's the concern, is that once you start bringing in that, rather than having people who have rolled their sleeves up and got their hands dirty in some of these disputes over the years, the ability to settle disputes, whether it's the waterfront dispute or whether it's a dispute between Karen Batt and Troy Wright about a workplace issue, the skill of the Commissioner is what's important and I don't believe - - -

10  
15 **MR HARRIS:** But surely you - - -

**MS BATT:** - - - and I don't believe that having five-year fixed terms is going to improve that at all.

20 **MR HARRIS:** Surely, coming from an employer association or from a union does not actually give you the skill base for dealing with individual based disputes, whereas in this economy, growing over the last 20 years, we have people who are deeply experienced with dealing with individual disputes. They're counsellors, they're people who work in family relationships. These  
25 are people and these are the kinds of functions that are now there, and yet, there seems to be no intention to employ those kinds of people or appoint them to these kinds of functions.

**MS BATT:** The principles around mediation and counselling are very  
30 different to being a person who's going to make a judgment around the making of an enterprise agreement or the resolving of a dispute on shift working - - -

**MR HARRIS:** No, sorry, I mean - - -

35

**MS BATT:** - - - or the making of a modern award. I don't believe that it is appropriate to simply say that we're going to only have counsellors or mediators similar to family disputes. I think that this is a very unique area of law in Australia and trying to make it generalised I think is a flaw.

40

**MR HARRIS:** Well, in fact, we're doing the opposite of making it generalised. We're actually saying quite specific skills for specific divisions. So the divisional structure relates to the skills and I note - - -

45 **MS BATT:** And we don't support the division structure.

**MR HARRIS:** - - - that you didn't actually comment at all on my proposition that the nature of the work has shifted so much in the last 20 years, and yet the skills haven't shifted.

5 **MS BATT:** I disagree. I think the skills have shifted and I think that the changes at Fair Work are predicated on whatever political wind is going on in Canberra to change the powers that were originally envisaged in the Australian constitution to settle disputes by conciliation and arbitration.

**MR HARRIS:** Do we have evidence that the nature of the skills have actually varied, then, to be able to - - -

10 **MS BATT:** You can see it by the different commissioners. You can see it with the operation of the unfair dismissal division. You can see it with the way many of them operate with conciliation or mediation. There's a whole different approach within that Commission to what it was when I started  
15 20 years ago. There has been a significant shift and many of the best commissioners have been there for a very long time, know how to read the tea leaves on making - finding a way through almost intractable disputes.

20 Their skills that they've brought with them from their role in employers or the unions or anywhere else, that has allowed them to have an eye that is not blackletter law application, it's looking for a settlement that allows both parties to leave feeling that they've had a win, and I think that that's the skill that Fair Work has had, and I think it's an important thing that we continue to retain.

25 **MR WRIGHT:** If I could add one point, I think someone from an employee or an employer background doesn't just have experience in a collective manner. They have a lot of experience in individual matters. We as a union deal with probably 50 per cent of our work at least is through individual matters, and that's where I think that qualification to deal with the conciliation  
30 stuff on individual matters comes from. It's not always about the collective, it's often about individuals and managing decisions regarding individuals.

**MR HARRIS:** Well, I guess this whole debate between us has proceeded on the basis of your statement on five-year terms and leaving baggage behind, so  
35 you've conceded in part to my argument - - -

**MS BATT:** No - - -

40 **MR HARRIS:** - - - because there's baggage, or you haven't?

**MS BATT:** I have not conceded that there is baggage. I'm saying that a person that comes in from the employer's side, if they are a good person and they've been appointed for their skills, can look at a dispute that is raised by a union based on the facts, not simply through the prism of an ideology that  
45 says the union is always wrong, and that is the skill of many of those commissioners and they can do that because they are not looking over their shoulder every five years, wondering if they're going to be appointed again if they've made a decision that goes against the political tide. And I think that that's a really important point.

**MR WRIGHT:** Can I just add an anecdote from a personal experience. I did a couple of years on the New South Wales Parole Board as an independent member where you worked with the judges and retired judges and magistrates and the idea of the objective arbiter is a complete myth. They all have prejudices, they all carry baggage, even in the criminal cases, they all recognise that, “I don’t like this particular type of crime, this particular suburb this person comes from.” A good one can recognise that and separate the decision-making. A lot of them behind the scenes can’t, even in criminal matters and even in parole matters, which I was quite surprised by.

But I think as members of the public, I had, certainly before that experience, always seen judges with a brilliant capacity to be able to separate themselves and separate their histories and separate their personal opinions. I don’t think that ever happens in any jurisdiction, on my experience after that, and I think the best we can ever hope to achieve is someone that recognises where they come from but still uses that experience, but doesn’t let it sway their decisions and I think we are pretty close to that optimum level now.

**MR HARRIS:** The presumption inside that is a good one, a good one will do that, and I guess we look at the system and see it as being appointed ultimately from a process that does not guarantee that you’ll get a good one. That’s what it comes down to.

**MS BATT:** But I don’t think a panel as indicated, with five-year terms, is going to improve that, so recommendations along these lines that aren’t going to improve it means that we’re engineering something that I don’t think is broken. We need to look at the specifics rather than the exceptions. If they appoint a poor one, then it will be appoint a poor one by a panel or the current process. It’s about making sure that the process by which they are appointed allows them to be independent and not worried about whether they’re going to have a job in five years’ time, and I think that’s the key.

**MR HARRIS:** But there’s no change to process in what you’re proposing. There’s just acceptance that today is the best that we can get.

**MS BATT:** I believe that the process as it exists today is appropriate.

**MR HARRIS:** Yes, well, that’s what I’m saying, so we don’t actually find that the nature of the decision-making that’s been put in place has actually supported that proposition, so there are examples - - -

**MS BATT:** It’s my experience of working in the system for 20 years that I believe that the system has not been broken. It becomes problematic when they start making political appointments, but then I believe that many of the people who are going into the bench are good people and are able to put that aside, and are able to make decisions based on the evidence presented.

**MR HARRIS:** Okay. So I think we should probably wind up about now

because we have to get our next one on the phone and I'm going to allow a few minutes to make sure that happens. So that's been very useful, thank you for coming along today.

5 **MS BATT:** Pleasure.

**MR HARRIS:** Appreciate your effort and particularly, even though I'm clearly not a constitutional lawyer, your propositions on resolving our apparent constitutional issues. So thanks for that.

10

**MS BATT:** Thank you very much.

**MR WRIGHT:** Thank you for your time.

15

**ADJOURNED** [1137]

20

**RESUMED** [1153]

25

**MR HARRIS:** It's Peter Harris here. Given we're on this funny thing where I'm talking to the ceiling and I hope you're talking to something more rational than the ceiling, I think the best thing to do is why don't I just start off by asking you guys, however many of you on the call, to identify yourselves so we'll get the names right for the transcript, and then as soon as you've done that, if you've got general comments to make on the nature of our draft report or other issues, perhaps I can just start you off doing that whole thing and we'll just listen?

30

**MS HAMMAT:** Okay, that's fine. So I'm Meredith Hammat, Secretary of Unions WA.

35

**MR DYMOND:** I'm Tim Dymond, I'm the Research Officer at Unions WA.

**MR SYREK:** My name is John Syrek. I'm a fulltime security officer.

40

**MS HAMMAT:** So there's just the three of us here, so I'll now turn to making a bit of an opening statement. First of all, to say thank you for the opportunity to be able to provide feedback on the draft report of your review into workplace relations. I suppose by way of opening we wanted to say that we support the submissions of the ACTU and in particular, the recommendation or the statement that they make, that the recommendations represent a substantial diminishing of workers' rights and a skewing of the Fair Work Commission's function more in favour of the employer.

45

We note that in the report, there is a finding that says Australia's workplace relations system is not systematically dysfunctional. It needs repair, not replacement, and so I suppose we're concerned to see such far-

ranging recommendations, given that the overall assessment is that the IR system in Australia is one that's working. By way of introduction, I wanted to make particular comments in relation to the following areas; minimum wages, institutions, enterprise contracts. I did want to talk particularly about WA's experience as an early adopter of some of the provisions which have a work choices type flavour, as well as penalty rates and right of entry. In particular, staying with minimum wages, report draft recommendation 8.1 comments that in making an annual national wage decision, the Fair Work Commission should broaden its analytical framework to systematically consider the risks of unexpected variations in economic circumstances on employment and living standards for the low paid.

We're concerned that the wording of this recommendation effectively stacks the deck against increase the minimum wage by framing increases in terms of reducing employment, and we think this sets up a false opposition between the interests of the unemployed and the interests of the low paid. The recommendation, we feel, also contradicts the bulk of the discussion in the body of the report which finds there's no clear evidence that the minimum wage increases affect unemployment. So restraining minimum wage increases won't necessarily provide for a decrease in unemployment, but will certainly entrench inequality and hurt the lowest paid in our economy.

We did also want to note that the gender pay gap is particularly significant in consideration about the minimum wage. We think this is a particularly important issue in the Western Australian context because WA continues and has continued for some period of time to have the biggest gap between average fulltime earning of men and women in Australia. But the most recent data, of May 2015, identifies that that gap in earnings is at 26 per cent in Western Australia. The next highest State is New South Wales which has a gap of 19 per cent. The national average is 17 per cent.

So we believe in the Western Australian context, the gender pay gap is particularly significant to consideration about the minimum wage because here, on average, women receive \$484 a week less than men in fulltime work which is obviously unfair, but it also has broader, long term consequences whereby women are more likely to be financially insecure and those issues exacerbate as women have children and also moving to fewer hours in part-time or some other form of employment. Then that pay gap persists through the rest of their lives, including when they retire, as a result of having less money saved in superannuation.

I did want to note that in WA, we continue to have a State minimum wage and that is subject to a State Wage Case every year. We've consistently argued in that State Wage Case that WA's larger gender pay gap warrants a State minimum wage that is higher. I think the important point is that having a case, or the ability to argue the case, at least allows for the opportunity for unions and civil society for it to make the case about what a minimum wage should be and the issues that should be contemplated, for the ability to advocate before an independent tribunal is really an important aspect, both of



the industrial relations system across Australia and particularly in WA. For this reason, we're concerned about the idea there could be temporary variations and exceptional circumstances in minimum wages and that that might undermine this idea of there being a hearing and the opportunity for parties to put their views on the question. I did want to turn now to the question of institutions generally and how they're dealt with in the report, and particularly to note that draft recommendations 3.1 to 3.4, the treatment of the Fair Work Commission.

10 We wanted to note Dr John Buchanan's submission where he described both proposals as leading to the erosion of the independent labour standards setting authority. We think that the Fair Work Commission is an important body and the removal of tenure - sorry - that if there's a substitution of tenure and Fair Work Commission instead have five-year contracts, are to be subject to performance management and be appointed by the relevant Federal minister alone, that this runs the risk of undermining the independence of that Commission, so that particularly that those with practical experience in the operation of labour standards would be effectively excluded from shaping them.

20 So any notion of a quasi-judicial focus to determine labour standards would be completely eradicated if the recommendations were implemented. So we argued consistent in Western Australia where there's been attempts to undermine the independence of our industrial tribunal, that it is essential that we have an independent tribunal and that there not be a transfer of power of the industrial relations system to the minister of the day. In relation to enterprise contracts, we wanted to echo the ACTU's concerns about these, and that they will effectively amount to a collective Australian workplace agreement, where workers will be offered it on a take it or leave basis for the condition of employment, and that that in effect would undermine bargaining in the system.

35 We are concerned that enterprise contracts would allow for the negative experiences of AWAs during the Work Choices era. In Western Australia, we have a long history of dealing with similar provisions. The Court State government introduced three waves of industrial legislation between 1993 and 2003. In WA, there was a form of individual contract called workplace agreements, and it operated in fairly similar ways. The findings from the time that these were around and they were available to employers to use on a take it or leave it basis for employees, and they did allow for the undercutting of existing employment conditions. The findings of those was that they were not equally distributed across all industries, but they were concentrated particularly in casual work and semi-skilled occupations; in supermarket and grocery stores, in accommodation, cafes and restaurants, and in the business services sector.

45 So basically areas where employees had limited bargaining power to begin with. 25 per cent of these agreements reduced wages below the award standard and more than half of them reduced or eliminated set conditions such

as overtime premiums, penalty rates, annual leave loading, with many employees clearly losing two or more significant conditions. In particular, women workers were 60 per cent more likely than men to have their wages reduced below relevant award rates. So our point is that these kinds of agreements operate to disadvantage those who are already most disadvantaged in the workforce and further entrenched inequality.

In terms of right of entry, I wanted to make some brief comments that again particularly are relevant in the Western Australian context. In Western Australia, it is a vast State and there's many employees who work in remote locations far away from the central business district. Right of entry, we think, is the important right that for workers to join their union in locations, to get advice and to get assistance, and many of the locations in which Western Australian workers work are very remote and it is pretty challenging for union officials to travel to those locations.

There are many examples of employers who take advantage of the remoteness of the location to effectively restrict union access, make it difficult for unions to access workers in accommodation villages where workers can reside for many weeks at a time, and effectively making the scheduling of flights and travel so difficult as to make it almost impossible for there to be meaningful interaction between unions and their members.

So we think there's an opportunity to improve right of entry to ensure that there's able to be a proper communication between unions and their members and particularly consider the remote location issues. We think there's an opportunity for this report to in fact find ways to make right of entry more efficient and less administratively burdensome, and to remove the ability of employers to particularly frustrate this attempt by way of the fact that those workers work in a remote location.

I wanted to turn to penalty rates and then Jan will also make some statements. He is a worker who relies on penalty rates, but our general notion is that we would reject the idea of the new 24/7 society and that that would warrant a reduction in take-home pay which is what would be brought about by reduction in penalty rates. The industries that are specifically targeted for a reduction in penalty rates are some of the lowest paid and many of these industries, the workers rely on penalty rates to make ends meet, so a reduction will only further increase inequality. We reject the view about the relative values of Saturdays versus Sundays. The draft report also provides no assessment of what a reduction in wages at weekends would do for labour supply or aggregate labour demand on weekends.

There's no evidence that penalty rates have lowered the rates of employment or economic activity at the weekends. Instead, employers are paying a wage premium to ensure they have skilled labour available at the times they need it. Good workers versus another - in other industries, we think this is just another exploitation of who are already low paid workers, many of whom are on minimum wage and rely heavily on penalty rates to

make ends meet. I wanted to sort of pause there and hand over to Jan. As I said, he works in the hospitality industry, receives penalty rates and I think it's important to hear an account of how those recommendations would particularly impact on workers.

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**MR SYREK:** Okay. I'd just like to start with a bit of background. I've worked as a security officer for the past six years. I am qualified, I do consider myself a professional. I have worked on weekends for 90 per cent of the time of those six years because that's where the majority of our work is. I do think that the job that I do is important and that it's a job that's as valuable as those of other workers in other industries which do keep their penalty rates. However, because I come under the hospitality industry, I'm now hearing of the discussion to cut my Sunday penalty rate. I do feel that my work is undervalued and that just because I am in an industry, there is a perception that my work is not as important.

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What do weekends mean to me? I don't want to have to work on weekends. I do because that is where the work is and it's very difficult to turn down work when it is fairly compensated by a fair pay, a fair pay which I receive on Saturdays and Sundays because of those penalty rates. The time and half and double times I receive on Saturdays and Sundays means that I can afford to pay my own mortgage, other than to be remunerative with my fiancée. It means that I can also afford my own mortgage whilst saving for the future. If that money was taken away, that extra money that I get from penalty rates, then I would completely have to re-budget and I would not be spending as much in other areas. I would have to sacrifice even more things so I can continue to afford to pay my mortgage and hopefully one day be in a financial position where I can afford to have my own family.

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I would like to have children, but at the moment, we're not in a position to do so because the cost of living is high, so we are trying to save and invest wisely during our younger years. Okay.

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**MS HAMMAT:** We might leave it there, and you know, happy to answer questions and perhaps supplement as you go through.

35

**MR HARRIS:** Thanks, Meredith. Can I ask you first, since we're on this question of penalty rates, you said in your presentation that you see the weekend penalty rates as being a premium for skilled workers. The skills don't vary between Saturday and Sunday so it's got to be more than that.

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**MS HAMMAT:** Well, then clearly our position is that it's an appropriate premium for people who give up valuable time that they would otherwise spend with family or in their community doing things that are important to them. So it's correct, it's not just a premium for skilled work, it is indeed a premium for people to be available for work at a time when others are traditionally enjoying leisure time.

45

**MR HARRIS:** The anomalies that we pointed out in our report, the

differences in rates which would say the same people sacrificing the same Saturday or Sunday, but getting paid vastly different amounts, you don't see any case at all for having those anomalies addressed and having them as a standard rate?

5

**MS HAMMAT:** Standard rate for the weekend?

**MR HARRIS:** A standard rate for the weekend, or even a standard rate for Sunday. I mean, we point out in the report the differences between being paid 100 per cent premium or being paid 75 per cent premium, or in some cases, depending on whether you're a casual or permanent worker, being paid even a different number again on top of that. So these are all quite different rates, but within the same kinds of industries performing similar work on weekends, but they're quite different rates. You don't see a case for changing them either?

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**MR DYMOND:** Tim Dymond speaking. Look, part of the thrust with industrial relations has been that notion that the parties get together and negotiate according to what their industry, what their particular enterprises can bear. So the fact that sort of different results come out in different areas and different industries is, frankly, not that much of a surprise. In terms of seeing it as an anomaly, we don't necessarily see it as an anomaly if that's what the industry in those various areas has come up with. So in the question of are there - if you were sitting down, God-like, from scratch and designing something, would you come up with something like that? Well, perhaps not, but we're not talking about that sort of situation, we're talking about a situation where the parties negotiate.

20

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So someone coming, some government, some authority coming over and just unilaterally declaring those are irrational, we don't agree with that at all. We believe that, as Meredith and Jan have been saying, there obviously is a distinction between weekends and weekdays. We believe that between Saturday and Sunday, there are distinctions as well. It's right that employment condition arrangements reflect those, and differences should be a matter of negotiation rather than being got rid of by administrative fiat.

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**MR HARRIS:** Okay, but you understand that that's not the proposition in the report? Or you don't understand that?

**MR DYMOND:** Well, what would be the point of making the proposition within the report?

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**MR HARRIS:** The proposition within the report is not that some God-like creature or some administrative fiat does it, but that the Fair Work Commission does it.

45

**MR DYMOND:** Your proposal to the Fair Work Commission would be, as we were saying earlier, removing a lot of the independence of the Fair Work Commission.

**MR HARRIS:** I think if we just stick with the proposition of penalty rates for the moment. I just want to be clear you have understood the proposition in the draft report, that's all.

5 **MR DYMOND:** Well, the proposition in the draft report is that there is - that the outcomes that you've identified between Saturdays and Sundays are irrational and between different - and the various different rates are irrational. Do I have that correct?

10 **MR HARRIS:** I said "anomalous", I think.

**MR DYMOND:** Anomalous, okay. Anomalous, and our point is that these are matters for negotiation between the parties.

15 **MR HARRIS:** All right. Well, at least we're not talking about "God-like" creatures. Can I go to minimum wages, Meredith. You commented on our recommendation that although we would retain the panel approach, we would like to see it strengthen its research capabilities and we'd like to see it particularly give consideration to the position of the unemployed at times of economic downturn, and while I didn't get all your specific words down, I guess my question for you is, you're not supportive of that proposition, but in coming to the position that said you don't want to see any change, which I guess is the circumstances, did you look at the possibility that in cyclical downturns, historically I think the West Australian minimum wage entity has considered this in the past and certainly at the Commonwealth level it's occasionally considered, but not reliably considered.

Did either of those two factors influence you in any sense?

30 **MS HAMMAT:** Well, I think what we're saying is that there's not a direct relationship between what happens to the minimum wage and the question of unemployment and I think there's a tendency for those issues to be overstated as though a reduction - a freezing of the minimum wage or a modest increase will have an automatic and direct impact on unemployment and I'm not sure -  
35 I don't accept that proposition. I think that the recommendation of a minimum wage performs other things as well. I suppose one of the points we would make is that an increase in the minimum wage often means that those workers spend that money almost immediately back into the economy because of the fact they are often not in a position to make savings or to spend it overseas, so it's a direct impact on the local economy and that often can be a stimulus for increasing employment.

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45 So that's the point we're making, that to set up the needs of the unemployed as being sort of directly affected by movements in the minimum wage, I think is problematic.

**MR HARRIS:** Okay. Would you see an increased role for somebody to act on behalf of the unemployed in front of the Fair Work Commission, or indeed, the West Australian minimum wage entity as being a reasonable proposition

to seek?

5 **MS HAMMAT:** Well, I mean, the current arrangement for the State minimum wage is that a variety of parties have an opportunity to make submissions. Some choose to do that, and so we've had submissions in the past from WACOSS, the West Australian Council of Social Services. We've certainly had submissions from individuals in the past as well, so as I understand it, there's nothing that would necessarily prevent those submissions being made. The point we're clearly making, though, is that clearly the minimum wage has a very - well, I think the idea that 10 unemployment should be seen as being in competition with increases in the minimum wage is problematic.

15 **MR DYMOND:** And I just add that when we have the State wage case here in Western Australia, WACOSS, the WA Council of Social Services, regularly makes a submission and their submission tends to be, or rather, is, in agreement with the unions for wages claims as well, and they - obviously they represent a number of organisations including a number of employee organisations within the social services sector. They always - and their 20 perspective is that - well, they are advocating on behalf of the unemployed and they want the unemployed to be paid reasonably once they gain work.

25 **MR HARRIS:** Sorry, can I just query that. So WACOSS, in its submissions to the WA tribunal, has recommended a proposition that they say is in the interests of the unemployed? It certainly doesn't seem to be the track record at the national level, but I'm just wanting to get clear what you said.

30 **MS HAMMAT:** No, I think - far be it for us to speak on behalf of WACOSS, but it think it would be fair to say that their submission considers the needs of their member organisations, so it considers the needs of people who are, for want of a better term, disadvantaged. Some of them may in fact be employees who are under-employed or on minimum wages themselves who are struggling. Some of them, you know, might be obviously people that are not currently in the labour market. So I think it would be fair to say that 35 their submission covers a wide range of people - well, the circumstances of a number of people who are perhaps relatively grouped together as being disadvantaged socially.

40 **MR HARRIS:** Sure. And what about the proposition that - again, I'm happy to take information in relation to the WA tribunal as much as the Fair Work Commission. What about the proposition that those kinds of institutions should undertake independent research of their own on this vexed question of trade-off, if there is a trade-off, and as you note earlier, I think the substantial weight of evidence for us is on small rises in the minimum wage. It doesn't 45 appear to be that much of a trade-off at all with the position of the employed, but we are more concerned about the prospects in downturns, but what did you think about the proposition that they should do independent research of their own into this question, rather than rely upon individual parties who are going to submit either on behalf of employers who have a natural inclination

to minimise minimum wage rises and unions, whose primary interest obviously is their members who are employed and we have a limited participation from third parties.

5           What would you think about the proposition that they do their own independent research?

**MS HAMMAT:** Well, I suppose there's a couple of issues. In one sense, there's perhaps a wide range of areas that it might be useful for there to be  
10 research conducted into, in terms of setting the minimum wage. I think it's worth bearing in mind that minimum wage and our submissions, you know, in particular, we recognise that there should be weight given to other considerations in setting the minimum wage. So it does kind of raise the question, why would there be particular research conducted into the question  
15 of the unemployed? Equally, it might be we would argue there be research conducted into its impact on the gender pay gap, which you know, is a persistent and ongoing issue particularly in Western Australia, but nationally as well.

20           **MR HARRIS:** Yes. I was going to come to that. Sorry, keep going, sorry.

**MR DYMOND:** Well, and just to add that on the Fair Work Commission's website, there is actually quite a lot of commissioned research already that - I mean, for example, that we do make use of in the State minimum wage case  
25 here in Western Australia as well. So there is certainly a lot of research that happens under the banner of institution.

**MR HARRIS:** Just on this question of pay gap, Meredith, I can't make the conceptual leap from how the minimum wage is a mechanism that can address  
30 the gender pay gap. Can you explain that to me?

**MS HAMMAT:** Yes. If you want to go, Tim?

**MR DYMOND:** I think essentially there was, a number of years ago, an entire Parliamentary reports by the House of Representatives, the Standing  
35 Committee on Employment and Workplace Relations. It went into pay equity and associated issues related to increasing female participation in the workforce and look, it reported and it found quite clearly that women are more likely than men to be reliant on the minimum wage. It contained a number of - a lot of information, particularly from the Working Women's  
40 Centre, that found that just over 60 per cent of award-dependent workers are women and so changes to the minimum wage setting and awards would disproportionately affect them.

45           In particular, they made notes that the old Australian Fair Pay Commission back in 2009 refused to increase the national minimum wage at all, and look, that essentially disproportionately harmed women. Women, as we said before, are more likely to be award-reliant and in a situation where other members of the workforce were receiving annual increases of around

4 per cent, that was very clearly an example where holding the minimum wage down disproportionately impacted women, disproportionately impacted women's incomes.

5 **MR HARRIS:** Yes. So I do see in that context of if there was no change to  
the minimum wage and other wages moved up, you would be  
disproportionately affecting women. I see that. I must say again, since that's  
really not the tenor of the recommendation from us, I was just struggling to  
10 is enhanced, I can't see that the upside, if you like, that is addressing the pay  
gap and making the pay gap less, is really a factor that the minimum wage has  
any influence in. That was more my question. But I appreciate your point on  
the downside.

15 **MS HAMMAT:** I mean, I think the point is, though, that the rate of increase  
in the minimum wage over time has been eroded and that any  
recommendations that would lead to a further slowing in the rate of those  
increases will exacerbate the gender pay gap. So it's not just the case that the  
20 gap gets bigger when the minimum wage increase is nil, the fact that over a  
long period of time minimum wage increases has been slowing relative to  
average wages. Anything that will further slow it will make it worse.

**MR HARRIS:** I see the point.

25 **MR DYMOND:** So and I was just going to conclude with part of our reason  
for bringing up the gender pay gap is precisely because, well, in your broader  
discussion in the report about the minimum wage, the gender pay gap doesn't  
really feature as a consideration and we think it ought to be and it ought to be  
addressed.

30 **MR HARRIS:** Okay. I take note of that. So institutions. You want to  
preserve the quasi-judicial role, if I got it right of the - you quoted somebody  
else's submission, but you said you want to preserve the quasi-judicial role of  
the Fair Work Commission and believe that, therefore, appointing somebody  
35 to the age of 65 is going to maintain that quasi-judicial position. I guess it  
would be fair to say we have doubts about the validity of a quasi-judicial  
structure, but we also have independent institutions in this economy that have  
fixed terms and aren't terribly - well, their independence isn't actually terribly  
undermined by having fixed terms.

40 I won't use myself, but I'm an example, but the Governor of the  
Reserve Bank has a seven-year term and doesn't feel terribly undermined in  
his independence, as I take it. Why do you think that independence is  
undermined by having a fixed term for an appointee?

45 **MS HAMMAT:** Well, I think it's a recognition that there is not just a fixed  
term contract, but the question of performance management and the question  
of being appointed is perhaps also a recognition that certainly in recent history  
industrial relations has been a contested terrain, if you will, and not - and one



5 where people's independence, I think, from the government of the day is important so that there could be sound decision-making. It has been, I think, an environment where that tenure has worked to the advantage of the institutions in terms of it not being caught up by its decisions out of the contested terrain, it would seem, politically, certainly over recent times.

10 **MR DYMOND:** Beyond the appointment, there's also the situation where putting in - the tenor of the report seemed to us to be against people appointing people who really have that practical experience of the operation of labour standards. I mean, your earlier point about sort of bringing in people who have sort of, you know, research and analytical expertise and things like that but not necessarily that - not necessarily that experience of the process orientation that's traditionally been Australia's industrial relation - had traditionally been a part, I should say, a crucial part, of Australia's industrial relations system. It's really undermining the notion of the rule-based process, it's a standard base process and it's a fair process.

20 **MR HARRIS:** But we do this now for the Fair Pay Panel. I mean, we don't stack the panel with people with backgrounds in individual sectors. We actually bring in people with expertise. I think our proposition is to do much more of that. Now, that's not against having people that might come from employer or union backgrounds, but it's saying right now they are the preponderance of appointees, the panel is probably the exception. Why wouldn't you do more like the panel that seems to have worked fairly well?

25 **MR DYMOND:** I guess we have our question - a question mark over how well we think the panel has worked. Certainly when it was the situation of the Australian Fair Pay Commission under Work Choices and which had the aforementioned zero per cent increase in 2009, that was once again something a panel that was supposed to emphasise expertise, support so-called sort of background knowledge of sort of economics, et cetera, to the fore, and the results we thought were not terribly fair, not terribly just and not terribly beneficial for Australian workers and Australian workers on any level. Our concern about the eroding of the quasi-judicial arrangement is that potentially you're on the road back to that sort of situation.

40 **MR HARRIS:** I understand that position. Enterprise contracts. Now, Meredith, I may have misunderstood you, we did have a short break of about three words that I missed in your discussion of enterprise contracts, but I don't think I've mistaken this thing. You referred to it as a "take it or leave it" arrangement and we've had this come up quite a few times and I think all new employment is a take it or leave it arrangement, is it not? I mean, when you get a job - - -

45 **MS HAMMAT:** I think the point being - - -

**MR HARRIS:** Sorry, keep going.

**MS HAMMAT:** - - - that in Western Australia, we'll talk specifically in

Western Australia, there was the case that an existing workplace might have many employees employed on a set of pay and conditions and then employers will embark on a deliberate strategy of undercutting that standard by offering new jobs on effectively a take it or leave it basis. So in fact, you had an erosion of an existing standard as new employees entered the workforce. And so whilst it may be true that jobs are often on a take it or leave it basis, the current system ensures that what is offered is consistent with what applied in that workplace generally for employees doing the same work, or indeed, you know, perhaps across several workplaces in an industry.

So our point is that when employers are able to do that and undercut existing standards, that the most vulnerable people are further disadvantaged and that that's most likely to lead to reduction, particularly in take home pay, but also in other working conditions, and it just simply reflects the fact that - I suppose it's a relative bargaining power at the point of engagement.

**MR HARRIS:** No, I appreciate that, although I think I'd maintain the proposition, you know, having had quite a few jobs in my career, you get offered a job and these are the terms and conditions and that's the offer. But I understand the linkage - - -

**MS HAMMAT:** Our point really is that that might work for those who are best-placed in the labour market to be able to say, well, that is not acceptable terms and I'm going to move on to another job, but for many people, and again, those who are already relatively disadvantaged, they don't have the same capacity to be able to not accept a job or to find one that's going to have more appropriate terms. So you're just entrenching the inequality and entrenching the disadvantage.

**MR HARRIS:** Yes. I don't, though, think it's quite the same thing. I guess what I'm saying is every employer goes to the market with a set of workplace conditions that he or she is offering to a new employee. This would be no different, so take it or leave it is that transaction. Regardless of whether someone is well-placed or not well-placed, it's a rare event for an employee to be given the ability to negotiate with an employer a significant variation to terms and conditions as a condition of taking up the job. As you become better off, much higher skills, or you're a football player or something, I guess you get to do that sort of stuff, but most people don't.

My proposition is therefore that take it or leave it isn't really the legitimate criticism here. The legitimate criticism is one I think you made as a subsidiary point, which is there will be differentials then in workplaces between the new employee on the enterprise contract and the existing employee and I would have thought your primary concern is that's the scope for erosion of conditions, rather than the literality of take it or leave it.

**MS HAMMAT:** Yes, that's correct, and clearly the fact that when that is the proposition - yes, that's correct, and when that's the proposition that people are being - where then there are provisions that allows there to be an

undercutting of existing standards, then that's exactly what happens. People's wages, their conditions get eroded.

5 **MR HARRIS:** So and unlike - - -

**MS HAMMAT:** I suppose - - -

**MR HARRIS:** Sorry, are you finished?

10 **MS HAMMAT:** Yes.

**MR HARRIS:** Unlike the AWA arrangements that some have referred to, I'm not sure in your case, because again, you're a bit different in Western Australia, but some people have said this is the same as Work Choices. Existing employees would not be obliged to take up the enterprise contract under this proposition, and in fact, because it's a statutory arrangement rather than an arrangement that is designed by common law contracting, there would be mechanisms inherent in this to assure an existing employee that they are not required to take up the enterprise contract. So you would still have the difference between people doing the same work on different terms and conditions, but you seem to have that in most industries anyway.

**MS HAMMAT:** If I could comment on that?

25 **MR HARRIS:** Sure, yes

**MS HAMMAT:** That was the same sort of methodology that a company - the changes we saw between 1993 and 2002 here, that there was an element of choice about whether people accepted these contracts or not, and what in fact we found is that in the end, there was very little choice. So people at the point of being promoted would often be required to accept, you know, an alternative arrangement, but in this case, you know, an enterprise contract, at the point of being transferred, if people were seeking to work part-time, perhaps to accommodate family and other needs, then again, it was a prerequisite for all those sort of changes in the employment contract that they enter into some kind of enterprise contract, and often, as I said, and a point I think could be well made, that would lead to a diminution of conditions of central wages or whatever.

40 So this idea that existing employees are protected I think is flawed because people change their employment contracts in a whole variety of ways in the existing employer and for a whole range of reasons, and what we observed in Western Australia was that on each of those occasions, it would be accompanied by a requirement to enter into one of the individual contracts. 45 The other point I would make is one that is particularly about competitive pressure, and so I think one of the concerns is that these kinds of mechanisms create a situation where one industry seeks to undercut wages and they do that by putting new employees onto those kinds of provisions. That then creates pressure in fact to other employers to follow suit, regardless of whether they

want to or not, because you know, they're left with this kind of proposition about, well, we'll go down the road, you know, undercut pay, undercut conditions where they're required to follow suit.

5           In fact, what is set up is that, again, so those people who are most disadvantaged in the labour market, a situation where there is increasing pressure that there be a reduction in wages and conditions. So I think the idea that this is just something that people encounter when they accept a new job and go into a new organisation doesn't match the reality of what we saw over  
10 a long period of time in Western Australia.

**MR HARRIS:** No, and I think we'd readily say the idea is to offer flexibility to employers and actually have them potentially copy each other via templates that might even be published by the Fair Work Ombudsman to show how you  
15 could legitimately do this with, I would call it a trade-off between different conditions. So there's no question in our minds that the proposition was designed, in fact, to see these agreements over time offer increased flexibility. I think the difference between us is inherent in this question of, is a no disadvantage test a viable proposition. You haven't referred to that, but I  
20 know inherently the arrangements in the period you were talking about, up to 2003, or 2006 in the Federal case, I think, there was a no disadvantage test.

I think you may be saying you don't think it's strong enough or was never strong enough or something. I think that would be the primary  
25 difference, would it?

**MS HAMMAT:** I'm talking particularly about Western Australian legislation, which had a - the no disadvantage test was only the minimum conditions of employment here, which is what was in the Federal system from  
30 2006 until - I don't know, the amendments - - -

**MR HARRIS:** I see. Sorry, Meredith, I - - -

**MR DYMOND:** There was, in the latter part of the Howard government, a  
35 reintroduction of the no disadvantage test.

**MR HARRIS:** That's right. You were the genesis of it.

**MS HAMMAT:** So the weakening of the no disadvantage test is - has those  
40 consequences that in fact, you know, people's conditions are eroded and also their pay, and again, it is those who have the least bargaining power in the system who suffer the most severe consequences. So a proper no disadvantage test allows people to negotiate whatever flexibility, whatever arrangement that fails the safety net, and we think the safety net should be set  
45 at a good level. For those that are trying to negotiate flexibility, as you call it, if they're already disadvantaged in the labour market, they have no power effectively to have a sensible negotiation with their employer that allows that flexibility to accommodate their needs.

5 It is overwhelmingly the needs of the employer that are met through  
those negotiations and often as a consequence of people's reliance on getting -  
whether it's a new job, or it may in fact be, as I said, a transfer, a promotion or  
a change in hours of work to accommodate family or something else, all of  
these are situations in which people may find themselves forced, in effect, to  
accept lower conditions of employment. So the current no disadvantage test,  
you know, we think goes some way, is considered appropriate. We've seen  
the consequence of where the no disadvantage test is eroded and I put in my  
submission some of the consequences of that.

10

**MR HARRIS:** Yes. Where it falls back to bare minima.

**MS HAMMAT:** Well, I think what I said was that - that's right. So where  
the no disadvantage test is minimum conditions, which in WA at the time was  
I think 10 fairly standard propositions and a very low rate of pay, you know,  
the consequences to that were concentrated in certain sectors; supermarkets,  
cafes, restaurants, business services, particularly impacted on women and  
particularly led to reduction in wages below the award standard and also the  
reduction or elimination of significant employment conditions.

20

**MR HARRIS:** Yes.

**MR DYMOND:** Can I just add that for the period of time in the Federal  
level, between about 1996 and 2006, where you had sort of Australian  
workplace agreements under the old Workplace Relations Act prior to Work  
Choices, they were sort of notionally subject to a no disadvantage test, but  
there is research that found that essentially wages and conditions for the sort  
of very few people who were on them, in a lot of cases did in fact erode even  
with a no disadvantage test.

30

**MR HARRIS:** Yes. We had testimony this morning that there are about a  
million people on them. Is that inconsistent with what you will recall from  
this research?

35

**MR DYMOND:** I don't have it in front of me, but I'm happy to provide it to  
the Commission.

**MR HARRIS:** Yes. No, I'm pretty sure - that would be good because  
there's always research we won't have found, but I do remember some  
research on that and I remember roughly the conclusion reached. I was more  
commenting on where there were a large or a small number of people on them  
because it does take me to IFAs, where we have relatively few - there's a  
relatively low take-up of IFAs by comparison with the perception perhaps out  
there that these agreements are very commonplace. Do you know the  
reasons? I think you referred earlier to some uncertainty for employees about  
how they might go about making such changes. Do you think IFAs are just  
not a very well-known mechanism, or is there some inherent problem in the  
nature of them?

45

5 **MS HAMMAT:** I don't particularly know that I have a view on that. I just simply make the point that we've got a system that has for many years focused on bargaining as a way to seek to tailor arrangements to make them appropriate on workplace-by-workplace or employer-by-employer basis. You know, our experience I suppose overwhelmingly favour bargaining as a way to reach those kinds of outcomes. I suspect bargaining probably works quite well to accommodate what individual employers might be seeking to achieve.

10 **MR HARRIS:** No, I was thinking of employees.

**MS HAMMAT:** Employees equally engage in bargaining, and so of course the nature of it is that employees' issues are a part of the bargaining agenda as well. Maybe the low take-up of IFAs is because our bargaining system works exactly as it's supposed to.

15 **MR HARRIS:** We'll leave that because it's not a major topic I think in the course of the submissions you've put forward. Can I do right of entry? The great difficulty with - look at the right of entry and we see increasingly over time it's become a matter of definition in blackletter law with descriptions of lunch rooms and levels of restrictions and all that kind of thing. It appears to be trying to regulate bad behaviour without necessarily being sure that - and that's not bad behaviour attributing it to either or any party, it's just bad behaviour per se. It's not a great place for blackletter law, really, these ideas of describing access to particular facilities and that sort of level of detail.

25 You've made some comments, Meredith, about general desires for improvements in right of entry, but can I ask you first whether your preference wouldn't be that blackletter law should stay out of this and these things are just negotiated by workplaces, thus reflecting, where there is good working relationships, right of entry would be fine, and where there's bad working relationships, you know, there's almost no solution that blackletter law can put in place, so should be dealt with via the standard kind of negotiating processes that historically have dealt with this sort of activity.

35 **MS HAMMAT:** Well, if I could start with the proposition where there's a good relationship and no problem, my observation would be that that happens already in Australian workplaces and that there's opportunity for - so that happens because of common understandings and because of the recognition that it did see the mutual benefit in providing for people, for union officials, to have proper access to people. So my view would be that that - anecdotally, my view would be that that is already happening. The point of requiring the legislation is there be a minimum standard that has to be met so that, you know, for those employers that are not interested in providing any facilitation, there is some minimum standard.

45 So my point really goes to the fact that what we have observed is increasingly employers seeking to frustrate what the minimum standards are, to make it extremely difficult, and I made reference to the fact that many Western Australian workers work in very remote locations. We've had stories

of union officials spending, you know, effectively a whole day to travel to a worksite on the basis of wanting to speak to members, only to find that when they arrive that day, after some sort of minor technical reason, being denied access. Those issues, of course, can't be immediately resolved, so there is, I think, from employers an attempt to really frustrate a process, as a way of keeping union officials out of their workplaces.

I made reference also to many people in Western Australia work in a fly-in/fly-out basis. They can live for weeks in accommodation camps, and yet, union officials are denied any kind of access to meet with people whilst they're effectively off-shift. They're denied the opportunity to meet with them at all because it's considered to be, you know, accommodation and therefore, not covered by the scope of right of entry. So I mean, our concern is with employer behaviour where they seek to keep unions out of workplaces. We think it is a critical part of the fair functioning of the system that unions have access to workplaces, have access to their members. And what we've seen is that I think, you know, really very poor behaviour from employers to frustrate that. I should say the other example in terms of remote locations is employers sort of insisting that unions meet with members in the middle of the day, in potentially 45-degree heat in tin sheds in the middle of the desert somewhere.

I mean, this is just clearly designed to frustrate any kind of access from union officials to their employees and these are the things that we think should be addressed, to improve right of entry and facilitate that.

**MR HARRIS:** But my question is a threshold one. So we've had statements made to us about bad behaviour on both sides, and I guess my threshold proposition for you to at least think of in this discussion we're having is, is blackletter law ever really going to be capable of defining the next level of response. So if not the lunch room, then where? And inserting all these things into regulation creates this thing that everybody says they don't want, the 900-page Act will become a thousand pages, of which there'll be a hundred pages describing lunch room access. Or is this stuff not generally better handled in the enterprise bargaining arrangements that generally apply to these kinds of employers?

We know they don't apply to people who - there are some employers who stick solely with the award, but just thinking about resolving right of entry issues, is blackletter law really ever going to resolve this?

**MS HAMMAT:** Well, I mean, our view would be that there has to be a minimum standard, that there needs to be - and that that would need to be spelled out to some extent in legislation. I think the proposition that it's left to the parties to bargain in an collective agreement really just sets up a circumstance where there'd be no right of entry. So at many workplaces, it wouldn't exist because employers would simply refuse to bargain that. So I think there needs to be a minimum standard, it needs to be in legislation.

5 I think part of the challenge with right of entry is that where a party is  
not doing the right thing, in effect that often means that unions are unable to  
access their members, and the question is, how do you then get relief? So an  
employer that refuses entry, and often on grounds that are not supported by  
the legislation, if you've just travelled a whole day to the middle of nowhere  
in Western Australia to see your member and the employer says, "Well,  
you're not coming in", you know, you've wasted a day. The only way to  
resolve that is in fact to travel all the way back to Perth and seek to get the  
assistance of the Commission.

10

I don't think the problem is having a minimum standard in legislation.  
It may be the question turns on how there can be relief where one party claims  
the other is not following that minimum standard.

15 **MR HARRIS:** Maybe we should look further at that as a narrower thing, but  
it is highly problematic in this area. Both unions and employers have said that  
they don't think we did enough on right of entry, but my explanation for this  
is the one I've just given to you; it is very hard to define, in response to the  
examples given, a form of blackletter law improvement that would deal with  
20 that. At best, it might partially deal with it, almost certainly falls short of it,  
not necessarily resolve these kinds of conundrums which appear to be driven  
by failures in the working relationship rather than failures in the principles  
that laws tend to try and put in place.

25 Anyway, that's more of a bit of an advertisement for why we're going to  
struggle a lot with this. It's quite a problematic area and inherently I guess in  
the past you would say this has actually not been subject to the degree of  
blackletter law, if you go back 20 years ago, but since then, it seems to be just  
a law upon law, upon law, upon law, and still the problems remain. I had one  
30 other thing here - - -

**MS HAMMAT:** We could perhaps make further written submissions around  
some of that.

35 **MR HARRIS:** Well, I'm interested in you doing that, and even though I  
think the deadline for submissions is supposed to be up, I've already irritated  
the staff here today more than once by saying, but we'll reopen it for a short  
additional submission on the subject. Don't feel you have to write pages, but  
just some kind of commentary on the general proposition. You know, we're  
40 always being asked to deregulate here at the Commission and I guess of the  
kind of regulations that we've looked at, that's the bunch that looks most  
scary in terms of is this regulation actually achieving a gain for people. That's  
not to signal change, we're not - - -

45 **MS HAMMAT:** So we will able to contribute - - -

**MR HARRIS:** Yes, that would be great. Finally, Unions WA suggest that  
you've got doubts about allowing the minimum wage to vary by State,  
Territory or region. I'm not sure this is how much this is actually going to



affect you because you have your own minimum wage proposition in any event, but did you have a comment you wanted to make on that? I've got a scribbled note of my own here about this, but I can't quite remember why.

5 **MS HAMMAT:** So I think the original recommendations of the Productivity Commission was that the minimum wage could be varied - - -

**MR HARRIS:** No, we actually decided it shouldn't be - oh, issues paper?

10 **MR DYMOND:** No, I think what we were talking about there was the proposal or the suggestion around the temporary variation to deal with exceptional circumstances.

15 **MR HARRIS:** Yes. I understand that's drawn a bit of interest. The way we tried to phrase it was so that people could give us their perspective on it, because I think the reason we put it in is there seemed to be some uncertainty from some parties about whether the Commission had the ability to do this, although the Commission didn't seem to be in much doubt about itself. But on the principle of such a variation, have you got a comment to make?

20 **MR DYMOND:** Look, essentially, we raise a point, and I think others have done so with you as well, that this would appear to be putting the burden on low-paid workers, paying if you like, for exceptional circumstances like natural disasters, when they're most likely to be the victims, if you like, of an exceptional circumstance like that, and least likely to pay the cost. So in that sense, we'd be extremely dubious about a notion that perhaps even a temporary variation, you know, why should they - why should the people on awards need to carry the burden, so to speak?

30 **MR HARRIS:** Yes, I think I do understand the practical effect of what you're saying. I was more thinking about the principle of the Commission having the ability to consider this, but look, we can leave it at that, I think. I wasn't trying to put you on the spot. It was just I had a note here and I couldn't remember why I had my note there. I'd like to thank you guys for making the effort today, telephone discussions are not easy and I thank you for putting in your submissions and particularly because the West has unique arrangements and it's not that we can't learn from them. In fact, in minimum wage, I think we did actually note you as being perhaps not completely a natural experiment in this question of minimum wages, but something not far off it, and so you have particular perspectives to offer and I want to thank you for bringing them forward.

**MS HAMMAT:** Thank you for the opportunity.

45 **MR HARRIS:** Okay, appreciate it. Bye.

**ADJOURNED**

**[12.56 pm]**

5 **MR HARRIS:** I think we are going to start up. So we are back on the record with the last of the Melbourne public hearings, and I think we're going to have the Australian Higher Education Industrial Association, would that be correct?

10 **MR ANDREWS:** Yes, thank you, Commissioner.

**MR HARRIS:** Can you identify yourself please for the record?

15 **MR ANDREWS:** Yes, Stuart Andrews, Executive Director of the Australian Higher Education Industrial Association.

**MR HARRIS:** Do you want to make some opening remarks, Stuart?

20 **MR ANDREWS:** Just very briefly, Commissioner, and thank you for the opportunity, quite obviously. We put in a submission on 17 March pre the draft report and we are thankful that a number of things that we wrote, we put in that submission have been taken on board by way of recommendations and lines of further inquiry. We've put in a supplementary submission, a post-draft submission of 18 September, and  
25 the outline of matters that we have forwarded today is a cut and paste of the first part of that submission. There is a second part which is a table that addresses all of the recommendations and other points of inquiry in the draft report, and I am happy to answer questions in respect of any of those other positions that we have put. But as I say, the outline of matters that  
30 we have submitted for this afternoon's purpose is the first part of our submission of 18 September.

In terms of those matters of particular concern which we put as priority in our outline, they go to various aspects of the unfair dismissal  
35 jurisdiction and getting matters heard and determined by the Commission, and our interests go beyond simply unfair dismissal matters but also to streamlining processes and weeding out claims that have no reasonable prospect of success in other areas such as general protections claims and bullying claims. So that's one part of our submission.

40 In terms of that we've made submissions as to the issue of filing fees and have drawn the Commission's attention to the UK experience, which I am happy to talk further about. And one further aspect of that, Commissioner, which we didn't highlight in our submission, is the fact  
45 that for the lower paid worker there is a remission aspect of the UK system and I am conscious also that one of our member universities, the Australian Catholic University, has provided a submission after talking to ourselves

and their concern is as to the lower paid worker. We didn't get to the further research of the UK system prior to both those submissions being before the Commission, and I would imagine that - - -

5 **MR HARRIS:** We can track that.

10 **MR ANDREWS:** - - - that would cover that. The other area of concern is in relation to the general protections claims, the ambiguities relating to what constitutes the exercise of a workplace right, which has been the subject of a number of submissions to the Commission, and I am happy to answer any questions in relation to what we have put there. Our concern is that jurisdiction shouldn't extend to areas of general unfairness. This jurisdiction relates to illegality and we shouldn't have a situation where complaints that are not able at the end of the day to be determined by a court or tribunal, such as an under payment claim or a failure to comply with an agreement, et cetera - if someone makes a complaint about those sorts of things then they shouldn't be victimised, etcetera, for doing so and therefore this jurisdiction should extend there. But other sort of run of the mill, in-house complaining within a workplace - if someone is complaining about those matters, and I can refer to cases, we don't see that as being something that the employer should be not able to pay proper attention to in terms of general workforce, workplace performance. And so there shouldn't be repercussions for the employer in tackling somebody for performance issues along those lines.

25 The other aspect of our submission today, Commissioner, that is before you relates to section 424 of the Act which relates to the Commission, the Fair Work Commission's ability to issue orders suspending or terminating industrial action on the basis of threats to life, personal safety, health or welfare, and universities have been the subject of - or there have been applicants before the Commission successfully for orders under section 424 that have led to the Fair Work Commission suspending industrial action on that basis. This is an issue that has been raised in the draft report and I am happy to talk to that further.

35 **MR HARRIS:** All right, well, let's go backwards from that one for a start because that is quite specific. You don't want to change section 424 because of specific examples that have occurred in your sector, if I understand correctly?

40 **MR ANDREWS:** Yes, Commissioner. What we say is that section 424, the intention of that section is towards innocent third parties who are affected by the industrial action related to bargaining in a workplace that they're not involved with at all. So students in universities, patients in hospitals, etcetera, etcetera, they can be the victim of industrial action and where that industrial action is causing a threat to their life or limb, their mental wellbeing etcetera, then there ought to be obviously the - we would

say obviously - the power of the Commission to order that industrial action be suspended so that harm does not occur.

5 In terms of the tight turnaround that the Fair Work Commission has in  
dealing with these applications - I think it's within 48 hours that the matter  
needs to be heard and determined by the Commission - if we're to have the  
Commission having a jurisdiction that says that whilst there might be a  
severe impact, people, patients in hospitals might die as a result, to use the  
extreme, for the Commission to make an assessment of likelihood of a  
10 particular event occurring is going to be very difficult in a short space of  
time. So we say leave the system as it is. If what is threatened by way of  
industrial action presents a likelihood that that suffering may occur then  
that's a basis for orders to issue. We are concerned that in a short space of  
time for the Commission to form an assessment that could be in error is -  
15 you know, could lead to adverse consequences.

**MR HARRIS:** But they're not going to be forced to do this. Our  
recommendation says, "Where the Commission is satisfied that the risk or  
the threat to life, personal safety, health or welfare is acceptably low." So  
20 we're not really talking about nurses walking out of the emergency ward or  
the ICU or something. The example I think that was given in our report  
was where the Commission had decided that Northern Territory teachers  
couldn't use industrial action. It just seemed rather too high a test had  
been actually applied here. So I don't think we're talking about where  
25 there's a genuine risk of death. We're talking about in circumstances  
where it appears the Commission may not have sufficient discretion to  
make wise judgments, as you say, in short term circumstances which  
means they probably won't really be too adventurous, but appears to have  
limited ability to make judgments - - -

30 **MR ANDREWS:** Well yes, I understand that Commissioner, and our  
submission doesn't take issue with the logic of the example that has been  
given. What we take issue with is - well, don't take issue - what we're - - -

35 **MR HARRIS:** You are allowed to take issue with it.

**MR ANDREWS:** Well, I know we're allowed to take issue but the point  
of our submission is that care ought to be taken in the drafting of any  
variation to section 424 to make it clear that where there is indeed some  
40 real likelihood of serious risk to life or limb, to use that expression, that  
that ought to form the basis, and continue to form the basis, for orders.

**MR HARRIS:** Yes, yes. We do get these applications in currently - I  
think in the rail or the train dispute in Melbourne most recently there was  
45 this question of is there a threat to public safety as a result of not having - I  
don't know whether that was the basis of the actual claim in front of the  
Commission, but I know it was the basis of some commentary in the news

media. I guess the Commission itself is quite capable of making these judgments. This is why we put this one up not as a recommendation but as a sort of investigation - is there an actual issue here? There may be no actual issue of discretion may be being logically applied. And defining it for the purpose of variation to black letter law is indeed reasonably problematic. Anyway, I take your point and we will give further thought to that. That's the intention of putting it up in the way we did.

**MR ANDREWS:** And whilst we've not had matters, Commissioner, under section 423 or 426, we don't see a logical link there that because matters are logically pursued under one section that in a disproportionate way that it means that that section is not working as it should.

**MR HARRIS:** No, no.

**MR ANDREWS:** We say it is.

**MR HARRIS:** In other areas the potential for major national economic harm kind of thing has probably got greater need for review than possibly this one. I don't know. Anyway, we're interested in investigating it so we will take note of what you had to say. So, general protections and this question of defining workplace rights. So your sector has in fact had some of the more interesting cases in this area, hasn't it?

**MR ANDREWS:** Interesting - that word, Commissioner, is - - -

**MR HARRIS:** Yes, exactly.

**MR ANDREWS:** - - - rather subjective.

**MR HARRIS:** It is in its well known meaning.

**MR ANDREWS:** Yes.

**MR HARRIS:** We live in interesting times.

**MR ANDREWS:** Yes, and we give advice to our members, and have given advice to our members, on a whole range of actual and potential general protections claims that don't make their way to the Federal Court. There was a case involving RMIT University that gained some notoriety. There has been a couple of cases in relation to the concept of political opinion. That concept, whilst not subject to our submission, I am happy to say for the record that that seems to be given a very wide meaning in terms of in-house politics to make reference to a University of Sydney matter that was before the courts in relation to disputants and different sides of a philosophy department, to a recent case where - not involving a university - where an employee's concerns about their employer complying with the

law was held to be a political opinion because observance of the law related to politics in some way.

5 So we are concerned in terms of the way that a number of the aspects of the general protections and workplace rights definitions are being interpreted by the Federal Court and the Federal Circuit Court, as I say in a very wide manner, which from our perspective we very much doubt that that was the intention of the legislature.

10 **MR HARRIS:** Is it possible to limit the exercise of rights under section 341 in associated sort of locations by drafting it to tie it entirely to the employment relationship? So these examples, and expressing a political opinion is one, could you limit the general protections to issues effectively that can be dealt with under an enterprise agreement, for example? In  
15 other words ones that are defined as being, by other parts of the legislation as being solely about the employment relationship?

**MR ANDREWS:** I think the position that we would take there, Commissioner, is that we see legitimacy with respect to the concept of  
20 workplace rights, that those rights may properly be embedded in legislation, an enterprise agreement, an award, and therefore if someone is complaining to their employer or going to a lawyer or other adviser, concerned that they are being underpaid and making complaints either to their employer or to somebody else, like in the Murrhy case, we see a  
25 legitimacy there, that they are trying to enforce what they have as an entitlement. And that is the subject matter of the complaint.

So our submission goes to this issue of subject matter. So in the Harrison v In Control case, for example, you have a case where the  
30 employee was complaining about the way that managers make decisions in the workplace. It was held not to be a workplace - and action was taken against - that was an issue of performance. There was performance management and constantly complaining about the way things were done. It was a performance related issue. And the judge of the Federal Circuit  
35 Court, or Federal Magistrates Court as it may have been at that time, concluded that it didn't constitute a workplace right.

But contrast that with Evans v Trilab which is a recent case where Lucev J of the Federal Circuit Court, where he goes over all these different  
40 authorities. He concluded that there was a reasonably open case for the argument that the employee complaining to their employer that you shouldn't do the soil testing this way, the Australian standard requires that this be done in another way, that issues to do with complaining - not doing it as the employer wants the employee to do, etcetera - we can see that as  
45 an issue of workplace right but Lucev J saw that as something that could give rise - as a complaint or inquiry about - that constituted therefore a complaint or inquiry under the heading workplace rights.

In those two factual situations the dismissal might be unfair - and we have a parallel jurisdiction, of course, to deal with unfair dismissals - - -

5 **MR HARRIS:** Unfair dismissals, yes.

10 **MR ANDREWS:** The issue is whether those sorts of rights, the right to complain to your employer about anything, about the colour of the carpet or whatever it might be, we don't see that as being the intention of the legislature in terms of saying this is something that, if the employer takes actions because you're constantly complaining about this, that and the other and not prepared to do this because of your complaints, etcetera, that the employer has somehow got their hands tied from dealing with that matter because it's a complaint or inquiry.

15 **MR HARRIS:** So we are agreeing that some tightness is needed but I'm trying to work out how to acquire tightness. I mean, we have thought of white lists and black lists and things like that but the problem with those kinds of things is you will never deal with the specific circumstances sufficiently to deal with the next apparently anecdotal case where either, you know, a judge can extend the right by judgment based on precedent and - he won't deal with all cases, it seems, by either a black list or a white list. I guess what I was trying to think of is: is there a way of conceptually linking the right to be perpetually self-managing? That is, if it can't be dealt with, if the right claimed is not one that is authorised as being capable of being dealt with in the course of the normal employment relationship, it isn't a right that exists under the general protections. I'm trying to find a way of self-management, if you know what I mean - - -

20 **MR ANDREWS:** Yes.

**MR HARRIS:** - - - rather than specification. But it's just a proposition.

25 **MR ANDREWS:** Yes.

30 **MR HARRIS:** I'm not saying that behind me is a team of lawyers saying this will work. But the advantage I have in coming to hearings, running this, is I can actually ask you a question and you have the legal background and you can tell me why that's a crackpot idea and here's three reasons. So that's what I'm interested in.

35 **MR ANDREWS:** We fully support the notion that there ought to be some tightness drawn around this, and in terms of the formulation that we have with respect - and that we have put with respect to complaints and inquiries relating to employment, that they ought to be - it ought to be narrowly defined by the legislation to be referenced to an entitlement that is capable of being determined in a court or tribunal.

**MR HARRIS:** Okay, a court or tribunal means we go back to precedent and we get a long list of - - -

5 **MR ANDREWS:** But it raises the subject matter, Commissioner. So as I said, like with an underpayment claim, if someone is complaining about being not paid correctly - - -

**MR HARRIS:** I think we can see how the simple ones work.

10

**MR ANDREWS:** Yes.

**MR HARRIS:** But having tried to examine this from the point of view, as I said, specification, the simple ones are easy. No-one is really in very much doubt about them. The ones that are imputed rights, if you like, that get drawn up only because of a set of circumstances and then are established by precedent as being a new right you never realised you had created under the term “general protections”. That appears to be the exposure. And then ultimately a court has to decide on this. So we could concede that perhaps this is not capable of reform and that it will always have to be dealt with by courts, but right now we are on a pathway which says how can we deal with this better by putting some tightness into it? And, as I said, I think while everybody is agreed it should be tightened, no-one can quite agree how to do that. In fact, no-one can advance to me brand new ideas on how to do that.

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**MR ANDREWS:** Well I could advance the idea, Commissioner, that it might be defined not with reference to concepts of courts or tribunals but in terms of instruments, being legislative instruments, or as you were saying the industrial instrument, whether it’s an enterprise agreement or a modern award. That tightens it in terms of the notion that the courts through development of the common law, that the law is wider than that expressed in statute and industrial instruments. So if we are to put boundaries around it with precision I think I agree that you would need to define the source of that entitlement in terms of an instrument.

30

35

**MR HARRIS:** Okay. Lodgement fees, so that’s a useful point you’ve got and I think we did actually hear about it from one of the Catholic Commission employees in Sydney as well, or certainly the general concern that they had about raising the lodgement fees would be unfair to the least well off. So your point is a well made one about remission for low paid workers. We can all debate about what a low paid worker is but I’m sure we will find a way to deal with that. So that’s quite a useful sort of intervention.

40

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**MR ANDREWS:** And there is, as I said, late research on our part, Commissioner, in terms of the UK system. There is a lot of information on



the relevant websites as to our their remission system works and the means testing involved.

5 **MR HARRIS:** Yes, we can - as I said, we're good at that. Once you point us in the direction of something I think we're good at getting after it. Unfair dismissal on the papers? We've had some interesting commentary on this because I think we have probably left a perception for those who are defenders of the right to effective administrative law style process that on the papers implies no consideration at all for any other factors. And so 10 we'll need to do a bit more work on this. But our intention with on the papers is that the documents that are submitted are examined at an early stage to see whether there is a likelihood of a viable case prior to calling upon an investment of time and/or money by the employer. But that would not prevent the Fair Work Commission from deciding that indeed there 15 was a case, regardless of whether the case was driven more by concerns about how a dismissal took place rather than whether it was legitimate. Now, defining this again is problematic. I'm just wondering if you've got any commentary on that sort of shift?

20 **MR ANDREWS:** Yes, well our submission to encapsulate it is that there ought to be a multi-faceted change to the current system, and that the Commission ought to be looking at the merits, or the conciliator if it's a conciliator looking at - directing the parties to a merit based discussion. So that's one aspect of it. Claims can, from our experience, involve clear 25 issues of jurisdiction. That there was no dismissal, that there was no employment relationship, etcetera, etcetera. We shouldn't have a system that forces effectively all such matters going through a conciliation process. If there's a clear jurisdictional issue alive then what we're saying is that the set up should be flexible enough for those matters to go straight 30 to a determination of that particular issue without requiring an employer, for example, in the sort of regime we're envisaging of directing their attention to the merits or the fairness of the dismissal that isn't actually going to be determined - there for determination if the jurisdictional argument is valid.

35 So in terms of the on the papers arrangement, if there's - and I can't recall whether the draft report, whether it envisaged that there'd be an employer response to the application prior to this consideration being given - but irrespective of what the regime is that ought to be factored in.

40 **MR HARRIS:** Yes, sure. We did have some useful contribution on how an electronic system, effectively a form which forced by its structure a complainant to identify factors that would help the complainant determine whether or not they actually had a legitimate case. In other words if you 45 can't fill out the relevant section you may lack the evidentiary need to have a meritorious case. We did get some proposals when we were in Sydney on that basis, and they will be up on the transcript on our website. It did

seem a useful way of putting a construct around on the papers. In other words, on the papers is not just a mechanism which says stick in a claim and see how you go, but it's actually a kind of claim which helps the Fair Work Commission staff identify right at the outset, or the Commissioner I guess, depending on who is exercising this - and that's another proposition that we have to clarify further, who is exercising this power - but decide it, as it were, on the papers. And so we will look at that, I think.

I guess because in your commentary to us you said well, do on the papers and have more merit focussed processes, do both of the recommendations or the aspects of the recommendation in 5.1, I was just wondering whether you had a view about which though is likely to be more effective? Our interest here is not that there's no unfair dismissal system. Our interest here is that the credibility of the system is not undermined by large calls on the time and resources of the participants when there was no real case.

**MR ANDREWS:** Yes, Commissioner, and that's exactly our perspective on this as well. For both the employee and the employer the current system has claims - if they ultimately end up being determined, heard and determined by the Commission it's so far down the track that the employee is in limbo all that time and the employer doesn't know what to do in terms of replacing, etcetera. So this is all about easing the numbers, getting - deterring, having people think twice about putting in an application and realising that there are financial consequences involved if they're pushing ahead with a case that's got no reasonable prospects of success.

With respect to the notion of on the papers, I think I can say that we would see it as - obviously I haven't seen the sort of electronic document that you have alluded to, but I could imagine that that could assist in weeding out cases that have got no reasonable chance of success on jurisdictional grounds and so it could go to various matters that relate to the definition of dismissal, et cetera and the nature of the employment relationship with information as to - ascertaining as to whether the casual employee is going to meet the threshold for being able to put in an unfair dismissal claim.

I personally don't see - perhaps my imagination is limited, but I would see it as much more difficult for a form to sort of weed out on the basis of the concept of fairness. I mean, fairness at the end of the day - - -

**MR HARRIS:** No, no that's true. That's going to be the judgment.

**MR ANDREWS:** That's right, yes. So on these jurisdictional things I think there is certainly much value in looking at ways of identifying those key facts that may make it clear as to whether someone is within jurisdiction or not.

**MR HARRIS:** That's I think what we had in mind, and moreover that if you couldn't fill out the relevant section of the form there would be a segment which then advised you to get advice rather than just proceed and put in a claim. In other words, that you would be unable effectively to put in a claim without being able to work out how to fill in box seven. So get advice, and that would be that. Anyway, it may not work. Who knows what technology is capable of delivering, but I know that in different circumstances this functionality has actually been made to work and intuitively it doesn't look beyond the powers of capability. The question of course with these things is all whether it will solve the problem or not. Technology can do wondrous things, but will it actually solve the problem? Don't know. Anyway, I thought I'd draw attention to it again in asking you that question.

Did you want to cover IFAs? It's been a matter of - we have had quite a lot of different testimony over the period of these hearings about IFAs and it would be fair to say that neither employers nor employee representatives seem tremendously taken with IFAs. I am always tempted when I get to the end point here, and it's happened already once today and I probably shouldn't do it again, but why do we have them?

**MR ANDREWS:** Well, IFAs were perhaps the centrepiece of our submission of 17 March and what we said then was our concern that if the legislature wants an arrangement whereby the individual employee and their employer can agree to some variant of a modern award or enterprise agreement that doesn't suit their purpose and the employee, to use new language, is not going to be worse off, not disadvantaged - I will go back to old language, which way we want to look at it - that that arrangement ought to be permitted by the system. Without going chapter and verse over the former AWA, Australian Workplace Agreement regime, the IFA regime was put in in replacement. It was to have safety mechanisms around it and the employer could be prosecuted if the person was in fact disadvantaged because there was no policeman. The Fair Work Commission doesn't act as a policeman on IFAs.

Unions have been very scared about the wide use of IFAs. In our sector in bargaining this is a sort of no go zone. So the IFA clause that you have to have in an agreement is of very limited scope. And what we've said, if the legislation - if the legislative intent is that with appropriate safeguards the individual can have some different arrangement to some aspects of their employment -that the enterprise agreement, for example, relates then the system should allow that. And that avoids an AWA type system which is a parallel system where there is greater potential for abuse. And I think everyone would perhaps, or most people would talk along those same lines. The enterprise contract that - if I've got the terminology right - - -

**MR HARRIS:** Yes.

5 **MR ANDREWS:** - - - that is proposed to the draft report I think, on my reading, is quite separate to that.

**MR HARRIS:** Yes.

10 **MR ANDREWS:** It's groups of employees.

**MR HARRIS:** It is, yes.

15 **MR ANDREWS:** So going back to the individual, and particularly in terms of if you look at the nature of our workforce today compared to 20, 25 years ago, the diversity of the people going in and out of jobs, having two or three different working jobs, working arrangements, being an employee here and a contractor over there, etcetera, etcetera and just the mobility of everybody, I think it's just so - there is so much potential for instruments that are directed to the collective to not operate effectively for an individual. And if the employer and the employee say we'd like to have something different but the system just doesn't allow it. Sorry, we can't do that differently. We'd be in breach of a provision of the enterprise agreement even though it's going to suit you so much better. You're going to be saving all this extra cost not having to come into work, etcetera, etcetera. You know, what - the system should permit it.

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30 So just because IFAs - there hasn't been a great take up in various sectors. And the university sector has been a very, very low take up - so I'm talking in a theoretical sense here, if you like. I'm not talking in terms of giving examples of situations within the university sector. But I think it's because the IFA arrangements in our agreements and awards have been narrowed, particularly enterprise agreements, by what I've said about concerns of unions as to how the system might be abused - then I don't think that's the starting point. I think the starting point is looking prospectively about what the flexible work needs of individuals are going to be into the future and having a system that does allow for those individual variations with appropriate safeguards.

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40 **MR HARRIS:** Yes, I appreciate that too. I think we might have reached the end of our time. I have lost my guide which tells me how to stay on time. Close enough to it. Is there anything that I have prevented you from putting on to the record today that you are keen to put on the record?

45 **MR ANDREWS:** No, not at all Commissioner and I am very appreciative of the opportunity to have been before the Commission this afternoon.

**MR HARRIS:** Okay, thank you very much for your time.

**MR ANDREWS:** Thank you.

5 **MR HARRIS:** Now, Professionals Australia would that be right? Michael, come on up. Did you come to our infrastructure inquiry too?

**MR BUTLER:** Someone else.

10 **MR HARRIS:** Someone else? I know the organisation did, and of course - because my memory for faces is not great so I will be going - I just thought I'd ask.

**MR BUTLER:** Eric Block, I think.

15 **MR HARRIS:** Yes, that would probably be right. Anyway, I know your organisation was on our list at the time. Fine, once you have settled if you could identify yourself for the record that would be great.

20 **MR BUTLER:** Good afternoon. My name is Michael Butler and I am the Director, Industrial Relations for Professionals Australia which is the trading name for the Association of Professional Engineers, Scientists and Managers Australia which is registered under the Fair Work Registered Organisations Act.

25 **MR HARRIS:** Thanks, Michael. Do you want to make opening points at all?

**MR BUTLER:** Yes, if I may - - -

30 **MR HARRIS:** Sure, go ahead.

35 **MR BUTLER:** - - - make an opening statement, Commissioner. Just by way of background, Professionals Australia represents a diverse range of professional and managerial employees, including professional engineers, scientists, architects, retail pharmacists, IT professionals, generic managers and so on, and we thank you for the opportunity to speak to the Commission through participation in this public hearing. I note our initial submission that was tabled - sorry, filed in March of this year, and a response to the draft report which was lodged on 18 September. Today I would like to, in this opening statement, just focus briefly on two main aspects; that is the proposal for enterprise contracts and the unfair dismissal and general protections jurisdiction.

45 **MR HARRIS:** Okay, go ahead.

**MR BUTLER:** By way of background Professionals Australia is particularly concerned about potential misuse of enterprise contracts

which, as we understand, will be able to be unilaterally imposed on some employees or where employees will feel that they have little or no option other than to accept an enterprise contract if it is offered. In summary, it is our view that there is potential for this type of industrial instrument to make what is already an unequal bargaining relationship more unequal. And by way of background I'd like to draw attention to our initial submission where we made reference to a survey that we conducted of our members who are currently on common law contracts. It was an on line survey, and I am aware that on line surveys can be critiqued, but we received 514 responses over a matter of a couple of days. It was - it certainly struck a chord amongst our members.

We sought information from our members on a range of issues, including the extent to which an employer was prepared to negotiate the terms of a contract, whether or not the general conditions in the contract are tailored to individual circumstances or those which are generally applicable to work colleagues, and if the employee's contract had been varied by the employer and if there was agreement with this variation. We wanted to test our anecdotal understanding of common law contracts with the experience of our members.

Just briefly regarding the extent to which there was negotiation under the terms of the contract, 82 per cent of respondents reported that they had little or no say in the negotiation of their contracts. The breakdown in response to the question, "Was the contract take it or leave it?" was 53 per cent and 28.5 per cent there was little or no negotiation. When it came to the question as to whether the contract had been varied by the employer, 58.41 per cent reported that they felt they had little choice but to accept. 19 per cent were consulted and generally agreed with the change, but only 7.5 per cent reported that they were consulted and it was either withdrawn or modified.

So the backdrop for us in our approach to enterprise contracts is that if these apply to a class or classes of employees and if these were to, for example, override the provisions of awards and then imposed as a condition of employment or new employees, there would be little to prevent those enterprise contracts in reality being applied across an enterprise.

In that regard, that's in contrast to the current arrangement where common law contracts - and I'm aware that this issue was canvassed in the draft report - but that currently common law contracts are set above the award or the enterprise agreement and the national employment standards but they must be in conformity with those. And over the years there's been an evolution of tests under the common law jurisdiction, and I appreciate that, you know, those tests are not always conclusive but with the negotiation of a common law contract, however limited it is, there is some

mutuality in that process where the employee can have a limited capacity to negotiate in respect of their individual circumstances.

5 Our reading of enterprise contracts is that that power of negotiation, however restricted it is, would effectively disappear. It would be possible, in our view, to have a very simple enterprise contract that contained a set-off provision that could comprehend all award entitlements and if in the absence of any tests that enabled an employee to negotiate then we would see that as a retrograde step.

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Currently - and I understand that enterprise contracts could also displace enterprise agreements - there are provisions in enterprise agreements where professionals and managerial employees are covered where there's already built in flexibility. It's quite common in enterprise agreements for professionals and managers to be covered for basic conditions of employment, but for there to be flexibility in remuneration.

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Likewise in awards covering professional employees such as pharmacists, architects, surveyors and general professional employees awards there are annualised salary provisions where by mutual agreement it is open to the employee, or groups of employees if enough individuals support it, to enter into these sorts of arrangements with their employer. But again there's a degree of mutuality. It is tested, readily tested, against benchmarks, you know, particularly if it's an annualised salaries provision, payment records.

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So they're just a number of the issues, Commissioner, that we're concerned about with the enterprise contracts having that capacity to even further limit what we would see as the limited capacity for professionals and managers to negotiate.

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The other area that I'd like to address briefly by way of opening statement are the unfair dismissal and general protections jurisdictions. If I could make the observation that we see these - I suppose it's stating the obvious - as very important protections for managers and professionals who have traditionally had a more individual, more individually tailored relationship with their employer and whilst they operate more flexibly, and always have operated more flexibly, as managers and professionals we think it's very important that rights are built in. And I suppose it's the evolution of the industrial system. I wasn't around practising industrial relations in the 1970s but the law of the 1970s was far more centralised than today's industrial relations climate and, you know, we think that the individual protections should be at least maintained.

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In terms of some of the specific issues raised in the report, reading the report we understand that there is a belief that at least a number of the applications that are made for unfair dismissal and general protections are

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made in cavalier fashion or made vexatiously or are trivial. I can only make the observation from our experience. We are an organisation of 23,000 members and as part of the service that we offer to members we offer a national workplace advice and support centre that is staffed by a group of lawyers, and are from time to time people who have been unfairly dismissed or suffer a whole range of - sorry, no suffer - experience a whole range of workplace issues will seek the assistance from our workplace advice and support centre. And we will on many occasions have the hard conversation with a member where we consider that an unfair dismissal application has not got merit before it's even lodged.

We offer a service to our, you know, to our members where we will work collaboratively with them but we won't take or lodge an application in a frivolous or vexatious manner. And in our experience most professionals and managers think very, very carefully before even lodging such an application because, you know, for the obvious reason that it might have future impact on their, you know, employment options. I suppose each to their own experience, but we certainly don't, based on our observations, come across applications that are lodged vexatiously or frivolously. That's a very serious step to take.

Just a couple of comments, and I'll stop in a moment, on a couple of the options. The suggestion that there be a greater consideration of unfair dismissal applications on the papers, our concern about that, if that proposal were to be implemented we would want to make sure that there was a transparent process whereby an employee could be properly represented. In our experience from the draft applications that sometimes our members will bring to us, that a lot of work needs to be done on these applications so that they're properly set out.

On the issue of jurisdiction issues, in our experience these can be very complicated. Because of the nature of professional awards it's not always clear whether a person is using their professional qualifications in the performance of their duties and we've had involvement in a number of arbitrated hearings on that very point. And to deal with a jurisdiction matter on the papers in professional employment, and that's all I can talk about, would potentially be very complex. But Commissioner, perhaps if I just stop there by opening - - -

**MR HARRIS:** Can you just explain that last point to me then? Why does it matter whether they're using their professional qualifications or not?

**MR BUTLER:** One of the common disputes, and it usually only arises in the case of unfair dismissals, is that - and it affects a small minority of people who are usually - who are either - who fall within the category of high income earners. If a person is a high income earner then if they're covered by an award they still have unfair dismissal rights and if someone



is a high income earner there will sometimes be a question as to whether or not a person, for example, is a manager as a professional engineer or is a manager as an administrator. And to determine an issue like that it is all based on the evidence.

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**MR HARRIS:** So a manager engineer would fall under the award and be in the unfair dismissal category?

**MR BUTLER:** Yes.

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**MR HARRIS:** A manager who happens to have engineering qualifications but they're not relevant to the discharge of his or her duties would have to go under general protections or some other mechanism?

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**MR BUTLER:** Well, the general protections if there was a breach of a general protection.

**MR HARRIS:** In some way, yes.

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**MR BUTLER:** Yes, and that's not always - we don't find that particularly easy to assess.

**MR HARRIS:** It's a different aspect, but it's been brought back to our attention time and time again.

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**MR BUTLER:** Yes, yes.

**MR HARRIS:** That these rights can be claimed as a sort of substitute for  
- - -

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**MR BUTLER:** Yes, and look we have heard that argument and I mean again, it's not something that you can rule out but it's very difficult because the tests for one are very different from the tests - - -

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**MR HARRIS:** Right, but anyway I didn't understand the quals but now I do.

**MR BUTLER:** Yes, yes.

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**MR HARRIS:** So it basically says just where you might have standing in order to make a claim.

**MR BUTLER:** Yes.

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**MR HARRIS:** Otherwise in unfair dismissals besides on the papers were there other aspects of our recommendations that professionals would be concerned about?

**MR BUTLER:** We're concerned about - - -

5 **MR HARRIS:** For example, the cap on general protections. Is that a problem for you? I'm distinguishing between general protections and the dismissals.

**MR BUTLER:** Right, okay.

10 **MR HARRIS:** Pick any of the topics that you like but I call them a sort of suite now because most other people do jump back and forward between them generally.

**MR BUTLER:** Right, yes.

15 **MR HARRIS:** If not we'll stick on unfair dismissals and I will go back to general protections. On unfair dismissals itself, so the rest of our proposition can be wrapped up under a heading which says, "Don't let form dominate over substance", so that effectively procedures that are  
20 otherwise currently a mechanism by which you may gain yourself compensation would not get you compensation.

**MR BUTLER:** No, no, and I would say that the way in which people are treated sometimes, and I'm not making a general statement, but on some  
25 occasions there, you know, the way that something was done was almost as bad as the actual act of something being done. I suppose it's - and I note the recommendation in the report that it is far better to have an educative and counselling role for employers. We - I mean, if I can go back to the - - -

30 **MR HARRIS:** And the possibility of fines for extreme examples.

**MR BUTLER:** Yes, but I mean if I can go back to - and the example on that again is a rare example but if I can go back to the example of the high  
35 income earner - I mean, I can - and I personally don't run individual cases in my role but - and I appreciate that this is anecdotal, but I can - - -

**MR HARRIS:** It's all anecdotal.

40 **MR BUTLER:** Yes, but I can certainly remember dealing with a large employer who thought that they had dismissed someone who had no unfair dismissal rights, who had virtually denied complete due - what we would consider to be complete due process, suddenly discover that they were  
45 award covered and had unfair dismissal rights. My point is that an educative role, a counselling role, even fines - I think you need both. I mean, we certainly want to see a change in workplace culture. As the system evolves and devolves then, you know, there needs to be a strong

framework of individual roles. So we think that the way in which someone has been treated, and particularly if it's a performance improvement process, and where there hasn't been clear instructions as to what is required, if there hasn't been adequate training provided, that simply a  
5 decision has been taken, that becomes a self-fulfilling prophecy that someone is going to be performance managed.

I think it's very difficult to separate the two, and in this regard I'm not talking about, you know, what could be described as minor, technical  
10 breaches - that the process can be temporal to the outcome. And I see that as a major, as a major issue in terms of - - -

**MR HARRIS:** The training example I can see - but it wouldn't be relevant to the administrative law process that you utilised to arrive at your  
15 decision. It wouldn't be a prior factor that contributed to poor performance and thus to dismissal. Now, I don't know because I'm not a lawyer - - -

**MR BUTLER:** Neither am I.

**MR HARRIS:** - - - but I will note that, but I on principle don't think we  
20 would intend to prevent the Fair Work Commission from deciding that someone who was employed on the basis of getting decent training was then sacked for being unable to perform when he or she hadn't received that training. I don't know that and I'm not here to create the law, but I  
25 wouldn't see that as being the kind of thing we had in mind when we said that the form should not dominate over the substance. We had in mind, I think, more the kind of thing that's in the small business code which is an advice effectively about the kind of process steps you should adopt before someone can legitimately be said to have persistently failed in the  
30 appropriate standards.

**MR BUTLER:** But we would then link that back to well, does - from our perspective does the shortcomings in the process contribute to the  
35 dismissal being harsh and unjust and unreasonable. And I suppose if I could add an analogy that may not be a perfect one, but with the workplace bullying jurisdiction, you know, performance management is not - is excluded from being treated as part of the workplace bullying jurisdiction so long as it's a reasonable management action. And an unreasonable  
40 management action can contribute very much to the outcome. I mean, to use - and again, it's another anecdote - but one of my staff recently had a case of a certain government department who, if I can use the analogy, the colloquialism, had the goal posts shifted every three months and when challenged the manager of this particular section of the department said,  
45 "Oh, we're doing this in real time." It was an outrageous abuse of process that could only end up in one way. So sanction, education, fines, I think they all have a role to play.

**MR HARRIS:** Okay. I won't labour this one I think any further. So enterprise contracts, now you're the first person, unique but perhaps you've spotted something that nobody else has but I must say I don't think we did either - so you have made a comparison between those on common law contracts and those potentially on enterprise contracts and have suggested that the substitution of an enterprise contract for a common law contract would involve less negotiation and thus be less desirable. We had envisaged with the chapter that we wrote on this as being enterprise contracts would provide a variation to awards. I agree we didn't note and couldn't even to agreements - people have pointed out some reservations about agreements. Not too many people have had a focus though, in fact no-one other than you has had a focus on the possibility of them being used to substitute for common law contracts. The survey that you specified seemed to have about a quarter of employees getting consulted, some successfully, some unsuccessfully.

**MR BUTLER:** Yes.

**MR HARRIS:** And 75 per cent then, very roughly, but not consulted.

**MR BUTLER:** Yes.

**MR HARRIS:** And your concern is that would be 100 per cent under the enterprise contract.

**MR BUTLER:** Well, it would be. I mean, even though, you know, from my understanding - and I appreciate that a lot of the detail is - - -

**MR HARRIS:** It's a concept, yes.

**MR BUTLER:** Yes.

**MR HARRIS:** At the moment.

**MR BUTLER:** But yes, it would be possible to develop the enterprise contract, have it as a condition of employment for new employees. But it would be quite possible to go to a category of employees or, for example, all professionals and managers and say - not in a - you know, I'm not suggesting that people are overtly threatened or anything of that nature, but just simply suggested to them that their company is facing competitive pressures, we would like you to all sign on to an enterprise contract. It happens to a small extent already. I mean again, I don't want to name particular companies with whom we've been in negotiations with, but in the consulting services industry generally, which is a very broad industry, there - which has suffered, as everyone is aware, a severe economic downturn, the - one particular company sought to increase the hours of work of all their employees, most of whom were on individual contracts.

Leaving aside issues to do with the application of the national employment standards, the way that this was achieved was that the HR leaders in particular sections would have individual one-on-one conversations explaining the company's rationale for the proposal. The overwhelming majority of people signed. An enterprise contract would make that a lot easier to do.

**MR HARRIS:** Well, it would certainly for new employees. The idea is it would for new employees. How incumbent employees are affected - I guess it's under our design but it's a conceptual design - is it's an option for them to take up but they can't be obliged to it up. I appreciate your point which says but there'll be a lot of moral pressure on people.

**MR BUTLER:** Well, people will feel obliged.

**MR HARRIS:** But whilst you have a common law contract you are, of course, protected by the provisions of the common law contract. So they will be whatever they are by the nature of common law agreements.

**MR BUTLER:** Yes.

**MR HARRIS:** But presuming you've got a contract you, at least until the end of the term of that contract, would remain on it and would then make a decision as to whether or not you remained in employment once that contract had expired under that term, in which case the presumption is the enterprise contract is by that stage the standard way of employing people in that firm and if you were to stay you would have to go on to the enterprise contract or you would have to leave because your common law contract had expired. So I think if that's right I see the proposition. We would still maintain this is a statutory instrument that's going to have statutory enforcement behind it in the sense that you can't be obliged to join it and people would have a right to formal complaint and review if they were being forced to sign. But I understand, and it's a point made by unions, that over time simply through turnover these things will become the common place way for the firm, but I think that was our intent. Our intent was that that's exactly what would happen, that these would be flexibility options that were available for firms. But I must say I had not considered it's interaction with common law contracts so what we'll probably do is look at the legal situation in relation to that.

**MR BUTLER:** And you'd be aware, Commissioner, there's a whole body of law at the moment that has evolved on the interaction between the common law contracts and enterprise agreements and awards.

**MR HARRIS:** Awards, yes.

**MR BUTLER:** But I suppose our, you know, our major concern is - I mean, apart from the fact that it does reduce the capacity for parties to enter into arrangements that might be flexible, it just in our view makes a law - what is already an unequal bargaining relationship potentially more  
5 unequal. But I suppose that we would be probably the main union whose members have common law contracts that's across a diverse range of industries. And as I mentioned to you earlier, Commissioner, we have a national workplace advice and support centre and, you know, wherever  
10 you find engineers and scientists and IT professionals in a whole range of industries we receive this information and I suppose that's the way we're in the position to - - -

**MR HARRIS:** No, no I'm not saying there's anything wrong with it. It's just it's an aspect that had not - I think when we looked at this we looked at  
15 the fact that there were awards, there were enterprise agreements and there were common law contracts and we could see a gap, and the gap was driven by, as you can see from the chapter, a particular data that indicates a particular segment of firms, quite a significant number of firms, that aren't taking up what we might call available flexibility options. What I hadn't  
20 thought of was that I could see this being, or we did see this as being a variation to awards primarily. But of course it - even if we said, which we haven't said to date, but even if we said "but not to enterprise agreements", it still does beg the question and what about common law contracts.

**MR BUTLER:** Also the other - and I'm not sure if this has been raised by  
25 any other organisation, but to what extent should there be conditions in awards that can't be touched in that sense as well. And again, I appreciate that the idea is being fleshed out but - - -

**MR HARRIS:** No, no, this is why we have the hearings. You tell us  
30 you're going to have to flesh out something on are all provisions - what you are suggesting is are all provisions to awards flexible in the hands of an enterprise contract or only certain provisions?

**MR BUTLER:** Yes, and particularly for new employees as a starting  
35 point who sit alongside other employees who might have different conditions of employment. That will happen for professionals and - - -

**MR HARRIS:** It happens a lot in firms that you deal with, I'm sure.  
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**MR BUTLER:** Yes, and in terms of salaries people will be engaged every  
45 day of the week on a whole raft of different salaries. But in a similar vein to the NES we, like most unions, would say well there should be some things that you don't have to negotiate over, that are basic rights.

**MR HARRIS:** Sure.

**MR BUTLER:** And negotiate over, for example, whether you have an annualised salary or performance pay or, you know, the myriad of different options.

5 **MR HARRIS:** All right, that was unique and interesting and I used “interesting” earlier and got away with it, I think. I didn’t intend it to be an insult.

**MR BUTLER:** Sorry?

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**MR HARRIS:** It was not intended to be an insult. Interesting is what it genuinely means. That is interesting. Okay, thank you very much for your time. I appreciate your appearance today.

15 **MR BUTLER:** Thank you, Commissioner.

**MR HARRIS:** Now, are we going to the phone for the next set of - I see that they’re West Australians.

20 **SPEAKER:** Yes, they are (indistinct).

**MR HARRIS:** I am so grateful. I am so grateful that the Chamber of Commerce and Industry of Western Australia has decided to come to Melbourne, and I probably should have said to others previously too, look we appreciate you making the effort given that we decided that with only the three registrants in Perth it really wasn’t worth trying to fit them in, fit the Perth meeting in and you’ve done a very credible thing, very helpfully, to come to Melbourne, so thank you very much.

25  
30 **MR MOSS:** Thank you, and thank you also to your staff for helping facilitate that as well. They have been particularly patient in me taking time to sort of organise the opportunity to come across.

35 **MR HARRIS:** No, I think we owe you. You don’t owe us. We owe you and so thank you. All right, for the record can you identify yourself, please?

40 **MR MOSS:** Yes, certainly. Paul Moss, I’m the Manager of Industrial Relations and Safety Policy at the Chamber of Commerce and Industry of Western Australia.

**MR HARRIS:** So Paul, do you want to do opening remarks?

45 **MR MOSS:** Yes, if you wouldn’t mind?

**MR HARRIS:** Sure, go right ahead.

**MR MOSS:** Look, the key aspect that we'd like to identify is we believe that there is a need to look forward towards developing an industrial relations system that is going to be responsive to future challenges for the Australian economy, and adaptive to workplace changes. Now, one of the  
5 key aspects here is the nature of changes are uncertain but one of the things that we see as key to that is access to flexibility. The circumstances affecting different industries, different parts of the industries, will change over time. Some of them more responsive to technology will change, others in shifting workforce demands. It's hard to identify a system which  
10 is going to be one size fits all, and identifying one level or focus of change going forward. But the fact that we will continually be subject to change seems to be a constant factor.

Australia needs to be globally competitive across all areas. You know,  
15 not only are we moving towards a 24/7 economy but we're a global 24/7 economy as well. And the regulation of employment is important not only with respect to overseas organisations looking at investing in Australia, but also domestic companies in Australia deciding whether or not they want to expand their operations and provide employment opportunities here in  
20 Australia, or do they take that money offshore? And one of the things that we've noticed based on the World Economic Forums measurements is Australia's competitiveness with respect to things like labour market efficiency and other like measures has fallen considerably over the last five to six years. And whilst industrial relations and labour relations  
25 frameworks are only one component that people look at in deciding whether or not to create, you know, to establish a business in Australia or to create job opportunities, we do believe it is an important factor that is taken into those considerations.

So we're very much of the focus that we need to be looking at setting  
30 up an industrial relations system that will take Australia forward. We commend the Productivity Commission for looking at some real positive changes in a number of interactions, in particular looking at new forms of agreement making in the concept of enterprise contracts, and I will touch  
35 on that a little bit later. The need for modern awards, to consider their impact on the unemployed, to consider consumers. To look at greater consideration of robust analysis, and looking at public guidance, not being tied simply to the views of the industrial parties.

As part of that looking at things like weekend penalty rates to ensure  
40 they reflect change in community expectations. Our members views, particularly within the retail industry, have been that if Sunday rates were reduced towards Saturday rates it would increase the number of working hours that they made available to the staff. They would tend to work less  
45 hours themselves and pass that dividend back on to their employees. One notable example of a small little newsagency was the owner who works excessive hours himself, has to open on a Sunday, simply competition



demands it. He works in the shop by himself. He opens for six hours. He has no other staff. He is there by himself. He has indicated to us that if the penalty rates were shifted towards time and a half for Sunday he would put on two of his staff to cover a full eight hour shift and not work in the business that day himself. And that would provide the employment opportunity, additional hours for his staff which were predominantly university students. They are missing out on the income and would taper in.

10 We pick up with what the Productivity Commission has identified, that you're not - particularly with smaller retailers and hospitality, that saving isn't going to go into the employer's hip pocket. That saving is going to go towards creating more employment opportunities and providing better customer service.

15 But we do believe that a similar approach needs to be taken in some of the other areas and we would encourage the Commission to look at things like a greater range of agreement making options, addressing some of the concerns that we have with the industrial action and right of entry, and also transfer of business. We also believe that the Commission should take into account some of the interim findings of the Royal Commission into Trade Union Governance and Corruption, as to how the industrial relations system has encouraged some - and I will stress it is some - parties to abuse rights and privileges provided by the Fair Work Act, and the need to address this by amending the Fair Work Act to curtail such behaviour. And it's not to remove rights where those rights are appropriately utilised, but it is to minimise the potential for excess.

30 With agreements, we're very much of the view that there's a need for a greater range of agreement making options to allow the parties to choose the option which is best suited to their needs. One of our real concerns with the enterprise agreement system under the Fair Work Act is it's prefaced on the union negotiated agreements. The rules, the requirements, the structures that are set up in place with respect to it are all geared specifically to unions having an inherent or fundamental part in that negotiation process. What it doesn't reflect is that union membership now reflects a very small percentage of private sector employment. So there needs to be options that can be tailored to workplaces to suit different types of arrangements. So we think things such as non-union forms of enterprise agreements would be useful, statutory individual agreements which are more concrete than the IFA arrangements currently available. Things like employer Greenfields agreements as a legitimate secondary choice or legitimate choice in addition to union Greenfields agreements, also being another opportunity.

45

**MR HARRIS:** So just on that, just for clarity, the option that we had that you can have an employer Greenfields agreement for 12 months, that's not sufficient?

5 **MR MOSS:** No. To pick up on that, we have picked up though I think the concept of having alternatives to union Greenfields is a good concept. The question is whether or not those alternative arrangements are viewed as viable alternatives. Not only from the perspective of the employer, but whether or not the unions involved in negotiating also view those as viable  
10 alternatives. One of the concerns we have with the employer Greenfields linked to 12 months is it doesn't provide that certainty for investment decisions because it is only limited to that 12 months and you're likely to find yourself potentially in exactly the same place.

15 Likewise final offer arbitration, and we can certainly see final offer arbitration has advantages over sort of unfettered or more traditional forms of arbitration that we see in Australia. Final offer arbitration hasn't had a real - hasn't really been utilised as far as we are particularly aware.

20 **MR HARRIS:** No, no-one seems to be adventurous enough to want to take it but in principle it seems a great idea, but in practice it's too frightening I suspect.

25 **MR MOSS:** Well, it is. The best examples of it are in the United States and North America where it tends to be largely limited to public sector arbitration, so that tends to be in circumstances - sorry, one of the things that really sort of identified differently with final offer arbitration in the public sector is that the public sector doesn't have the same economic considerations that the private sector does, or particularly that's the way  
30 it's viewed in the North American context. And so the question then becomes how transferable is that when, if for want of a better word, the Commissioner picks the wrong outcome - and of course that would vary depending on the party - does that then influence where that goes. Understand that it would certainly have a benefit though with that being  
35 threatened, that that can sometimes - and the purpose of that is to bring the parties closer together and by having the threat of final offer arbitration probably encourages settlement. The question is whether or not, from the employer's perspective whether or not the union perceives that as a credible threat.

40 **MR HARRIS:** Sure.

45 **MR MOSS:** If they don't perceive it as a credible threat then they're unlikely to change their bargaining behaviour. So that's where having a stand-alone alternative option we think would be better, particularly when you're considering the way in which Greenfields agreements are used, particularly tending to be on larger projects. Market forces certainly have

a fair amount to play in there, and particularly when you're considering an underpinning of a no disadvantage test against awards and the NES. You know, there's not the potential for employees to be disadvantaged in that respect.

5

I think one of the things that we've tended to notice is, you know, notwithstanding union membership declining, you are seeing quite strong real wage growth with employees as well so that tends to indicate that market forces and the ability for employees to have some competitive advantage, particularly given that, you know, for a lot of employees in Australia - you know, we are a fairly high skilled environment. We have to be to be high wage. So that gives people that competitive, that ability to negotiate on their own terms. Now, that's not to say that's uniform across the board, but those industries which tend to have, employees tend to have a lower bargaining position because in particular it's low skilled, tend to be industries which don't have enterprise bargaining in the first place. So hence that's where the safety net comes in.

10

15

**MR HARRIS:** Yes.

20

**MR MOSS:** We also see that having alternative options doesn't necessarily displace union agreements. We've had a number of circumstances where we have had alternatives. And where unions do have a strong presence within an organisation the ability to have non-union agreements hasn't, in our experience, displaced those union agreements. You know, it potentially gives more options for the employees should they believe that the union is not representing them, and there's been some circumstances where we have seen that occur but it's very, very rare.

25

30

**MR HARRIS:** You can have non-union agreements now, can't you? Cochlear is the celebrated example, which has a fairly workable workplace relationship. It was, I think, engaged in a five year negotiation supposedly for a union based agreement but in the end the workforce wouldn't back the - I think it was the Manufacturing Workers' Union's propositions versus the employer's propositions - and so they've managed to maintain a - what I would call a non-union agreement, workplace. Now, it may not be exactly what you had in mind but since I know that to some degree is that roughly what you had in mind?

35

40

**MR MOSS:** No. We were looking at it more as a discrete non-union version.

**MR HARRIS:** So you think a statutory version of a non-union agreement?

45

**MR MOSS:** Basically, yes. Yes, because the things like Cochlear and other examples where you do get agreement - so notwithstanding the - or not disagreeing with the - - -

5 **MR HARRIS:** And not being a party to - - -

**MR MOSS:** Yes, that's right. It's the time and the process that it's taken to get there. Now, it's not unusual to see in some cases negotiations lasting 18 months to two years before an agreement is finally made. And particularly if, you know, the union doesn't have a strong control or presence within the workplace. Good faith bargaining and the obligation to negotiate with them irrespective of the proportion that they represent can delay or extend the progress out. So it's really having options. And where the union does have a strong presence well then that option is going to be union-negotiated agreements nine times out of ten.

We do think that the proposed enterprise contracts would be a valuable addition to agreement making options as part of the broader suite. We see it as particularly going to be attractive to some small to medium sized employers.

**MR HARRIS:** Which is what it was designed for.

25 **MR MOSS:** Yes, that's right. Probably not micro business. It would probably be a little bit too complex for them.

**MR HARRIS:** Even then for them, and for larger businesses they have the ability to run to common law contracts if they want to, or to have the ability to manage enterprise agreements so that's the way we thought it - we saw it unfolding anyway.

**MR MOSS:** Yes. So we see that as a useful option, the view that it could be strengthened in a couple of ways. In particular it being assessed by the Fair Work Commission, or we'd probably say the Minimum Standard Division, against the no disadvantage test.

**MR HARRIS:** The reason we worried about that and didn't go with it in the end is because it appears that this is a set of employers who haven't had a high level of confidence in getting into enterprise bargaining and that one of the reasons wouldn't be so much their concern about negotiating with the union - I'm sure that was maybe a contributing factor - but equally at least it would have been the general loathing of managing, you know, to lodge and debate with a regulator and so we thought lodge, important,. Transparency, got to have that. Exchange with regulator, possibly don't have to have it. Not to say we've - as you know, this is a conceptual - - -

**MR MOSS:** Of course, yes.

**MR HARRIS:** - - - field so we're certainly up for variation to it, but that was the rationale.

5 **MR MOSS:** Yes.

**MR HARRIS:** That's an interesting thing that you would support the idea that it should be opined upon.

10 **MR MOSS:** This is coming back from the feedback from our members, and in particular one of the reasons why IFAs aren't at the top - and there's a few other reasons why, but one of the reasons that IFAs aren't viewed as attractive is they don't have that certainty. So what they're relying on is they've made an assessment as to whether or not they think it passes the no  
15 disadvantage test but they have no certainty over that. They'd much prefer to have some discussion or argy-bargy with the regulator at the time that you're proposing the agreement rather than having it three or four years down the track when you're facing an underpayment claim. And that's part of the, you know, part of their concerns. So particularly if you're  
20 looking at - one of the biggest problems with AWAs was each and every agreement was lodged and each and every agreement was assessed, and that created a massive amount of paper work and a massive backlog for the Office of Employment Advocate which was assessing those. And so you had ludicrous examples of agreements taking up to two years to be  
25 approved, by which time the employee has moved on. And if you had to correct it that was problematic.

But enterprise contracts seem to be quite a different beast in that you'd have, you know, one framework - I'm using that term loosely - or template  
30 agreement applying to a large group and then, you know, use - - -

**MR HARRIS:** The idea is you'd learn by going and that the first employer that picked up one of these options and put it forward would, if the Fair Work Commission/Fair Work Ombudsman looked at it and  
35 thought, "Don't look too bad, in fact quite novel. We'll put it up on the website", that says similar employers can look at it and go, "Let's copy this."

40 **MR MOSS:** Yes.

**MR HARRIS:** So that was the concept.

**MR MOSS:** So that would be by having it, doing it in that way, the volume of documents that need to be approved would be much smaller.

45 **MR HARRIS:** Relatively small by comparison with the AWA process.

**MR MOSS:** Exactly. So approval requirements would, a) should be fairly quick and, b) be relatively a low administrative burden on whoever was going to be approving them, particularly given that to a large extent, say if it was put with the Fair Work Commission or the Minimum Standards Division, it wouldn't necessarily have to be done by the members. It largely could be administratively - - -

**MR HARRIS:** A standard matter, yes.

**MR MOSS:** Yes, that's right. And that would lower the cost and provided it was overseen by them. We mention Minimum Standards Division because if you're looking at splitting the Tribunal up into one which is looking at focussing on disputes, one which is looking at minimum standards, agreements once they're finalised aren't a dispute and shouldn't be treated as such, and it's got a closer affinity to minimum standards so that's why we'd suggest that would probably be the better - - -

**MR HARRIS:** We're also giving some thought I think, he says looking at loyal staff who sit in the audience, to maybe having a third element which would be agreements. But anyway, we'll come back to that because - but it's a worthwhile point. It certainly doesn't belong in the Tribunals Division, if you like.

**MR MOSS:** No, that's where we'd sort of - yes, it's at the wrong focus I would have thought. We are very supportive of adopting a new no disadvantage test.

**MR HARRIS:** And you are recommending the one that was effectively used between '97 and 2006?

**MR MOSS:** Yes, yes. It was fairly flexible, it was adaptive over time. They were able to do it in such a way that they created a level of consistency. That's not to say that it was perfect. One of the flaws with respect to it was it was very hard to get to a decision maker if you disagreed with the outcome because the people who were doing the test were doing it administratively and had no discretion. That was probably the one flaw that we had with it. But as far as models are concerned it's a reasonably good one to look at as a starting point. One of the things though that we - we are of the view is that a no disadvantage test should be applied against the relevant modern award but it should be applied against the NES as well. One of the issues that we've identified is, or problems that we have, is the NES is fairly descriptive and the NES has, particularly when you're looking at things like sick leave or personal carer's leave and annual leave as well as some other provisions, has been written very much from the perspective of a Monday to Friday, 9 to 5 concept. It has very little flexibility, particularly when you're applying to non-standard working arrangements.

5 So the question comes in to when we're looking at four weeks annual  
leave, what is a week? Particularly if you're on a fly in/fly out roster or in  
the health industry working variable rosters where you might be working  
35 hours one week, 42 the next. What constitutes a week in that situation?  
The same as with a day, what constitutes a day? The Australian Fair Pay  
and Conditions Standards provide the entitlement as an hourly entitlement.  
Now, that was fairly easy to accommodate because it was - you took it  
down to the lowest common denominator, an hour, and we all know what  
10 an hour is. There's no variation in the concept of an hour. But the concept  
of a week or a day can vary. And we're starting to see, you know, and in  
our submission in reply we've raised a particular decision of the Fair Work  
Commission where the Full Bench has come back with no answer to that  
and leaves it very much up in the air.

15 There's also been one which has only come down a few days ago,  
Australian Federation of Air Pilots v HNZ Helicopters. The employees  
under an enterprise agreement were working a 13 day on, 15 day off roster  
- so in other words they're only working half the year for want of a better  
20 term - with the agreement specifying that annual leave is to be taken during  
the off cycle. Now, this is actually a union agreement as well so the  
interesting element is the union is a party that has also challenged this.

25 Now, the requirement that annual leave be taken during the off cycle  
has been found to contravene the NES because whilst section 88 of the Fair  
Work Act allows an employer and an individual employee to reach  
agreement as to when annual leave is to be taken, that agreement can't be  
reached at a collective level. So it breaches the NES. And it's things like  
that you start to get inflexibilities in it. So we'd say that one of the  
30 recommendations we'd probably encourage would be bring the NES down  
to the simplest possible level and ensure that it has opportunity for  
flexibility, or in the alternative allow for some flexibility through  
agreements to play with how the NES entitlements are provided.

35 **MR HARRIS:** The hardest thing - we've had this proposition come up a  
couple of times and no-one has yet said but how, if you allow some  
negotiation around the NES how do you put in place a limit to the extent of  
that negotiation? That I guess the value of the NES is these are inviolate,  
no-one can trade them off, everybody should rely upon having them.

40 **MR MOSS:** Yes.

45 **MR HARRIS:** And then you put "except for". The difficulty is then  
defining that, and particularly again because you probably heard me earlier  
today saying to people it's nice to have the concept but applying it in black  
letter law is potentially deeply problematic, and we get the rights of entry  
thing in particular which must drive everybody nuts because we look at

them and think, you know, this is just incremental, regulation of incremental regulation.

5 **MR MOSS:** We see it working in one of two ways. The NDT provides that limitation. So the person responsible for administrating the NDT - so let's say it's the Tribunal for argument's sake, that sets - that acts as the gatekeeper as to what level of flexibility is acceptable or not acceptable. And in that way then that gatekeeper can adjust that depending on community standards or concerns, and that could either be allowing increased flexibility or reducing it, depending on the circumstances that they see.

15 The other approach is to really simplify the NES. A lot of the problems associated with the NES come to it wants to deal with the matter too much. So rather than just simply saying, you know, employees are entitled to four weeks annual leave, or we'd say probably better expressed as 152 hours of annual leave, or five weeks in the case of a shift worker, and leave it at that by and large, it wants to take it that next step further and try to regulate it too much. So ratchet back the regulation, provide the key entitlement but let the parties sort out how it's going to be taken or how it's going to be accrued, those types of things. So dial back the level of prescription and that way you reduce the level of black letter law and leave it up to the parties to resolve.

25 **MR HARRIS:** And just so I know, and for the benefit of those who will go through this transcript afterwards from our side in terms of looking it through, you haven't used four weeks annual leave just as an illustrative example, it's actually the sort of thing that you're suggesting. So this concept of taking four weeks annual leave back to a fixed number of hours  
30 - - -

**MR MOSS:** Yes.

35 **MR HARRIS:** - - - is not just an illustrative example, it's conceptually what you think needs to take place?

**MR MOSS:** Well, what should be done. So you're taking it down to the lowest common denominator and that way there's no dispute about what the entitlement is.

40 **MR HARRIS:** Okay, that's a worthwhile point. Thank you for that.

45 **MR MOSS:** We did identify that we think there should be some greater regulation with respect to content, and I will take on board the comments that you made to AMMA early in these proceedings.



**MR HARRIS:** We'd just like everybody from the employer side to look at everybody else's proposition about if you want to write down the matters that could be addressed in an enterprise agreement - we're not asking for a monolithic position but we're asking for a high level of awareness between employers because we too will need to look at this and work out how far it will go. And as you heard me point out then if you did hear AMMA, there's differences between employers I think based around, as much as anything, the concern that says if it's not defined in the enterprise agreement where will it be defined. And for some I think it doesn't have to be, I'm big enough and ugly enough to look after myself, and for others it can be I'm very exposed to this if it isn't defined somewhere.

**MR MOSS:** Yes, and there are variations in that. Now, the experiences that we've tended to have in WA, and I'm speaking from a very parochial basis, but - - -

**MR HARRIS:** As is your requirement. You're a representative.

**MR MOSS:** Well, precisely. Agreements, enterprise agreements in Western Australia have tended to be fairly light on compared to what we normally see in the east coast, okay. So it's not unusual for an enterprise agreement in Western Australia to be no more than 20 or 30 pages in length. And I've had a number of discussions with, you know, particularly head office in east coast going, "I'm a little bit nervous about this document because it doesn't tell me what I have to do." And you turn around, "Well no, but it's not designed to." The purpose of covering just the core entitlements and providing a high level of flexibility means that you're adaptive to change. You've set the fundamental framework and then the rest is open for discussion and those types of things. Particularly when you consider the content - you know, if you're looking at the content of agreements still having this concept of having to have consultation with employees for significant effect and change, then there's still that underlying protection that if the employer wants to do something or introduce something, change which is significant, then they do need to consult with their employees.

It's not waking up one day and going, "Righto guys, we're going to be doing this." There is still that process of consultation, but at the end of the day businesses do need to be adaptable and flexible. You know, if you're locked into things and you can only change it by getting agreement, you know, to change things about the way in which you arrange work or those types of things, then you end up with the type of examples that we had for Toyota, not being able to be adaptive to change. And in the current environment that we have that's not, from our perspective, a really good thing. So we're quite comfortable, and most of our members are really

quite comfortable, in having that prerogative and having that ability to make change.

5 **MR HARRIS:** Well, that's worthwhile having on the record in its own right. Thank you for that.

10 **MR MOSS:** One of the things that we have seen really with content is it has expanded out the timeframes for negotiating agreements. And it's all too frequently ancillary matters, matters which aren't directly related to terms and conditions of employment, that draw out that bargaining process. And that probably leads on to the next one that I really want to identify, is industrial action, and that for us is concerning. The impact of industrial action is far more than just simply days lost due to industrial action. The impact is far greater. In particular it has an impact on our international reputation and poor bargaining outcomes.

20 International reputation I think, you know, a fairly good example of that recently is the Gorgon dispute. Now, there was no days lost due to industrial action. It all resolved there. But you started to see some of the implications coming out of that, in particular the New York Times picked up the problems that Gorgon was having with delays, not only with respect to its issues with the trade unions but also red tape. And then compared that to a project, an LNG project that Exxon Mobil were doing in Papua New Guinea which was delivered on time and within budget. And you look, you know, then at Australia and a similar project, over time, over budget. And that's not looking particularly good.

30 With the Teekay dispute which was the tugboat operators threatening to close down the port of Port Hedland - and bear in mind that's one of the largest ports in the world in exporting out iron ore - you know, a handful of workers holding the WA and the Australian economy to ransom - our words. You know, we were fielding questions and calls so - and particularly an Australian expat in the United States organised a call from some foreign investors, or American investors, who basically wanted to know what the hell was going on because they were concerned about their investment dollars and what's happening over there in Western Australia, and having to have a fairly long conversation with them about what was happening and how the game was played. And the problem is it was a game that was being played but the ramifications could be quite damaging in that respect.

45 So we do have an impact on our international reputation. The threat of industrial action also has an impact on the bargaining outcomes. Industrial action, whilst rarely taken, is frequently threatened, industrial action. One of the things we're seeing is direct action ballot orders increasing under the Fair Work Act. And it's quite frequently that threat that results in agreements having what we would describe as poor outcomes, particularly

provisions which are restrictive in place. Because at the end of the day the person negotiating the agreement has to make a choice between the immediate effect now versus potential future consequences down the track. And particularly when you look at the impact that industrial action will frequently have not only on the employer but third parties, particularly clients. There is an awful lot of pressure put on those employers to get the issue sorted, and the easiest way to resolve industrial action or prevent it from occurring is to capitulate. And that's frequently what happens unfortunately.

10

So that's one of the reasons why we would like to see some greater protections with respect to industrial action being the matter of last course, but also industrial action not being pursued on excessive or unreasonable claims. And by and large you can leave that for the Fair Work Commission to identify. You don't need to specifically identify it too much. There is the reasonable person test that the Commission is quite used to applying. Now, that's not to say someone like CCIWA would always agree with the way in which the Commission applies that test, and under a background of a perceived right to strike that the Fair Work Commission seems to hold quite true you'd expect that those types of provisions would be used quite judiciously. But there are options to put that in to allow for some of those excesses to be curbed back.

**MR HARRIS:** But once you empower the Commission to judge what is reasonable aren't you bringing it back more towards the old style arbitration? So most negotiations appear to start out with an ambit claim. That's definitionally unreasonable.

**MR MOSS:** Yes.

30

**MR HARRIS:** We've said until you've undertaken good faith negotiations you shouldn't be able to undertake industrial action, so we'd say at that point with the ambit claim solely on the table you can't move to industrial action. That's our current sort of perspective about how far you could let the Commission go. But once you have started and are engaged in good faith negotiation even if a claim is, I don't know, a ten per cent wage increase a year now, it's come down from a 25 per cent wage increase a year, at what point does the Commission decide it's reasonable when a request is put in by an employer, don't allow the protected action ballot, don't allow the protected action order to go ahead? You are really empowering the Commission to come in and start judging whether four per cent is good or six per cent is good, and that I think the system has tried to avoid over the last 20 years. We've tried to move away from this idea of having individual, or towards the idea of individual firms and their employees determining, you know, the right outcomes under enterprise bargains and the Commission having far less of a role in arbitrating deals.

45

So I think that was what we were wary of. How would you respond to that?

5 **MR MOSS:** Okay, in essence what you're really starting to do is move - so we've got the test of the ability for the Commission to suspend or terminate industrial action.

**MR HARRIS:** Yes.

10 **MR MOSS:** Where it's causing significant effect and harm, or significant harm. What you are effectively doing is rather than arguing it at that point you bring forward the test at an earlier point. So is what's being proposed, you know, is the industrial action being proposed proportionate or reasonable? Are the claims not excessive or not unreasonable? So you're  
15 getting the Commission to assess it at that point which would hopefully then remove or reduce the potential disputation at a later point of time by having those issues considered up front. Yes, it is giving the Commission a greater role in that respect, but it's one that they should be able to quickly adapt the test to.

20

**MR HARRIS:** I have no doubt they could do it.

**MR MOSS:** Yes.

25 **MR HARRIS:** The question is systemically haven't we been trying to move away from that? And we're now a long way away from it. This would be a step back towards the older style of arbitration.

**MR MOSS:** Yes.

30

**MR HARRIS:** So it would seem in principle. I mean, tell me if I'm wrong. I'm happy to be told where I'm wrong.

35 **MR MOSS:** Well it's not so much arbitration. It's not arbitrating an outcome. It's managing the level of disputation.

**MR HARRIS:** That's a clear hint, isn't it? Ten per cent is too much. You're not allowed to strike. But six per cent, okay go ahead and strike. It's sort of a hint, isn't it?

40

**MR MOSS:** Well yes, potentially. Now the issue is what is perceived on that will vary depending on circumstances, you know.

45 **MR HARRIS:** I agree with that. I'm not even doubting that judgment. It was more I guess the degree to which we've been relying upon, as I said, employers and employees via their representatives coming to a conclusion

versus one that has a third party, you know, possibly in there quite actively.

5 **MR MOSS:** Now probably one of the things from our experience tends to be, and let's work on the assumption that it's the wages which might be the primary - and it's not always the case actually - - -

**MR HARRIS:** No, no.

10 **MR MOSS:** - - - salary, but - - -

**MR HARRIS:** It is far more it's the conditions in particular.

15 **MR MOSS:** You know, you tend to find that wages will be a factor of that but the parties quite often in sensible and realistic negotiation, and you know the majority of them are along those lines, the percentage differential is not necessarily massive in that aspect. You might be half a per cent or a quarter of a per cent off. Now, that's unlikely to be viewed in anyone's case as unreasonable when you're arguing on that. Part of this suggestion  
20 is really to curb some of those excesses that we're starting to see where people are being held to ransom, for want of a better term, through quite excessive claims. It's at that point that you would see it. I would imagine, I would envision that the Fair Work Commission would establish quite a high precedent for that - and we'd probably not be quite happy with that  
25 but that is realistically probably where it would end up - but it's there to curb some of those excesses. You wouldn't see, and you probably wouldn't expect the Fair Work Commission to entertain, lengthy and significant arguments over what seems to be relatively run of the mill type matters.

30 **MR HARRIS:** Okay. I wanted to get you to the modernising of awards in due course.

35 **MR MOSS:** Yes, certainly yes. The only thing I'd probably - the other one I'd want to cover off is transfer of business provisions.

**MR HARRIS:** Yes, and I want to get that too.

40 **MR MOSS:** Yes.

**MR HARRIS:** Because you offer specific ideas and we say hallelujah to ones that aren't that well addressed. Transfer of ideas. Business ideas are rare on the ground.

45 **MR MOSS:** Yes, this is probably one - this is one of the things we're getting a lot of feedback from some of our members on, particularly with respect to the public sector. There's a massive inconsistency between

trying to move public sector terms and conditions into a private sector arrangement. And the experience is that it's doing one of two things. It's costing jobs or employers are pulling out of those arrangements. And to quite an extent. You know, employers are looking at it and going yes, we're happy to take over this particular function or this particular section but we'll guarantee we will not employ any of your staff.

**MR HARRIS:** Yes, we've had that a number of times and in fact the stark example of coal mines in Queensland came up quite early on in our - where coal mines might be reopened but staff will not be employed because the agreement that was struck previously in great times is not an agreement that can apply in poor times.

**MR MOSS:** No.

**MR HARRIS:** That was quite a - it's really very stark, this cost of employment, I think.

**MR MOSS:** It is. It really brought home to me when I was talking to one of our members who was, you know, a WA based manufacturer, used to quite a different style of operation. Manufacturing in WA tends to be high skilled, quite flexible in its operations. It was expanding and it was looking at purchasing a facility in Newcastle. And the facility in Newcastle had a 102 page enterprise agreement which was read in conjunction with the award. And I explained to him that if you are taking over this and you're taking over any of the staff, which is what they wanted to do, you'd have to comply with this agreement. And he looked at me and said, "If I comply with this I'd be out of business." Which was, of course, interesting because, you know, the previous employer had gone out of business as well. And you know, it was effectively a real deal breaker for them in that respect but they were in there and offering, wanting to offer a lifeline.

**MR HARRIS:** So our proposition was if the employees vote for it they should be able to move on the basis of the revised award arrangement - sorry, the acquiring employer's arrangements. So that voluntarily you could do this. But we have had advice that says that's a reasonably rare circumstance where that choice is going to be made by an employer, a prospective new employer, because the transaction itself in acquiring the business, that would have to be a condition precedent.

**MR MOSS:** And this is part of the problem, quite often a lot of that discussion is done at very early stages, and particularly with a lot of it it's highly confidential and highly commercially sensitive so you don't - you know, once you then go out to the employees it's then published to the whole world and this is great.

**MR HARRIS:** That's right, but you can't present the employees with the new conditions without being, the acquirer, having put your hand up.

5 **MR MOSS:** Exactly. Now, one of the things that - and I don't like to  
harp too much on the WA system but the WA industrial relations system  
doesn't have transmission or transfer of business provisions at all. Now,  
whilst the WA system only applies to a very small proportion of employers  
currently, prior to 2006 it was the dominant system in WA. So pre-2006  
10 most businesses in WA were covered by the state industrial relations  
system and very few were covered by the federal. So we have quite a  
history with respect to that. We never had transmission of business  
provisions in there. The only exception was with respect to transferring for  
long service leave, but the instruments themselves didn't carry across.  
15 There was no provision, no ability for them to do so. And they were  
underpinned by, of course, the awards and the Statement and Conditions of  
Employment Act, which is akin to the national employment standards.

20 This concept was looked at in a review of the state IR system in 2002  
which was conducted by Steven Amendola. He was commissioned by the  
government to look at a broad aspect, and one of the things that he came  
up with was that where there is a comprehensive set of minimum  
conditions that apply universally to all employees there may be little need  
for such protections, you know, and identified that, you know, having the  
transfer of those instruments can affect the new employer's decision to  
25 proceed on in that aspect. So on that aspect we've got strong safety nets.

**MR HARRIS:** And what you are saying, I think, is that at the time  
transmission of business was seen as a problem. I remember a celebrated  
Telstra case, I think, a call centre case but I can't be certain that's right, but  
30 I remember the transmission of business became quite a celebrated issue  
back in the early part of the 2000s. But if you've got - what you're saying  
is with national employment standards in place perhaps you need, or you  
have less need of transmission of business. And it's an issue that could be  
tested against that. In other words, look at the circumstances that might  
35 have put transmission of business in as an industrial problem in the first  
place and see whether the NES has altered the circumstances.

**MR MOSS:** That's right.

40 **MR HARRIS:** And do you say he actually did that in his inquiry?

**MR MOSS:** Well, those are comments that he made and we've translated  
that into our - we can actually provide - - -

45 **MR HARRIS:** When was that? When was that?

**MR MOSS:** 2009 - - -

**MR HARRIS:** 2009.

5 **MR MOSS:** - - - that review was done, so it was done as a review of the  
state IR system to look at it going forward. And so we've got a nice little  
example of WA having quite a distinctly different set of arrangements in  
place and, you know, no particular issues coming out of that, that lack of  
protection in that respect that replicates - that the old transmission of  
10 business provisions was not ideal, at least only applied for transfer of  
instruments where the businesses were really engaged in the same industry.  
But even that was not ideal in that aspect. Sorry, you wanted us to go to  
modern awards?

15 **MR HARRIS:** I want to ask about modern awards. So your proposition  
and the proposition from a number of employers has been yes, we've  
reduced from 4,000 to 122. It was a long, laborious and difficult process.  
Some employers are happy with their new award being more simplified  
and certainly clearer to them. I wouldn't necessarily say clearer to every  
20 reader of it, but clearer to them. Others are unhappy and have the view  
that it was cobbling together all the standards from the combining of a set  
of awards and didn't really simplify the process. So there are split views  
but we understand there is still dissatisfaction. Our proposition had been  
that it's best to cease the four year review process because we're traversing  
ground that almost all the parties said to us we're tired of traversing.  
25 We're not, we think we've squeezed about as much out of this process as  
we can. Our proposition was that the Minimum Standards Division would  
take over responsibility for reviewing issues within a set of awards,  
perhaps across an industry or a number of allied industries, and deal with  
simplification of awards issue by issue, which would get you away from  
30 the idea of shrinking numbers because shrinking numbers of awards isn't  
actually going to necessarily achieve very much unless you can simplify  
things internally.

35 **MR MOSS:** Yes.

**MR HARRIS:** But simplification itself is substantially problematic  
because someone is likely to lose something in the course of  
simplification, so best have it considered issue by issue so those trade-offs  
can become very transparent and the parties can exchange on them at least  
40 in a way that says well, if we're going to take, you know, matter X out of  
this set of awards what are the consequences of that? How can we  
ameliorate those consequences, you know. So we were imagining an  
issues based approach. Your comments, if I understand correctly, are  
saying you think that awards should move to becoming a simple safety net  
45 in terms of minimum numbers of terms and conditions, and I think  
everybody agrees in principle that they are meant to be transiting towards a  
safety net but no-one agrees in practice what that might be.



**MR MOSS:** No.

5 **MR HARRIS:** I wanted to ask you who should do it? Leaving aside the  
question of what is the next way of addressing award simplification - we  
would say issues based. Other people have different views. That's fine,  
we will look closely at those options. But the crucial question for me is  
10 who should do it? We have envisaged it being done within the existing  
Fair Work Commission but with a revised nature of the people who are  
employed being skills based for the purpose of, you know, I work in  
Minimum Standards Division, I'm a different kind of employee from  
working in Tribunals Division. And similarly for appointees to those  
15 positions, to commissioners and deputy presidents and that kind of thing,  
that they would be skills based for the purpose of dressing out.

**MR MOSS:** Yes.

20 **MR HARRIS:** And we have inherently seen those shifts in the nature of  
the structure of the Fair Work Commission and the nature of the  
appointees to the Fair Work Commission as being essential to the purpose  
of continuing modernisation, but in this case led by the Fair Work  
Commission rather than perhaps collectively led under a legislatively  
directed modernisation kind of process.

25 **MR MOSS:** Yes.

30 **MR HARRIS:** So we have wanted to invest more confidence in the Fair  
Work Commission but with a change to its nature of operations and its  
personnel. Now, I'd like to ask you who because if that model doesn't  
appeal to you we need to know this. Lots of people have said to us, "Oh  
well, you know, I'd appoint commissioners this way" and "Don't change  
the appointment of commissioners at all." And relatively rarely when I ask  
this question can I get a specific answer. But you've been unwise enough  
35 to propose continuance of simplification so that gives me the avenue to say  
continued simplification by whom?

40 **MR MOSS:** Yes. We would probably suggest it should be led by the  
Tribunal, that reviews could be suggested or recommended by relevant  
parties. So there'd be an opportunity for someone to say, "Look, we're  
unhappy with this for these reasons", and the Tribunal having the option to  
pick that up. But it would be a Tribunal run process, and we think that the  
Tribunal should consult widely in that, not leave it up to the industrial  
parties to run and prosecute the case and determine the case simply on  
those - - -

45

**MR HARRIS:** Right, so you are somewhat with us in the sense that the revised Fair Work Commission through, if I want to be clear, the Tribunals Division would do reviewing?

5 **MR MOSS:** Yes, well - - -

**MR HARRIS:** Or the Minimum Standards Division.

10 **MR MOSS:** We would recommend, yes, the Minimum Standards Division.

**MR HARRIS:** Through the Minimum Standards Division?

15 **MR MOSS:** Yes.

**MR HARRIS:** Would do the reviewing, right.

20 **MR MOSS:** Yes. So one of the problems that, you know - the compulsory four year reviews I think had some merit around the concept based on the history of previous review processes. So, you know, the Workplace Relations Act had a requirement for the Commission to review it but because it actually didn't tell the Commission how to do it in the timeframe nothing happened with it.

25 **MR HARRIS:** No.

30 **MR MOSS:** So the four year review made them do something about it. If you had a properly engaged Minimum Standards Division which had this as a charter and was keen to prosecute that charter, then you don't need to remove - you don't need to have the legislative boot to push them on that particular path. Because things don't need to be reviewed on a four yearly cycle, particularly when those four year reviews take three to four years to complete. So the Minimum Standards Division having that charge and that requirement to do that, to be able to consult widely, to be able to - and a preference to direct engagement we think is important. One of the things we identified in our original submission is industrial relations is something which is quite charged. It's very difficult for an employer to hop up on a stand under cross-examination and put their business on the line. There are other ways in which that evidence can be elicited. Likewise in the reverse aspect, it's rare for an employee to get up on the stand and subject themselves to exactly the same process.

45 So the greater opportunity for more consultative, even sort of dare I say it town hall style discussions, for the Tribunal or Minimum Standards Division to inform itself about what the views of the parties or those who have to live with the awards and the impact that that has - and in particular we do pick up on the Productivity Commission's suggestion that that

should take into account the needs of the unemployed, take into account the need for concern as a client who are directly affected by that - that that's a logical extension, and not be encumbered by history.

5 **MR HARRIS:** Yes.

10 **MR MOSS:** Because I think that's the - you said some people are happy with awards that they've got and other people aren't, and the general view that I've had is that those industries where you effectively started the new model award with a clean sheet of paper - so mining and the hydrocarbons are two really good examples of that. They weren't encumbered by history. The Real Estate Industry Award is another which is very much fit for purpose. There was a little bit of history attached to that. Vastly different compared to, say, the Manufacturing Industry Award which was 15 the federal Metals Award applied more broadly. You can pick up, you know, the current Manufacturing Award, modern award, and the old federal Metals and they pretty much do look the same. And that's not a criticism on the Commission. It only had a very short period of time to create those 120 modern awards. So the process they took was sound, 20 based on that limited timeframe, but not ideal by way of outcome.

**MR HARRIS:** And not worth continuing to repeat by comparison.

25 **MR MOSS:** No, because our viewpoint is that people have become very much entrenched into what we've secured or what our agreement provides and there's a real sense of ownership of this is our agreement from the, you know, relevant industrial relations party this is our agreement. It's not the agreement that applies to the employers and the employees in the industry. So everyone is caught up in that history.

30 **MR HARRIS:** Okay. I am conscious of the time and people probably want to get a cup of tea and all that kind of thing. So Paul, is there anything I have failed to elicit from you that you'd like to get on the record before we break for - - -

35 **MR MOSS:** No, no, those were the key things I wanted to reinforce there, so thank you very much.

40 **MR HARRIS:** Well, let me thank you for coming from WA for the purpose of this. It's a long hike and we really appreciate the effort you made to put submissions in and provide us with quite interesting perspectives from WA. The contributions today have been worthwhile. Thank you very much.

45 **MR MOSS:** Thank you.

**MR HARRIS:** Okay, we are going to have five minutes or something for a cup of tea and then we'll come back, and I think we have the Nursing and the Midwifery Association. We've had nurses multiple times now.

5

**ADJOURNED**

**[3.39 pm]**

**RESUMED**

**[3.47 pm]**

10

**MR HARRIS:** Let's start up again. We have the Australian Nursing and Midwifery Federation. Can you guys in a generic sense – hopefully this is not unacceptable language – can you guys identify yourself, please, for the record.

15

**MS THOMAS:** Lee Thomas, Federal Secretary.

**MS BUTLER:** Annie Butler, Assistant Federal Secretary.

20

**MR BLAKE:** And Nick Blake, Industrial Officer.

**MR HARRIS:** Lee, do you have something basic to say by way of opening statement?

25

**MS THOMAS:** Well, we'd just like to thank you very much for the opportunity to speak with you here today. You've obviously got copies of our submission and our subsequent outline. I'm not going to make any opening statements. I just thought it might be wise just to hand straight over to you so you can ask us your questions.

30

**MR HARRIS:** We had some interesting exchanges previously with representatives in a nursing sector about penalty rates and overtime arrangements and shift work. I'm just wondering are there – we haven't recommended changes, as I think you would know, to those arrangements as they affect nursing. But the proposition was made and drawn attention to that we did say this is subsequently the Fair Work Commission might look at other sectors. But we tried to make it reasonably plain that we thought people who are employed in the emergency services and response kind of area should not be subject to that change because we think employment arrangements and provision of services have shifted substantially in some sectors from the time when penalty rates were first established. But in your own case, the community attitude hasn't shifted at all.

45

So I was a little surprised that we got these levels of concern, not that I – my surprise doesn't matter one way or another. But I wondered whether

it was clear enough from our report that we had actually taken that position. The first thing I'll do is I thought I'd ask you generally for your views on penalty rates and related matters, because you guys are more in a sort of collective shift kind of option really rather than penalty rates, aren't you?

**MS THOMAS:** No, penalties.

**MR HARRIS:** Penalties are important to you specifically?

**MS THOMAS:** Yes, very important to us.

**MR HARRIS:** Let's stick with penalties then for the moment. Because I've also been told that shift work is far more important too.

**MS THOMAS:** Well, I think the two things go hand in hand really.

**MR HARRIS:** Some people's shift rates, I think, have incorporated a penalty. So they are more smooth than others.

**MR BLAKE:** We certainly had a healthy debate when the draft report recommendations came down about the extent to which our membership was exposed to any reduction in penalty rates. You're quite right, I mean, the draft report was clear that at this stage the recommendation was focused in areas such as hospitality, retail and so forth.

Our membership is probably a bit wider than what would be traditionally called emergency services sectors. Whilst we have a large membership in the hospital and aged care sectors, we also have members in, for example, primary care, GP clinics, other types of clinics, that maybe sit out of that. But for us historically nurses have relied very heavily on penalties/loadings/and other payments of that nature. We reckon that on average it probably makes up about 40 per cent of their remuneration for nurses required to work in a shift work environment. So we're pretty keen to keep them and improve them where we can.

**MR HARRIS:** But that's fair enough. If you're okay as far as your representation is concerned, then I can move on to public sector employment versus private sector employment, which has been another issue we've received a fair amount of comment on and, again, as I said, in your sector that the – now, I'm not sure whether the high degree of difficulty is actually in negotiating in the public sector context or in the private sector context because, again, we've heard both can be problematic. But I have the general impression that public sector wage negotiations, a subject on which we had an entire chapter but didn't actually come to a recommended position, but, as I pointed out to the CPSU representatives this morning, we were looking for more and better

responses perhaps before we designed anything by way of ultimate commentary.

5 Do you have a view to express on the general nature of negotiating with government as an employer? Is it more problematic than negotiating with private sector employers? Is it more time-consuming? Are the objectives and outcomes clear in the process?

10 **MR BLAKE:** I think it's fair to say the last 10, 20 years it's been more difficult to negotiate reasonable outcomes with state governments and public sector employers more generally. You'd be aware that in recent years they've had their wages policy, pattern bargaining by another name, in our view, where we're locked into negotiating on a maximum wages outcome. It's often the case, particularly in the hospital sectors where you may be one step removed from government directly, that you're sitting down opposite people who have no discretion or no authority in terms of the bargaining process. It can be very frustrating.

20 They're referring all their findings and views to head office who are making a decision in line with the government policy. Of course, that varies a bit when you have governments that are more sympathetic to public sector workers. We've been able to get some benefits in terms of, for example, workload management tools in Victoria, New South Wales and Queensland. But we have had difficulties in the state government areas. We have significant difficulties at the moment in the Commonwealth public sector areas in terms of getting reasonable outcomes. I think it's a cap of 1.5 per cent a year at the moment, but it varies.

30 Historically, we've allowed the public sector to lead the nursing market in terms of outcomes. But increasingly the private sector now often lead in terms of the outcomes.

35 **MR HARRIS:** That's an interesting development. Are we talking hospitals here primarily? Would that be where the private sector is increasingly leading?

40 **MR BLAKE:** Yes. Certainly in the public sector it's mainly hospitals. The private sector, hospitals and aged care.

45 **MR HARRIS:** Yet if the private sector has for-profit motives – and I know some are not-for-profits but very much needing to make sure they a hundred per cent cover costs – they're obviously findings ways then of dealing with their wages bill through other efficiencies in terms of – by comparison with the public sector. Would that be right?

**MS THOMAS:** Well, staffing levels usually, given that it is the case almost universally that staffing is 70 to 80 per cent of the expense. What, of course, is the first thing to be looked at is the staffing level, the number of staff available per shift or per area. So in public sector hospitals there are quite often workload outcomes, nursing hours per patient day or ratios, however you want to describe them. That is the case around the country in public hospitals. But in private hospitals it's not the case. We don't have the same sort of outcomes in terms of that. So there's a bigger gap in staffing levels often in private acute hospitals as opposed to, on the other hand, public hospitals.

**MR BLAKE:** I suppose the other thing that's worth noting is the private health sector is very lucrative. It's a good business to be in. Private acute hospitals are big money earners. They differ from the public sector to the extent that in the public sector really the focus is trying to generate as much service output as you can within a defined budget. It's quite often the case that budget shrinks rather than grows. In the private sector they're able to pitch their product or their service to maximise their returns, which is not often to be the case in the public sector where it really is about throughput.

**MR HARRIS:** In the case of the public sector, would you accept that it may be legitimate to have an overall wages target, wages growth target, from a fiscal perspective, but that standard having been set, it would be best to leave the individual institution to do the negotiations? Would that be a preferred position from your perspective? You'll see the way our chapter in the draft report went. We were suggesting that in order to get productivity enhancements you're almost certain to have to go to the institution level where the productivity gains are undoubtedly better known than they ever could be centrally or the opportunity for productivity enhancements.

So the trade-offs could be made, this will improve the productivity of the institution and, in return for that, we're prepared to share the benefits with you so you get the correct incentives established, that kind of thing. Did you have a model that was like that at all in one?

**MR BLAKE:** In our experience, the model that has worked in the public sectors where it's controlled by government policy is essentially that you have an enterprise bargaining framework but the agreements replicate each other pretty much. In terms of productivity initiatives, our experience has been that the focus is on cutting numbers of staff, making them more flexible in terms of what hours and what arrangements they're prepared to work. At an enterprise level it hasn't worked. Rather, where there has been positive outcomes it's been a sort of a industry or sector wide level where there's an ability of a group of facilities who introduce a change

which benefits the whole of the sector but wouldn't necessarily be available on an individual-by-individual enterprise basis.

5 I think in our submission we pointed to the no-lift policy that originated in Victoria where the union in Victoria and a group of aged care facilities agreed to introduce lifting devices to stop individual employees lifting residents from their bed or from the bath. That required employers to purchase lifting equipment. But the fact that they all were doing it at the same time, it allowed them to have an even playing field in terms of that  
10 initiative. It cut accidents and work cover premiums dramatically in industry, so it was a benefit to them. But you wouldn't be able to do it by knocking on the door of a single aged care facility and saying, "We want you to spent \$10,000 on this lifting device, please."

15 **MR HARRIS:** So some things have to be done centrally.

**MR BLAKE:** Yes.

20 **MS THOMAS:** And I think it's the case that when you're dealing in health or aged care in those sectors the productivity in the way that Nick has just described where there is an issue and there is a very logical outcome in terms of lifting and reducing injuries, thereby increasing productivity, is one thing. But in health it is the case that it's not a widget factory. We are dealing constantly with the variations of people's frailties,  
25 human condition.

It does make it – it is fair to say that our members are constantly looking at productivity gains, but there is a limit when you're dealing in the context of human illness and disease.

30 **MR HARRIS:** I was just trying to work out whether it was better to discover that at an institution level, which is where roughly our draft chapter has been going, but you at least pointed to one clear example where you said it's better to discuss it, anyway, rather than discover it –  
35 perhaps it is discovered locally, but it can only be discussed and implemented or it's preferable to discuss and implement it at what might be considered to be an industry-wide level. That's food for thought.

40 **MR BLAKE:** It's also the case that because of centralised funding often by the Commonwealth, that there's limited capacity for employers to break out and do anything dramatically different from their competitors which may be geographically within a block or two and competing for the same population. Our experience has been that whilst we have, for example, 500 aged care agreements in Victoria, they probably fall into one, two or three  
45 categories, based on the fact that they might be private for profit, not for profit, religious agreements. But they're all negotiated individually but it's the same outcome.



**MR HARRIS:** They have rough templates behind them.

**MR BLAKE:** Yes.

5

**MR HARRIS:** You mentioned in passing we did actually – because we have heard of this but in our comments on pattern bargaining where we called them potentially an efficiency tool, but we haven't gone any further with that until we get, again, better information. But we had actually noted that it would probably depend on the competitive circumstances of the industry. In some industries they may well be an inappropriate device but for highly competitive industries they're probably just a quick way to get to perhaps not a resolution but to a simplification of the issues in dispute in the course of a negotiation.

15

**MS THOMAS:** In the public health sector as well, if you're saying by institution by institution, it's very unlikely that our members would find that an acceptable way to negotiate public sector conditions. It also would depend on what you're defining as an institution because it could limit transferability. So if by institution you mean a hospital against a hospital - - because in the public sector districts also have the capacity to transfer – use people across institutions. If you had already there a frustration with differing policies, procedures, not so much conditions, but between local health districts or networks or regions – they're called all different things across the country – that would make it much more – could make it more difficult not just things like the no lift policy but a whole range of circumstances could be more difficult if you tried to approach it by an institution-by-institution level.

20

25

**MR HARRIS:** It's good contribution. I assume we've finished with the photos now, he says optimistically. We're not supposed to have photos during the active session, although we established that standard because we were expecting Channel 7 and so many photographers and for some reason they're not here today.

35

**MS THOMAS:** You should have let me know, we could have brought them along.

**MR HARRIS:** No, don't encourage. I think this is much better. Otherwise I have to go back in deeply formal mode and I can't actually ask you leading questions. I have to wait for you to work out what I'm asking.

40

**MS THOMAS:** Did you want to talk about pattern bargaining?

**MR HARRIS:** If you've got some comments on pattern bargaining, I'd love to hear some comments on pattern bargaining.

45

**MS THOMAS:** I think Mr Blake might have some comments on pattern bargaining.

5 **MR BLAKE:** It's been our position since the introduction of collective bargaining that we've supported pattern bargaining. The reality in our industry is that whilst we're required under the Act to negotiate at an enterprise level, the outcomes, as I said earlier, tend to be consistent in terms of what the employer is seeking and what the union is seeking as well. We don't tend to have disparate outcomes in defined geographical or  
10 sector wide areas. They tend to be pattern outcomes.

They're certainly not as a result of industrial action but, really, as a result of a recognition by the industry that consistency of outcomes is more beneficial to the provision of services. The other thing that I think is worth  
15 noting is that nursing is a very mobile workforce, incredibly mobile workforce. We've had situations in the regional sectors of the country where for various reasons one employer is unable to compete the employer across the road in terms of collective bargaining outcomes and there's been a mass movement because of structural shortages and demand for nursing  
20 labour where nurses through I think necessity, because they need to maximise their income, have simply moved across holus-bolus to other employers who offer better conditions. We don't think that's a good thing in terms of provision of health and aged care services in the country.

25 So we are mystified really as to the, I suppose, not so much the Productivity Commission's report but certainly the general tenor within the community of this opposition to pattern bargaining where we think that in some instances it would be beneficial to all parties.

30 **MR HARRIS:** As I said earlier, our in-principle look at this suggested if it's a competitive industry the chances of there being a dis-benefit from this must be reasonably small. But if it's not competitive circumstances it's plausible that you could see collusion effectively created and the driving up of costs very rapidly. Whether we have a solution to this is,  
35 again, a different proposition. But it's good to get you on the record about that.

I understand you've got views on section 424 of the Act and the suspension of industrial action or intervention in the circumstances relating  
40 to – well, relating to your industry in particular. Would you like to talk a little bit about that?

**MR BLAKE:** We certainly addressed it at length in our submission and certainly I note that our Victorian and Queensland branches that appear in  
45 these consultations I think have raised it as well. It really goes to the fact that we think nurses in Australia start behind the eight ball in relation to taking protected industrial action to advance their desires in a collective

bargaining setting. First of all, they are a occupational group that are reluctant to do anything that would affect the wellbeing of their patient or their residents. So the industrial action they do take often is very minimal.

5 Even so, the history for us has been in relation to that section of the Act and the taking of protected industrial action has been very easy for employers and governments to come along and argue successfully before the tribunal that any action that has been taken has a direct harm to the safety and welfare of the population and therefore should be ruled to be  
10 unprotected. We think that is a contrivance in the sense of how we deal with – how we know the provision of health service is delivered every day in Australia and how that compares to the taking of the industrial action.

15 We would like to see a more realistic approach adopted by the tribunal to look at well, what is the day-to-day situation as opposed to the situation during the periods of industrial action.

**MR HARRIS:** Do they ask you when you're down in front of the Commission on this sort of this argument over whether your industrial  
20 action is going to jeopardise patient safety, do they ask you what propositions you would put in place to ensure you wouldn't jeopardise safety? I mean, I'm sure you'll put up submissions. But I guess what we're looking at is how is the test being applied by commissioners in practice? That's what we're looking at.

25 **MR BLAKE:** I think, Peter, that the starting point is to say that every branch of the federation has had extensive and comprehensive policies around taking industrial action and how this can minimise any impact on people who are getting services in health settings or requiring services. So  
30 there's all these exclusions around emergency, paediatrics, oncology. There's a whole raft of - - -

**MS THOMAS:** Category 1 and 2 surgeries, the list goes on.

35 **MR BLAKE:** So that's the first step before any industrial action is taken. Then there are considerations of the types of industrial actions based on the settings. It's often the case that the industrial action will be when a hospital bed becomes vacated the nursing staff will put a ban on that bed and it can't be used again until the industrial action is concluded.

40 Now, the response from government employers has been to go down to the tribunal and say, "Well, as a result of that, we've had Mary Bloggs on an emergency trolley for 12 hours. That person wouldn't be there if the industrial action hadn't been taking place," or, "Our surgeons have  
45 cancelled elective surgery for today and that meant that three people couldn't get hip replacements." And that has been a successful argument before the tribunal in most cases.

5 But we would say that every day of the week hospitals cancel elective surgery, they close beds, they send people home, they take all different types of decisions affecting the level of service and the running of the facility on a day-to-day basis. But because it's been done by a union in relation to the support of an industrial claim, it's seen as being damaging to that service.

10 **MS THOMAS:** I think in addition to that – and that's the long end of industrial action, so the very last resort end where you close beds or walk off the job for a limited period of time or whatever that might be. I think Nick has answered the question about the endangerment of safety. However, it is the case – and I've been – years ago now, but I have been in a hearing in the Commission where our members wore t-shirts as part of a low-level industrial action that was put up by the applicant, the employer, to endanger safety.

20 Now, that's the other end of the continuum. So I think when we talk about industrial action we need to be clear about what actually is it that we're talking about.

25 **MR HARRIS:** In consideration do they actually go to the measures and say, for example, how is it possible that patient safety is endangered by wearing t-shirts?

**MS THOMAS:** Well, in that case the Commission found that the wearing of t-shirts did not endanger the safety. So, yes, in answer to the – in that specific instance, yes, that was the case.

30 **MR HARRIS:** I mean, this is all about a judgment test really and it's a damn difficult thing to fix in black letter law. But we have had examples given to us of circumstances where this has been used and particularly relevant to limiting the powers of employees negotiating with government. This is why I started out with the public sector employment sort of angle. 35 It's almost a quid pro quo that says, "Well, if I'm unable to exercise industrial action and I'm negotiating with a centralised entity that isn't taking account of individual workplaces," it puts you in a somewhat invidious position, so it would seem.

40 That said, your history hasn't been at all bad of being successful, it seems to me, in managing your industrial circumstances. There had been other examples drawn to our attention which are probably better than your own of this. I think the ambulance and first response were – the issues were put to us in Bendigo that were not dissimilar to this but seemed to have – well, they didn't seem to be easily solved. So we're interested in 45 the issue because of that, but we don't know whether the problem lies in

black letter law or in simple judgments that are being made within the Commission.

5 I mean, we can recommend it to government that it has a different  
approach to its industrial arrangements, but that will be a recommendation  
in principle without a – there’s no binding of government activity in  
legislation. Government will have to choose to bind itself to different  
behaviour in the future. But when we look at black letter law and think,  
10 “What can we do if this test is not being completely effectively applied,” it  
is a question of whether the test is the problem or the judgment is the  
problem. That’s why I’m interested in your own experiences.

**MR BLAKE:** We’re quite heartened by the draft report and  
recommendation that there needs to be some acceptance – and I think you  
15 put it in the terms of whether the impact on health and welfare of the  
population is acceptably low. So at least there’s an opportunity for the  
Commission to have regard for what does that mean in this context, what  
does that mean in a health setting and at least it triggers a debate or a  
discussion around what that means in a particular setting. At the moment  
20 we find the tribunal is simply swayed by the fact that this has happened  
because of this action, therefore they have to do this, and it’s not in our  
favour in most cases.

**MR HARRIS:** Of course, in some circumstances the Fair Work Act isn’t  
25 relevant at all because employees are covered by different legislative  
requirements. That’s been useful on that. Enterprise contracts. Now, we  
put up enterprise contracts as a concept to deal with small and medium  
sized employers and their apparent lack of a flexibility option for  
determining variations to awards. I know that it’s attracted some attention  
30 from some larger employers but we think they’ve probably got better  
options available to them than this because there’s a fair few safeguards  
inherent in the enterprise contract arrangement which would, we assume,  
not make it that attractive to large employers. But I understand you have a  
view on enterprise contracts. Would you like to put that view forward?

35 **MR BLAKE:** We don’t support the introduction of enterprise contracts,  
even having regard to some of the protections that you say may apply.  
We’ve had some very poor experiences, particularly in relation to  
conservative state governments and their state industrial action laws and  
40 how that’s impacted on our members. We find, Peter, that the outcome for  
us is that where we have workplaces where there are small numbers of  
union members or they have very weak industrial ability to push their own  
positions, employers invariably access those parts of the Act that give them  
the greatest benefit. We just think that the enterprise contract position –  
45 that’s when we understand that they might apply – would be very attractive  
to part so the industry that we think should be encouraged more to bargain  
collectively and do more to pay market conditions, not do less.

We say at the moment there's very little requiring employers to bargain, and that's a deficiency in the current arrangements. We don't want to see the introduction of changes, including enterprise contracts, so it encourages employers to do less or have an easier option that will reduce their cost base.

**MR HARRIS:** Is it true in nursing that bargains dominate or do award arrangements or near award arrangements dominate?

**MS THOMAS:** Bargaining dominates.

**MR BLAKE:** Yes.

**MR HARRIS:** So you might have a set of employers who haven't taken advantage of what we might call the flexibility option, being bargaining, but it's not a large group of employers.

**MS THOMAS:** It's tiny.

**MR BLAKE:** We have all of the public sector and all of the private hospitals that are covered by agreements. Probably 95 per cent of the rest. We have pockets because they change, they close, they start up again. But we would have the bulk covered by agreements. As I said earlier, Peter, the approach that normally is taken outside of the large employer groups is that we negotiate with employer organisations who represent 200 clients and we negotiate consistent outcomes through that process that apply across their client base. That's the way it has been working for us. We're definite that in the event that enterprise contracts are introduced, some of those employer organisations will be attracted and we'll be suggesting that to their members that that's the way to go. That won't benefit our members and it certainly won't benefit healthcare in this country.

**MR HARRIS:** Okay. Thanks for your comments on that. I think I'm at the end of my list of questions for you guys. Are there things that I have not given you the opportunity to put on the record that you would like to put on the record?

**MS THOMAS:** I think we just want to ask a question of clarification around the penalty rates. We acknowledge the Productivity Commission in their draft report said emergency response areas were exempt from any proposed changes to penalty rates. I think the clarity around emergency response areas is something that we are very keen to put on the record. We would see that – I'm being provocative here. We would say that any nurse or midwife, irrespective of where she works – and that includes assistance in nursing however titled – are emergency response personnel and

therefore would be covered by this catch-all that you're saying are exempt from any proposed changes to penalty rates.

5 **MR HARRIS:** Our rationale for exemption, although it's got a number of grounds – I want to emphasise that – but the simplest one for me to put across in terms of clarification has been has the nature of the work in terms of expectations of the service changed a lot? Has community attitude towards expecting to see work or the rationale for which the penalty rate was originally put in place changed? And we think in some sectors it has.  
10 That's a clear-cut – and we think it has, although that's not the sole basis on which we've made that advice, we certainly think it has. In the case of emergency service workers, it does not appear to have done so.

15 That's our level of thinking. We may supplement in the final report with further comments, but that's the sort of indication. I can't, therefore, give you an explicit assurance. But you can see where the logic takes you. Here in the case of adjustment to workplace relations system, as in most cases, if we can't find a specific empirical black and white line, we'll use the logic of the basis of making a decision and we'll advance the logic.  
20 That's what we'll probably do in the final report as well.

**MS THOMAS:** Yes, and so I think what you're saying, if I'm correct, is irrespective of the sector in which you work, whether it's an aged care facility or an emergency department public hospital, the empirical data  
25 hasn't changed for why penalty was awarded in the first place, and therefore, under your current proposals would continue.

**MR HARRIS:** That's the way we've written the draft report. That's the basis on which I think you should come forward with any variations or  
30 commentary which you already have. We'll be still seeking comments from people to say that's a fundamentally unsound basis and you should instead look at it this way or that way or the other way. But I guess all I can do with a draft report and without telling you the final report because it's not written and no one knows, including me or anybody else here, what  
35 it says. But I thought I would respond to you by saying that's the basis on which we put these things forward. So you can see, I think, the logic of the chapter.

40 If you take the three or four points out and you simply apply them to the proposition that you put forward, I think you can write your own answer. It won't be our answer until we write the final. But you can write your own answer down and test it against where we come out in the final.

45 **MS THOMAS:** Yes. Thanks very much. I don't have anything else. Anne?

**MS BUTLER:** No.

**MS THOMAS:** Nicholas?

**MR BLAKE:** No, thank you.

5

**MR HARRIS:** Thank you very much.

**MS THOMAS:** Thank you.

10

**MR HARRIS:** Now, we have to go to a phone connection.

**ADJOURNED**

**[4.23 pm]**

15

**RESUMED**

**[4.30 pm]**

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**MR HARRIS:** Brendan, it's Peter Harris. I'd like to thank you for making the time this afternoon to join the hearing. Just for the purpose of the record - - -

25

**MR McCARTHY:** Thank you, Mr Harris, for accommodating me. It was rather late in the day that I requested to be heard and I appreciate you giving me the opportunity.

30

**MR HARRIS:** Not a problem at all. Do you want to make any – I know because we're on teleconference it's always a bit of a pain this. But do you want to make any opening remarks? I've got emailed information you went through a little earlier today and I've got notes here from a previous submission that you put up. So don't feel obliged to go onto the record with an opening statement in the way we've allowed other people, but if you wanted to, I certainly want to give you that opportunity.

35

**MR McCARTHY:** All right. Well, what I could put – I've provided you with what are really talking notes, so they're not a submission as such, but I thought they might help expedite the proceedings this afternoon. There might be typos as there was in my original submission, I think. But it's basically just to assist me with the sort of points that I wanted to make. The only other introductory thing I'd like to say is I've read the draft report but I can't say that I've studied it, nor can I say that I've absorbed it all. So I'm directing – I intend to direct my attention to those points I've identified in my notes that I've provided you. Five of those are sort of interrelated, so I'll – are points 1 to 5, namely protected industrial action, unprotected industrial action, bargaining for major projects, bargaining for essential services and right of entry.

45



They're all sort of a bit related. The other, establishing minimum standards, is not related to those other five points. So with your indulgence what I was intending to do was to maybe go straight into the comments that I can make in respect of minimum standards and then come back to those other points, if that suits you.

**MR HARRIS:** Sure. Go right ahead.

**MR McCARTHY:** All right. Well, my reading of the draft report, it seems to me that the Productivity Commission has partly recognised that there is quite distinct functions currently undertaken by the Commission in a number of areas, in particular in establishing employment standards, either through awards or through annual wage reviews or living wage reviews or in any other way compared to other types of roles that it had that are quasi-judicial or facilitating enterprise bargaining.

It seems to me that those two divisions have been recognised and there's been an endeavour to try and improve the quality of both areas. In particular, the area I wanted to – not in particular, but the area I wanted to devote attention to today, which would form then part of my original submission, is the establishment of minimum standards. By minimum standards I mean anything that relates to awards in establishing the conditions within those awards or any other type of minimum standard, be they annual wage reviews or whatever their class now becomes - that terminology is wrong.

So that area I wanted to address you on. In particular, the recommendation that there be two branches of the Commission established; one for establishing minimum standards and another for other roles of the Commission. The difficulty I have with that is that inevitably I think under the one tribunal the control of who is involved in minimum standards will be presumably under the control of whoever happens to be president at the time.

My criticism, if you like, of how the Commission currently establishes full benches and allocates members to those full benches is done in a way that restricts diversity of views and opinions and seems to me to try and establish, and is achieving I think, a uniformity of view which, particularly for minimum standards isn't conducive to obtaining the best results from the consideration of issues that need to be looked at for the implications of new standards as against existing rights or disputes.

I've provided you with a table to give you some idea of why I've formed that view, which is a table identifying a number of full benches that Commission members have been involved in since 2011. But, in particular, I'd want to focus your attention on the figures for 2013 to 2015; that is, 1 July 2012 to 30 June 2012 right through to 30 June 2015.

Now, these numbers aren't – and I'd be the first to accept there's a degree of subjectivity in them, particularly what is a significant matter for a Full Bench. There's also a degree of you can't look at one Full Bench, for example – if a member happens to be, for example, Hatcher VP on 60 full benches, which he was in 2015, many of those may be simply appeal benches that deal with liberty to appeal or very inconsequential or insubstantial matters.

But when one looks at either the totality of the numbers of matters that different members are involved in, where in particular the significant Full Bench decisions that they've been involved in – if you look down the table on the very right-hand side, for example, Frost J, expectedly, would be in a large number, 29. But then the only members that have been involved in more than 10 are a small range of members, members which have a particular background and few, if any, have a diverse background to those particular background.

My view – and it's very hard to establish beyond any doubt all these things, because, as I say, the varying degree of subjectivity and a degree of interpretation, there's also a degree of feel from experience of what's actually happening. My view is that there's a small number of, if you like, preferred members that are allocated Full Bench matters for significant matters. If it were not that, then it's very hard to explain how some members, and some very senior members that are involved in a very low proportion of significant matters, some a low number of Full Bench matters and some a high number of Full Bench matters but a very low proportion of significant matters – hard to explain how some members are not involved in any Full Bench matters at all where there's been a significant issue involved.

My view is that there is a degree of control over those full benches that limit the diversity of views and I can't see that that diversity of view, that I believe is very necessary to come to a group outcome from standard setting type deliberations and consideration, I don't see how you can come to the best outcome without a diversity of view and without a diversity of background and experience for those types of matters. So I don't have any confidence at all that if there were merely another division of the Commission that dealt with standard-setting matters, then the outcomes would be no different. The confidence that many people would have in those standard settings would continue – and I think it is already eroding – but continue to erode and would not be conducive to a transparent, independent, openly clear identification of who was involved in the consideration of these matters for standard setting.

The other issue that's related to that – the other issue that I dealt with in my written submission earlier – the overwhelming role of the

Commission is involved in single individual disputes, matter that are not matters that are dealt with on an economy wide or industry wide type basis. In my view, the FWC is not a body that is properly suited or members have the skills appropriate for consideration of what are basically economic – not basically, but what are significantly economic issues.

The example I would give of that is the apprenticeship rates case. That was a decision that increased apprenticeship rates over two years by over 30 per cent in one fell swoop. When one examines that decision, a critical element of making that decision was a view formed that the demand side for apprentices on the demand side rates obtained didn't matter, or if they mattered, were not significant in deliberations by employers and decisions by employers as to whether they employ apprentices or not.

That decision was taken under what I would think is the high watermark of apprenticeship intakes. Since that time – and I'm not saying solely because of that level of increase – I think you'll find that apprenticeship intakes maybe have not collapsed but close to it and significantly declined. The justification for the – or the basis of the reasoning for what was relied upon, probably more accurately, by that Full Bench appears to have been a single piece of research that was submitted, I think, by the ACTU – I could be wrong there – that when one really backtracks it to see what this research was, it's little more than a literature search and review of articles in respect of apprenticeship intakes and rates of pay and views about what was important and what was not important in decision-making about employing apprentices.

So on the two sides of it, one is that the control of constitution of full benches to a narrow band of members, and secondly, if there are to be FWC members involved, then I don't see that there will be the skill set and experience necessary for the task at hand. So what I'd encourage the Commission to do, that is, the Productivity Commission, is to review that recommendation as to whether it is better to have two divisions within the Commission or whether it's better to have a completely separate body and entity whose sole purpose is to establish and maintain the review standards, whether they be awards or annual wages or whatever.

I'd expect that the response, if there is to be one by anyone criticising my criticism of the constitution of full benches, they'll – I'll suspect that there'll be arguments or submissions, "Well, these rosters that they're establishing. How do we know matters are to come up for a particular roster?" But there's usually multi rosters for the one period. So different benches can be selected with an eye to well, if a significant matter comes up, this will go to that bench rather than that one.

Secondly, I'm aware that some members have been replaced on full benches for reasons unknown, but it appeared obvious that it's because they weren't members that would be suitable for a significant matter. Another reason may be that the travel costs for non-Melbourne and non-Sydney members to Melbourne or Sydney or anywhere is too substantial for non-Melbourne and Sydney members to be involved in full benches. But if the Full Bench is in Perth or Brisbane or Adelaide, people travel from Sydney and Melbourne to those locations. So I just don't see where that travel argument would stand up.

Another reason might be given well, there's some people that are not suitable. That's probably right. And it would be improper to disclose who is or who is not suitable. But there's no transparent way of identifying who has expressed an interest, who has not expressed an interest, who will be considered, who won't be considered, why they would be considered, why they won't be considered. None of those things are transparent whatsoever in that sort of process.

Or there might be those members who said, "Well, look, I don't have any interest in those areas. Please exclude me." I don't know the answers to those issues. But I guess my main submission in respect of minimum standards, Mr Harris, is that you reconsider having two divisions for completely different purposes within the Commission.

**MR HARRIS:** Okay. I understand that and it's been pretty clear. Can I just ask you, if we were to go down this path we'd probably have to give the government some advice about how in a practical sense we would reallocate existing deputy presidents and vice presidents and the like. I'm sure the skill base of the individuals when they were selected will still be on record. So that's one criterion you could use to determine this. But have you put any thought further to how we might, as it were, reallocate the existing capability? Or is your proposition really create the institution and start again?

**MR McCARTHY:** It's the latter; create the institution and start again and consider in that starting again what – I don't think that there'd be – and I take from your question you're suggesting that the existing members within the Commission be appointed to this new body.

**MR HARRIS:** Continuity sometimes is valuable, you see, but it's a question.

**MR McCARTHY:** Yes. I think it should be completely separate. If there were to be any – for either continuity or transition purposes, then I think it should either be – I think it only needs one or two people and it should either be the president and someone assigned by the president or – either one or two people of that sort of basis. But I don't see why there

would be really be a need – I don't see why I guess the corporate knowledge, if I can class it that, of the Commission in standard-setting matters is such that it wouldn't be able to be reviewed or studied, taken into account in a new body.

5

**MR HARRIS:** You can start again. It's just that you can often gain greater confidence in starting again by saying, for example, we've got the minimum wages panel, you might want to retain some capability out of that. You might want to take some capability out of the institution that has shown itself to have skills. But it was more a question whether you put your mind to it. I wasn't asking you to try and develop this in real time. I'm going to take the proposition from you that - - -

10

**MR McCARTHY:** I haven't, but I'm happy to think about it in real time. One of the options would be for a new body for a number of people to be – for the new body – rather than identifying individual people, for the new body to seek advice from the president as to who would be appropriate for involvement in that type of body and that type of role, because then there's a question of how many and leave it to the new body to make the decision but on advice and recommendation from the president.

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**MR HARRIS:** Fair enough. Do you want to turn your comments to the other points that you picked up particularly? I was notably intrigued by right of entry and your query underneath it, "why is there a right of entry at all?" I don't want to be starting working backwards, I know, but it was an intriguing proposition that you put up.

25

**MR McCARTHY:** The reason I raised that – it doesn't seem – to me the history of the right of entry was dealt with, although not as fulsomely as I would have liked. My view is that right of entry was originally established more for enforcement purposes where I think it's partly recognised within the draft report but not as much as I think it's the actuality. And right of entry was the time when private sector union membership was in the mid-60s where – and, fortunate, was primarily of anything to do with conditions or rights of the workplace were a key role of union officials.

30

35

There were no occupational health and safety acts that appeared through the '80s giving rights to individuals and obligations and rights to stop work, for example, all those sorts of enforcement type things. They were in an era where time and wage as part of the enforcement role was effective time and wages records that were written out longhand in books that were kept in the personnel offices area. No such thing as being able to electronically examine or have provided for you details of hours worked, who they're worked by, all the sorts of things that are associated with enforcement of wages and conditions.

40

45

It was also at a time when there were few well-resourced or properly-resourced agencies such as the ombudsman that dealt with enforcement and strategic enforcement of terms and conditions of employment. So that the real purpose now I think has changed quite significantly, not even for –  
5 I think you addressed the discussion issue – I purposely (indistinct) discussion and a purpose is so that employees can be advised about representation rights and those types of things.

10 But employees in the private sector in particular there's 13, 14 per cent that made their decision about representation. The question of who represents them is confined by what constitutional coverage a particular union may have over that area of work. So with those very substantive changes in the reasons originally for right of entry and the purpose of right of entry now, I have difficulty seeing why it shouldn't be addressed right  
15 from the premise of well, is there really a need for a right of entry at all? The answer might come back, yes, there is. But it needs to be clarified more particularly what the purpose is.

20 The purpose is, it would seem to me, more likely to be to enable recruitment than for any of the other purposes that are canvassed. But that places the union official in no more different a category to any other service provider that is seeking to be able to – for an employee to decide whether they should avail themselves of those services. And there's any number of different types of services that one can think of in that regard  
25 from health service providers to superannuation providers to, I mean, banks, tax agents, whatever.

30 So I just was a little – I think there is an area that should be addressed before final recommendations are made as to well, what's changed with respect to the role that right of entry plays now compared to what its original purpose was? And, is it appropriate for what is mainly now a service provider rather than an enforcer for a private sector workforce that the vast majority are not members of unions – is there a sound basis as to why unions should be given that privilege?

35 **MR HARRIS:** What about for entry for the purposes of checking on workplace safety?

40 **MR McCARTHY:** Any employee has the right, under occupational health and safety legislation, as I understand it, to raise a safety issue. Any employee can call an inspector. The inspectorates from certainly departments I'm aware of in Western Australia and I'd expect in all states are much more well-resourced to respond to safety issues now than they ever were – well, not ever were, since the introduction of occupational  
45 health and safety legislation. The introduction of improvement notices, the introduction of stop-work notices, in effect, by those inspectors. Access to the inspectors is a lot easier. I would think the response time and reaction

to requests to inspect unsafe areas or suspected unsafe areas is fairly good from those departments.

5 Moreover, the capacity for an employee, if they have reasonable grounds to believe that something is so unsafe that they should stop work, they're protected. They weren't previously legislatively protected. So if an employee felt, "This is so unsafe, I'm just going to stop work and I'm not going to do anything" – and employers are encouraged – my understanding from matters that have come before me on (indistinct) 10 disputes, employers encourage employees if they have that view to exercise that right. The health and safety argument to me is much different to what it used to be pre-OHS legislation.

15 **MR HARRIS:** Thank you for that. Do you want to go on with the remaining four points you've got in there? I just wanted to be sure we had time to get you on the record on right of entry because your observations about the shift is quite notable.

20 **MR McCARTHY:** Sorry, I didn't catch that.

25 **MR HARRIS:** I just said it's quite a notable observation you've made about occupational health and safety legislation having changed in recent times and resourcing for that purpose, relatively recent times, and it's worth getting on the record on that matter on right of entry. But the other four, if you want to make comments on that, that'd be great.

30 **MR McCARTHY:** The protected industrial action is one of the issues I think you raise in the report as well. You seem to be open to review of the standard or definition of significant harm and I've classed it as third party harm, third party as being – particularly the impact-type dispute. This is a bit of background for that Woodside dispute because I was the original member who issued the order with respect to that. So a bit of a background to that, unless you're already aware of that background, I can 35 embark on.

**MR HARRIS:** I guess we know something, but we never know enough. So if you want to briefly touch on it, that'd be great.

40 **MR McCARTHY:** The crane company was for Pluto. That crane company with the size of (indistinct) up there for the construction of LNG plants, the sophistication of moving by cranes is very specialised. There's only I think two or three firms in the world that could do that work. The dispute up there was where the agreement for that company, which involved about 10 I think – I could be wrong, it could be eight, could be 12 45 crane drivers – could not reach agreement with their employer and exercised their right to obtain a protected action ballot order.

The number of employees at the site by that employer who were involved in this was, as I say, that number, only eight, 10, 12. So the cost of a day's industrial action was \$3.5 million at least, plus all the other reputation and indirect costs associated with that. The employees that  
5 could have been, had the strike continued, affected by that was something in the order of two to three thousand employees. There was one contractor who may well have been placed in a position of having to stand down something like 1500 employees.

10 Not all of these things were canvassed in detail in the decision, given the time I had to write the decision. Whilst the decision said I wrote it with access to transcript, that was actually an error in the decision which I didn't bother to correct because I thought it would have looked a little bit too self-protectorist. But, anyway, the – which I wrote within two days  
15 and I centred on the issues that eight to 12 employees having capacity to cause that amount of damage and the approach that's been taken in the appeal on that and since – and I don't want this to sound like it's being overturned on appeal, that doesn't really concern me – it's rather the consequences of the test that was established by the Full Bench.

20 That's why when you've asked for suggestions about well, how could one define "reasonable harm" I've turned my mind to that. I can't say that I've spent as much time as I would have liked. So there's probably some areas that I might, on reflection, review and change. But what I'm  
25 suggesting is that somehow or other define "significant harm" as reasonable harm. Reasonable harm being a proportionate action after taking into account and obliging the Commission to take into account the rights of the parties and impacts and consequences of the actions, not the impacts and consequences of the actions on the direct employer, but the  
30 impacts and consequences on others, because that's where the reasonable harm argument really should be addressed, not so much in other areas directly involving the direct parties.

35 So I accept your argument about the – and there were other avenues in the Act if the conduct of the parties during the bargaining is either unfair or deceptive or misleading or things of that nature through bargaining orders and the like. But it's the third party where significant harm has an impact. So my suggestion is that you look at suggesting defining "reasonable  
40 harm" rather than "significant harm" and requiring the Commission to balance the rights of the parties directly involved with the consequences of those who aren't, the impact on those – the consequences of those actions and the impact of those who aren't.

45 But in doing that it set out a series of things – and this is by no means exhaustive the six things I've suggested there – that the Commission be required to consider and form a view about in deciding whether the harm incurred is reasonable or not. Things like how many employees are



involved in the action, how many employees to be affected by the action? Is there a risk? To what extent is there a risk of other employees and how many that may be stood down? Direct cost to the action, indirect cost to the action and the consequences, whether they're disproportionate to the right to take the action. So that's the suggestion I would make on your request for input on that issue.

**MR HARRIS:** I think it was very helpful. You're one of the relatively few people who's gone to the specificity of the point you make. I often have to ask people to move from the generality to the specifics because we're in the final phase of this inquiry obviously and the advice we have to put in front of government needs definitionally to have specifics in it or its chances of it being adopted are always diminished. If you can give governments lots of statements in principle but – anyway, I did note this and I want to thank you for doing it. Do you want to go on to the others?

**MR McCARTHY:** All right. Well, unprotected industrial action, unless I've missed it, there doesn't seem to have been much given to – or much consideration given in the draft report to unprotected action. In particular, I refer to section 418 orders, that is, where there's an allegation of unprotected application, the application for stop orders or not persist orders to the Commission. The issue there I think is well, the types of orders – for those types of orders the (indistinct) significant harm standards – it's a fairly low hurdle to get over, simply whether the Commission is satisfied that the action is unprotected and is occurring. Then there's obligations flowing from that.

But it seems to me that there's been a series of Full Bench decisions, particularly in the last year and this year, that seem to place – the balance between expedition and procedural fairness has tipped a fair way towards procedural fairness. My suggestion that I made in my original submission that the sort of matters that come to the Commission on unprotected industrial action, they have a real urgency about them. Part of the role that they play is if there is a doubt that – or more than a doubt, if there's a view that well, look, the employees that are involved in this action really don't want to be involved, the effect of an order is a defence to those employees who actually may want to work but are being convinced not to. The existence of the order has that effect.

The problem that I think there is in – and this has an effect on the procedural fairness and the time limits on it – is that the onus is on the employer to obtain the evidence. Now, matters that used to come before me that employers had a lot of difficulty obtaining the evidence because sometimes people would just walk off. They wouldn't know why, they wouldn't know who to talk to in respect of it to understand why and they had to scratch around to gather evidence to be able to establish that there was unprotected action occurring.

My suggestion was that there should be a reverse onus, because the people who are taking the action should be, as some full benches have found, they should be prepared to put a case to the Commission – to me, they're the one who initiated the action, they're the ones who've taken the action. They should be in a position to defend why they took that action and why it is not unprotected action. So whilst I'm not a proponent generally of reversal of onus, only in the urgency and expedition of these types of matters the need to – obligation to issue orders or interim orders quickly, a reversal of onus could be of – I think it's called for to make it a more effective part of the legislation.

**MR HARRIS:** Wouldn't the Commission normally, when faced with unprotected industrial action, make the presumption that the action was illegal and order it to cease just simply by, on the face of it, action is occurring, we're not in a protected action period, definitionally action should cease?

**MR McCARTHY:** Well, they need to make a finding of fact that it is occurring. It could be that the employees walk off on the grounds that they believe there was a health and safety hazard. Certainly there is a – so they make their application quite often without the knowledge of what the reason underlying it is. The Commission cannot presume that the action is unlawful. They must make a finding of fact.

**MR HARRIS:** They can't make it simply on the fact that it is within - - -

**MR McCARTHY:** They can't take a presumption that (1) there is action occurring or (2) that the action that is occurring is unprotected. They must make a finding of fact to that effect. The standard for making that finding of fact is fairly low compared to other standards. It's balance of probabilities or anything like that. It's a relatively low standard. But notwithstanding that, a finding of fact must be made.

**MR HARRIS:** But the period in which this action is occurring doesn't definitionally establish that it is unprotected?

**MR McCARTHY:** No. All of the two-day obligation to make a decision or issue an interim order, that doesn't give the Commission the authority to take a presumption. All that the Commission is compelled to do is look, I can't make a decision, I must issue an interim order. There's no presumption of industrial action being protected or unprotected or even occurring. It's simply an obligation to issue an interim order. The problem that occurs is that through the procedural impediments orders which may otherwise be able to be issued on the same day – so there might be one day of unprotected action – because of the procedural impediments they become two days or three days.

Part of that procedural impediment is that the acquiring of grounds for the employer to establish to the Commission's satisfaction that in fact the action is occurring or it is probable or it is threatened. Establishing a probability of industrial action that will occur is not a simple exercise of fact-finding. There's lots of nuances in it. Establishing that there is industrial action being organised will usually be disputed and the information available to be acquired within that sort of timeframe by those employers who are damaged by unprotected action, it's difficult to achieve.

The other, I guess, illustration of this is in 418 orders it's very rare, in my experience, for any evidence to be given by unions or union officials. What is done is a procedural argument about well, fairness, I need to get advice on this. Well, we don't know why they walked off or the union wasn't involved in this or the employer agreed to this stoppage or – there's a whole range of things. Particularly in the building and construction industry on CBD type buildings, it's usually the start of a morning, it's usually a mass meeting or something and it's usually they simply don't walk through the gate to go to work.

**MR HARRIS:** I might get some more work done on this because it's clear understanding of your ability to take unprotected action is different from what you've led today. So I'll ask for a little bit more - - -

**MR McCARTHY:** The ability to take unprotected action, it's the access to the consequences of being able – for a remedy to stop that unprotected action.

**MR HARRIS:** I understand what you're saying. I think my understanding of your ability to take unprotected action any union when there is an extant agreement on foot that hasn't expired is that it is exceptionally limited and, although what might once considered to be wildcat action or whatever you want to term it can still occur, I had understood that it was all definitionally illegal and therefore the only question wasn't one of establishing so much a question of fact but establishing what you could do to respond to it if indeed it was beyond the control of the union.

In other words, entirely done by a subset of employees who were beyond reason or advice. I've certainly had that example given to me but I haven't had the kind of example that you're talking about where effectively an employer has to prove that there is insipient or real industrial action. I haven't heard enough about that anyway to – but I'm going to take your advice and we'll get some work done. Can you tell me about major projects?

**MR McCARTHY:** Then to major projects, I can't say I'm proper – I couldn't quite comprehend or understand the three alternatives that you had. I should have read it a few more times, I suppose. But the option I think that you had of well, have no capacity to take industrial action for 12 months, to me, that simply defers the problem and it would create an even greater risk for major projects. I should say the major projects that I've had involvement with over here include Gorgon, they include Wheatstone, they include Pluto, they include the last phase of the North West Shelf for Karratha, and there's a whole range of others, but all of those.

So they're gigantic projects and the logistics of those projects and just in having the number of different contractors and employers on site and ensuring that there is an appropriate agreement in place, because if there isn't, then – and you will have gathered from the Pluto experience with the crane drivers – the risks to the projects are immense if there is a capacity to take protected industrial action during the life of the project. They're immense. I can't imagine that a major project, major contractor or even player would allow a contract to start without there being some protections in place and a risk of – and if there are risks of the problem occurring in – reoccurring in 12 months' time, I can't imagine them then starting the project; the risks are too great.

**MR HARRIS:** We agree with you. The design at that point was for – and you might have noticed in the chapter – Greenfield projects aren't all major projects. Some of them are quite small. They're, nevertheless, Greenfield. The idea of the option, the 12-month option, was for those who are most likely to want to get their – or could get their project done within that period it could be of value to them to simply be able to proceed certainly after three months of negotiation.

**MR McCARTHY:** I may have missed the subtlety of that.

**MR HARRIS:** Subtlety is not something we're renowned for here. It's probably the clarity of the drafting. But, finally, essential services you had a – sorry.

**MR McCARTHY:** My points are really directed at major projects.

**MR HARRIS:** Yes. Essential services.

**MR McCARTHY:** And the issue that I have – well, if I can just finish this one point. The issue really is the access to protected action during the life of the project. I'm suggesting that well, agreement should be able to be made for the life of the project, however long that is. The issue is really the access to protected action. There should be a different set of rules that are more stringent in the sense of justification for a protected action ballot order and the like for those projects. It could even be a case – and I've

heard a case or a suggestion that projects of significant national importance or over a particular value, there shouldn't be any capacity to take protected action during its life.

5           But I haven't turned my mind to all of the alternatives and  
consequences seen and unforeseen in those sorts of – that sort of area. I  
just suggest to you that you have a look at perhaps – or have a relook at  
different or differential tests for access to protected action because it's that  
10           front end rather than the back end where the issue really lies. My issue  
with essential services is it's really the same as that for major projects and  
it should be – for essential services action that jeopardise or put the health  
and safety or welfare of the community or a section of it at risk, then the  
capacity to take protected action should have a different type of  
requirement because the consequences are much higher.

15           **MR HARRIS:** We're sort of out of time at this end. Is there something  
additional you'd - - -

20           **MR McCARTHY:** Sorry about that.

**MR HARRIS:** No, that's fine. It's been very interesting, I've got to say.  
But is there something else that you'd like to add before we sort of wind it  
up?

25           **MR McCARTHY:** No. I wish you luck in your final document.

**MR HARRIS:** By the end of November we'll be done, but when the  
government publishes it, it could be as late as early part of next year, but  
you'll see the results then. Anyway, thank you for making the effort to get  
30           on the phone. As I said, I know the phone things are not fun.

**MR McCARTHY:** If you have any other points, don't hesitate to contact  
me.

35           **MR HARRIS:** Thanks very much. Now, I think we're only a couple of  
minutes behind. We have the intriguing title where the next representative  
is Duncan Graham from the Johnny Gibson and the Hangovers Benefit  
Fund. Would that be right? That's what it says here. I must say I showed  
my EA this this morning and she said, "That's got to be a typo." But  
40           perhaps not.

**MR GRAHAM:** Well, I am associated with Johnny Gibson but not – I'm  
not here in the capacity.

45           **MR HARRIS:** That's good. Anyway, perhaps when you get settled you  
could identify yourself and tell us in what capacity you are here then.

**MR GRAHAM:** Well, I'm here basically as a private submission. I don't have - - -

**MR HARRIS:** If you could put your name on the record for us too.

5

**MR GRAHAM:** Duncan Graham, Duncan Edward Graham.

**MR HARRIS:** Thanks, Duncan.

10 **MR GRAHAM:** I made a written submission back in March, submission 117. Because the draft report seemed to go directly to my submission, I thought it worthwhile me coming again.

15 **MR HARRIS:** You want to put any other remarks onto the record while we're talking here or do you just want me to go through this ultimate question?

**MR GRAHAM:** I've actually prepared a short introduction.

20 **MR HARRIS:** Sure, go for it.

**MR GRAHAM:** If you give me a few seconds I'll get it out. My submission today is largely in response to the Productivity Commission's draft report, especially in response to the chapter 14 recommendations. The matters concerning employment elasticity is dealt with in appendix C and the acquittal of casual loading is dealt with in appendix F. I'll also seek to magnify some of the matters I originally dealt with in my written submission.

30 Perhaps the most controversial and radical recommendation in the draft report aims to fold Sunday workers in hospitality, entertainment, retail, restaurant and café sectors, known by the Commission as HERRC, back into Saturday penalty and casual regimes. My appearance here today primarily aims to impeach the arguments towards that recommendation. 35 ABS figures on employee earnings, benefits and trade union membership released in June 2014 demonstrate some unique characteristics about HERRC industries. Out of the 19 industry classifications used by the ABS, two are relevant to us; those of retail trade and of accommodation and food services.

40

The all-industry rate of casualisation is roughly 24 per cent. However, the retail sector reports 39 per cent casualisation and the accommodation and food services sector reports a whopping 65 per cent. Furthermore, those two industries both report a cohort of over 400,000 casuals each, which greatly overshadow any other industry. ABS patterns in work study 45 from 2009 reports that across all industries permanent employees are

employed on weekdays against casuals by a factor approaching 2:1, whereas on weekends those ratios are reversed.

5 By combining these findings we arrive at the inescapable and  
powerfully telling conclusion that casual workers are, by far, the majority  
of workers in the HERRC sectors on weekends. It is therefore crucial that  
the Commission should, when arguing wage reform in the HERRC sector,  
10 consider the rates awarded to casuals as the standard by which all reforms  
should be primarily judged. It is as ingenuous and misleading to argue the  
reform case principally through the wages of permanence in the sector as it  
is to argue that casual rates on weekends in the sector are fair in  
comparison to permanent rates.

15 In the case of permanent employees under the relevant awards in  
retail, hospitality, restaurant and fast food awards, the modern awards  
provide for a leave loading of 17 and a half per cent and some also require  
extra leave entitlements for leave earned under shift work arrangements.  
As leave loading since its introduction in the 1970s has always been and  
20 remains primarily an instrument, however blunt, to annualise or amortise  
leave payments to reflect a penalty or shift allowance rate at which they  
were likely earned, it is obvious to me that casual loadings must reflect the  
same principle in order to be fair and non-distorting.

25 Therefore, despite the Commission's attempt to argue, especially in  
appendix F, that casual loadings only apply to the ordinary hours or non-  
penalty attracting component of the employment and are therefore  
legitimately acquitted by a non-multiplying 25 per cent of the ordinary  
hours rate, I'm unconvinced.

30 Further, two time periods in the retail award already fail to achieve the  
non-multiplying casual loading of 25 per cent. These two periods  
represent the busiest periods of weekend retail trade, thus, the daytime  
periods on Saturday and Sunday, which currently attract a nominal 10 per  
cent casual loading and zero per cent casual loading respectively. In fact,  
35 under the recommended reforms a retail casual worker who works daytime  
on Sundays would be expected to have his or her hourly rate fall, using the  
pre-July figures, from \$37 to \$21 per hour, a fall of about one-third. A  
similar worker in food services would suffer a less egregious loss but when  
one includes the 2014 cut to their Sunday penalties already enacted, the  
40 result is largely similar.

45 The Commission, not without equivocation, argues that its proposed  
reductions to Sunday penalties for permanence in casuals will increase  
employment in HERRC industries. I'll focus mainly on studies that seek  
to place the figure on the implied elasticities that will reflect award rate  
changes. Whilst the Commission has also reported surveys of employers  
about their expected staffing arrangements after changes, I'm sure most

people would find it difficult to unpick genuine and rent-seeking responses to such surveys.

5 In appendix C the Commission surveys the academic economic literature in Australia to attempt to arrive at a plausible elasticity of minus 0.3 per cent to minus 0.5 per cent, as stated in chapter 14. Many, and perhaps the majority, of these studies surveyed report a statistically insignificant employment outcome. Where they are even more robust or more statistically significant results very widely but rarely touch minus 0.5  
10 per cent.

I recognise that most studies cited, as in the US and UK literature, are premised on minimum wage variations, but I would suggest they are the closest approximation we have to variations in penalty rates. Surveying  
15 the US literature, especially since the robust studies of Card and Krueger, which happens to be in fast food in the 1990s, we get an even lower overall employment result. I recommend to the Commission a US Centre for Economic and Policy research paper by John Schmitt in February 2013 entitled “Why Does the Minimum Wage Have No Discernible Effect on  
20 Employment?” which reviews a plethora of employment elasticity studies from the last two decades.

Schmitt finds a consistent and vanishingly small employment level response to minimum wage increases by comparing many studies and  
25 meta-studies which often have very large data sets. Even if we derive minus 0.5 per cent, which I believe may be overly optimistic, as an accepted elasticity for the penalty changes on a Sunday in HERRC industries, we encounter two problems: (1) the inefficiency of a wage cut to boost employment in the HERRC industries.

30 To put it bluntly, the implication is that half of the savings for said employers would be absorbed within profit and would simply be a redistribution from workers’ pockets to employers’ pockets rather than to a commensurate increased employment via a matching gross wages bill. (2)  
35 A lack of derivation of where the gross employment increases are expressed as a number of people newly employed, or conversely, a greater roster of hours for existing employees. To put this bluntly, does the wage cut seek to make employees in the HERRC sector work more hours for the same pay or to employ new people to cover those hours and thus reduce  
40 the gross pay of existing employees? Both outcomes have problematic equity results. That’s pretty much what I’ve prepared.

**MR HARRIS:** Thanks for that, because I have said in a number of  
45 occasions when we’ve had probably nothing as quite as detailed as your own presentation but we’ve had a few things come up from the union side in particular on this, that we are going to do more work on this employment generation probability. For what it’s worth – and we don’t



disagree that surveys do actually have problematic aspects to them. We've not only said that in the chapter, we've said it in some of the hearings as we've gone around.

5           We do like surveys because at least it shows that the question is being  
asked. Ultimately, they're not a foundational piece of work generally on  
which you can rely on for making the kind of case we'd prefer to make.  
But sometimes they're the only thing that anybody has. And you will have  
10           seen that in their own Saturday/Sunday sort of question is actually based –  
well, one of the more substantial pieces of work is a survey, not one  
conducted by us but one conducted I think Wiley in South Australia.  
Anyway, I can't remember the conduct but I noted your comments on  
surveys and we don't necessarily want to depend on surveys to the extent  
we can avoid doing that.

15           On hours and/or new employees, which is I think where you finished  
up, there's been a fair contribution over time to not just our inquiry but  
some others which suggest that there are small business employers who  
work preferentially themselves on Sundays because of the high rates.  
20           Some substitutability we think is probable. But how many will do this is  
still a question that remains worthy of some analysis. Those could be,  
therefore, filled either by hours by additional employees remaining on or  
new employees being put on for a period. But we don't disagree with you,  
this is an area of greyness and some uncertainty. And we'll try and put  
25           some greater certainty into it.

          I was very interested in your comments about casuals being a  
dominant employee in this sector on weekends. While, subject to  
correction, certainly I can't recall having heard that in a as explicit a form,  
30           I think it's been presumed that casuals would be the dominant employees  
on weekends, not necessarily just by us but by others. But I don't think  
I've heard the evidence put forward in a numeric sense in the way you just  
did.

35           So that analysis is going to be made available to us in your submission  
and your derivation of it will be quite important because you may have  
found a mechanism that I've already asked some of the union people when  
they've submitted for information from their own files, as it were, from  
their own background on what their perception is of employment levels on  
40           weekends, and indeed, whether this question of casual employees being the  
dominant form is correct or not.

          We know from our analysis of the awards that some awards effectively  
do have an encouragement factor towards employing casuals on weekends,  
45           and we do note in the thing that there might be some substitution of  
permanent employees for casual employees if this varies. But we weren't  
certain enough to go beyond that with data. But, again, you may have

found a data source that either we don't have or a way of accessing information that we could use. So I found that very interesting and we've taken note of it. I mean, the staff here today but people on the record as well.

5

You mentioned Card and Krueger. As I'm sure you know from reading the rest of the appendices, since very few people penetrate the appendices, and somebody up in Canberra will want to say, "See, someone at least read my appendix" – you will have noticed that we did actually go through the Card and Krueger sets of surveys for minimum wage. It's possible I have actually read that 2013 US report. I've read a number of studies in the US of minimum wages for the purpose of our minimum wage thing.

10

15

But I don't know that. Whenever anyone cites a study, we go looking for it. So you can rely upon someone picking that up. As you say, the difficulty here is translating other people's analysis of their minimum wage circumstances to not just our minimum wage circumstance – we think that's a little bit of a stretch but it's not too much a stretch. Then here we're dealing with the propensity to employ or not employ based around an even more micro variation than minimum wages are because we're in a particular set of industries. So we may be able to draw something from that. But my suspicion is we will still be trying to provide, at best, partial analysis rather than anything that's comprehensive.

20

25

It's very good of you to make the effort. I don't know if you have any questions to ask other than making these observations back. So maybe in anticipation of what you hoped I would ask you, you could say, "You should have asked this and here's the answer to it," he says trying to find a way of extracting more information from you while you're still here.

30

**MR GRAHAM:** If I can address just a couple of things you just raised there. You're correct about trying to specifically uncover how casuals and permanents are arrayed across times during the week. It's difficult. All you can do really is mash one set of ABS figures up against another and try and get a result. For example, with the 2014 figures on – which show quite starkly that the 800,000 in those industries that were casual matched to within 2 and a half per cent the 800,000 who were permanents – so straightway you've got a 50:50 split.

35

40

If you use the patterns in work survey report that they issued in 2009 and assume that not too much has changed, then you have to assume that there's a majority of casuals on weekends. I've also been in retail greengrocery for 23 years in every level, from wholesale pick and pack, delivery, management to just what we call shit-kicker positions. It is pretty obvious to anyone in that industry that your permanents are not going to be employed on weekends except in circumstances where their particular

45

skills are of a level that they can't really be matched by casuals. It is overwhelming the number of casuals that work in that particular industry; I would say much higher than the average retail rate.

5 My experience, which I brought out quite briefly, I guess, in the original written submission is that because that particular industry is also dominated by youth, that they have a pretty poor understanding of their protections, rights and they are pretty much unable to make an informed judgment on whether their casual rate is matched by the appropriate permanent rate at any time.

10 **MR HARRIS:** It's complicated for everybody, I don't just think for young people, but, as you say, they're in a probably even less certain set of circumstances. Anyway, can I thank you for making the effort. I have to tell you for the hearings you're one of our best analytical submitters and you've given us a few hints for where to go and also some suggestions on how to do the design work for the final report in terms of the costing. So that's very good of you. I want to express my appreciation on the record. Thanks very much.

20 **MR GRAHAM:** All right. Thanks.

**MR HARRIS:** Now, I think we're down to our last submitter, and, look, I'm almost back on time. Do we have another submitter? I can give him a minute or so, but if he doesn't front – he's got one minute. This will be disappointing. We've had one pull out but we haven't had any no-shows. We'll give him a minute or two. I don't want to shut him down completely if his tram has broken down or something. We'll go off the record.

30 **ADJOURNED** [5.39 pm]

**RESUMED** [5.48 pm]

35 **MR HARRIS:** Can you identify yourself, please, Seth, for the record?

40 **MR WATTS:** Certainly. My name is Seth Jonathan Watts.

**MR HARRIS:** You've got a bit of a presentation to put forward, have you, Seth?

45 **MR WATTS:** Absolutely, I have a statement.

**MR HARRIS:** Please proceed.

**MR WATTS:** On opening, I'd like to have a quote of Martin Luther King because I feel it sums up what I've been dealing with quite properly.

5           *On some positions cowardice asked the question, "Is it safe?" Expediency asked the question, "Is it political?" Vanity comes along and asked the question, "Is it popular?" But conscience asked the question, "Is it right?" There comes a time when one must take a position that is neither safe, nor political, nor popular, but he must do it because conscience tells him it's right.*

10

From Martin Luther King Junior. So over the past 24 hours I've had to ask myself what is really valuable and in doing so have had to trim the fat, so to speak, of so much information regarding security on a national level without prior censorship. My testimony is my work and dedication to the  
15 duty and care of the public through the medium of security.

Before coming to Melbourne from Western Australia I was for a time in the numismatic industry which is rare coins and banknotes. During that  
20 time I had the honour to meet and have my photo taken with Dr Vivienne Thom, who at the time was CEO of the Royal Australian Mint and who only up until recently was replaced as the Inspector-General of the Intelligence Services. Little did I know that when I moved to Melbourne and entered the security industry how long and hard the journey would be in terms of learning more about the truth, money and human behaviour.

25

In my nine years in the private security sector I've had the pleasure to work with and learn from people from the military, police, intelligence and, of course, the public. I've been called upon at times to guard the Melbourne Cup, police archives, 50 Lonsdale Melbourne twice, once for  
30 the Department of Sustainability and for the Ministers for DHS and DH, amongst other things. I've been called upon at times to guard the Melbourne Cup – excuse me, I've already mentioned that. So I need to keep scrolling down.

35 Before being seconded at 50 Lonsdale, was trained at HWT on Southbank and secured the doors for Andrew Bolt and CEO, amongst other things. So for me, it is strange to be the sharp end of the stick without any real say in the development of government and policy which the public sector furnishes to Australian citizens. I've had far too many  
40 roles over the years as a supervisor for such things as main events, major banks, including NAB data backup centre and more, where I can make input with governmental organisations such as IBAC, Privacy Victoria and IPAA Victoria that (indistinct) of I make my time doing so.

45 Ironically, tomorrow is another form of integrity. While being able to attend last year and learn from industry experts, I've had to wait to see if my pay is in on time and if there's still a seat available. Due to the

complexities of detailed complaint I'm forced to make to the workplace  
ombudsman, I've been instructed on good use to hold off until the  
investigation is complete. Out of all of this I feel somewhat directly and  
uniquely experienced to speak on behalf of those who have approached me  
5 over the years or who have found themselves in similar situations and/or  
continue to be forced in character-compromising life conditions or for the  
sake of earning a buck simply because the system is broken and all the too  
real life issues are continuing to be ignored.

10 As a man of conscience, I am forced to take a stand against the very  
system which has both kept a roof over my head for so many years and an  
industry which very nearly put me on the street. I'm forced to ask the  
question, did these experiences shape me or were they merely the catalyst  
for what I already am? As a person of government and power who is  
15 meant to work for the public interest, what are you going to be about it?  
What is the price of integrity? What does one have to do in order to feed  
his family while keeping the community safe?

20 It appears that to be taken seriously in this world people need a face.  
Well, I'm here, sent in being flesh and blood, a face with a name. I will  
continue to finish a proper white paper on the issue and follow up in due  
time but for now I will just leave it with this last statement from Gandhi:

25 *Even if you're in a minority of one, the truth is still the truth.*

Thank you for your time.

30 **MR HARRIS:** Thanks for that, Seth. So you've got a complaint now  
lodged with the Fair Work Ombudsman?

**MR WATTS:** I'm about to follow that up this week.

35 **MR HARRIS:** This is related to your employment in the security  
industry. Is this relating to effectively working on a labour-hire basis or is  
it something wider than that?

40 **MR WATTS:** It is something definitely wider than that. It involves a lot  
of people. However, it is that I'm the one, as stated, to be a face for the  
name. As I mentioned here, I've trimmed the fat off a lot of things.  
There's a lot of people that want to come forward. They're afraid of losing  
their jobs. I've had to come to terms with the fact that I'm prepared to do  
so, I'm prepared to leave the industry at this level. But at the same time, I  
don't want to compromise the investigations with what I'm putting  
forward.

45 **MR HARRIS:** So you don't want to put a lot of detail forward. You're  
comfortable with having made the statement and that's sufficient from

your perspective?

**MR WATTS:** For now, that's sufficient.

5     **MR HARRIS:** Thank you for bringing your statement forward and we  
appreciate everybody's contribution on the record here today. I also think  
you have the rare privilege of being our last submitter for the purpose of all  
these hearings. So I want to thank everybody, who's not here obviously,  
10     but on the record I will, nevertheless, thank everybody who has submitted  
through the course of these seven or eight days of hearings that we've  
undertaken. Thanks very much. We're now completed on the hearings for  
Workplace Relations.

15     **ADJOURNED INDEFINITELY**

**[5.55 pm]**